

**Florman #2**

**EMPLOYMENT ARBITRATION OPINION AND AWARD**

In the Matter of Arbitration Between:

EMPLOYEE

and

EMPLOYER, INC.

ARBITRATOR: Phyllis E. Florman

**Termination**

**FINDING OF FACTS**

1. Ms. Employee was hired on July 1, 1999 at Employer's Store #168 in City A, State A as a Loss Prevention Greeter in the Security and Loss Prevention Department. She was employed for 10 months.
2. Greeters wear uniforms including a teal smock, greet customers referred to as "guests" coming in and exiting, watch for shop-lifters, and enforce Employer's policies and procedures.
3. Policies and procedures are contained in the Team Member Handbook and the Notices Notebook, both of which Ms. Employee acknowledged receiving on July 1, 1999. Found therein are the following policies:

### Standard of Conduct

Team leaders, managers, professional and Loss Prevention team members have a direct responsibility for protecting Employer assets and upholding Employer policies and procedures. Because of their position, these team members are held to a higher standard of conduct.

### No Alcohol Sales to Minors

As responsible citizens and alcohol licensees, it is our duty to stop the sale of alcohol to minors. We are especially concerned about this because thousands of teenagers die each year in alcohol-related traffic accidents. It is up to each of us to guide minors with a fair but firm rule. Our stores will not sell alcohol to those underage. Minors must know our stores are not places to purchase alcohol; and if they try, they must take responsibility for their actions.

If your position involves the sale of alcohol, it is necessary for you to check for proper identification whenever you suspect a minor is trying to purchase alcohol. Employer makes every effort to effectively label alcohol products to alert you to questionable sales.

With your help, we can stop illegal alcohol sales at Employer.

### Notice To- All Team Members Regarding: Alcoholic Beverages and Beer Sales/Purchases

This notice is being posted to inform all team members that sales purchases or attempted purchases of alcoholic beverages by or for persons under 21 years of age is prohibited and to do so holds potential serious consequences to the team member and Employer for violating the law.

Team members selling alcoholic beverages to, or purchasing alcoholic beverages for persons under 21 years of age will be terminated.

Team members selling alcoholic beverages in violation of any local ordinance will be subject to discipline up to and including termination (i.e., ordinances that prohibit liquor sales on Sunday, prohibit alcoholic beverages from being sold before noon, etc.).

We hope this notice will clarify the Employer's position regarding this matter and eliminate any misunderstanding in the future.

If you have any questions please contact your first assistant.

4. Ms. Employee was terminated on July 8, 2000 for violating those policies. On July 11, 2000 she submitted Employer's Termination Appeal Form - Part I seeking review of her termination pursuant to Employer's Termination Appeal Procedure. She wrote that she believed she was terminated without just cause because:

I never witnessed the transaction between the three of them. I was not on that end when it happened. By hearsay from Person 1 (coffee shop) I learned about it. The under-age boy told me he did not want to get anyone in trouble and was going to give it back to Person 2, which I encouraged him to do, feeling he knew he made a mistake;

and she wrote that she believed she was retaliated against because:

Person 1 (coffee shop), who saw it all, involved me in this situation in hopes of her getting my position.

5. Employer's May 26, 2000 answer on Termination Appeal Form - Part 2 stated:

The termination of your employment was done with just cause for negligence, poor judgment, conduct detrimental to Employer interests, and conduct unbecoming a loss prevention team member. Our investigation further found no evidence of discrimination or retaliation.

6. Ms. Employee on June 1, 2000 requested her case be submitted to arbitration in accordance with the Termination Appeal Procedure. The Procedure provides in part.

#### Selection of the Arbitrator

Upon receiving a notice of election to arbitrate...the Employer will deliver or mail a list of at least five impartial arbitrators to the team member. The arbitrators...shall be attorneys... The arbitrator shall be chosen...by alternatively striking names, the team member striking first....

#### Rules Governing the Arbitration Hearing

The case shall be conducted in accordance with the applicable provisions of the Employment Dispute Resolution Rules of the American Arbitration Association....

### Arbitrator's Authority

...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...or...raised at the arbitration hearing....

In reaching a decision, the arbitrator shall interpret, apply and be bound by any applicable Employer handbooks, rules, policies and procedures and by applicable... 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....

