

Daniel #6

TERMINATION APPEAL PROCEDURE

IN THE MATTER OF THE ARBITRATION BETWEEN:

EMPLOYER

and

EMPLOYEE,

ARBITRATOR: WILLIAM P. DANIEL

FACTS

The claimant worked as a store detective in City A for about four years. He transferred from store 19 where he had worked from June 10, 1992 until August 1995 to store 22 and worked there until his discharge August 10, 1996. He was terminated for allegedly mishandling two separate apprehensions on July 22, 1996. The final review from which appeal is taken summarized the charges:

The termination of your employment was done with just cause for violation of Loss Prevention Training Guidelines, including stopping without a witness or backup, asking for merchandise after a subject entered the restroom, not completing a voluntary statement, not issuing a civil demand, failure to report a customer contact, excessive force, and for violation of the Honesty Policy.

The claimant contended that he was not discharged for just cause and that the actions of the employer were discriminatory and racially motivated.

The statement of facts upon which the employer relied and presented its case at the time of hearing are as follows:

The first apprehension involved a male and female who selected an ankle bracelet and processed pictures from the jewelry aisle and went the wrong way through a turnstile into the concourse without paying. Mr. Employee pursued them into the hallway where the bathrooms are located and stopped the male, but the female entered the women's room. At the time he stopped the male, he had no backup detective with him. Mr. Employee

waited for the female to come out of the bathroom and then asked her where the bracelet was. She denied having the bracelet. He then escorted the male to the loss prevention office and directed the female to wait on a bench outside the office. Mr. Employee came back out of the office and again asked the female where the bracelet was. Again, she denied having possession.

Mr. Employee returned to the loss prevention office. A few minutes later, several other detectives became involved in apprehending a different female shoplifter in the front concourse. Mr. Employee left the office to assist with that apprehension. When he arrived at the scene, he helped handcuff the woman behind her back and assisted in escorting her to the loss prevention office. Inside the office, he took sole control of this female subject and, according to all the eyewitness accounts, threw or pushed her against the wall in such a manner and with such force as to cause her back and head to hit against the wall with a loud sound and to cause her to fall into a chair which was there. Mr. Employee then went over to the male subject from the previous apprehension and released him from custody without completing any of the required paperwork.

The employer notified the claimant that it was also relying upon his past work history which contained several disciplinary entries. Because the termination appeal procedure is not extended to cases of discipline less than discharge, the claimant was permitted, in the course of his presentation, to address prior disciplinary incidents and to explain his position.

I. APPREHENSION WITHOUT PROPER BACKUP

Employer witnesses testified that it was a well-published Employer policy that a detective must have a second person in the proper "backup position" close enough to hear everything that is said and to provide immediate assistance if necessary. Any attempt at arrest is to be abandoned if that situation cannot be assured. OMP Specialist Person 1 testified that the policy is primarily aimed at insuring the safety of the detectives and that while such a failure is considered a serious disciplinary offense, it is not necessarily treated as a terminable offense in and of itself. The claimant concedes that when he stopped the male suspect in the hallway outside the bathrooms, he did not have anyone in the proper backup position and this is confirmed by Detectives Person 2 and Person 3 who were a little late coming to the scene.

II. CUSTOMER CONTACT AFTER A BREAK IN SURVEILLANCE

As defined by Employer policy, contact is "stopping a person for a theft and they don't have stolen property". It further provides that "All customer contacts must be thoroughly documented with reports written by each witness immediately before they leave for the day". The common case occurs when a detective stops a customer for, or questions them about shoplifting, but does not recover any merchandise. A break in surveillance is usually the problem because it allows the customer an opportunity to dump or discard the merchandise out of sight. Person 4, the Loss Prevention Manager at store 22, testified that detectives are specifically taught not to make a stop after a subject enters the bathroom or elevators because of the obvious break in surveillance. Person 1 and Person 4 both explained that such customer contacts are a great concern of the Employer because of potential liability for false arrest, defamation, and other such claims. The Employer generally follows a progressive disciplinary policy for such contacts which may lead to discharge.

Detectives Person 2 and Person 3 testified that when they arrived on the scene, the claimant had the male in custody but that the female was in the bathroom. He told them that he was waiting for her to come out of the bathroom and during approximately two minutes while they waited, they did not hear the claimant ask the male anything about the bracelet. Their testimony was that when the female came out and joined the male, the claimant then looked at both of them and asked: "Where's the bracelet?" to which the female replied that she did not have it and rolled down her socks to show him. The claimant explained in his testimony that though the female was present at the time, he was speaking only to the male whom he had had under continuous surveillance. Person 4 testified that when he questioned the claimant about that event and asked whether he had waited deliberately for the female to exit the bathroom before

inquiring about the bracelet, the claimant admitted that he did so and that it was in essence "fishing". He repeated that admission in a later interview according to Person 4, indicating that he did so because he "wanted to get the bracelet back".

