

Grissom #7

VOLUNTARY LABOR ARBITRATION

TERMINATION APPEAL PROCEDURE

IN THE MATTER OF THE ARBITRATION BETWEEN:

EMPLOYEE,

AND

EMPLOYER,

Termination Appeal 7-7-02

David W. Grissom

Arbitrator

ARBITRATION OPINION AND AWARD

This Arbitration, conducted pursuant to Employer's Termination Appeal Procedure, was held on March 4, 2003 at the HOTEL in City A, Michigan. The Hearing was concluded on the above noted date. Pursuant to the receipt of the Transcript and Post-Hearing Briefs, this Arbitration Opinion and Award is rendered.

FACTS

On July 17, 2003, Appellant Employee filed this Appeal under Employer's Termination Appeal Procedure in the matter of her termination on July 3, 2002 for "excessive misuse of Employer time" and negligence in her responsibilities as a Team Leader. Appellant Employee, hired on August 7, 1972, asserts that her discharge was not for just cause in the following terms (Joint Exhibit #2):

Because no conversation about termination or discipline was discussed. OMP not present at time of termination. Because of the stress of being pulled in every direction. My injury at Employer caused me to sit more rather than go on S/L. The continuous calls off break or lunch to take care of our guests or team.

Settlement Desired: Any remaining vacation time, back pay and monetary value of my service - no less than \$500,000 (Five Hundred Thousand Dollars).

Employee (/s/)
Date: 7-17-02

On August 14, 2002, Human Resources Representative Person 1 responded to the Appeal as set forth below (Joint Exhibit #2):

RESULTS OF REVIEW

The termination of your employment was done with just cause for gross negligence in the performance of and serious disregard for leadership responsibilities and the Employer's interests, and excessive misuse of Employer time. Our investigation further found no evidence of discrimination or retaliation.

Person 1 (/s/)
Date: 8-14-02
Human Resources Communications
Service Representative

This case involves excessive amounts of time spent in the smoking break room of Store No. 28 located in City A, Michigan.

TESTIMONY

In support of the Employer's position that the termination was for just cause, Mr. Person 2, Store Director of ROAD A Store No. 28, testified as follows: Ms. Employee was a Woman's Area Team Leader responsible for that entire Department. At the time of her discharge, she had five (5) or six (6) Team Members (Associates) reporting to her and in her capacity as a Team Leader, had the authority to hire and discipline employees working under her supervision. Ms. Employee reported to Mr. Person 4, Fashion Lines Team Leader (TR. 21-26).

Store Director Person 2 testified further as follows: Ms. Employee was a forty-eight (48) hour Team Leader who was not required to punch in and out for "breaks" and lunch. The Team Members under her supervision are entitled to two (2) fifteen (15) minute "breaks" during their

shifts and one (1) thirty (30) minute lunch period (see Section 8.11 of the collective bargaining Agreement between UFCW, Local 951 and Employer, Inc. - Employer Exhibit #3). Mr. Person 2 testified that "breaks" constitute paid time but that the lunch period is not paid; that Team Members punch in and out for "breaks" and it was Ms. Employee's responsibility to assure that no infractions in "break" time occurred and if so, to counsel them as a prelude to the effectuation of "positive discipline" (see Positive Discipline Policy - Joint Exhibit #6). Director Person 2 testified that the policies, practices and Rules for all Team Leaders and Members are embodied in Employer's Team Member Handbook (Employer Exhibit #4); that a forty (40) hour Team Leader is entitled to two (2) fifteen (15) minute "breaks" and a thirty (30) minute lunch period and that a forty-eight (48) hour Team Leader who works a ten (10) hour day, will have three (3) fifteen (15) minute "breaks" and a thirty (30) minute lunch period. As denoted, Ms. Employee was in the latter category (TR. 27-30).