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

### Relief

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

### 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 team member's termination from employment....

7. On October 6, 2000 an arbitration hearing was held at the Hotel A in City B, State A at which the parties were afforded full and equal opportunity to make statements and arguments, introduce evidence, and examine and cross-examine witnesses. The proceedings were transcribed. Post-hearing briefs were submitted by November 22, 2000 as agreed.
8. Testifying at the arbitration hearing, Loss Prevention Team Leader Person 3 stated the positions of greeter and store detective are in his department; his department is

held to a higher standard of conduct than others because they are the first point of contact for a violation or for criminal activity, they have greater visibility and they are expected to be role models for other employees; in meetings he speaks of this standard and of the duty to report violations; to promote awareness of the policy strictly forbidding the sale of alcohol to minors, cashiers wear buttons saying identification is checked, notices are posted, and internal sting operations are conducted; and when alcohol is scanned at a register, the cashier must enter the purchaser's date of birth.

9. Mr. Person 3 further stated on April 28, 2000 a store detective informed him Greeter Person 2 purchased alcohol in the Employer's liquor store for an under-aged bagger Person 4; he interviewed them and cashier Person 5; he learned Ms. Employee had taken the alcohol from Person 4 and placed it into her car trunk; he interviewed Ms. Employee; and his May 1, 2000 report read in part:

...Employee stated that Person 4 had come to her...said he felt bad for asking Person 2 to do it.... Person 4 was scared because the alcohol was in the backseat of his car and he did not want anyone to see it. Employee said that she did not want Person 2 to get in trouble so she told Person 4 that he could put the alcohol in her trunk...later on Person 4...wanted to get it back from her and said he was going to give it to Person 2.... Employee...gave it back...she was not sure if he gave it back to Person 2....

...I explained to Employee that she had unwittingly participated in the commission of a crime.... I asked Employee why she did not report it and she said both Person 2 and Person 4 had promised that it would never happen again....

10. Mr. Person 3 added he was concerned with Ms. Employee' conduct because of the duty to perform at a higher standard of conduct and to report violations or criminal activity; she assisted by putting the alcohol into her trunk; and Person 2 Person 2 and Person 4 were also terminated.

11. Testifying at the arbitration hearing, Manager of O.M.P. Relations Person 6 stated his department reviews discipline for just cause and for compatibility with Employer philosophies; he recommended termination for Ms. Employee and Person 2 Person 2; and the Labor Relations department recommended the discipline for Person 4 and the cashier because they are bargaining unit employees.
12. Mr. Person 6 added he recommended terminating Ms. Employee for failing to report the matter in spite of her clear responsibility to do so, for showing poor judgment by taking and then returning the alcohol to a minor, and for conduct which was detrimental to Employer interests and could have harmed the minor and the public.
13. Testifying at the arbitration hearing, Ms. Employee said she did not see Person 2 Person 2 buy the alcohol for Person 4; she believed Person 4 when he said he wanted to return it to Person 2; when she learned of the transaction it was too late to prevent it; and she felt she did all she could to prevent a minor from having possession of alcohol by getting it away from him and giving him time to think about what he had done.
14. Ms. Employee added she exercised poor judgment in hindsight by giving it back to Person 4 to return it to Person 2; Employer policy obligated her to report it but Mr. Person 3 was not present and she usually reports to him; she took it upon herself to try to solve the problem and prevent a recurrence without getting others in trouble; and she gave Mr. Person 3 a statement on May 1, 2000 which read:

...[Person 4] came to me to say he had gotten Person 2 Person 2 to get him alcohol... He said he felt bad about this and wanted Person 2 to take it back. I don't know...if Person 2 got it back. I told Person 4 he could put it in my trunk, then he asked for it back. That's when he said he was going to give it back to Person 2. I did put the alcohol in my trunk.

15. Ms. Employee noted that she did not tell Mr. Person 3 she has a 16 year old; she realized she was acting more like a mother than a Greeter; she regretted not reporting the incident but at the time she wanted to get the alcohol away from Person 4 and she had a lot on her mind including a call from her doctor; and she now realized the best way to prevent a recurrence would have been to report it.