The second customer contact was with the same female and occurred after the three detectives had escorted the male to the loss prevention office. The claimant told the female to have a seat on a bench next to swinging doors which led into the non-public area of the office. At the office, Detective Person 3 went in with the male subject while the claimant, according to Detective Person 2, stopped at the door and told her that he still wanted to "take" the female for the ankle bracelet. He then returned to where she was sitting. According to Person 2, the claimant told the female that he wanted the bracelet and asked her where it was to which she again replied that she did not have it, at which point she was directed to return to her seat. This episode was video-tapped by a camera which surveyed the general area.

In his testimony at the hearing, the claimant was unable to specifically deny that second contact and, as in his prior statements, indicated that he could not remember exactly what he said. He suggested that he probably had approached her in a sympathetic vein, because of her obvious concern over what might happen to her companion, asking if he had ever been in trouble before and assuring that it would just take a minute or so.

III. FAILURE TO REPORT THE CUSTOMER CONTACTS

Person 1 testified that all detectives are required to write a report about each customer contact so that it can be fully reviewed and investigated with an eye to any circumstances that might be the basis of claims against the Employer. Detectives Person 2, Person 3, and Person 5 confirmed that there was very specific training on these procedures and detailed the items to be included in any report. Person 1 testified that failure to file an Employer report is a terminable

offense and Detective Person 5 agreed. In fact, the claimant, in his testimony, conceded that "Now the discipline for failure to report a customer contact, and I think every store detective knows this, is termination".

An incident report was submitted on the apprehension of the male subject but no customer contact report was filed in regard to the female. Though the first incident with the female was mentioned by the claimant in his report, the second one was not. He testified that he regarded the first one as accidental or coincidental and his remarks were directed to the male and not the female who had just exited the restroom. The second contact outside the swinging doors was not mentioned at all.

His failure to file a report came to light the next day when Person 2 became concerned about the incident and reported it to Person 4 though she did not, herself, mention in it the report which she had filed that prior night. The claimant observed that Person 2 violated the policy herself because she had witnessed what went on and did not make any mention in her report. There was no reason, as Person 4 testified, that Person 2 would have had any uncertainty when she approached him the next day as to her responsibilities and, according to the claimant, Person 2 had ill will toward him and had improperly characterized what had transpired. He denied altogether that the incident involved a contact with the female. Person 2 explained that because it was not her customer contact, she did not believe she was required to make such a report. The Employer policy, exhibit C-30, requires that "All customer contacts must be thoroughly documented with reports written by each witness immediately before they leave for the day".

IV. DISHONESTY IN THE INVESTIGATION PROCESS

The loss prevention code of conduct stresses that store detectives must be honest in all respects of their work due to the nature of their positions particularly involving criminal matters and the apprehension of customers for shoplifting. Person 4 testified that he interviewed the claimant about the apprehension of the male and that in describing the events, he omitted any mention of a second contact with the female. According to Person 4, the claimant persisted in this denial and claimed he only talked to her once in the area of the restrooms. When specifically confronted with a charge of a second contact outside the loss prevention office, the claimant again denied it. Person 4 then told him that he had information that it had happened and that there was a videotape of that second contact at which point, the claimant acknowledged that he might have done that. It was Person 4's opinion that the claimant was evasive and dishonest in this regard. He noted that his investigation disclosed that the claimant had discussed the incident with two other detectives the evening it happened, asking Detective Person 3 whether she thought it was customer contact to which she replied she did not know because she had not been present and did not hear what was said. At that point, he also asked her about the first remark he had made and she told him that she thought that was a customer contact. Person 2 testified that after the apprehension, she told the claimant she thought he had a customer contact that evening. After revealing the videotape and contradictory reports, Person 4 allowed the claimant to write a supplemental report and at that point, the claimant recalled a verbal exchange with the female but explained that it was just to inform her of what was going on with her friend and to preserve some confidentiality from being overheard by employees in the area.

