

**Beckman #1**

**VOLUNTARY ARBITRATION PROCEEDINGS**

Termination Appeal Procedure

David L. Beckman, Arbitrator

In the Matter of Arbitration between

EMPLOYER,

And

EMPLOYEE

**OPINION AND AWARD**

Date of Assignment: August 14, 1997

Date of Hearing: February 12, 1998

Receipt of Briefs: April 8, 1998

Date of Decision: May 7, 1998

**ISSUES**

- (1) Does the evidence establish just cause for the termination of the employment relationship between the Employer and Employee for an incident which occurred on May 19, 1997?
- (2) If just cause is lacking, what is the remedy?

**RELEVANT TERMINATION APPEAL PROVISIONS**

**Section L**

**Arbitrator's Authority**

The arbitrator's authority shall be limited to deciding claims arising out of or relating to the associate'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 Employer 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 Employer 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 authority to consider or decide any matters which are the sole responsibility of the Employer in the management and conduct of its business.

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

## **Section M Relief**

If the arbitrator finds that the associate was unlawfully or unjustly terminated, the arbitrator may grant any remedy or relief that a court of competent jurisdiction could grant. However, in no event shall the arbitrator award relief greater than that sought by the associate.

If the arbitrator awards back pay, the arbitrator shall deduct from the award[ed] the associate's interim earnings, any other sums paid in lieu of employment during the period after discharge, including but not limited to unemployment compensation payments, and any amount attributable to the associate's failure to mitigate the damages.

If the arbitrator orders reinstatement, the Employer shall have the option, within fourteen (14) days of receipt of the award, to request that the arbitrator make a monetary award in lieu of reinstatement. If the Employer makes such a request, the arbitrator shall make a monetary award which the Employer, at its discretion, may pay in lieu of reinstatement. The arbitration hearing shall be reopened for additional proofs on this issue if either party so requests.

## **Section N Arbitrator's Award**

The arbitrator shall submit to the parties a written award signed by the arbitrator. The award shall specify the relief awarded, if any, and the elements and basis for any monetary award. The award shall be accompanied by a written opinion signed by the arbitrator which shall include findings of fact and, where appropriate, conclusions of law. The arbitrator's award shall be final and binding and a judgment may be entered on the award by any circuit court or other court of competent jurisdiction.

## **EMPLOYER POSITION**

The evidence clearly shows the Employer had just cause to discharge Ms Employee. The Employer has a long-standing and reasonable policy expressly prohibiting the very conduct she engaged in, theft/unauthorized possession of Employer property, and put her on notice of that policy. There is no question that her conduct violated the policy. The Employer's investigation of the matter was fair and reasonable. The personal purchases policy does not allow for an employee to consume an item and then pay for it later, such as at the end of a shift, within a day or at payday. Where there is an emergency, the Employer expects that after the emergency has been addressed, the purchased item should be paid for. While the unexpected start of a menstrual cycle could be considered an emergency, Ms Employee did not act reasonably after the emergency had passed.

Ms. Employee claims she paid for the tampons, but the written evidence contradicts this. We question her credibility on the issue of payment, as well as the credibility of Person 1. Ms. Employee changed her story from one of "forgetting to pay" altogether to "I meant to say I forgot in the morning and paid later that night ". If her memory was not reliable on June 3, how could it have been reliable on the date of the hearing?

The Employer has been consistent in enforcing its theft policy, and when the policy is violated, the Employer consistently imposes the penalty of termination. The Employer witness was unaware of any exceptions to this in the thirteen years he has been handling cases for the Employer. We submit that when an item is needed during an emergency, the Employer need not tolerate a failure to pay after the emergency has subsided. Accordingly, discharge is the appropriate discipline in this case.

Why discharge? Discharge is the remedy called for in the policy. Progressive discipline is

clearly not the proper approach in a theft or unauthorized possession case. The Employer has determined, as a matter of policy, that termination is needed on the first offense. The theft policy is extremely important to Employer's operation, and important to its efforts to control stock loss. The authority of the arbitrator is such that the arbitrator should uphold the policy, and not modify the policy in the guise of reducing the penalty. Indeed, Section M of the appeal procedure deals with Relief to be granted by an arbitrator and covers this very issue by stating that if an employee is disciplined in accordance with the policy, the penalty imposed by the Employer may not be reduced.

Ms. Employee was carelessly indifferent to Employer procedures. As team leader, she should be held to a higher standard than her team members, because she has the responsibility to protect the store from theft.

