

**Florman #1**

**EMPLOYMENT ARBITRATION OPINION AND AWARD**

In the Matter of Arbitration Between:

EMPLOYEE,

and

EMPLOYER,

ARBITRATOR: Phyllis E. Florman

**NATURE OF THE CASE**

Ms. Employee had been employed at Employer's Store 120 as the Marking/Receiving Department Team Leader since March 7, 1994. She was terminated on October 23, 2002 for violating the Honesty Policy and the Policy Prohibiting Theft and Unauthorized Possession of Company Property by knowingly purchasing merchandise at the wrong price. Pursuant to Employer's Termination Appeal Procedure, Ms. Employee challenged her termination in arbitration. Her November 4, 2002 Request for Review of Termination states:

**...why you believe your employment was terminated without just cause:**

Because I followed the proper step in buying a damaged chair and table. Page 53 in Team Member Handbook. If you thought I stealing and watching me on the side, why not stop me and pull my receipt instead of 30 days later and you except my money. I'm not stealing. I pay for it. The guest had the chair for a year, 90 day or return items. The cost of the chair was \$37.50.

**...why you believe you were discriminated against and state the basis for the alleged discrimination...**

Because I damaged Employer pops can in at call and got full credit for it and the team leader that's white sold the pop for full cost to the guest at 23 cents a can. 48 double can case, checking the guest, she still has her job. After calling team relations about this, to justify the mean, they had the store give the rest away at the cost of supersale free, they already had sold some of the pop. That is cheating the guest. Two wrong don't make it

right. I believe I was set up. Every team member or team leader in the store have bought markdown or damaged item in the store before. It kind of strange that all black (three) team leader was fired for stealing and the white for markdown only.

**...why you believe you were retaliated against...**

Because I call team relations about the Employer pop they was selling for full cost after they got full credit for it cheating the guest. I do have paperwork to support this claim.

**Settlement desired:** back pay, vacation pay.

Employer's December 2, 2002 response reads:

The termination of your employment was done with just cause for violation of the honesty policy and knowingly purchasing product at the wrong price. Our investigation further found no evidence of discrimination or retaliation.

On April 24, 2003 and June 24, 2003 arbitration hearings were held in accordance with the Employment Dispute Resolution Rules of the American Arbitration Association. They took place at the Hotel A in City A, State A. The parties were afforded full and equal opportunity to make statements and arguments, introduce evidence, and examine and cross-examine witnesses. A video was shown. The proceedings were transcribed. Post-hearing briefs were submitted by September 10, 2003 as agreed.

**ISSUES**

The parties agreed on the following statements of the issues:

- (1) Whether the discharge of Ms. Employee was for just cause?
- (2) Whether the discharge of Ms. Employee was racially discriminatory?
- (3) Whether, at the time of her discharge, Ms. Employee was properly denied Vacation Pay?

## GOVERNING PROVISIONS

### Termination Appeal Procedure -- Arbitrator's Authority

The arbitrator's authority shall be limited to deciding claims arising out of or relating to the team member's termination from employment. The arbitrator shall have the authority to determine whether the termination was lawful under applicable federal, state and local law and to determine whether the company had just cause for termination.

The arbitrator must consider and rule on every issue within the scope of the arbitrator's authority which was specified on the Termination Appeal Form or which was raised at the arbitration hearing and which was not resolved prior to arbitration.

In reaching a decision, the arbitrator shall interpret, apply and be bound by any applicable company handbooks, rules, policies and procedures and by applicable federal, state or local law. The arbitrator shall have no authority, however, to add to, detract from, change, amend or modify any law handbook, rule, policy or procedure in any respect. Nor shall the arbitrator have the authority to consider or decide any matters which are the sole responsibility of the company in the management and conduct of its business.

If the arbitrator finds that the team member violated any lawful company rule, policy or procedure established by the company as just cause for termination, and finds that the team member was terminated for that violation, the team member's termination must be upheld and the arbitrator shall have no authority to reduce the termination to some lesser disciplinary action.

### Termination Pay Policy

The Company will give adequate notice, or termination pay in lieu of notice, to full-time and part-time OMP team members with at least six months of service who are terminated by the Company for any reason other than misconduct involving violation of Company rules, policies, procedures or guidelines; or conduct which is detrimental to or which demonstrates a disregard for guests, Employer people, or Company interests. Team members discharged for these offenses are not entitled to notice or pay in lieu of notice. Employer people terminated for reasons of misconduct involving violations of Company rules, policies, procedures or guidelines; or other conduct which is detrimental to or which demonstrates a disregard for guests, Employer people, or Company interests will not be paid for unused vacation or Personal Paid Days.