V. RELEASE OF THE MALE SUBJECT WITHOUT APPROPRIATE PAPERWORK

Person 4, Person 2, Person 3, and Person 5 all testified in regard to the procedure which requires that when a person is taken into custody, certain paperwork must be completed. First, there is a written "voluntary statement" for the person to sign containing a statement of the facts as the detective determines them. Such statement is important as evidence in the event of any later proceedings. Testimony indicated that such a statement is required for all adult subjects other than those who are handcuffed, impaired or unable to understand the nature of the statement. It was further indicated that when a person is to be released from custody without the police being called, the detective is to give the person the paperwork for a "civil demand" and a "limited release". The civil demand is required for everyone unless they are under 10 years of age or had shoplifted less than \$4.00. The civil demand allows the Employer to recover ten times the amount taken, up to a limit of \$100.00. A limited release is also required for all adults who are released. This gives the Employer an option to prosecute for a period of the next sixty days. Testimony of the witnesses confirmed that there is no discretion for the individual detective as to issuing such paperwork.

On cross-examination, Person 4 acknowledged that the log book which lists all cases of apprehensions showed a few cases where civil demand had not been issued and which would seem to be in violation of the guidelines. He explained that most of those cases involved extraordinary circumstances such as where the subject was a minor, illegal alien, of advanced age, or did not speak English. Another instance would be if the individual was immediately to be transported to jail by the police. The claimant acknowledged in his testimony that out of some 340 entries, there were approximately 16 or 17 that he had some doubt or question regarding.

The claimant's cross-examination of Person 4 addressed some of the exceptional cases, causing Person 4 to explain that there was no reason that an illegal alien could not pay a civil

demand but that in fact the individual in that case was a ward of the state. Another case involved an 82 year old female having been apprehended for stealing a small amount of merchandise which, to Person 4, justified not issuing a civil demand less the shock would adversely affect the condition of the elderly person. Person 4 conceded that charges of failure to complete such paperwork were very rare and that he could not recall another detective who was disciplined for that.

The claimant, on cross-examination, conceded that he did not complete the paperwork and explained that he released the individual because of other events which were taking place in the office which might have been a physical a7ard to the individual. This contention by the claimant relates to a subsequent apprehension of a female subject who was brought by him and others into the same office. Testimony indicates that prior to the arrival of that second female the male had been moved to another area of the office and away from the path traveled by detectives with the woman. The claimant acknowledged that the decision to release the male was made after he felt that she was under control: "After it seemed like she wasn't going anywhere, I made the decision that the best thing to do was to get my other subject out of the office."

VI. EXCESSIVE AND UNNECESSARY FORCE

Person 1 testified that excessive force by the Employer's store detectives is a very serious concern because it can expose the Employer to extraordinary liability. He pointed out a case in 1990 wherein a shoplifting suspect's neck was broken during the course of apprehension resulting in a very substantial judgment against the Employer. That incident caused a suspension of all physical contact with subjects by detectives for a one year period and a revision of restraint policies.

Written policies regarding excessive or unauthorized force is contained in the loss prevention code of conduct manual. It states that all customers and employees, even though involved in criminal acts, should be treated with respect and dignity, regardless of the situation. According to Person 1, even where physical contact is necessary, it must be done within those parameters and that restraints to be used must be based on the "Restraint Matrix" as authorized by the Employer. The detectives are warned that any deviation from that process could result in disciplinary action including termination. According to the Restraint Matrix, certain specific limited action may be taken depending upon the level of conduct of the subject. A "take down" is authorized only when a subject mounts an armed or unarmed attack on a detective; detectives are instructed to disengage if they are unable to effectively control the subject using authorized techniques.

The incident here involved arose when a female subject was apprehended attempting to leave the store with stolen merchandise. Several detectives commenced the initial apprehension to which the subject was extremely resistive. The claimant, called to help, finally was able to handcuff her wrists behind her back. He then, with Detective Person 2, walked the subject backwards to the loss prevention office. As they were about to enter the office, another detective moved the male subject to the other side of the room which is separated by a half partition. As Person 2 and the claimant entered the room, it was intended that the subject would be escorted between two desks to an area where chairs were arranged against a wall. Because of the close quarters, the claimant took full physical control of the woman and proceeded to move her backward between the desks toward the area where he wished her to sit. There is no disagreement among any of the witnesses or the claimant about the events up to that point.

According to the claimant, the subject's behavior was erratic from the start and she was still resistive as they passed between the desks. He described how they were moving face-to face with her back to the wall and his left hand behind her back on the handcuffs. He recalled stumbling or tripping in the process which caused the subject to be pushed towards the chairs where she first struck the wall and then slid down into a sitting position. He denied altogether either lifting and throwing her or pushing her with an intent to harm her.

