

Grissom #5

ARBITRATION

TERMINATION APPEAL PROCEDURE

IN THE MATTER OF THE ARBITRATION BETWEEN:

EMPLOYEE

AND

EMPLOYER

GR: Appeal: Termination

David W. Grissom

Arbitrator

April 13, 2002

ARBITRATION OPINION AND AWARD

This Arbitration was conducted under Meijer's Termination Appeal Procedure on March 13, 2002 at HOTEL in City A, Michigan (Joint Exhibit #1). The Hearing was concluded on the above noted date. Pursuant to the closing of arguments of the parties and the receipt of the official Transcript of the Hearing record, this Arbitration Opinion and Award is rendered.

FACTS

On September 14, 2001, Mr. Employee was discharged for violating Employer's Theft and Unauthorized Possession of Employer Property policy in connection with an incident that occurred on Friday, September 7, 2001 at Store #175 in City B, Michigan (Employer Exhibit #8). On September 21, 2001, Mr. Employee filed an Appeal to Arbitration under the Employer's Termination Appeal Procedure alleging that his discharge was not for just cause and requesting

that he be reinstated and made whole (Joint Exhibit #2). In his Appeal, Mr. Employee suggests that his termination from employment was imposed in retaliation for an affair he was rumored to have been conducting with another employee. He has also alleged that he was the recipient of discrimination.

On October 4, 2001 in Answer to Mr. Employee's allegations, the Employer responded as follows (Joint Exhibit #2, page 2):

The termination of your employment was done with just cause for failing to pay for merchandise that you took out of the store which is a violation of the theft policy. Our investigation further found no evidence of discrimination or retaliation.

Pertinent aspects of Employer's Termination Appeal Procedure are set forth below (Joint Exhibit #1).

Termination Appeal Procedure

Policy No: 237

Revision: 2

Effective: 04/25/98

Purpose and Scope

This procedure has been established to provide an exclusive, final and binding method for the Employer and any eligible team member to resolve all claims, controversies, disputes or complaints arising out of or relating to the team member's termination from employment, including any claims or complaints based on federal, state or local law. In the event a team member 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.

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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.

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 (sic) team member'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.

In the event a court of competent jurisdiction should determine that this procedure is not the sole and exclusive remedy and forum and/or that the decision and award of the arbitrator, if any, is not final and binding between the parties as to some or all of the team member's claims, it is intended that exhaustion of this procedure be a condition precedent to the institution or maintenance of any legal, equitable, administrative, or other formal proceeding by an eligible team member for all claims arising out of or relating to the team member's termination from employment.

Mr. Employee at the time of his discharge was a Team Leader in the Meat and Seafood Department at the City B Store. The events that led to his termination are not in dispute. On Friday, September 7, 2001, Mr. Employee worked from 11:30 A.M. to 7:30 P.M. At about 7:20 P.M., he proceeded to check-out Lane #22 to pay for some merchandise he was buying and planned to take home. Lane #22 is one (1) of the store's four (4) self-service "U-scan" lanes where customers are at liberty to scan their own merchandise by putting money into a slot or by using other means of payment such as a debit card, credit card or a check. There is a cashier situated nearby who oversees all four (4) U-scan lanes and is available to assist customers who utilize the machine.

It is further not in dispute as established by Employer witnesses and acknowledged by Mr. Employee himself, that he made two (2) transactions just prior to leaving the store. First, he scanned and paid for a package of hamburger patties which he then gave to another employee. In the second transaction, he scanned two (2) steaks and a bottle of Ibuprofen which totaled \$29.33. This transaction was temporarily halted while being processed due to a change-over of cashiers who are responsible for the four (4) U-scan lanes. Thus, it took a few minutes for the previous cashier to sign off and the new cashier to sign on. Thereafter, Mr. Employee commenced putting

money into the U-scan to pay for the above described merchandise. He first put a ten (10) dollar bill into the machine which was accepted. Then, he put in a twenty (20) dollar bill which was not accepted and came back out of the slot. He resubmitted the twenty (20) dollar bill but it was rejected again. At this point, instead of attempting to further pay for the merchandise by inserting the bill once more or paying the cashier directly, Mr. Employee put the twenty (20) dollar bill back into his wallet which he placed in his pocket. He then picked up his bag of merchandise which contained the two (2) steaks and the Ibuprofen and walked out of the store.