## **EMPLOYEE POSITION**

It is the position of Employee, by counsel, that the hearing and transcript reflect that the claim of Ms Employee should be acknowledged. There was absolutely no justification for any discipline, not to mention discharge. There are three primary reasons which support the claimant's position.

The claimant's work record is exemplary. She has progressed from an hourly employee to a team leader. She has received merit wage increases, as well as promotions. She has also completed more than two years of college and reared a minor child during her employment with Employer's. She had an exemplary reputation and even the Employer's witness acknowledged that she had no reason to suspect Ms Employee. The second aspect of significance to this case is that the practices at the gas station were substantially different than in the major part of the store. The gas station was sometimes undermanned. The practices with respect to employee breaks,

merchandise purchases and other aspects of the operation were different. The reality is that the employee handbook could not be applied to the gas station as it was to other parts of the store.

The third and most significant reason the claimant should be accorded relief is that no theft occurred. The Employer policy is substantially at variance with common definitions of theft. The testimony clearly confirms that the claimant had revealed to her supervisor and co-worker (Ms. Person 2) the nature of the use of the tampons. It also reveals that Ms Person 2 failed to relate the fact that the claimant was returning to work that same day because of a personnel shortage problem. This all shows that the Claimant did not attempt to conceal the taking of the tampons. She also advised openly of her intention to pay for them. When she returned to work the split shift, she paid for the tampons. Her testimony in this respect is corroborated by the cashier who accepted payment from the Claimant.

Not only was there a total failure to show intent to steal but also the total lack of the act of theft. Accordingly, the Claimant should be reinstated to her job with full back pay for the time that she was wrongfully discharged from her employment.

## **INTRODUCTION**

The Termination Appeal Procedure which Employer, (herein referred to as Employer) makes available to an employee who has been discharged (herein referred to as Appellant, Claimant or Employee) contains provisions which allow for final and binding arbitration. Under that procedure, David L Beckman, Louisville, Kentucky was selected as Arbitrator to decide the issues set forth on page 2 hereof. The hearing was held at the Inn, City A, State A on the date set forth on the cover page hereof.

The proceedings were transcribed Full opportunity was given to each party to present evidence, to examine and cross examine witnesses, to state positions and to make arguments with

respect to the evidence. Following the hearing, both parties filed written briefs of their respective positions.

## **FINDINGS OF FACT**

Employee was hired at Store #000 in City A, State A in March of 1995. In two months she became team leader (herein sometimes referred to as manager) of the jewelry/cosmetic department. In February of 1996, Employee transferred to the gas station as team leader, or manager. The gas station is in a building separate and apart from the main store. The gas station stocks food and other convenience items for sale, in addition to gasoline.

The incident which the Employer relies on in support of its action of discharge of Ms. Employee occurred on Monday, May 19, 1997. On that day, Ms Employee punched in and began work at about 8 15 a m. Shortly thereafter, she took a box of tampons off the shelf in the gas station for her personal use. She did not pay for the tampons at that time. She placed the box in her smock pocket and went to the back room, where she put the box of tampons in a desk drawer. She went to the main store where she attended a weekly team leader meeting. Her co-team leader, Person 2, also attended the meeting. The meeting ended shortly after 9.00 a m and both Ms. Person 2 and Ms Employee returned to the gas station.

Upon her return to the gas station, Ms Employee went to the back room. Ms. Person 2 was there at the desk working. Ms Employee took the box of tampons out of the desk drawer, and said "Don't let me forget to pay for these before I leave ". When one of the scheduled team members called off work unexpectedly, Ms. Employee determined that she would work a split shift, that is, go back home and come back later to cover for the absent employee. Shortly before 11 00 a m., Ms Employee went to the desk drawer, took the box of tampons out of the drawer and placed them in her smock pocket. She then punched the time clock, walked out of the back

room, past the cashier, and out the door of the station. She did not pay for the tampons before she left the store.

Ms Person 2 reported the incident to Person 3, the service lines leader at the store. Ms. Person 2 was concerned about what she observed to be lax enforcement of the employee purchases policy at the gas station, and she reported that when she confronted Ms Employee about her lax enforcement of the policy with the team members, Ms Employee stated that it "was easier for them to pay for it all at the end of the night." Person 3 advised Ms. Person 2 to take her concerns to the loss prevention department.