There were five other employees in the room at the time who observed what occurred. Detectives Person 2, Person 3 and Person 5, and Person 6 and Person 7 who were not detectives. According to Person 2 the claimant pushed or threw the subject with both hands into the wall where the chairs were while she was still handcuffed. Her butt hit the top of a chair, her head hit the wall with a thud and she slid down into the chair in a seated position. Person 3 recalled seeing the claimant grab the subject around her biceps, pick her up and throw her against the wall causing the same result. Person 5 noted that the claimant grabbed the subject with both hands, picked her up and threw her towards the chairs, again with her head hitting the wall above the chair and then sliding into the chair. Person 6 saw the subject picked up and thrown against the wall and fall into the chair - her upper body and head hit the wall and Person 6 recalled she could clearly hear the impact. Person 7 saw the claimant back the subject through the space between the two desks with his hands on her upper arms and then shove her against the wall so that her back and head made a loud thump before she slumped into the chair. All the witnesses heard the subject immediately respond with obscenities complaining of how she was treated and indicating an intent to make trouble for the claimant.

Another detective, Person 8, called as a witness by the claimant, testified that he did not see the incident but was present and heard a loud thump against the wall followed by the subject

yelling obscenities at the claimant. Person 2, Person 3, Person 6 and Person 7 all testified they were very surprised and even stunned by the incident. They all confirmed a common opinion that the claimant's actions were excessive and not appropriate or in accordance with training.

Person 4 noted that in statements given by the claimant, he admitted pushing the subject toward the chairs and made no initial excuse of tripping or stumbling over something as the cause. Later in the investigation, the claimant did raise an excuse of accident and unintentional stumbling. None of the other witnesses to the incident testified that they observed any stumbling or tripping on the part of the claimant.

In his testimony, the claimant acknowledged that he pushed her through the desks and that her back and head hit the wall. He asserted his prior position that he somehow had stumbled or tripped which caused him inadvertently to push her with unintended force. The claimant further testified that the witnesses really did not have a good view of what happened and also expressed that he could have never picked up or thrown the individual due to the simple physical limitations of such a move. He noted that he had his hand on the handcuffs behind her back which would not have permitted the motion which most of the witnesses recalled.

Employer witnesses Person 1 and Person 4 both testified that the Employer has been consistent in all cases of excessive force and that all detectives engaging in such conduct have been discharged. The case of a white male detective, Person 9, another white male detective, Person 10, and white males Detectives Person 11 and Person 12 were all discharged for that reason. Two cases, those of Person 10 and Person 11 went to arbitration and the discharges were upheld. Detective Person 13, a white male, was discharged for failing to report a customer contact and his discharge was upheld in arbitration. Detective Person 14 was similarly

discharged without an appeal to arbitration and Detective Warner, a white female had her discharge upheld in arbitration also.

The claimant argued that another detective, Terrell, made a stop without proper back up and was not discharged. The Employer conceded that occurred but pointed out that violation of that policy alone was not considered as a dischargeable event even in the claimant's case.

Citing the grievant's past work record as a consideration in determining to terminate him, the Employer presented evidence of policy violations resulting in discipline such as allowing a subject who was not being detained to come into the loss prevention office after an apprehension and then go to his automobile and return. Four other instances of policy violations involving customer contacts with breaks in surveillance had also resulted in discipline including a three day suspension. On another occasion, though he was aware that other detectives had broken into the loss prevention manager's locked file cabinet to view confidential records and had gained access to voice mail messages, he did not report it to the Employer. He and two other detectives were suspended for a short period of time and three others were discharge for their role in their incident. The claimant complained in that case that he felt he was being unfairly dealt with. The claimant was given the opportunity to go into detail as to each of the incidents cited by the Employer and the record was examined as to statements made by him and explanations on file in each case. There was not a substantial difference of opinion as to the factual situations in any of the cases.

It was pointed out to the claimant that part of his grievance was the contention that the Employer acted out of discriminatory motives due to race. He was provided the opportunity to produce any proofs and testify in that regard. In his brief, the claimant noted that the Employer did not call Detective Person 8 who was the only other black detective present on the night in

question to testify about events (the claimant did call Person 8 as his own witness in the matter). Though his brief expressed the opinion that "my termination was a foregone conclusion motivated by racism and the additional charges were brought to make that conclusion a reality", specific details of discriminatory or disparate treatment as compared with non-black detectives was not presented. In fact, in his testimony, the claimant conceded that there was no evidence of racial remarks, bias or motivation on the part of anyone in management that he could show. The Employer did not present any witnesses, evidence, or testimony in regard to the issue of racial discrimination.

PERTINENT POLICIES AND RULES

CODE OF CONDUCT MANUAL

* * *

3. Honesty. In order to be a strong and healthy Employer, we depend on you to be totally honest. As a Loss Prevention associate, the Employer believes your position requires that your credibility be beyond question. Therefore, the Employer feels that you should be totally honest when dealing with associates, customers and Employer officials. It also requires that all written reports be totally factual in their content. Falsification of a written report is grounds for disciplinary action up to and including termination.