Director Person 2 testified further as follows: In the summer of 2001, he was the recipient of complaints from Team Members that Team Leaders were spending an excessive amount of time in the smoking break room. This course of events was discussed with Loss Prevention Team Leader Person 3 and they decided to install a surveillance camera in the break room. This decision was cleared at the Corporate level. The purpose of his (Mr. Person 2's) installation of the camera was to find out if the information he had received was accurate and in this, he instructed Mr. Person 3 to report to him the names, dates and times any Team Leader was discovered to have spent excessive time in the break room. In August 2001, Mr. Person 3 provided him with a detailed Report identifying ten (10) Team Leaders who had spent inordinate amounts of time in the break room. Four (4) such employees including Ms. Employee, were Fashion Area Team Leaders. The six (6) others were Hard Lines Team Leaders (Employer

Exhibit #5). It was established via the surveillance camera that during one (1) week, Ms. Employee had visited the smoking break room twenty-one (21) times and had spent fifteen (15) hours and thirty-eight (38) minutes in there. Mr. Person 2 confirmed that Ms. Employee's maximum allotted time for "breaks" per day was forty-five (45) minutes (three (3) breaks) plus the thirty (30) minute lunch period - total authorized time away from her job responsibilities: one (1) hour and fifteen (15) minutes. Yet on the days recorded between July 21, 2001 and August 2, 2001, Ms. Employee was in the smoking break room as follows (on vacation one (1) week during this period):

VISITS	DURATION
5	3 Hrs. 29 Min.
9	5 Hrs. 50 Min.
4	4 Hrs. 47 Min.
3	1 Hr. 32 Min.
TOTALS 21	15 Hrs. 38 Min.

Store Director Person 2 testified that according to his calculations, this constituted ten (10) hours and thirty-eight (38) minutes in excess time spent in the break room in August 2001 by Ms. Employee (TR. 31-33).

Store Director Person 2 testified further as follows: Pursuant to these developments which greatly surprised him, he conducted a meeting with all Team Leaders on August 20, 2001. A major Agenda item involved his concerns about excessive amounts of time being spent in the smoking break room (Employer Exhibit #6). It is not in dispute that Ms. Employee was at that

meeting. There, he informed the Team Leaders of the extent of the abuses and emphasized that these were serious Rule violations. He also advised that the break room was not to be used for store business or meetings or to prepare documents and so on. In this, he testified that there is a conference room and Learning Center for those purposes. He further told the Team Leaders that anyone who had been designated as having spent excess time in the break room, would be conferred with individually by Line Managers. He also told the Team Leaders at the August 20, 2001 meeting that the surveillance camera would be left in the break room and might be reactivated in the future. On August 27, 2001, Fashion Lines Team Leader Person 4 conducted a "one-on-one" discussion with Ms. Employee on the subject of her excessive time spent in the smoking break room (Joint Exhibit #3b) (TR. 45-51).

Store Director Person 2 testified further as follows: In late Spring of 2002, it came to his attention that the same offenses were occurring again. Upon this information, he instructed Loss Prevention Team Leader Person 3 to reactivate the surveillance camera. Subsequently, Mr. Person 3 reported back to him that Ms. Employee and five (5) other Team Leaders had been spending inordinate amounts of time in the smoking break room. The period of surveillance was from June 2, 2002 to June 8, 2002. For these five (5) days, the number of visits and durations of time were tabulated for all affected Team Leaders (Employer Exhibit #8). The numerous visits to the break room and the time spent therein for Ms. Employee was reported as follows:

EMPLOYEE - Breaks 6-2-02 to 6-8-02

<u>06/03/2002</u>	<u>Duration</u>
<u>Breakroom</u>	<u>Minutes</u>
233p-254p	21
356p-414p	18
446p-507p	21
620p-645p	25
718p-739p	21
811p-830p	19
933p-949p	16
1031p-1040p	9
Total=8 times	2 hr 30 min