The following subsequent developments are also not in dispute: When Mr. Employee walked out of the store, he passed the U-scan cashier and did not request assistance. Further, he did not leave any items not paid for with the cashier notwithstanding the fact that he still owed \$19.33 for the goods. The incident was discovered when the next store guest in that U-scan lane could not use the machine because Mr. Employee had not completed his transaction. The cashier was required to clear the machine. This course of events was reported to the Store Detective in the Loss Prevention Department who reviewed the video tape (the camera is situated just above the U-scan screen) and identified Mr. Employee.

It has further been established that Mr. Employee did not work on Saturday and Sunday, September 8 and 9, 2001; that he next reported to work at 7:00 A.M. on Monday, September 10, 2001 and that he went directly to work in his Department. Then, at about 10:00 A.M., Loss Prevention Team Leader Person 1, called Mr. Employee to come to the Loss Prevention Office. When questioned about his transactions on Friday, September 7, he admitted that he had left the store with merchandise he had not fully paid for. In this, Mr. Employee asserted that he had become "frustrated" and that he was suffering from back pain; that he wished to get home as quickly as possible for an ice application. He claimed that on the way home, he realized that

what he had done was wrong and planned to come in and pay for the merchandise the "first thing" on Monday morning. It is uncontroverted however, that after having worked three (3) hours on Monday, September 10, 2001, Mr. Employee still had not paid for the merchandise. During the interview, he could not recall how much money he owed. He was asked to provide a written statement and did so later that day (Employer Exhibit #5).

On Wednesday, September 12, Mr. Employee was again interviewed, this time by Store Director Person 2 with Ms. Person 1 on hand. At the end of the interview, he was suspended pending further investigation and told that he could be terminated. The matter was referred to Sr. OMP Relations Specialist Person 3 who upon review, recommended that Mr. Employee be discharged for violating Employer's Theft and Unauthorized Possession of Employer Property policy (Employer Exhibit #8). At a subsequent meeting on September 14, 2001, Mr. Employee was notified of his termination and the reasons underlying the decision. The policy pursuant to which Mr. Employee was terminated is set out below.

Theft and Unauthorized Possession of Employer Property

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

As specified at the outset, the events as described above are not in dispute. In corroboration of the above described developments and in support of the Employer's position that the discharge of Mr. Employee was for just cause, Store #175 Loss Prevention Team Leader Person 1 testified as follows: On Friday, September 7, 2001, she received a call at home from the Store Detective who had seen the video tape of Mr. Employee's U-scan transactions. She embarked upon an immediate investigation. In explaining the U-scan process, Ms. Person 1 first referred to the "U-scan Journal" which identifies the two (2) steaks, the pain reliever (Ibuprofen),

the price of each item and the total amount – \$29.33 (Employer Exhibit #1). Then, photographs of the U-scan machine itself were used to point out its inclusive devices and parts such as the scanner, shelf for items, start button, bags available, slots for cash payments, coupon slot, screen, payment menu and so on (Employer Exhibit #2). In this connection, the camera which recorded Mr. Employee's transactions on video tape was identified and the tape was played at the Arbitration Hearing (Employer Exhibit #3). That tape confirms the earlier description of events which generated Mr. Employee's termination. He agreed that there was no problem regarding its authenticity and affirmed that he had not seen anything that was inaccurate. Through Ms. Person 1, a video depiction of Mr. Employee walking past the check-out lane into the South Concourse hallway with the bag in hand was also played back for the undersigned Arbitrator's consideration. Mr. Employee left the store at 7:28:42 P.M. (Employer Exhibit #4) (TR. 14-27).

Team Leader Person 1 testified further as follows: On Monday, September 10, 2001, she interviewed Mr. Employee in the Loss Prevention Office at about 10:00 A.M. He had arrived at work at 7:00 A.M. His response to her questions regarding the subject incident were these: He had become "frustrated" when the machine kept "spitting out" his money and because his back was hurting, all he could think of was getting home to apply ice to the area of pain; that he did know what he had done was wrong and that his intent was to pay for the goods the "first thing" that morning, Monday, September 10, 2001. Ms. Person 1 went on to testify that Mr. Employee advised during this interview that as soon as he arrived at work on Monday, he checked her office but she was not there. In this connection, Ms. Person 1 testified that in fact she had been in the store since 6:00 A.M. and had gone about making her rounds. According to Mr. Person 1, Mr. Employee also told her that he had called her but was unable to make contact. In this score, Ms. Person 1 testified that she carries a phone, received no call and that she also could have been

paged. She was not. She noted that there is a phone in the Meat/Seafood Department (TR. 28-34).