Dishonest associates hurt everyone. They can jeopardize everyone's job security through their actions. If you should become aware of anyone who is dishonest, it is your responsibility to inform the appropriate Employer official. In some instances, it may be necessary to investigate dishonesty on the part of a fellow associate within your department. In these cases, the Employer expects you to put your personal loyalties aside and to act in the best interest of the Employer. Honesty is the measure of success for all Loss Prevention associates.

* * *

11. Use of Restraint. As a Loss Prevention associate, your job may require you to restraint [sic] a person arrested for a criminal act committed on our property. Restraint is used only as a way to ensure the physical safety of the person being arrested, as well as the associate making the arrest. The only acceptable restraint to be used is based on the Restraint Matrix authorized by the Employer. Any deviation from the accepted matrix will be deemed to be a violation of Employer policy and subject to review by Corporate Loss Prevention. Violations of this policy could result in disciplinary action up to and including termination.

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CUSTOMER CONTACT POLICY

Definition: Stopping a person for a theft and they don't have stolen property.

Documentation: All customer contacts must be thoroughly documented with reports written by each witness immediately before they leave for the day.

Degrees:

2nd Degree: Conduct by the store detective was not reasonable and a customer contact occurred. The detective's actions did not conform to training or all efforts were not made to minimize liability and protect Employer assets.

MANAGEMENT AND PROFESSIONAL ASSOCIATE TERMINATION APPEAL PROCEDURE

A. Purpose and Scope

In the event an eligible office, management or professional associate (hereafter "associate") has a complaint about his or her termination from employment, it will be resolved in accordance with this appeals procedure (hereafter "Termination Appeal Procedure" or "Procedure").

The Termination Appeal Procedure has been established to provide an exclusive, final and binding method to resolve all claims, controversies or complaints, arising out of or relating to an associate's termination from employment by the Employer, including any claims or complaints based in whole or in part on federal, state or local law, whether statutory or common law. For purposes of the Procedure, termination from employment shall mean an involuntary and permanent separation from employment by the Employer and shall include any actual or constructive dismissal, discharge, firing or release.

* * *

D. Standards to Be Applied by the Arbitrator

The jurisdiction of the arbitrator shall be limited to complaints protesting termination from employment. The arbitrator shall determine whether the termination was lawful under applicable federal, state and local statutory and common law and shall determine whether the Employer had just cause for termination. The arbitrator must consider and rule on every issue which was specified on the Termination Appeal Form or which was presented 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 an applicable Employer handbooks, rules, policies and procedures and by any 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.

* * *

F. Relief

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 power to reduce the termination to some lesser disciplinary action.

POSITIONS OF THE PARTIES

Claimant: The witnesses presented by the employer contradicted and discredited themselves and it is obvious that there is no evidence to support the employer's claim that there was just cause for discharge. The claimant has clearly and credibly testified that there was no customer contact with the female subject as the employer contends and therefore, there was no reason for having to make a report. It was entirely consistent and not dishonest for the claimant to insist upon that position in the course of investigation. The past record of the claimant clearly shows that he has always correctly reported customer contacts and there was no reason for him to fail to do so on this occasion, since he was well aware that a substantial penalty would arise otherwise and there was in fact no detriment to him if he had made such report.

There was no excessive force used against the second female and the employer has simply attempted to use a combination of incredible testimony from a group of witnesses who have given intentionally dishonest testimony on other occasions. Those witnesses were so grossly biased that they could be induced to lie under oath simply to strengthen their own status. The fact is that the claimant has been unfairly treated in the past as to disciplinary matters and was, in this case, not guilty of any misconduct whatsoever. There is no explanation possible other than that the employer is racially motivated to discriminate against him and has fabricated this case for that purpose.

It is requested that this appeal be granted and that the arbitrator provide to the claimant full and complete remedy and relief.

Employer: The claimant violated training guidelines by stopping a subject without proper backup, by asking for merchandise after surveillance had been broken, by failing to complete a voluntary statement and by not issuing a civil demand, by failing to report a customer contact, and by using excessive force in violation of the restraint policy. Furthermore, he was guilty of violation of the honesty policy by his evasive and untruthful responses to the investigating officer. His entire work record was properly taken into consideration which reveals that he has consistently violated policies and has previously engaged in dishonest conduct. The witnesses presented are entirely credible and consistent as to all aspects of the case and the facts as set forth by the employer should be accepted as the basis for decision in this matter.

As to claims of racially motivated treatment, the claimant presented no *prima facie* case and even if he had, the Employer's basis for his termination was not pretextual but based upon clear evidence of substantial and serious misconduct.