OMP team members terminating for other reasons will be paid at their current rates for unused vacation earned during their last anniversary year. Additionally, they will be paid for all unused, Personal Paid Days provided they have at least one year of service.

## Team Handbook

Keeping Our Company Healthy and Competitive ... The following are guidelines for you to follow to ensure your company remains healthy and competitive.

Honesty. In order to be a strong and healthy company we depend on you to be totally honest. The company believes strongly that there can be no exception to this rule in light of the nature of our operation.

Based on this, we require you to be totally honest with guests, the company, fellow team members, vendors, suppliers, etc...

Team members who are not totally honest with the company, or have knowledge of other individuals' dishonesty and fail to report this information, will be subject to discipline up to and including termination.

Theft and unauthorized possession of company property. Team members involved in or having knowledge of a theft or unauthorized possession of property from the company, fellow team members, vendors, or suppliers will be terminated, regardless of the amount or value of the merchandise, their work record or length of service.

Unauthorized markdowns. During the course of business, you may find merchandise or products that may require a price markdown. Under no circumstances are any team members authorized to take a markdown for themselves, other team members, or friends and family without first obtaining a team leader's authorization. The amount of the markdown allowed must be within previously authorized limits or authorized at the time the markdown is taken by their team leader or the store director-in-charge. Violation of the markdown procedure will result in discipline up to and including termination of employment.

### Our Company's Property and Confidential Information.

Damaged Product. Company product that is damaged may or may not be saleable to guests (i.e., packages broken open, soiled merchandise, dented cans, etc.). Such items are not available to team members for personal use or consumption. The personal use of damaged product is prohibited unless proper authorization to do so is given in advance by a team leader or store director-in-charge.

### Personal Purchases

No team member is authorized to buy, or make available to another team member, any markdown, surplus or damaged item that is not available to the general public unless prior written authorization has been given by the store director.

## **STATEMENT OF FACTS**

Ms. Employee was a Team Leader responsible for managing the Reclamation Area. The area is located in the back room, off the sales floor. Damaged items are sent there to be disposed of according to a disposition code predetermined by the vendor and Employers. Some items are destroyed even if only damaged in a minor way.

There are three different disposition codes. The "mark down and resale" code means the item is to be returned to the department and placed back on the sales floor at pre-set production percentages. Lines leaders and store directors have authority to reduce these items below the normal mark downs. The "return to vendor" code means the item is to be removed from the computer and inventory. The "destroy and write-off" code means the item is removed from inventory, marked down to \$0, and thrown away. Reclamation area employees do not have authority to change an item's disposition code.

**Ms. Person 1, Greeter in the Loss Prevention Department,** testified that she greets guests coming into the store and checks sales receipts when people leave; in the summer of 2002 she noticed some Team Leaders including Ms Employee acting "suspicious" by paying at the Photo Lab cash register for merchandise marked way down; and on September 20, 2002 Ms. Employee purchased a chair and ottoman for \$10.00 and a table for \$5.00.

Ms. Person 1 explained that she touched the chair, swiveled it, and found it to be in perfect condition; she touched the table and found no scratches; Person 2 helped Ms. Employee take the items out; on a break she went to see if there was another chair like it and saw one priced \$199.99; and she reported it to Person 3 and Person 4.

Ms. Person 1 acknowledged that she did not sit in the chair; it is not her responsibility to point out problems with items or to ask about any; and although Ms. Employee said the items were damaged, she did not ask how they were damaged.

**Mr. Person 2, former Area Team Leader for Paint and Furniture and Hardware,** testified that he had been employed 15 years; he was terminated on October 23, 2003 for improper markdowns; the Policy regarding marking down merchandise is if it is more than \$100.00, the markdown is 10% and if it is less than \$100.00, the markdown is 20%; then, every 2 weeks the item continues to be marked down at that percent.

Mr. Person 2 recalled that in order to mark down an item at a greater percent, the Team Leader must get in touch with the Lines Leader who must get the buyer's consent; Team Leaders can obtain cost information on the computer; the chair and ottoman which Ms. Employee bought had a unit cost of \$37.50 and a retail cost of \$199.99; and the table had a unit cost of \$26.60 and a retail cost of \$69.99.