Ms. Person 1 testified further as follows: When Mr. Employee arrived in the Loss Prevention Office for the September 10 interview he did not indicate that he had been looking for her. Also that if it was his intention to pay for the merchandise "first thing" that morning, he could have gone to a check-out lane, the Service Desk or to the Cashier's Office to pay directly. No such action was taken. Ms. Person 1 testified additionally that on September 10, she asked Mr. Employee why he had not told his immediate Supervisor, Lines Team Leader Person 4 about the incident or Store Director Person 2. Ms. Person 1 stated that Mr. Employee answered that since this was a loss prevention issue, he wished to deal with her. He also informed her that he knew the pronouncements of the policy on Theft. According to Ms. Person 1, Mr. Employee also informed her that the two (2) steaks were outdated, would have been thrown away and that he had done the Employer a favor by purchasing them; that he had cooked the steaks on his grill on the evening of September 7 and they were not good (TR. 25-39).

Team Leader Person 1 also testified as follows: At the September 10, 2001 interview in her office, Mr. Employee advised that it was never his intention to steal and that he had previously worked in his family's business where an "honor system" existed pursuant to which he could take merchandise out of the stores to be paid for at a later time. As already denoted, Mr. Employee's written statement is in this record as Employer Exhibit #5. It has been established through the testimony of Ms. Person 1 that later during the day on Monday, September 10, Mr. Employee called her to find out how much he owed and then came into her office and wrote a check for \$19.33. Ms. Person 1 testified that subsequently, she contacted Sr. OMP Relations Specialist Person 3 and sent her the Incident Reports she had prepared (Employer Exhibits #6

and 7). Ms. Person 1 testified that Mr. Employee had a number of options at his disposal relative to his September 7, 2001 transactions, to wit: (1) He could have left the merchandise in the store (2) He could have approached the U-scan cashier and asked for assistance (3) He could have offered some other form of payment (4) He could have paid the remaining amount directly to a cashier. On the evidence, Mr. Employee elected to do none of these things. Instead, he placed the rejected twenty (20) dollar bill back into his wallet and left the store with the partially paid for merchandise (TR. 40-45).

Ms. Person 1 additionally testified that another interview in her presence was conducted with Mr. Employee by Store Director Person 2 in his office on Wednesday, September 12, 2001. Queried again on why he had left the store with unpaid merchandise, Mr. Employee stated that it was a "stupid" thing to do but that his back was hurting and he had become "frustrated." Ms. Person 1 testified that Store Director Person 2 then discussed the Employer's policy on Theft and Unauthorized Possession of Employer Property and Mr. Employee once again stated that he knew the policy. Mr. Person 2 concluded the September 12, 2001 interview by suspending Mr. Employee, informing him that the matter was being referred to the OMP Office and that he was subject to discipline up to and including discharge (TR. 45-40).

Sr. OMP Relations Specialist Person 3 testified as follows: On April 18, 2000, Mr. Employee had been given a copy of all Employer policies and procedures including the Team Member Handbook containing the "Theft/Unauthorized Possession" policy (see signed receipt – Employer Exhibit #9). Therein, it is also stated at page 99 under the caption, Standard of Conduct, that Team Leaders, Managers, professional staff and Loss Prevention Team Leaders are held to a higher standard of conduct (Employer Exhibit #10). Ms. Person 3 also testified that the "Theft/Unauthorized Possession" policy is conspicuously posted, referred to in weekly

newsletters, is on-line and is stressed in meetings. She further advised that there has been no Employer practice of imposing discipline less than discharge for proven Theft and that in some 300 cases she has handled, all such employees were terminated. Ms. Person 3 explained that "Unauthorized possession" means that an employee is unable to assert that there was an "intention" to pay for the merchandise at a later time or to lodge an excuse that he/she simply "forgot" to pay; that the employee must pay for the merchandise prior to taking ownership (TR. 51- 54).

