Daniel #1

VOLUNTARY LABOR ARBITRATION

TERMINATION APPEAL PROCEDURE

IN THE MATTER OF THE ARBITRATION BETWEEN:

EMPLOYER, INC.

and

EMPLOYEE

ARBITRATOR: WILLIAM P. DANIEL

INTRODUCTION

The claimant, a 47 year old black man, was terminated December 3, 1996 from his position as Meat Team Leader (Department Manager) at store number 124 in City A, State A. He elected to appeal his discharge under the Employer's Termination Appeal Procedure and raised claims that the discharge was without just cause, was unlawfully discriminatory on the basis of race and age, and was unlawfully retaliatory for his having filed a charge of discrimination with the EEOC. Pre-hearing petitions by the claimant for certain discovery were granted in part in accordance with the provisions of the Termination Appeal Procedure.

FACTS

The claimant began work in May 1996 at the Store B as the manager of the meat department. He was initially hired in May 1994 as a meat cutter at the Store A. At that time, Person 1, was the Store Director and over a period of months, decided to promote the claimant to a Team Leader in Training. After Person 1 became the store director at the Store B, he had the claimant transferred to that store to become the Meat Team

Leader. Person 1 remained at the Store B for about three months before being promoted to the position of District Director in which capacity he has served for three years.

Person 1 testified that prior to being employed by Employer, the claimant had had prior meat experience and had done a nice job as a trainee. When he needed a Meat Team Leader at Store B, he had chosen him. His assessment of the claimant's performance during the three month period was: "He did a nice job for me.". Though he had never made a formal evaluation of him, Person 1 was of the opinion that he would have received a good evaluation.

When Person 2 became Person 1's successor as store director in the early summer of 1996 Person 3 became the Supermarket Team Leader with immediate supervisory authority over the claimant among others. A few weeks later on July 20, 1996, Person 3 put an evaluation in the claimant's file. This evaluation was not discussed with the claimant nor shown to him nor was his signature obtained. It covered 21 aspects of performance and work attitude rating the claimant as failing to meet expectations and needing improvement in every regard; it was the worst possible evaluation that could have been given. Person 1 testified that it is common practice to have employees sign evaluations and that such evaluations should be done every six months or annually. He was unable to explain why this was the only evaluation done of the claimant during his three years of employment at Employer. Person 3's evaluation surprised him since he would not have so rated the claimant based on the time that he worked for him. Person 1 confirmed that the claimant was one of the best managers that ever worked for him. Despite the adverse evaluation the claimant received a semi-annual merit pay increase in August 1996.

During the weeks that followed, Person 3 became increasingly critical of the claimant's work performance telling him, on one occasion, "If I had my way, I'd fire you." and on another occasion that there was nothing the claimant could do to save himself. Another time, Person 3 told him that he was building a file on him. On several occasions, according to the claimant, Person 3 made derogatory remarks to and about him.

Person 1 testified that one time when he was making a store visit, he saw the claimant and noticed that he seemed quite upset. When he asked what was wrong, the claimant was reluctant then to discuss it so Person 1 set up a meeting with him. He was told that the claimant was not getting on well with Person 3 and felt that he was being treated unfairly. Person 1 conveyed that information to Store Director Person 2 recommending that Person 3, Person 2, and the claimant get together to discuss any problems. He also conveyed his concern to Person 3 who subsequently reported to Person 1 that the meeting had gone well and that everything had been worked out. The claimant confirmed this also to Person 1.

The claimant also had complained to Night Store Director Person 4 about what he regarded was Person 3's unfair and discriminatory treatment and reported that he felt threatened all the time. Person 4 passed these comments on to Person 2 but did not know if anything ever came of it. He testified that Person 3 told him that he was going to get rid of the claimant and that he did not like him.

In October 1996 an investigation was commenced involving the claimant's responsibility for out-dated meat being found on the sales floor. This protracted investigation, which resulted in meetings between Person 2, Person 3 and the claimant

did not conclude with any charges against him. Another accusation arose in about the same time frame about alleged stealing of candy; it was investigated but not acted upon for lack of any evidence of wrongdoing.

That month the claimant concerned about racial discrimination, sought advice from the EEOC. He told Person 2 beforehand that he was going to do so and also mentioned it to Person 1. He deferred filing until December, when he was under suspension, and later filed a charge of retaliation when he was terminated. It was with this background that the incident resulting in the claimant's termination took place.