For these reasons, the appeal should be denied and it should be found that there was just cause for termination and that such was not racially motivated.

ISSUES

1. Was the claimant discharged for just cause?
2. Was the discharge of the claimant unlawfully motivated by racial discrimination?

DISCUSSION

It is appropriate at the outset to consider the termination appeal procedure generally and in the context of past disciplinary action short of discharge which is relied upon by the employer in buttressing the current disciplinary penalty. The arbitrator noted and commented that only

discharges are subject to review in appeal procedures. This is significant because in cases such as this, where the employer has relied upon the past alleged misconduct of an individual, that may become a decisive factor when weighing the proofs. Employees are not given an opportunity to reverse prior disciplinary action though they may insert written comments in their personnel file to explain alleged misconduct. As the arbitrator pointed out at the time of hearing, it is necessary then for the employer, when relying upon a past disciplinary record, to present such cases in sufficient detail so that the claimant may be fully informed of the whole case against him. And for that purpose, the claimant may, at the time of hearing of his discharge, attempt to prove that prior disciplinary action which was taken into consideration as a factor, in fact, was wrongfully assessed. To the extent the claimant is successful in nullifying a factor upon which the employer relied in its decision, the discharge may be found to lack a sufficient just cause basis.

In this case, the claimant did present evidence and documentation regarding past disciplinary incidents and the employer produced evidence also to explain and contradict his perception of those events. At the time of each prior disciplinary action, the claimant had had an opportunity to reply and put into his file any explanation or difference of opinion; in some cases that was done, in others it was not. There was no indication that the claimant was in any way intimidated or restrained from fully challenging such other disciplinary penalties. The claimant's past work record shows discipline for failing to follow procedures after an apprehension and four separate instances of customer contacts after a break in surveillance had occurred. He was thoroughly advised and warned in each case of discipline and was thereby made very well aware of the Employer's policy and determination to enforce compliance. Of particular concern was his involvement in the case of other detectives breaking into a locked file cabinet and viewing

confidential records. While he, himself, did not actually carry out that scheme, he was aware of it and made no report to the Employer regarding it.

The arbitrator has carefully considered the arguments of both parties in regard to the work record and has reviewed each instance for the factual details and the positions taken by the claimant in either explaining or attempting to excuse his actions. There is found no basis for doubting or disregarding the Employer's evaluation of those various acts of misconduct and the disciplinary penalties assessed being within a reasonable range and consistent with the concepts of progressive discipline appear appropriate. For that reason, it is found that the employer was entitled to take into consideration the claimant's past work record as part of just cause for his discharge for the events of July 22, 1996.

The claimant's problems on July 22, 1996 commenced with his pursuit of the suspected male and female shoplifters. He was so intent upon apprehending them, that he proceeded without determining whether he had the required backup. In fact, he did not and he acknowledges that. So at the point of his approaching the individuals, he was not in compliance with Employer policy. It does not appear from the claimant's story and that of the other detectives who soon came on the scene that he had commenced questioning the male suspect before the female went into the restroom. There is no doubt that the surveillance of the female was broken by her entering the restroom. Of course, this could have been avoided had the claimant waited for backup of one of the female detectives who could have continued the surveillance.

Once the female entered the restroom, it was no longer possible for the claimant to take action to apprehend her since it could not be proven that she was in possession of the alleged stolen bracelet. Upon her returning to the hallway as she and the male subject stood with the

claimant, he asked a question as to the location of the bracelet. At that point, the subjects denied any involvement and the female subject even offered to show her ankle around which originally it was observed the bracelet had been placed. The claimant contends that the question regarding the bracelet was addressed only to the male and that he did not intend to challenge the female subject. This assertion is rejected as incredible. He did not attempt to question the male separately, his remark was made in the presence of the female without any disclaimer, and she reacted as though it had been addressed to her. It is obvious that the claimant intended to question the female since he waited until she returned before raising any question about the bracelet. His own statements subsequently appear to support an intent on his part to "go fishing" for the evidence.

It would appear that he was quite set in his intent to retrieve the bracelet and that what occurred thereafter was a continuation of his plan. With the male suspect removed to the loss prevention office and the female sitting outside in the hall on a bench, there was no reason for the claimant to make any further approach to the female who was simply waiting for her companion. Nevertheless, the claimant came to that area, approached the female, and spoke with her. Detective Person 2 indicates that the claimant was determined to follow up about the bracelet and that, in fact, he asked the female subject about it the second time. The claimant's testimony about this was quite equivocal; he claimed he could not remember exactly but thought he had only talked in terms of reassuring her as to the outcome for her companion.