The Employer's investigation generally confirmed that gas station team members were eating and consuming merchandise prior to purchase and sometimes without paying for same. There was some evidence that this had occurred in front of Ms Employee.

On June 3, 1997, Person 4 interviewed Ms Employee who admitted that she had not paid for the tampons. She said she took them because it was an emergency, and that she had forgot to pay for them. Ms Employee said that she had recently reviewed the Personal Purchases policy with her team members in view of the Person 5 termination. Person 5 had been terminated for allegedly violating the theft policy. At the end of the interview, Person 4 gave Ms Employee an opportunity to address three issues (1) theft of tampons, (2) unauthorized possession of Employer property, and (3) eating and consuming product without paying for it or allowing that to occur.

Ms Employee responded in writing to the issues raised by Person 4, and in relevant part, she stated as follows.

In the case on the 19th, I did not recall not paying for this item until today [June 3, 1997] when it was brought to my attention. I didn't even remember needing this item later on and that I hadn't paid for it. If I had, I would have made sure it was purchased. I know that according to policy this is theft and I was wrong but this was not a conscious thought of "Oh, what can I steal today."

On June 6, 1997, Ms. Employee called Person 6 in Corporate Team Relations in City B to report that she had paid for the tampons. Person 6 recalled her saying she

"had used the tampons and believed she had gone back in and paid a few days later, she thought it was week and a half to two weeks ago at this point in time, but she didn't know a specific time or date, she wasn't sure who she paid, but she thought it was Person 1"

When Person 6 received the call, he was unfamiliar with the paperwork on the case, and it was not until later that he noticed the discrepancy in content between the phone call and the prior written statement of Ms Employee.

At the hearing, Person 1 was called to testify. Person 1 formerly worked as a team member at the gas station. She quit her employment with Employer's on the same day Ms Employee was discharged. She explained her actions this way.

"I just didn't like the way they treated [Employee], I didn't like the way they treated the other girls out there, I didn't think it was fair I didn't think any of them did anything wrong and I was not going to work for a Employer like that "

The evidence from Person 1 and Employee suggested that Person 1 helped Employee recall that she actually had paid for the tampons on May 19 after she had come back to work, because Person 1 recalled that she rang up the tampons along with some other items Ms. Employee had purchased, as follows.

When we had gotten there, she pulled up to a pump and she got gas, I think it was like \$5, she didn't get that much worth of gas I got right out, went in and clocked in, got my drawer and everything in, she came in, she paid for the gas, she had a Sprite and something else, I can't remember what it is, and then she said, "Go ahead and ring up \$2.49 " I said, "What's that for?" She said earlier this morning she had gotten a box of tampons and she needed to pay for them, so I rang that up.

## OPINION

As a matter of procedure, the burden of proving just cause for discharge is on the

Employer. Because of the value and importance of the relationship, the evidence presented by the Employer should be clear and convincing. After reviewing all of the evidence and after considering all of the arguments of the parties, I find that the evidence clearly and convincingly establishes that Employee violated the Employer's policy with respect to "Personal Purchases ". The Employer did not act arbitrarily or capriciously by imposing termination, given the evidence in the case. The defenses submitted on behalf of Ms Employee are not persuasive.

The Personal Purchases policy is set forth on pages 57 and 58 of the Team Handbook. The policy states, in relevant part, as follows.

When making personal purchases we trust our team members to use good judgment to avoid placing themselves in a compromising position. Team members who choose to violate these rules will be disciplined or may have their employment terminated.

The following are some common-sense principles team members can use as a guide.

Drinking, eating, or sampling of merchandise or products (even if damaged) is not allowed, unless approved in advance by a team leader or unless the team member has properly paid for the item and the team member is on non-work time (breaks, lunches, before or after a scheduled shift). Violation of this guideline will result in termination of employment.

Payment for merchandise or products by team members must be made during the team member's non-work time, and merchandise or products must be consumed only during non-work time.

Payment for merchandise or products by team members must be made from the guest side of the counter and must be made to an on-duty team member. Team members cannot ring up merchandise or products that they are purchasing.

Team members making purchases must pay for the merchandise or products in total at the time they receive the merchandise or products. Team members may not extend credit to anyone without prior approval from the store director-in-charge.

Merchandise may not be held for or by a team member under counters, in back rooms, at guest service desks or any other location prior to purchase.