Sunday, November 24, was the weekend before Thanksgiving and the store was extremely busy as was the meat department. The claimant was scheduled to start work at 3:00 a.m. to function as an opening meat cutter preparing meat to be wrapped by clerks who would be starting at 5:00 a.m. His other duties involved getting the department ready for business. He did not report for work at 3:00 a.m. admittedly because he had overslept. The store entrance video tape indicated that he did not enter the building until 5:02 a.m. At that time, he punched in but his card was not accepted by the computerized time clock. He did not realize what had happened and went directly to work. A couple of hours later he was contacted by an office clerk who told him that it had not registered. He realized at that point that his supervisor Person 3 had failed to clock him out the previous day when he had forgotten to bring his time card to work; this caused the machine to refuse the next entry.

It was some time after 10:00 a.m. when Person 3 came into work and learned of the problem due to his failure to clock him out the prior day. According to the claimant, Person 3 asked what time he should be clocked in for that morning. The claimant told

him that he had stopped to do a comparison check at Another Store that morning around 4:00 a.m. A little later, an employee in the meat department complained to Person 3 that the claimant had been later getting in to start cutting meat and that had put everything behind schedule. Person 3 then called the claimant back and said that he had been told that he had not been seen in the department until about 5:30 a.m. At that point, the claimant told Person 3 that he was unsure what time he had arrived at Employer after completing the comp check but that it must have been some time before 5:00 a.m. because he came in the store just ahead of an employee who was scheduled to commence the 5:00 a.m. shift.

Person 3 did not testify in this matter but a written statement submitted by him to Store Director Person 2 on November 25, 1996 was received in evidence. He reported that the claimant told him about the time clock problem and asked to be punched in for 4:00 a.m. with no mention being made as to when he had arrived at the store or the comparative check of a competitor's store. He stated in his report that when he talked to the claimant later, he reaffirmed that he was in the store at 4:00 a.m. The claimant testified denying that that report accurately characterized the contacts and conversations which he had with Person 3 regarding the time clock matter.

Based upon this report, Store Director Person 2 talked to Person 5 from the Corporate Human Resources on Monday, November 25, and upon her advice, began an investigation by interviewing the claimant and gathering other evidence. The interview took place on November 26, 1996 and was attended by the claimant, Person 2, Person 3 and Loss Prevention Team Leader, Person 12, who took notes. Person 2 informed him about the discrepancy in the time that he said he arrived at the store and the claimant

immediately asserted that he had stopped off to do a competition check at the Another Store on his way to work and had had coffee there with an employee arriving at the Store B a little before 5:00 a.m. The claimant acknowledged that he was scheduled to come in at 3:00 a.m. but explained that he occasionally comes in later because he frequently has to stay on at shift end until the next cutter comes in. Person 2 pointed out to him that he did not think that a comp check should be on the clock though the claimant indicated that sometimes he would just stop on his way into work. Person 2 also was of the opinion that 50 minutes was excessive for a comp check. The claimant was uncertain of the time of his arrival at work. He reiterated the he was estimating his time based upon another employee who had entered the building at the same time. He did not argue with Person 2 over his estimation that an actual comp check should not take much more than 15 minutes but explained again that he had stopped to talk with a team member at the Another Store that he knew and had walked around the store in various areas other than the meat department.

At that point, the claimant was shown the video tape indicating the time that he had arrived and asked to write up a statement of what had actually occurred. Person 2 told him to put down the exact time that he had come in on Sunday and the claimant indicated he did not know what time he came in so he was told to put down what he thought. The claimant denied abusing time and indicated that when Person 3 asked him what time he should be punched in, he told him the time that he thought matched his time spent doing the comp check on the way to work.

It was on this occasion, immediately following the time card discussion, that Person 2 again took up the candy theft matter and it was discussed at length and the

claimant denied any wrongdoing. Person 2 concluded the meeting by telling the claimant that it was his responsibility to report correct time and saying that he was there at 4:00 a.m. when he was not there until after 5:00 would be time card fraud and suspended him until Friday. By then, after checking with the Member Relations Department, he would let him know the final decision.

After the meeting, the claimant attempted to prepare a handwritten statement as requested as to the event and the specific time that he got to the store. Person 3, who was present while he was making this out, responded to his uncertainty by telling him that he had to put down a definite time and finally that he should put down "a happy medium, just put 4:30 or something" and this was said despite the fact that they had just finished watching the video tape which indicated 5:00 a.m. as the arrival time.