Based upon the circumstances in these two instances and the testimony of the parties, the arbitrator concludes that the claimant made two separate customer contacts after a break in surveillance clearly contrary to Employer policy and with full intent and awareness of what he

was doing. There could have been absolutely no doubt in his mind that he was engaged in prohibited activity.

There followed from this breach of policy another problem for the claimant - the failure to write up a report concerning each of these customer contacts. It is clearly recognized by management and employees alike that this an absolute requirement in which employees have no discretion whatsoever and it is for a very valid business purpose of ascertaining potential liability for false arrest or defamation. All of the detectives including the claimant agreed with the Employer's position in this regard. The claimant argues that he did not believe customer contacts had occurred or that he was required to mention it in the incident report. In fact in his report, he characterized the first contact as being accidental. The evidence is quite to the contrary and his report in that regard was misleading. Furthermore, the evidence does not support his contention that his second contact was casual and had nothing to do with the alleged theft. The evidence is quite clear that such was a contact and to be reported. His deception both by way of failure to file the report and later to acknowledge what had occurred when questioned by his superiors, demonstrates a conscious scheme to cover up and deceive which is clearly contrary to the honest policy promulgated by the employer.

There was no basis for his claim that there was some misunderstanding on his part since he asked Detective Person 3 shortly thereafter whether it might have been a customer contact and later that evening he was told by Detective Person 2 that she thought he had had a customer contact. In fact, if Person 2 had not, on second thought, decided to report the matter to Person 4, the Employer might never have found out what had transpired. The claimant points out that Person 2 was, herself, in violation of the policy because as a witness to the events, she was required to set such forth in her own report for that evening. He is correct - Person 2 should have

made an official mention of it even though she asserted she did not because it was not her "customer contact". It does not appear that that is an exception to the policy. It is quite clear that the Employer wants everyone who is involved in any way with a customer contact to state in a report what they know about the incident. The failure of Person 2 to do so and the apparent failure of the Employer to take disciplinary action against her may be because of the secondary aspect of her responsibility and the fact that very soon after her report, she notified Person 4 of all facts. In any case, the failure to discipline Person 2 does not affect the Employer's right to take action against the claimant nor does it support a disparate treatment argument.

This first incident of the day was somewhat compounded by the claimant's failure to carry out all of his duties as the apprehending detective. Though he appropriately isolated the male in the loss prevention office, he did not complete the required paperwork of a "voluntary statement", a "civil demand" or a "limited release". Even though the claimant subsequently became quite involved with a second apprehension which moved to the loss prevention office, there was no reason why he could not have returned to the male subject once the second apprehension had been accomplished or request someone else to give him assistance in that regard. Rather, he took time from the second apprehension to approach the male subject and dismissed him without following the established procedures.

The testimony of all of the detectives and Employer witnesses and the claimant's own witness, Detective Person 8, establish that completing that paperwork was mandatory and that a detective had no discretion in that regard. The claimant attempted to prove that it was not unusual for detectives to exercise discretion as to whether to complete the paperwork and he questioned Person 4 at length with an examination of the log book. What was revealed was that out of some 340 cases, there were only approximately 16 or 17 entries of possible inconsistency.

Person 4's explanation that exceptional cases, such as unique status of an individual, their age, or the ability to speak and understand English or immediate transport to jail by the police, were the likely cause is credible. Such exceptional circumstances did not exist in the instant case and there is no basis for finding that the claimant was excused from this obligation.

The second apprehension presents a much more serious picture and one upon which the employer relies primarily to substantiate its decision to terminate the claimant. Excessive force used by store detectives is a serious concern for any retail merchandiser because it can expose the Employer to extraordinary liability aside from the obvious illegality of assault and battery. Person 1' testimony regarding a past incident in which a judgment resulted against the Employer for a very large amount of money, points out the very valid concern which the Employer had and which caused it to completely revise its policies regarding physical contact and the use of physical restraint. This is more than emphasized by references in the Code of Conduct manual and in the establishment of the Restraint Matrix. Only specific limited actions can be taken by detectives and that depends on the level of conduct of the subject.

In this second instance, it did, in fact, take a number of detectives to initially subdue the female subject and handcuff her. There is no doubt, as the claimant points out, that she was recalcitrant and very physically resistive. However, the two detectives did get her under control and handcuffed her and walked her backwards to the loss prevention office. There is no testimony indicating that she was particularly uncooperative in the course of that travel. The loss prevention office is a fairly limited space crowded with furniture, and, on that day, filled with other people including the male from the first apprehension. As the claimant and Detective Person 2 brought her into the office, it became apparent that if they wanted her to be seated in the chairs along the wall, it would be necessary for one of them to relinquish control because the

passage between the desks was narrow. The claimant took over and facing the subject commenced to push her backward through the opening with an intent to have her finally seated in an area approximately five feet away.