Mr. Person 2 stressed that those items were in the Reclamation Area because the chair was missing a bolt and the table had been scratched, the disposition was to write them off and destroy them; on September 20, 2002 Ms. Employee asked about them and he priced them at \$10.00 for the chair and ottoman and \$5.00 for the table; but he never checked with his supervisor prior to setting those prices; and when he was helping her out with the merchandise a man asked to buy the chair from her and he asked for the ottoman.

Mr. Person 2 acknowledged that when merchandise is marked to be destroyed, no employee is allowed to buy it; if a guest returns furniture after using it, the Policy is to resell it unless its condition involves a safety issue; the chair was missing a bolt in its swiveling

mechanism and the table was slightly scratched and he did not consider them to pose a threat of harm; and they were not marked "clearance" items.

**Ms. Person 4, Loss Prevention Team Leader**, testified that she was involved in investigating improper markdowns; those under investigation were Person 2, Person 5, Person 6, Person 7 and Ms. Employee; and Ms. Employee was interviewed twice concerning her purchases.

Ms. Person 4 emphasized that at the October 7, 2002 interview Ms. Employee said she was aware of the Honesty, Markdown and Merchandise Hold Policies, understood a markdown cannot go below cost, did attend the markdown meeting with Person 8, knew the disposition of the items she bought were "markdown and destroy"; was aware the chair and table were below cost, and called them a good deal.

Ms. Person 4 explained that a Team Leader or Store Director must approve any markdown greater than what the policy provides; if an item is "markdown and destroy" it must go into the "hole-in-the-wall" which is a compacter; at the second interview held on October 15, 2002 Ms. Employee said she believed she only needed Person 2's approval, in the past Person 10 and Steve told her if an item was damaged it is better to "get something out of them than to throw them away", she deletes e-mail that "does not concern me" so she deleted e-mail about markdowns without reading it, and she cited the Handbook on Unauthorized Markdowns to insist it is okay to buy damaged merchandise out of Reclamation.

Ms. Person 4 stated the Handbook section required approval from Person 9, Ms. Employee's Team Leader, or Person 10, Mr. Person 2's Team Leader; Person 10 and Person 9 denied telling Ms. Employee what she claimed; the e-mail said damages were to be returned to vendors; and at the end of the second interview the Store Director put Ms. Employee on notice of

possible termination for knowingly purchasing merchandise at a price below cost or at an improper price. Ms. Person 4 acknowledged that greeters only check for receipts, not for damages or price; if the disposition of an item is "markdown to resell" it does not always go back onto the sale floor because a Line Director or Store Director can change it to "destroy and write off"; and there is no written policy governing resale of used items.

Ms. Person 4 further acknowledged that Mr. Person 2, not Ms. Employee, set the price for the items in question, but noted it was both their responsibility to be sure Mr. Person 2 got the okay to do so; and concerning Ms. Employee, they interviewed **Person 13, Steve, Person 10, Gordon and Stan.**

**Mr. Stephen Person 9, Fashion Lines Leader, testified that** he is over Marking and Receiving; he was Ms. Employee' supervisor; returned or damaged items go to the Reclamation Area where they are either identified to be returned to vendor, or to be marked down for resale, or to be marked down and destroyed; and if an item is to be resold, the department Team Leader assigns it the appropriate markdown.

Mr. Person 9 noted that Ms. Employee did not ask him to okay the prices of the chair, ottoman and table; an employee is not permitted to buy damaged items in Reclamation; an employee cannot purchase an item in lieu of trashing it; Ms. Employee was present at the staff meeting when Person 10 reviewed the policy on damaged items; neither he nor Person 10 ever said, "Try to make money off them"; and an employee cannot set aside a resale item and purchase it.

Mr. Person 9 acknowledged that some items marked to be destroyed have sat in Reclamation a number of days; an item can go below cost with progressive markdowns, but

noted it does not occur often, and if an item remains unsold and gets marked down to \$0 it would be thrown away but not given away.