#### **POSITION OF THE EMPLOYER**

1. The Employer contends it had just cause to terminate Ms. Employee because she abdicated her clear and undisputed responsibility to uphold Employer policy on alcohol sales to minors; she was aware of the duty and of being held to a higher standard of conduct and she failed to report an illegal alcohol transaction or to investigate when she first heard about it or later in the day.
2. The Employer further insists it had just cause to terminate her because she abdicated her clear and undisputed responsibility to act to protect Employer assets. she was aware of the responsibilities and expectations; she had the alcohol but returned it to the minor; and the minor could have hurt himself or others.
3. The Employer also maintains Ms. Employee was a 10 month employee who was unable or unwilling to accept the duty to subordinate her personal feelings and interest in protecting her co-employees and to act in the best interests of the Employer; she used extremely poor judgment; she acted to protect Person 2 and Person 4 from being discovered and discharged; and the Employer no longer has confidence in her.

## **POSITION OF MS. EMPLOYEE**

1. Ms. Employee contends it was unfair to fire her for actions which never would have occurred if the cashier had done her job; the cashier should have declined the sale; and her only involvement was to keep a minor from drinking.
2. Ms. Employee further insists it was unfair that she lost her job and the cashier did not; when the sale occurred she was on the opposite side of the Party Store; Mr. Person 3 testified he felt she had unwittingly helped, so he did not believe she was a partner in crime; and she was only a partner in trying to keep a minor from drinking.
3. Ms. Employee also maintains she was naive; she truly believed Person 4 was going to return the alcohol to Person 2; it was too late to do anything about the sale; and she acted like the mother of a minor, which she is, and got the alcohol away from him.

## **DISCUSSION**

1. In accordance with the Termination Appeal Procedure, the arbitrator “has the authority to determine whether the Employer had just cause for termination”. The phrase “just cause” is not defined in the procedure. However, in the employment context it is generally understood to mean: the Employer has the burdens of establishing that the employee committed the offense with which he or she was charged, and that the penalty imposed was justified under the circumstances; and the Employee has the burden of establishing factors in mitigation.
2. As to the offense, Ms. Employee was terminated for violating, the policies relating to Standard of Conduct and Alcohol Sales to Minors. The Employer's May 26, 2000 answer to her appeal states she was terminated for “negligence, poor judgment,



conduct detrimental to Employer interests, and conduct unbecoming, a loss prevention team member".

3. The evidence clearly established these. Ms. Employee acknowledged Employer policy obligated her to report the incident but she did not report it. She agreed she exercised poor judgment by returning the alcohol to the minor. And she conceded she was acting like a mother instead of a Greeter.
4. As to the penalty imposed of termination, the just cause standard requires a balancing of factors in mitigation with factors in aggravation. This is because management's action should not be set aside unless it can be said it was arbitrary, capricious or discriminatory. The inquiry focuses on notions of fairness and due process.
5. Factors in mitigation are found to include: (1) she had no involvement in the sale of alcohol to a minor; (2) she had no prior discipline on her record; (3) she regretted not reporting it.
6. Factors in aggravation are found to significantly outweigh those in mitigation, and are found to include: (1) she was aware of being held to a higher standard of conduct by virtue of the fact she was a Loss Prevention team member; (2) she had direct responsibility for protecting Employer assets and upholding Employer policies; (3) she was aware of the policy prohibiting alcohol sales to minors; (4) she had several opportunities to investigate and report the incident; (5) she consciously decided not to report the incident and assisted by putting the alcohol in her trunk; (6) the Employer conducted a full and fair investigation before deciding on discipline; (7) she regretted her actions and had the opportunity to explain but chose not to tell the investigator everything; (8) the other non-union employees were also terminated, (9) given the

serious nature of the offenses and the Employer's attitude towards alcohol and minors, it cannot be said it was unreasonable to terminate her employment the first time she committed them; and (10) the Employer no longer has confidence in her ability or willingness to act in its best interests in accordance with its policies

7. There are further reasons to uphold the termination despite Ms. Employee's contention that it was unfair to terminate her but not the cashier. First, the cashier is a bargaining unit member but Ms. Employee is not. Second, the Labor Relations Department and not Mr. Person 6 recommended the discipline for the bargaining unit employees involved. Third, the Termination Appeal Procedure limits the Arbitrator's Authority as follows:

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

## **AWARD**

Ms. Employee termination was for just cause. Therefore, her appeal is denied.

Phyllis Florman

Arbitrator

DATED: December 12, 2000