Person 2 did not believe that the claimant had actually done a comp check on Sunday and relied solely on Person 3's statement of what the claimant had told him. He acknowledged that he did no investigation to confirm whether the comp check had been done or why. Nor did he ask Person 3 if he had been told about it but failed to mention it in his report.

The claimant explained that comp checks are basically a comparison of prices charged by a competitor store for similar items. He claimed that there was no formal training or rules or policies on how to do it and no one had ever informed him that there were only certain days that it was supposed to be done or any time limits. He testified that on Friday, November 22, he had talked to the Manager of Corporate Meat Buying in City B, Person 6, about the pricing of turkeys for the upcoming holiday and that Person 6 told him to check out the prices at Another Store and get them to him by Monday, November

25. Person 2's investigation did not include checking with Person 6 or the employee that the claimant said he had talked to at the Another Store.

On cross-examination, Person 2 was asked if, assuming that the claimant had stopped at 4:00 a.m. at Another Store for a comp check and was there until he drove to store 124 and then told Person 3 to clock him at 4:00 a.m. because that was when he was doing the comp check, there was anything wrong with this conduct. Person 2 responded that other than that a comp check should be done on the clock and actually added to the end of the shift, as was normal practice, there would be no misconduct involved. Person 2 acknowledged that he had never told the claimant that comp checks had to be on the clock or added to the time card at the end of the shift or what the normal practice was. From his investigation, he felt that the grievant did not make any comp check at all, arrived after 5:00 a.m. at the store, and told Person 3 to clock him in at 4:00 a.m. in an attempt to collect money for work not performed. He accepted in every regard Person 3's report against the explanation of the claimant.

Person 5 independently reviewed Person 2's findings and concurred in the decision to terminate the claimant. Person 1 also reviewed the report and agreed. Person 3 did not participate in any respect in the decision to take disciplinary action.

Person 2 did not believe that the claimant was performing acceptably based on the report from Person 3 and Meat & Seafood Specialist, Person 7. Person 7 testified that he travels to different stores to try to work with the department leaders to make improvements and to give them training and instruction and would visit the Store B at least once a week. The meat department at the Store B was struggling and conditions were not good - he was continuing to try to help the claimant and his team improve. He

testified that he did not think there were any other stores worse than Store B and that the problems had persisted even before Person 3 came. He had told Person 3 and Person 2 that he felt there was considerable room for improvement in the department. In his opinion, comp checks such as the claimant said he did, should take no more than five or ten minutes at most and he did not think there was even any really good reason for doing it in anticipation of Thanksgiving because the turkey pricing had been established; there was little opportunity to make any changes during the few days left.

The claimant testified that he believed the action taken against him was discriminatorily motivated because he is a black man, over 40 years of age and in retaliation for his announced intention to file a complaint with EEOC. He related no specific racial incidents between members of management and himself. He felt Person 3's decisions in hiring black employees was influenced by racial bias citing also that there were only three black persons hired in the some 50 managerial positions at the Store B. He felt that Person 3 disliked him because he was black and had a more cordial relationship with white managers. He noted also that white employees were not consistently fired for using the word "nigger". One employee, Person 8, was fired for referring to the claimant as "a nigger in charge of this department" unaware that he was overheard by the claimant and another employee. He pointed out that another white employee, Person 9, had commented that he was "just hiring too many niggers in this department" with no disciplinary action taken though he admitted this statement. He felt that he had been disciplined by his former team leader, Person 10, on one occasion when he had gone to a black expo event though in his testimony he admitted that the supervisor was really aggravated because he had not been told beforehand that the claimant was

going to be away during a particular time. The claimant also noted the case of Person 11, a younger employee, working in the department who had admitted placing outdated meat in a floor case. In that instance, Person 3 had automatically blamed the claimant for doing it and when it came to his attention that Person 11 was responsible, there was no action or discipline taken against him.

Person 4, a former night manager at Store B, who is also black, testified as to his discharge for an incident involving two white employees. Person 4 had permitted those employees to leave the building to engage in a drag race behind the store which he observed. He believed the employees had been off the clock when, in fact, they were not. Each of the employees was suspended for a short time for misuse of Employer time. The Employer's position was that Person 4 had failed in his management responsibilities and duties and that though he would not be returned to a managerial position, it might consider rehiring him in some other capacity.