**Mr. Person 11, Team Relations Specialist**, testified that he supervises Team Leaders; Ms. Employee told him she defended herself in a discrimination situation involving a former employer and won, and if she was ever fired she would sue for discrimination; he attended Person 10's meetings with Team Leaders including Ms. Employee where markdowns and disposal of damaged merchandise was discussed; employees were told not to hold or purchase merchandise in the back room; and once Ms. Employee asked him to put a price on a carpet shampoo machine which had a missing piece and which was off the sales floor in the back room, but he said there was a markdown policy to follow.

Mr. Person 11 acknowledged that the Handbook states "their team leader or the store director-in-charge" can authorize a markdown; it is not unusual for an African American woman to talk to him, an African-American man, about racial issues; Ms. Employee did not indicate any mistreatment by Employer's; and there was no proof she purchased a carpet shampooer.

**Ms. Person 12, Team Relations Director**, testified that pursuant to procedure she read the interviews, went through the just cause steps, and called Store Director Person 10 to recommend terminating Ms. Employee for knowingly purchasing merchandise at an improper price as well as for violating the Honesty Policy.

Ms. Person 12 stressed that Ms. Employee needed the Lines Leader or Store Director to okay the prices but failed to obtain it; Team leaders cannot markdown an item to any price they choose; Ms. Employee knew the price was unauthorized because items marked to be destroyed are not priced at all, items are not to be purchased out of the back room, computers all over the store give prices of items, merchandise is not to be held in the back for an employee to purchase,

and it was not true that Steve and Person 10 told employees it was better to put a price on something and get something for it; and the Damaged Product Policy does not speak to purchases but rather addresses situations where packages break in the store and employees can use the contents in the store.

Ms. Person 12 explained that Employer's has a zero tolerance for theft; Ms. Employee purchased at a wrong price and caused Employer's to lose money in violation of the Theft Policy; she violated the Policy on Personal Purchases by holding merchandise and buying it at a price lower than the public; she violated the Honesty Policy by stating things Person 10 and Steve denied as well as failing to follow markdown procedures; and Ms. Employee had been employed a number of years and was aware of the policies; and no Vacation Pay was due Ms. Employee because the Policy states Team Leaders discharged for violating policies are not entitled to it.

Ms. Person 12 acknowledged that she did not personally interview anyone; an employee or guest can purchase an item below cost, but added only if it is on the sales floor and is properly marked down; there is no written policy regarding sale of used items; the progressive markdown policy is not in the Handbook; and the Unauthorized Markdowns Policy does not state that a Team Leader must go to a Lines Leader for a markdown.

Mr. Person 10, Store Director, testified that he holds weekly meetings for Team Leaders and Lines Leaders; Ms. Employee regularly attended them; he discussed markdown procedures and reviewed the policy for damaged items; he never said it would be better to get a few dollars for a damaged item rather than just toss it out; and when in doubt, an employee should get a Lines Leader or Buyer's opinion.

Mr. Person 10 acknowledged that sign-in sheets show Ms. Employee attended meetings discussing markdowns; and the Handbook refers to dispositions of damaged product and personal purchases.

Ms. Person 13, Reclamation Area employee, testified that Ms. Employee was her boss; from Monday to Friday the chair, ottoman and table sat in Reclamation; she scanned them and they were marked down to resell; she had discretion to either toss them or return them to the furniture department; the other furniture Team Leader, Stan Sanford told her to throw them away because of the problem with the guest who returned the chair and she took the chair down to \$0 and entered it into the computer.

Ms. Person 13 recalled that Ms. Employee asked Person 2 if she could buy the items; he priced them and she did; because a Team Leader gave his consent, she did not check further; and either Person 2 or Stan Sanford can okay an item for resale.

Ms. Person 13 acknowledged that the items sat in Reclamation because the dumpster was full, not because they were there for employees to see if they wanted to buy them; nothing in writing says an item to be destroyed can be sold with a Team Leader's consent; her job is to dispose of damaged items per the disposition code; items in Reclamation are in cages, sorted by department; and if employees were allowed to comb through them it would be confusing.

**Ms. Employee** testified that she had been employed 8 years in the Receiving Department; her duties included overseeing Receiving, Layaway and Reclamation; in Reclamation she was responsible for making sure damaged items were given the proper disposition; items to be destroyed went into the hole-in-the-wall unless they were metal or long furniture; the latter were thrown into the dumpster; she noticed the items in the Reclamation Area and asked Ms. Person 13 about their disposition; she replied they were to be marked down

for resale but she was going to destroy them but the dumpster was full; and she asked Mr. Person 2 if she could buy them.