What happened instead was that she moved backwards at a considerable speed, striking her upper body and head up against the wall with a loud thud and then dropping into a chair. According to the claimant, this came about because he stumbled or tripped and pushed her unintentionally. All of the other witnesses to this event, Detectives Person 2, Person 3, and Person 5, and employees Person 6 and Person 7 testified as to what they saw and it is in direct opposition to the claimant's story. They observed no stumbling or tripping by the claimant; rather they characterize what happened to the female subject as being either thrown or pushed very hard toward the wall. The witnesses dispute the claimant's recollection that he had one arm around behind the subject on her handcuffs and one on her arms. Rather they consistently observed that he either had his hands on her biceps or her side.

As with all witnesses observing a single event, there are variations to be expected. Some of the witnesses perceived that he actually picked her up and threw her while others saw only that she was pushed with great force. The claimant's testimony that there was no way that he could have picked her up seems more plausible both because of a lack of handholds and the fact that the subject was of a size not easily lifted up. It appears more likely that she was pushed with great force just as some of the witnesses observed. It must be found upon all of the evidence that, contrary to the claimant's assertion, this was not an accident but an intended act on this part. It may be asked why he would do this and the explanation may lie in a number of events that had already occurred. He had been busily involved in the first apprehension and probably at this point, realized that he had violated Employer policy in those customer contacts.

He was also involved in completing the necessary paper procedures in the first apprehension with which he was uncomfortable. Furthermore, it would appear he was not well disposed to this second female subject because of her resistive efforts which made it difficult for him to escort her. In the end, he probably simply lost his temper and intentionally pushed her toward the seating area. It is unlikely that he intended the result - that she should strike her back and head on the wall. However, the lack of specific intent to cause bodily injury does not relieve him of the responsibility and obligation to avoid excessive force. The evidence is quite clear that he did intend to forcefully push her and he is responsible for what happened.

There was no evidence submitted that, as a group, the witnesses to the incident had any reason to testify falsely or that they were part of a scheme or conspiracy "to get" the claimant. It is entirely credible, as they related, that they were stunned and shocked by what the claimant had done knowing that it was totally contrary to established policies and rules. Over the years, the Employer has consistently enforced these rules regarding excessive force and unauthorized restraint. Four detectives, all white, were discharged and in two cases which went to arbitration, the discharges were upheld. There is no evidence that there was any instance of excessive force by a detective that did not result in termination. Failure to report customer contacts have also consistently been subject of disciplinary action and in many cases, termination where the matter had proceeded through progressive discipline or was particularly egregious. Two recent cases of termination were both upheld by arbitrators.

In the filing of his appeal and by remarks made at the time of hearing and references in his brief, the claimant raised the question of whether the Employer's actions in this regard were racially motivated and discriminatory. The evidence offered by him consisted of conjecture and assumptions. Though it is clear that he belongs to a protected class as a black man and was

subjected to adverse action, he did not show that the Employer's evaluation of his qualifications for the job were discriminatorily motivated or constituted disparate treatment. Nor was it shown that he was replaced by a person who was not a member of the protected class. It is found that he did not establish a prima facie case that legally would require the employer to meet a burden of articulating a non-discriminatory reason for his discharge. However, the employer did demonstrate such a basis for his termination supported by the several acts of misconduct as noted above. There is found to be no pretextual action on the part of the employer to cover up discriminatory racial motives.

SUMMARY

Though several aspects of the complaint against the claimant are not dischargeable offenses - such as the failure to have a back up - and the events all occurred within a very short ten minute period, such does not mitigate or affect the seriousness of the total misconduct. The claimant committed two terminable offenses - use of unauthorized, excessive force, and failure to report two customer contacts. He was well aware of the two customer contacts involved and yet failed to make the required report and in the subsequent investigation was evasive and untruthful.

In some instances, it may reasonably be argued that years of long service with an unblemished record should be taken into consideration in assessing the disciplinary penalty. Even if the appeal procedure in this case allowed such discretion to an arbitrator, the facts do not. During a short term of employment, the claimant has been consistently involved in policy violations and his record not only provides him no credit, but was fairly considered by the employer in determining to terminate his employment.

There is no basis whatsoever for finding discriminatory or racially motivated intent of the employer. The claimant did not present even a *prima facie* case, and the employer's proofs and evidence clearly established a just cause basis for termination.

AWARD

The appeal is denied. The claimant was guilty of numerous incidents of misconduct, the use of excessive force and failure to report customer contacts being particularly serious. The Employer's determination to terminate his employment was for just cause.

WILLIAM P. DANIEL

ARBITRATOR