In support of his claim of discrimination based on age, the claimant testified that Person 3 made numerous jokes about his age once saying that he owned only 78 records instead of CDs. Another comment made to him was that he hoped the claimant was not losing his hair in the meat department, shedding it in the meat. At the meeting that Person 1 had arranged between Person 2, Person 3 and the claimant, he was stunned by Person 3's remark that he was "too old and too slow for this job". The remark attributed to Person 3 was not recalled by either Person 2 or Person 12 who was taking notes at that meeting. She testified that she believed, being over age 50 herself, she would have recalled Person 3 making such a statement. The claimant testified that he believed that he was also discharged in retaliation after informing the Employer that he intended to file a complaint

with the EEOC and that the time sequence which followed a month later with his suspension and discharge confirmed that motivation.

The claimant testified that he was replaced as the manager by Person 11, a white employee who was younger than 40 years of age, who had previously been involved with rewrapping of outdated meat and abusing time clock procedures. The employer noted that the position of manager was filled through a job posting for which only two persons applied - Person 11 and another employee who was black. Person 11, according to the employer, had performed management functions in the department during the interim and had more meat and management experience than the other candidate.

The claimant related no statements or actions of Person 2, Person 1, or Person 5 that demonstrated any racial or age discrimination motives or retaliation for filing with EEOC.

TERMINATION APPEAL PROCEDURE

AND ATTENDANCE AND PAYROLL REPORTING GUIDELINES

A. Purpose and Scope

This procedure has been established to provide an exclusive, final and binding method for the Employer and any eligible associate to resolve all claims, controversies, disputes or complaints arising out of or relating to the associate's termination from employment, including any claims or complaints based on federal, state or local law. In the event an associate who is eligible to use this procedure has a complaint about his or her termination from employment, it will be resolved in accordance with this procedure.
Notwithstanding the foregoing, decisions to terminate employment for business or economic reasons may not be challenged through this procedure. Decisions to terminate employment for business or economic reasons remain within the sole judgment and discretion of the Employer.

* * *

E. Request for Review

An eligible associate who has been terminated from employment, and who desires to challenge the termination, must first submit a request for review of the termination to the Associate Services Department by fully completing and signing Part 1 of the Employer's Termination Appeal Form (PL 169).

* * *

G. Election to Arbitrate

If the associate is not satisfied with the answer of the Associate Services Department and desires to arbitrate his or her claims, the associate must elect arbitration in accordance with the procedures below.

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I. Discovery

After the associate elects arbitration and an arbitrator is selected, the parties shall attempt to agree on pre-hearing discovery. If the parties cannot agree on discovery, the arbitrator may authorize discovery consistent with both the need to provide a full and fair consideration of the relevant and material facts of the case and the need to provide a relatively inexpensive and expeditious method to resolve the parties' dispute.

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L. Arbitrator's Authority

The arbitrator's authority shall be limited to deciding claims arising out of or relating to an 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 disciplinary action.

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 awarded (sic) 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 is discretion, may pay in lieu of reinstatement. The arbitration hearing shall be reopened for additional proofs on this issue if either party so requests.

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.

* * *

R. Exclusive Remedy. Effect of Arbitration and Condition Precedent

This procedure is intended to be the sole and exclusive remedy and forum for all claims arising out of or relating to an eligible associate's termination from employment.

The decision and award of the arbitrator is final and binding between the parties as to all claims arising out of or relating to an associate's termination from

employment which were or could have been raised at any step in this procedure and judgment may be entered on the award in any circuit court or other court of competent jurisdiction.

GUIDELINES

* * *

All team members are personally responsible to record their time record accurately. This includes their start time, finish time, lunches and break periods.

* * *

Anyone found to be using an override for other than legitimate business reasons will receive discipline up to and including termination. Team members, who violate the policy of accurately reporting their time worked, or another team member's time worked, will be terminated.

POSITIONS OF THE PARTIES

Employer: There was just cause to discharge the claimant based upon his violation of the policy requiring accurate reporting of time. The claimant committed time card fraud in violation of the Employer policy and his explanation that he was doing a competition check is not believable and, in any event, does not justify one hour's absence from work for which he sought compensation. He clearly had not been doing a competent job and his performance was properly subject to criticism by his superiors even prior to the time card incident. There is no evidence that Person 3 orchestrated the events and falsified information so as to bring about the claimant's discharge. This is not a case of mistake or carelessness on the part of an employee but rather shows an intentional attempt to obtain money for time not worked. This is not a case simply of misuse of time but rather a scheme on the claimant's part.