Ms. Employee recalled that employees buy damaged "pop," diapers in busted-open packages, glassware with several broken glasses, Mr. Person 2 priced the merchandise and helped her take them home; as they were leaving a man bought the ottoman from her; and she paid at the Photo Lab cashier because the items were too big to go through a regular register aisle.

Ms. Employee explained that her first indication that Employer's thought she did something improper was on October 7, 2002 when she was interviewed; she did not know the items' prices because they were going into the hole-in-the-wall; she always deletes e-mail about markdowns because she only worked in Reclamation; and she followed procedure by asking a Team Leader for a price.

Ms. Employee stressed that she did not feel the prices were unreasonable because the guest had the chair for more than one year before returning it, so Employer's made a profit from her; she made an entry in her notebook on September 5, 2002 that "I was told that they were watching Person 2 and Person 6 for markdown"; the Personal Purchases Policy to her relates to an item to buy and take home to use; there is no sign in Reclamation stating employees cannot buy merchandise there; and to her if an item is marked down to \$0 in Reclamation, an employee can have a team leader put a price on it and buy it, whereas if an item is marked down and returned to the sale floor, then the markdown percent applies.

Ms. Employee acknowledged that she received the Handbook when she was hired; she was aware that to have an item marked down below cost requires the approval of a Lines Leader or Store Director; she sold the chair to a "stranger" on the way out; she could have left the items

with a greeter and paid at another register; she received the e-mail concerning markdowns but deleted it without reading it; she rang out at 5:00 p.m. and Belinda left at 3:30 p.m.; and her duties including following policies.

**A video was played**, narrated by Ms. Person 4, showing the sale of the chair, ottoman and table; it was dated September 20, 2002 at 15:50 which is 3:50 p.m.; and she acknowledged the time on the video was 16.50.10 but explained the time had not been changed when the clocks were changed in April.

## **POSITION OF THE EMPLOYER**

First, the Employer argues that it had just cause to terminate Ms. Employee; that she was on notice of policies which govern employee conduct; that the Theft and Unauthorized Possession Policy provides for termination regardless of the amount or value of the merchandise; that the Honesty Policy requires total honesty; that the Personal Purchases Policy requires prior authorization from the store director in order to buy any markdown or damaged item which is not available for purchase by the general public; that the Unauthorized Markdowns Policy requires approval by the employee's supervisor or store director-in-charge; and that a fair and reasonable investigation was conducted before deciding on discharge.

Next, the Employer insists that Ms. Employee' stated justification for her conduct failed to show she reasonably and in good faith believed she was properly purchasing the items because (1) Mr. Person 2 was not authorized to approve \$10 and \$5 prices since the Unauthorized Markdowns Policy not only states, "first obtaining a team leader's authorization" but goes on to state, " the amount of the markdown must be within previously authorized limits or authorized at the time [it] is taken by their team leader or the store director-in-charge," and for a team leader it means approval from a Lines Leader; because (2) Mr. Person 10 and Mr. Person 14 did not

authorize sale of damaged merchandise from the Reclamation area that would otherwise be thrown away; Mr. Person 10 was discussing merchandise on the sales floor not in department back rooms which should be marked down to clearance prices; he directed a store fixture mirror with no disposition code to be marked down to \$1.00; and Mr. Person 14 directed damaged pop be sold as individual cans on the sales floor for customers to purchase; because (3) there was no established or accepted practice of allowing employees to buy damaged items from the Reclamation area according to Mr. Person 9, the Fashion Lines Leader who was Ms. Employee' immediate supervisor; because (4) Ms. Employee' claim that the sole reason she purchased the items was to get them out of the Reclamation area because the dumpster was full is unbelievable and is inconsistent with the reason she gave when interviewed that "It was a good deal;" and because (5) her conduct cannot be excused on the basis that the items would otherwise be thrown away.

Third, the Employer asserts that she also violated the Honesty Policy; that during the investigation she claimed Mr. Person 10 and Mr. Person 9 stated Team Leaders should try to sell damaged items rather than throw them away, yet they denied this.