<u>06/04/2003</u>	<u>Duration</u>
<u>Breakroom</u>	<u>Minutes</u>
913a-922a	9
1026a-1058a	32
1139a-1208p	29
134p-2p	26
231p-310p	39
325p-342p	17
508p-547p	39
636p-715p	39
Total=8 times	3 hrs 50 min

<u>06/05/2002</u>	<u>Duration</u>
<u>Breakroom</u>	<u>minutes</u>
918a-929a	11
1043a-1115a	32
1123a-1201p	38
108p-134p	26

<u>06/07/2002</u>	<u>Duration</u>
<u>Breakroom</u>	<u>minutes</u>
824a-838a	14
1002a-1027a	25
1126a-1206p	40
152p-204p	12

149p-209p	20
255p-322p	27
Total=6 times	2 hr 34 min

211p-236p	25
313p-4p	47
Total=6 times	2 hrs 43 min

<u>06/08/2002</u>	<u>Duration</u>
<u>Breakroom</u>	<u>Minutes</u>
825a-850a	25
930a-1011	41
1122a-1151a	29
1223p-1232p	9
204p-235p	31
Total=5 Times	2 hr 15min

- 5 Days worked
- Total Visits – 33 times
- 14 Hrs. and 7 min
- 6 Hrs and 15 min (Maximum allowable – corrected)

These corrected tabulations, showed that Ms. Employee had during the identified week, spent thirteen (13) hours and fifty-two (52) minutes in the break room; seven (7) hours and thirty-seven (37) minutes in excess of the six (6) hours and fifteen (15) minutes allowed to her, to wit (Employer Exhibit #2):

**Employee
Number of Visits to Break room
6/2/02 – 6/8/02**

Date	Rest Periods Taken	Rest Periods Allowed	Excess
6/3/02	8	4	4
6/4/02	8	4	4
6/5/02	6	4	2
6/7/02	6	4	2
6/8/02	5	4	1
Totals	33	20	13

**Employee
Time Spent in Breakroom
6/2/02 – 6/8/02**

Date	Total Time Spent	Time Allowed	Excess
6/3/02	2 hrs 30 min	1 hr 15 min	1 hr 15 min
6/4/02	3 hrs 50 min	1 hr 15 min	2 hrs 35 min
6/5/02	2 hrs 34 min	1 hr 15 min	1 hr 19 min
6/7/02	2 hrs 43 min	1 hr 15 min	1 hr 28 min
6/8/02	2 hrs 15 min	1 hr 15 min	1 hr
Totals	13 hrs 52 min	6 hrs 15 min	7 hrs 37 min

Store Director Person 2 testified that he and Mr. Person 3 discussed this with Ms. Employee and on June 24, 2002, Hard Lines Team Leader Person 5 interviewed her (Joint Exhibit #4a). Ms. Employee was given an opportunity to provide a written explanation and did so (Joint Exhibit #4b). These documents were sent to OMP Representative Person 6. Mr. Person 5's Interview Report denotes that Ms. Employee confirmed that she was cognizant of her 2001 infractions and acknowledged that she was at the August 20, 2001 "Team Leaders" meeting

conducted by Mr. Person 2. She also advised that Mr. Person 4 had counseled her. Further, according to the Interview Report, Ms. Employee stated that she was aware that she was entitled to three (3) fifteen (15) minute "breaks" but stated that she must sit down after performing physical tasks. The Report further states that in calculating Ms. Employee's pay rate, the excessive time spent in the break room equated to misspent funds in the amount of \$105.30. Also denoted was Ms. Employee's contention that she had handled business-related matters in the break room and often answered the phone. However, according to the Report, she was reminded by Ms. Person 5 that at the August 20, 2001 meeting, Store Director Person 2 had emphasized that such alleged work was (is) prohibited in the break room (TR. 51-54).

On June 24, 2002, Ms. Employee submitted the following written statement (Joint Exhibit #4b):

6-24-02

Be aware that I injured by back at Employer's. I have a herniated (sic) disk which will bother me from time to time and I have to sit. I talk to my team member about dept. also Team Leaders that have to vent sometimes. Also am here over my 48 hrs weekly. I feel this is something that can be resolved with O.M.P. A.S.A.P.