There was a full and fair and reasonable investigation conducted and the claimant was given every opportunity to explain his side of the incident. Discharge was the

appropriate discipline in this case and should not be set aside by the arbitrator. In no respect was the claimant denied any unused vacation pay and that really should not be an issue.

The claimant's contentions that this decision of discharge was based upon racial or age bias is not borne out by any of the facts nor is there presented any case which, under federal or State A law, meets the standards of proof required. The claimant has not presented a prima facie case of either race or age discrimination. Through he and Person 3 did not get along well personally, the decision to terminate him was not made by Person 3 but by persons to whom there is attributed no discriminatory motivation.

There is no basis for his charge that he was terminated in retaliation for his filing with the EEOC. No causal connection is shown between his protected activity in that respect and his discharge. The Employer has proven a legitimate, non-discriminatory reason for his discharge and the claimant has failed to carry the burden of proof.

Claimant: The claimant was wrongly terminated based upon the animosity and determination of his immediate supervisor to carry out that scheme. He had been unfairly and unjustly accused of various acts of misconduct all of which were unproven but his supervisor persisted in finding some way to get rid of him.

The employer contends that the claimant was guilty of falsifying his time records. This determination was based entirely upon the report of the immediate supervisor who clearly had animosity toward the claimant and was racially biased against him and motivated by age bias also. The employer has not carried the burden of proving just cause. The evidence indicates that the claimant was directed by the corporate meat manager to make a competitive check of prices and did so during a period of

approximately an hour prior to reporting for work. The employer concluded that that did not happen but has no basis for that belief. Furthermore, the claimant clearly informed his supervisor what had happened and why he wished to be credited with an hour of time on the clock but the supervisor, being hostile to the claimant, failed to report or confirm that, hence causing the termination to take place.

It is clearly a set up of the claimant by a supervisor and other managers. The claimant had a history of satisfactory performance prior to Person 3's coming which precipitated adverse evaluation, charges of meat department mismanagement and even theft of candy.

Being confronted with an inquisition, it is not surprising that the claimant became uncertain about exact times of the comp check and his arrival and he said so. Nevertheless, the employer forced him into agreeing to facts which were not accurate and then used that as a basis for his discharge. The employer was so committed to getting rid of this employee it did not even consider the possibility that it might merely be some mistake or misuse of time which would not result in termination under the policy. Not only was he not discharged for just cause but he was also denied earned yet unused vacation time to which he was entitled under state statute.

Even though issues of discrimination and retaliation were partially presented to the arbitrator, it is requested that he not rule on any Title VII claims since such are currently pending with the EEOC. The decision in this case should be based upon the allegations of time card fraud and should be seen to be purely pretextual for the discriminatory motivation of the Employer. In the event that the arbitrator does find jurisdiction to determine the discrimination charges, then a remedy should be granted

which would be complete and consistent with damages that he could receive through a Title VII claim.

For the reasons noted above, this claim should be granted and full relief afforded the claimant.

ISSUES

1. Was there just cause to discharge the claimant?
2. Was the discharge unlawfully discriminatory on the basis of race and/or age?
3. Was the discharge unlawfully retaliatory for having filed an EEOC charge of discrimination?
4. Was the grievant wrongfully denied earned but unused vacation time?

DISCUSSION

PRE-HEARING PROCEEDINGS

In accordance with the termination appeal procedure, requests for pre-hearing discovery were made and the parties' positions in that regard presented to the arbitrator. Requests by the claimant for extensive disclosure of records touching generally upon hiring procedures, the numbers of minority employees, names of minority employees terminated and other information covering the geographic area in which the Store B store is situated were limited in the absence of claims of specific direct acts demonstrating discriminatory bias to the claimant personally. A time period set for further petition by claimant elapsed without such request. Further, the claimant was advised future discovery could be sought as the hearing progressed. Certain discovery was directed as deemed appropriate to the claim and the claimant was permitted in the process of the hearing to introduce evidence of discriminatory situations and statements both direct and indirect

and disparate treatment of minority employees at the Store B. This determination by the arbitrator was done under the authority of the Termination Appeal Procedure, Article L, Discovery, with "full and fair consideration of the relevant material facts of the case and the need to provide a relatively inexpensive expeditious method to resolve the parties' dispute".