Fourth, the Employer emphasizes that discharge was the appropriate level of discipline; that it is the penalty specified in the Theft and Unauthorized Possession Policy; that it is the normal practice to impose this; that under the Termination Appeal Procedure the Arbitrator's Authority requires the Arbitrator to follow the policy if it is found the employee violated it and prohibits the Arbitrator from amending policies; that all 5 Team Leaders received the same discipline; she was engaged in abusing her position by self-dealing; and she cannot claim she innocently misunderstood the policy on markdowns or damaged merchandise since she deliberately deletes e-mails pertaining to such policies including the June 10, 2002 e-mail which

clearly stated, "You may ONLY sell damages if the disposition in the salvage instructs you to do so."

Fifth, the Employer maintains that her discharge was not racially discriminatory in violation of Title VII of the Civil Rights Act of 1964 or of the State A Civil Rights Act; both acts require the employee to prove discrimination on the basis of race either by direct evidence or through disparate treatment evidence; this she could not do although she claimed Mr. Person 10 marked down a mirror to \$1.00 and Mr. Person 14 placed damaged cases of pop on the sales floor, and neither one was discharged; but they were not "similarly situated" which case law recites requires a showing they had the same supervisor, and engaged in similar conduct, but received different treatment; all 5 Team Leaders under investigation for violating policies by making improper markdowns or purchasing improperly marked down items were discharged; and 2 of the 5 were replaced by African Americans.

Finally, the Employer claims that it was proper not to pay Ms. Employee her unused Vacation Pay; that the Termination Pay Policy for OMP team members states, employees "discharged for reasons of misconduct involving violations of Company rules, policies, procedures or guidelines..." will not be paid for unused vacation or Personal Paid Days; that State A Code §22-2-4-4 which requires "all earned wages" be paid upon an employee's termination has been interpreted by the State A Court of Appeals (See, State A Heart Associates, PC v. Bahamonde, 714 N.E.2d 309, 1999) to require employer policies regarding payment of Vacation Pay to be enforced; and Ms. Employee was on notice of this Policy.

#### **POSITION OF THE EMPLOYEE**

First, Ms. Employee argues that the Employer is a "for cause" employer according to the Handbook it holds out as a contract between it and the employee; that here, just cause did not

exist; and that Ms. Employee was wrongfully terminated and should be paid back pay and any other damages incurred as a result.

Next, Ms. Employee insists that she properly relied on and followed the Unauthorized Markdowns Policy by "first obtaining a team leader's authorization" before taking a markdown for herself; that Mr. Person 2 was Furniture Team Leader so he was the appropriate person to ask since the items she purchased were from furniture.

Third, Ms. Employee asserts that she properly relied on and followed the Damaged Product Policy by getting "proper authorization...in advance by a team leader or store director in charge"; that "personal use" means use in her personal home for her personal pleasure; and that Mr. Person 2 gave her prior authorization.

Fourth, Ms. Employee emphasizes that these Handbook policies were a source of confusion for many people and must be construed in favor of Ms. Employee and against the drafter; that besides Ms. Employee, witnesses believed all they needed was authorization from the Team Leader of the department from which the items came in order to purchase them at a markdown price; that the policies do not state that a Team Leader must obtain approval from a Lines Leader; that the policy regarding Personal Use does not state it requires personal use of the item in the store; and that an e-mail does not constitute a written amendment to the Handbook.

Fifth, Ms. Employee stresses that the Honesty Policy was not violated, that Mr. Person 2 also testified that Mr. Person 10 told him to get whatever he could for damaged items; and that Ms. Person 13 testified she had seen Team Leaders approve markdowns and purchases out of the damages department.

Finally, Ms. Employee maintains that she was discriminated against on the basis of her race since a Team Leader who is white sold damaged pop to guests at a markdown price but was

not discharged; that all 3 black Team Leaders were fired for stealing; and that she is entitled to Unused Vacation Pay.

## **DISCUSSION**

The Employer adopted the just cause standard for disciplinary or discharging employees. Under this standard it has two burdens of proof. The Employer must establish that (1) Ms. Employee committed the offenses of violating the Honesty Policy as well as violating the Theft and Unauthorized Possession of Company Property Policy by knowingly purchasing merchandise at the wrong price, and (2) the Employer must show that the penalty of discharge was justified under the circumstances. Ms. Employee has the burden of establishing factors in justification or mitigation.