The evidence clearly establishes that Ms. Employee did not "pay for the merchandise or

products in total at the time [she] received the merchandise or products ". She took a carton of tampons off the shelf shortly after she arrived at the store, and she took them to the back room where she placed them in a desk drawer. By placing the tampons in a desk drawer in the back room, Ms. Employee violated the last paragraph quoted above which prohibits team members from holding merchandise in a back room, "or any other location prior to purchase". The evidence shows that Employee exited the store twice with the tampons, but without paying for the tampons. Such evidence clearly establishes a failure to follow the Personal Purchases policy.

Are the defenses raised by the Claimant sufficient to require a finding in favor of the Claimant? The first defense is that there was an emergency which should be taken into consideration. There is evidence that the Claimant took the tampons off the shelf, because she was having an unexpected menstrual period. Assuming for the sake of argument that Ms Employee was faced with a true emergency and grabbed the tampons and went directly to the rest room, there is nevertheless the fact that she failed to go to the cashier to pay for the tampons when the emergency was over. Instead, she put the tampons in the desk, an action which is clearly prohibited by the policy. The reality is that the emergency did not prevent her from paying for the tampons when she came out of the rest room, even though it provided an excuse for her not paying for them prior to going to the rest room. It was not unreasonable for Employer to expect the Claimant to comply with the policy as soon as the emergency was over.

Next, it is argued that the termination action is not proper in view of the Claimant's exemplary work record. It is no doubt true that Ms. Employee progressed from an hourly position to two managerial positions, the first as team leader of the jewelry and cosmetic department, and the second as team leader of the gas station department. She is a talented person. But despite her otherwise good reputation and record, it is clear that she did not manage up to the

standard required by the Employer with respect to the enforcement of the Personal Purchases policy. Her personal failure to follow the policy in this instance may account for the lax enforcement of the policy observed by Ms Person 2. That is, if a manager does not sufficiently respect a policy, enforcement will leave something to be desired.

Counsel for Claimant has made an argument for a contrary explanation. He argues that the conditions at the gas station were the cause of the lax enforcement of the policy, that is, the fact that the gas station was sometimes undermanned, and that portions of the handbook could not be applied at the gas station. For example, if only one person is on duty, the procedures for checking out the purchases of the employee cannot be followed.

While the argument may have relevance under some circumstances, it is not relevant here, because there was nothing to prevent the Ms Employee from following the policy under the facts in evidence. Indeed, the reasonable inference to be drawn from the evidence is that Ms. Employee did not enforce the policy sufficiently with those who worked for her. While it is true that one employee was discharged for violating the policy prior to this, there is reason to believe that enforcement became lax thereafter. Indeed, that was the consideration which prompted Ms. Person 2 to report what she had observed to higher management.

My conclusion, given the detailed policy with respect to personal purchases, and the fact that Ms Employee did not follow the policy on May 19, 1997, even if it were held that none of the negative implications should weigh against Ms. Employee, it would not be unreasonable for the Employer to take the position that team leaders must follow the Personal Purchases policy, and any deviation there from will be at their peril.

The policy itself clearly provides notice that employees should "use good judgment to avoid placing themselves in a compromising position". What is the stated penalty for employees

who fail to use good judgment? The policy clearly states

Team members who choose to violate these rules will be disciplined or may have their employment terminated.

There is no basis in the evidence for holding that the Personal Purchases policy should not be applied to the gas station. Clearly, the policy applies as much to the gas station as to the main store. Retail purchases occur there, as well as in the main store. After the termination of one of the gas station employees for failure to follow the policy, Ms Employee acknowledged that she referred to the policy and reminded the remaining employees of its importance.

Accordingly, I find insufficient evidence to support the conclusion that the gas station should be held to be exempt from the policy requirements.

Finally, it is argued that no theft occurred here, and the arbitrator should so find. The asserted basis for this argument is that the Claimant did not have the requisite intent to steal, and that she acted to take care of her needs, and simply forgot to pay for the tampons thereafter. I find the argument to lack persuasiveness, primarily because it does not give sufficient weight to the context of the case. The context of this case includes the fact that the Employer has been in the retail business for many years, and that it has developed a detailed written policy to deal with the kind of problem which occurred here. The substance of the Personal Purchases policy indicates that it is clearly designed to require affirmative actions on the part of employees which, if followed, eliminate the kinds of concerns which the courts face in theft cases. Since the written policy specifies certain procedures and puts employees on notice of the necessity for following such procedures, one might reasonably conclude that there is a difference between common law or statutory theft and unauthorized possession of products by employees.