FINDINGS OF FACT

Credibility issues certainly arise in this case because not all of the testimony or the documents received in evidence are consistent. In making credibility findings, the trier of fact must keep in mind that parties are often motivated to tell other than truth by their own self-interest. This is true not only of persons such as the claimant in this case but also of other witnesses who may have reason to testify falsely out of animosity or friendship. Besides considering the motivation of each witness, the trier of fact may also observe his or her demeanor while testifying and weigh whether a person claiming to have acted or reacted in a certain fashion did so as a reasonably prudent person would have.

It is the burden of each party in this case to prove that which they affirmatively urge either by way of a charge or a defense. Because this matter concerns such a serious outcome as the loss of employment and the stigma of serious misconduct and because the employer's burden is to show just cause, something more than the mere preponderance of the evidence should be expected. This arbitrator, as most other arbitrators do, requires clear and convincing evidence of misconduct justifying termination.

Upon all of the documentation and testimony, it is found that the claimant had been satisfactorily performing his work for some time at the Store B store as Person 1

confirmed. Though Person 7 felt that there was room for improvement and was working with the claimant to that end, there was no disciplinary jeopardy until Person 3 became his immediate supervisor. It is difficult to understand how this sudden change occurred in the quality of the claimant's performance but apparently Person 3 had set much higher standards than had his predecessor. From the very beginning, he was very critical of the claimant's work and was unrelenting and, in fact, insulting in his expressed determination to get rid of him. That first and only evaluation confirmed this plan of Person 3's; the absolute minimal grading was inexplicable. Even assuming that Person 3's attitude toward the claimant was based only upon his work performance, there seems little justification for its harshness. There is no evidence that Person 3 undertook in any way to assist, counsel, or educate the claimant as to exactly what he should do. Rather, his management style was criticism and accusation.

It is not surprising, then, that the claimant should commence feeling harassed and took the matter up with his former boss, Person 1. Person 1 was quite surprised considering what he knew of the claimant as a good and competent worker and thought that it might simply be a matter of miscommunication. It was for that reason that he directed the store manager, Person 2, to meet with Person 3 and the claimant and get it straightened out. Though Person 2, Person 3 and the claimant seemed to think initially that they had resolved any problems, that certainly was not so. Charges brought against the claimant by Person 3 in regard to mislabeled meat being put back in the case were never proven. And that was true also as to the candy incident which really is a non-issue since the employer, though seemingly obsessed with tracking it to the very end, never leveled any charge of misconduct.

The claimant has convincingly proven that Person 3 had considerable animus toward him and was determined to remove him from the department. This circumstance existed on November 24, 1996. The claimant asserted that on that morning, though he was late for his scheduled time, he decided to stop and make a comp check at a Another Store at about 4:00 a.m. and that when he finished he went directly to the Store B and attempted to clock in. Person 2, who investigated the case, doubted that the claimant made a comp check at all and felt that even if it had been done, it should not have taken nearly 50 minutes. The claimant testified without contradiction that the corporate meat head, Person 6, had told him to check prices of the turkeys. No evidence was presented that Person 6 did not tell him that nor was Person 6 called as a witness. In fact, Person 2 did not even contact Person 6 in the course of his investigation. Another aspect of the claimant's story about the comp check was that he was escorted around the store by an employee he knew. Person 2 did not attempt to get details about this or to investigate whether it was true. There is no evidence which contradicts the claimant's testimony in that respect.

It must be found then that the claimant went to the Another Store at 4:00 a.m. on his way to work, made a comp check and talked with an employee at that store while taking a tour of the premises. He went to that store in response to a request by a management official for some pricing information. Person 2 admitted, on cross-examination, that if the event occurred as the claimant said, then it would not have been improper; this is very significant.

Arriving at work, the claimant was unaware of the specific time but apparently had only a general idea based in part upon seeing another employee enter whom he

thought started at a certain time. He ran his time card through the machine but did not notice that it failed to register. He had every reason to believe that it registered and was unaware of the fact that Person 3 had failed to properly clock him out the day before. It was a little past 5:00 a.m. and he immediately went to work. At that point, he had every reason to believe that he was on the clock and would be paid thereafter in accordance with what the time card showed. He knew that any additional time for the comp check would have to be approved by his supervisor. At this point, there was no intent to deceive. He was informed that the time card had not registered before he could get the comp check time approved. Person 3 had also learned about the clock problem and subsequently when the claimant approached him and asked what time the claimant wanted him to enter on the clock. According to the claimant, he told Person 3 to put him down for around 4:00 a.m. because he had stopped on the way to work to do a comp check.