**Concerning the offense of violating the Theft and Unauthorized Possession Policy by knowingly purchasing merchandise at the wrong price, the evidence clearly established that:** (1) the items were damaged and in the Reclamation Area waiting to be thrown in the trash; (2) although their disposition codes were "markdown/resell", the Furniture Department Co-Team Leader Stan Sanford had instructed Ms. Person 13 to throw them away; (3) Ms. Person 13 had marked them down to \$0 and was waiting to throw them away; (4) instead of disposing of the items in the store's trash, Ms. Employee asked the other Furniture Department Team Leader for prices at which she could purchase them; (5) Mr. Person 2 arbitrarily picked \$10 for the chair and ottoman and \$5 for the table; (6) the prices were below cost and, therefore, needed to be approved by at least a Lines Leader; (7) neither he nor she obtained specific authorization from a Lines leader or the store director; (8) Ms. Employee knew the prices were below cost; (9) the transaction was discovered during an investigation of Team Leaders who were suspected of marking down merchandise to unauthorized prices for each other or purchasing items at

unauthorized markdown prices; (10) the damaged items were not available for purchase by the public and the Personal Purchases Policy requires prior written authorization from the store director to buy a damaged item that is not available to the general public.

Concerning the offense of violating the Honesty Policy by making untruthful claims about what Mr. Person 10 and Mr. Person 9 said, the evidence clearly established that: (1) during her second interview of the Employer's investigation, to try to justify her conduct, Ms. Employee stated that Store Director Person 10 and Fashion Lines Dealer Person 9 made statements that team leaders should try to sell damaged items rather than throw them away; (2) Mr. Person 10 and Mr. Person 9 expressly denied this; (3) the sign-in sheets indicate Ms. Employee attended the meeting he held on markdowns; (4) Mr. Person 9 confirmed that neither he nor Mr. Person 10 ever said, "Try to make money off them" (damaged items in Reclamation to be trashed) and an employee cannot buy damaged items in Reclamation; and (5) no one corroborated Ms. Employee' claim.

Concerning Ms. Employee' justifications, the record does not support them. Ms. Employee states the Unauthorized Markdown Policy only requires "a team leader's authorization." But the Policy goes on to state, "The amount of the markdown allowed must be within previously authorized limits or authorized at the time the markdown is taken by their team leader or the store director-in-charge."

A pre-authorized amount would be 10% and 20% for damaged goods, and since the amounts exceeded those percentages, it was insufficient under the Policy to merely get a team leader's authorization. Further, who qualifies as "their team leader" depends upon who is making the purchase. An employee must seek approval of his or her team leader. In the case of Ms. Employee who was a Team Leader, she would need to go at least a level above to a Lines Leader

to obtain approval for a markdown beyond the normal 20% for damaged items classified as "markdown and resell." This was the understanding testified to by Ms. Person 4, Mr. Person 9, and Mr. Person 2.

Ms. Employee offered as justification the Damaged Product Policy, but that Policy does not address markdowns or selling damaged merchandise to employees. It addresses and prohibits "personal use or consumption" of damaged product by employees. Ms. Employee asserts it covers her purchases because the furniture was for her personal use away from work.

However, the Policy gives examples of Company product that is damaged and "may or may not be saleable to guests (i.e., packages broken open, soiled merchandise, dented cans, etc)." It goes on to state, "such items are not available to team members for personal use or consumption" absent advance authorization by a team leader or store director-in-charge. Ms. Employee herself gave examples of damaged pop cans, broken open diaper packages, and glassware. This does not reasonably extend to include damaged furniture in the Reclamation Area waiting to be discarded which are not understood to be "used or consumed" in the same fashion as a broken bag of diapers.

Ms. Employee offered as justification the idea that the policies cause confusion.

However, in plain and clear language the Personnel Purchases Policy reads:

No team member is authorized to buy, or make available to another team member, any markdown, surplus, or damaged item that is not available to the general public unless prior written authorization has been given by the store director.

Further, to clear up any confusion the Employer sent an e-mail Memorandum on June 10, 2002 regarding markdowns. It contained a chart, Computer Network websites, and express instructions: "You may ONLY sell damages if the disposition in salvage instructs you to do

so...." Ms. Employee stated she always deletes markdown e-mails, unread, because she works in Reclamation. Her self-imposed voluntary ignorance is no justification.

Ms. Employee offered as justification that Mr. Person 10 had said it was better to get something for damaged items than nothing. However, the record reflects he was speaking about inventory and clearance items. He was not speaking of damaged items in Reclamation. As a Team Leader for 8 years, it is not reasonable to believe Ms. Employee confused clearance inventory with damaged items in Reclamation.