For the sake of argument, let's proceed with the premise that Employee did not commit common law or statutory theft. Let's further agree with her counsel that she did not have the

requisite intent for such a crime. But this is not a criminal case. The enforcement of a state law is not at issue here. Rather, at issue is the enforcement of an employment policy with respect to personal purchases. Employee knew how she was supposed to accomplish an employee purchase. She had to know the Employer was serious about enforcing the policy it had established to cover personal purchases, because she witnessed the termination of one of her employees shortly before this incident. Despite all of this prior notice, Ms Employee did not enforce the policy on herself.

If Ms. Employee had given proper respect to the policy, she would not have put the tampons in the desk drawer, knowing that she had not yet paid for them. Nor would she have asked another employee to remind her to pay for the tampons "before I leave." Since she was obligated to pay for the tampons right then, what she asked another employee to do was to change the policy for her. She had no authority to do this. An employee cannot escape the personal responsibility of paying for an item in the manner the policy requires, by asking someone to remind her to discharge the responsibility in a fashion not allowed by the policy. Moreover, if the thought of paying is in one's mind, the responsibility for acting on that thought includes that idea that right then and there the item must be paid for. The defense that she forgot to pay loses its persuasiveness at this point, because instead of paying, Ms Employee turned the issue into not whether she was going to pay for it, but whether her co-worker was going to enforce the policy against her.

Employees are not exonerated from honoring the Personal Purchases policy merely because a co-worker fails to remind them to pay. Employees have a prior and superior obligation to pay, as required by the policy, and if they do not follow the policy, it is no defense to say that another employee did not make them follow the policy. At the very moment Ms Employee

attempted to put the burden of policy enforcement on someone else, she had the duty to enforce the policy on herself.

Ms Person 2 was appalled at the actions of Ms Employee, and I find that to be the reason she reported what she saw to higher management. All employees have reason to know the importance of the Personal Purchases policy, and they also have reason to know how seriously the Employer views the requirement that all employees comply with the Personal Purchases policy. When viewed in this light, it is clear that Ms. Person 2 acted reasonably.

One other consideration needs to be addressed Counsel for Ms Employee, at one point in the proceedings, questioned the authority of the Employer to define theft in a manner different from the ordinary legal definition of theft, and inferred that in doing so, the Employer is being unfair to its employees. It is likely that Person 1's feelings of unfairness are based on a similar inference. The inference is that the employees do not have the same kinds of defenses available to them to hold onto their jobs, as they would have in court, and that such a result is unfair, considering the importance of the employment relationship. The argument is ingenious, but it is not persuasive.

When employees go to work for an employer who has the kind of rules and policies as are involved in this case, the employees are put on notice that whatever notions they might have with respect to rules of conduct imposed on them by society, one of the conditions of the employment relationship is that they follow the particular policies or rules of conduct which the employer has seen fit to impose on them. In this case, Employee knew, or had reason to know, the Employer's policy with respect to Personal Purchases. The policy is fully explained in the Team Handbook, a copy of which is supplied to all employees upon hiring. The policy clearly states that failure to follow the policy could result in termination of the employment relationship.

This being the case, it should come as no surprise to any employee that one's obligation to the employer is greater than one's obligation to the state or the country. Therefore, notions of law which are applicable to one's obligation to follow the rules imposed by a state may not be applicable to one's obligations to follow the rules imposed by an employer. This distinction was not foreign to the Claimant, because she admitted in her first written response to the investigation: "I know that according to the policy this is theft and I was wrong. . ."

The Claimant felt the sting of the policy, and felt it was not fair that she was terminated, because she did not consciously set out to steal tampons on May 19, 1997 I have no reason to doubt her statement, but a relevant fact in this case is that the policy does not require a showing of common law intent to steal, it merely requires a showing that the Personal Purchases policy was violated. She may not have consciously set out to steal tampons, but she should have consciously set out to follow the policy. My holding is that there is nothing unfair about the Employer having a reduced burden of proof under the policy than it has under the law, because Ms Employee had advance notice of the specific requirements of the policy, and of the importance of following the policy. Accordingly, I find that Ms. Employee should have known when she came out of the rest room after her personal emergency was over, and put the tampons in the desk drawer, that it was time not to conceal the tampons, but to pay for them.

In summary, the evidence establishes just cause for the termination of the employment relationship between the Employer and Employee for an incident which occurred on May 19, 1997.

## **AWARD**

The Appeal of Employee is denied.

DAVID L BECKMAN