Person 3 did not testify and, therefore, the written report that he submitted must be very carefully scrutinized in the light of the claimant's sworn testimony. Person 3 did not mention at all the comp check which the claimant says he told him about and that is certainly a critical point in this case. Based upon the claimant's sworn testimony and the previous finding that he did stop to make such a comp check, it would seem only reasonable that he would mention that to Person 3. In fact, he repeated that to him later in the day when Person 3 questioned him further. At that point, Person 3, a person with obvious animosity toward the claimant, would have seen his chance to be rid of the grievant. He could prove the claimant had not arrived at work until sometime after 5:00 a.m. when he was seen by another employee and also that the claimant was seeking

compensation from 4:00 a.m. This would present the basis for a time card falsification charge and that is exactly what Person 3 stated in his report.

In the meeting of November 26, 1996, the claimant was interrogated about the alleged time card falsification. That Person 3 did not acknowledge the claimant's claim that he had been informed of the 4:00 a.m. comp check is not surprising considering his mind-set. The claimant told Person 2 about the comp check but Person 2 disbelieved him from the outset. He asked no specific questions; it was not the responsibility of the claimant to cover every detail. If Person 2 had asked, he would have learned about Person 6's request and the name of the employee that the claimant talked to at the Another Store store. Apparently he believed Person 3's report totally and rejected anything that the claimant said. The written notes taken by Person 12 were not a verbatim transcript and are useful only in general terms as to the subject matter, the attitude of the parties, and basic discussion format; they are often disjointed and made no sense relative to other statements immediately before or after an entry. Those notes do indicate a confusion on the part of the claimant as to exact time, which is not surprising since he was trying to recall the sequence of events that had not seemed important to him previously. Even though Person 2 knew the exact time that the claimant had come into the store, he attempted to confuse him by asking as to other times that he might have arrived. Appropriately, he should have been told what the employer's contention was and the evidence upon which it was based prior to being led down the path of making a commitment to some time of which he was unsure.

Person 2 knew of the animosity between Person 3 and the claimant - Person 1 had brought it to his attention, the claimant had brought it to his attention, and it had even

been the reason why a special meeting was called at Person 1's direction. Nevertheless, Person 2 accepted Person 3's statement of the events and rejected the claimant's explanation without a thought of Person 3's motivation. That, combined with his failure to fully investigate all of the facts, brought about a flawed foundation for the further consideration of discipline and the decision to terminate the claimant.

DISCRIMINATORY MOTIVATION

Though the claimant has sought to exclude from the arbitrator's consideration questions of racial, age and retaliatory discrimination, the Termination Appeal Procedure clearly requires such consideration and determination. In light of the fact that the claimant exercised his right under that procedure to require arbitration, he must also be held to have agreed to have "any claims or complaints based upon federal, state or local law" decided in this fashion. Furthermore, he also agreed that the arbitrator's authority would be "to determine whether the termination was lawful under applicable federal, state and local law. . .". The arbitrator finds not only that he has the jurisdiction but the obligation to proceed to make such findings and conclusions.

RACIAL AND/OR AGE DISCRIMINATION

It is the obligation of the claimant in this regard to establish a prima facie case, creating rebuttable presumption of discrimination. In doing so, among other things, he must show that he is a member of a protected classification and that similarly situated persons outside his class were treated more favorably. Additionally, he must show that he was doing his work well enough to meet legitimate expectations and that a replacement was sought for him. In this case, the claimant has been able to present no direct evidence of racial discrimination but relies rather upon other incidents and events occurring around

him and perceived disparate treatment of whites and blacks. His subjective feelings and observations in this regard are not supported by clear and convincing proofs; in incidents cited by him there are distinguishing factors such as Person 4's discharge for failure to carry out his management responsibilities versus the lesser discipline of white employees who were, in fact, misusing work time. The failure to promote particular black employees over others or Person 3's low opinion of a particular employee who happened to be black do not provide a basis for finding the circumstances of a discriminatory racial atmosphere which affected the claimant's employment.