Concerning the penalty of discharge, certain offenses of an extremely serious nature such as those Ms. Employee is charged with, are usually considered inherently grounds for discharge without warning. Ms. Employee was on notice that the Theft and Unauthorized Possession Policy stated, "will be terminated, regardless of the amount or value of the merchandise, their work record, or length of service." The Policy reflects the generally recognized penalty for this misconduct. It was contained in the Handbook she received when hired. Her conduct was not merely the result of oversight or misunderstanding. Her conduct was intentional.

As an 8 year employee in a position of Team Leader, Ms. Employee had an obligation to be aware of and to follow proper policies and procedures. As supervisor of other employees, she was reasonably expected to enforce proper policies and procedures. Her intentional violation of that policy and the Honesty Policy caused a breach in the employment relationship. An Employer need not retain an employee it cannot trust. Such serious misconduct does not, as a general rule in labor relations, merit an employer's attempt to rehabilitate the employee regardless of years of service.

Further, the record reflects that the discipline imposed was consistent with prior treatment of the similar offense. It was un-refuted that others were not permitted to continue employment after engaging in conduct which violated the Theft and Unauthorized Possession Policy.

Additionally, the Termination Appeal Procedure limits an arbitrator's authority, reciting "The arbitrator shall have no authority...to add to, detract from, change, amend or modify any...handbook, rule, policy or procedure in any respect." And it further states that "if the arbitrator finds that the team member violated any lawful...policy...established by the company as just cause for the termination...the arbitrator shall have no authority to reduce the termination to some lesser disciplinary action."

Concerning the claim of discrimination on the basis of her race, Ms. Employee could not meet her threshold burden of proof. Pursuant to Title VII of the Civil Rights Act of 1964, 42 USC 2000e-2(a), and the State A Civil Rights Act, IRC 22-9-1-2(a), the employee's burden is to either show: (1) membership in a protected classification, (2) an adverse employment action, and (3) direct evidence that the action was taken for unlawful discriminatory reasons: or to show: (1) membership in a protected classification, (2) he or she was meeting the employer's legitimate expectations, (3) an adverse employment action, and (4) a similarly situated employee outside the protected classification was treated more favorably.

Under our facts, Ms. Employee could not produce any evidence that she was discriminatorily discharged because of her race. There was no evidence that the officials involved in the decision to terminate her employment were motivated for some reason other than what the investigation uncovered or that the reason given by the employer was pretextual. All 5 Team Leaders involved were discharged. Of them, 2 were Caucasian. And 2 were replaced by African Americans.

Further, allegations that similarly situated employees were treated more favorably had no foundation in the facts. Ms. Employee cited Mr. Person 10 marking down a mirror to \$1.00 and Mr. Person 14 putting damaged cases of pop on the sales floor to be sold by the can. However, the mirror was a store fixture not damaged merchandise and, unlike her situation, both the mirror and the pop were put on the sales floor for guests to purchase. *Peters v. Renaissance Hotel*, 91 FEP Cases 293 (CA 7 2002) requires a showing that the employee had the same supervisor, was subject to the same rules, engaged in similar conduct, without differentiating or mitigating circumstances to distinguish their conduct or the Employer's treatment of them. This she could not show.

Concerning Ms. Employee's claim for unused Vacation Pay, it cannot be sustained. State A Code Section 22-2-4-4 requires all earned wages be paid to an employee upon his or her termination. However, *State A Heart Associates PC v. Bahamonde*, 714 N.E.2d 309 (Ind Ct App 1999) held that although the statutory term "wages" includes unused Vacation Pay, if an employer adopts a policy regarding payment of Vacation Pay including conditions for receiving it, the policy is to be enforced.

The Employer here has a policy in place which conditions the right to be paid unused Vacation Pay on being discharged for a reason other than violation of Company policies or procedures, or conduct showing a disregard for company interests. This Policy was on the Company's Computer Network, an internal computer network. All employees have access to it. And Ms. Employee had access to a computer in the marking/receiving department office. By virtue of her conduct, she did not qualify for it.

**AWARD**

Ms. Employee' Termination Appeal cannot be sustained. Ms. Employee' termination was for just cause. Her discharge was not racially discriminatory in violation of applicable law. She was properly not paid her unused Vacation Pay.

DATED: September 29, 2003

Phyllis Florman

Arbitrator