Sr. OMP Relations Specialist Person 3 testified further as follows: She was contacted by Loss Prevention Team Leader Person 1 on September 10, 2001 about the Employee matter and the Incident Reports were sent over. Thereafter, pursuant to her consultations with Ms. Person 1 and Store Director Person 2, the decision was made to terminate the employment of Mr. Employee. The grounds: Mr. Employee was clearly culpable of Theft. There was no dispute. He had made a conscious decision to leave the store with the merchandise without paying for same and certainly the incident at least constituted "unauthorized possession." Further, Mr. Employee had knowingly declined to adopt any of the several options available to him to assure that the goods were paid for and when he finally did pay the \$19.33 balance on Monday, September 10, 2001, he had already been confronted by Ms. Person 1 after spending three (3) hours on the job and it was too late. It was her assessment that Mr. Employee never intended to pay for the merchandise and even if he did, he would still have been discharged because there is no "honor system" at Employer's. Beyond this, the back pain excuse was unacceptable on its face and in any event, she observed that Mr. Employee had worked an eight (8) hour shift on Friday, September 7, had shopped thereafter and had spent time at the U-scan machine. Ms. Person 3's

ultimate conclusion was that Mr. Employee was unalterably guilty of violating Employer's Theft and Unauthorized Possession of Employer Property policy (Employer Exhibit #8) (TR. 55-65).

Mr. Employee testified on his own behalf as follows: First, he acknowledged that the events as described by Loss Prevention Team Leader Person 1 and Sr. OMP Relations Specialist Person 3 were true and accurate. But he stated that notwithstanding, he never intended to steal anything. Mr. Employee insisted that he had attempted to pay for the merchandise and that throughout the course of the entire incident, he was not thinking clearly because he was preoccupied with the pain in his back. He also testified that he had become "frustrated" when the U-scan kept rejecting his twenty (20) dollar bill. He testified also that he did not page Ms. Person 1 when he came to work on Monday, September 10, 2001 because he does not like to page people and further stated that he did pay for the merchandise by check later that day. Mr. Employee apologized for his actions and said that he could be trusted as a proud Team Leader who loved the Employer (TR. 66-57).

On cross-examination however, Mr. Employee could provide no acceptable answer as to why he had not alerted his immediate supervisor or Store Director Person 2 about the incident at the earliest opportunity. He also advised that he did not go to the U-scan cashier to pay for the merchandise because "I didn't recognize her and that as he left the store, he could not find a supervisor to whom he could make payment. These offerings as well as his earlier testimony were simply not credible and in any event, Mr. Employee was constrained to acknowledge that Managers cannot accept money in the circumstances described. Mr. Employee concluded his testimony by stating that his actions constituted "poor judgment" for which he was sorry (TR. 76-90).

ISSUE

Was the termination of Appellant Employee for just cause?

DISCUSSION

The evidence in this case finds that the termination of Appellant Employee on September 14, 2001 was for just cause. On that evidence, Mr. Employee's actions on Friday, September 7, 2001 clearly violated Employer's policy on Theft and Unauthorized Possession of Employer Property (Employer Exhibit #8). The policy is set forth below.

Theft and Unauthorized Possession of Employer Property

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

It has been established that pursuant to U-scan and Store #175 video tapes which recorded Mr. Employee's transactions and exit from the store on September 7, 2001, supported by the testimony of Loss Prevention Team Leader Person 1 and Sr. OMP Relations Specialist Person 3 – acknowledged by Mr. Employee himself, he failed to pay for the two (2) steaks and a container of Ibuprofen, left the store and took the merchandise home. On the evidence, Mr. Employee made a conscious decision not to pay for the goods notwithstanding options available to him to assure that payment was made, to wit: (1) He could have left the merchandise in the store (2) He could have approached the U-scan cashier for assistance (3) He could have offered some other form of payment or (4) He could have paid the remaining amount (\$19.33) directly to a cashier. He elected to do none of these things and instead, placed the twenty (20) dollar bill back into his wallet and left the store with the partially paid for merchandise. Clearly, his actions constituted theft of Employer property.

Mr. Employee was unable to provide any credible explanation for his actions. There is none. He admitted that his conduct was wrong and apologized but this purported contrition squarely does not lessen the gravity of his offense and cannot undo the intentional course of events that generated his termination — Theft and unauthorized possession of Employer property. Unfortunately for Mr. Employee, the determination here must be that he never intended to pay for the merchandise. Such payment was not made until later in the day of Monday, September 10, 2001 after he had been confronted and questioned by Loss Prevention Team Leader Person 1. The evidentiary details regarding Mr. Employee's conduct in violation of Employer's "Theft/Unauthorized Possession" policy have been fully recounted in this discourse and are uncontroverted.

The termination of Appellant Employee was for just cause. There is no evidence of retaliation or discrimination. The termination is upheld.

AWARD

The discharge was for just cause and is upheld. The Appeal is denied.

David W. Grissom

Arbitrator

April 13, 2002