In respect to alleged age discrimination, there are some events that must be considered. Person 3, according to the claimant's testimony, made fun of him in an age based fashion regarding his musical tastes, commented upon his falling hair, and lastly in a meeting, expressed the opinion that he was "too old and too slow". Considering Person 3's general animosity toward the claimant and in light of his failure to testify in this matter, it is found that he did make the remarks about musical tastes and falling hair and that such tend to exhibit an age bias toward the claimant. Though Person 2 does not recall, nor does Person 12, the note-taker at the meeting when Person 3 allegedly made the "too old" remark, their sensitivity to such a remark was likely much less than that of the claimant who already perceived such an attitude on the part of Person 3. The arbitrator accepts as convincing the claimant's recollection of that statement and rejects the disclaimer by the two Employer witnesses not because they are consciously lying in that regard but because they are less likely to have clear recollection.

There is, then, a basis for an age discrimination claim but it is directed solely at Person 3 and not found to exist in regard to Person 1, Person 2 or Person 5, the

individuals who decided to take the action of termination. Person 3 did not participate at all and there is no showing that his age bias was transferred to them.

Although there were complaints about the quality of the claimant's work, there is a conflicting basis there - Person 1 was of the opinion that the claimant's work had been very good when he was the director of the store; Person 7, a Meat and Seafood Specialist, had a different opinion but was working with the claimant; apparently, Person 3 felt that he was performing far below expectations. Person 3 did not testify in this matter and based upon the other testimony of other witnesses and the fact that charges in October of mislabeling of meat were never proven or action taken against him, it must be concluded that he was at least performing up to minimum expectations.

If the employer had, in fact, acted even in part to terminate him because of his age, this case would be cast in a substantially different light. However, at most, it can be said that the proofs show that Person 3 who was clearly antagonistic and hostile toward the claimant and committed to removing him from the work place did act in that regard to falsify his report by omitting reference to the comp check. The attitude of Person 3 must be regarded as persuasive evidence that the information he provided to the Employer and charges which he raised are to be rejected where there is any contradictory evidence. Because it is not shown that the persons who mistakenly decided to terminate the claimant in any respect were motivated to act on that basis, this arbitrator must decline to find a violation of federal or state law.

RETALIATORY MOTIVATION

Though the claimant clearly informed both Person 2 and Person 1 that he intended to pursue his rights under EEOC, and, in fact, subsequently did make such a finding,

there is no evidence that any of the three decision makers - Person 2, Person 1, or Person 5 - were so motivated to retaliate by discharging him. The fact that they relied upon and believed Person 3's report, which this arbitrator rejects, and that Person 2 made an inadequate investigation of the matter, does not prove discriminatory motivation. As noted above the management representatives who terminated the claimant believed that certain facts were true and so drew false conclusions. Though mistaken, they acted in good faith and such rebuts the claim of discriminatory motivation.

CONCLUSION

The arbitrator finds that the employer has not proven just cause for the termination of the claimant. However, such action was not motivated by age or race bias or retaliatory purpose; there was no violation of state or federal laws in that respect. For the reason, that arbitrator declines to award any remedy based upon such statutes.

The claimant shall be reinstated to his former employment subject to the right of the employer to make the election of a monetary award in accordance with the Termination Appeal Procedure. Because the claimant was improperly terminated from employment, he was also improperly denied his earned accrued vacation pay and such must be paid to him as part of the remedy.

The arbitrator is authorized to grant any remedy or relief that a court of competent jurisdiction could grant and so the claimant is to be made whole for all lost wages which calculation shall be of his total lost earnings less any interim earnings and any unemployment compensation received during the period. He shall also be made whole for any diminished or lost fringe benefits to the extent that he suffered actual out-of-pocket loss. Because if this matter was heard by a court of competent jurisdiction an award of

attorney fees could be directed, it is the intent of this arbitrator to consider such application upon a presentation of a summary of such particulars by attorney for the claimant.

The parties are directed to attempt agreement in all respects of back pay, out-of-pocket expenditures, and attorney fees and failing agreement in any respect within sixty days after the date of this decision, shall submit such issues to the arbitrator for final determination.

AWARD

The claim is granted. It is found that the claimant was not discharged for just cause. It is further found that such decision to terminate him was not based upon racial or age discrimination or for retaliatory purposes.

The remedy is reinstatement with back pay and further determination of monetary remedy in the event the parties are unable to agree. Further award may be made if the employer elects to avoid reinstatement. A sixty day period is established for completing this process, at which time the arbitrator may be asked to make whatever further determination by way of remedy is necessary.

WILLIAM P. DANIEL

ARBITRATOR