Employee /s/
Woman's (sic) Dept.

Store Director Person 2 testified that after the Person 5 Interview, he received a recommendation for termination from OMP. The grounds: Gross negligence and misuse of Employer time. He also testified that all employees identified in Employer Exhibit #8 were terminated with the exception of Ms. Person 7 who did not receive a "one on one" counseling in the summer of 2001 because she was on vacation (TR. 55-68).

On cross-examination, Mr. Person 2 stated that the Employer's "Positive Discipline" Policy applies to Team Members as bargaining unit employees and has never been applicable to

Team Leaders (Joint Exhibit #6). A reading of this document confirms Mr. Person 2's testimony. Further, Mr. Person 2 testified that he was unaware that Ms. Employee had any medical problems until after her final Interview on June 24, 2002. Mr. Person 2 completed his testimony by stating that in the termination of Ms. Employee, her thirty (30) years with the Employer and her work record, were taken into consideration (TR. 69-90; 91-95).

OMP Relations Specialist Person 6 testified regarding his review of the 2001 and 2002 violations; his discussions with Store Director Person 2 and his ultimate decision to recommend the termination of Ms. Employee. The grounds: Gross negligence, excessive misuse of Employer time and disregard of Team leadership responsibilities. According to Mr. Person 6, he had no evidence at his disposal of a medical condition that would have affected the performance of her job. Further, that all Team Leaders are expected to assist in different areas of the store as directed by supervisors and therefore, Ms. Employee's suggestion that working in the Garden area entitled her to an additional "break", was not acceptable. Mr. Person 6 stated that the termination was approved by OMP Administrator Person 8. He completed his testimony by indicating that the effectuation of progressive discipline is within the discretion of the Employer but that due to the seriousness of Ms. Employee's offenses, termination was warranted (TR. 97-117).

This concluded the Employer's presentation.

As its first witness, Appellant called Hard Lines Team Leader Person 5 (adverse). He testified that the "Positive Discipline" Policy applies to hourly employees and that progressive discipline "might" be applicable in some cases but not with respect to Ms. Employee. He confirmed that this matter did not constitute "time card fraud", a mistaken assessment denoted in his Interview write-up dated June 24, 2002 (Joint Exhibit #4a) (TR. 118-147).

On cross-examination, Ms. Person 5 explained that he and Mr. Person 4 had essentially "switched positions." He answered that when Ms. Employee worked for him, she never requested his approval for extra or longer "breaks" for any reason and had not told him about a purported medical condition (TR. 150-157).

Ms. Employee testified on her own behalf as follows: She was hired on August 7, 1972 as a Cashier and had moved up to Team Leader prior to her termination. In her capacity as a Team Leader, she had supervised as many as fifteen (15) Team Members but that when terminated, about six (6) employees were reporting to her. Sometimes she was assigned to work 7:00 A.M. to 6:00 P.M.; at other times, 7:00 P.M. to Midnight depending upon the schedules set by Mr. Person 4. Ms. Employee contended that she was entitled to four (4) "breaks" and a thirty (30) minute lunch period. This assertion was contrary to the evidence but even if true, her time spent in the smoking break room was exigently excessive. According to Ms. Employee, if she wanted an extra "break", she asked Mr. Person 4 or Mr. Person 5 for permission and these extra "breaks" were granted. She also testified that she conducted Employer's business in the break room and planned her day. Ms. Employee stated that she had no prior discipline in her record (TR. 153-160).

Ms. Employee testified further as follows: Store Director Person 2 did tell her not to conduct business in the break room but she continued to do so. Regarding her herniated disc problem referenced in an "Application for Weekly Indemnity" dated January 1, 1986, Ms. Employee testified that the condition had been corrected (Appellant Exhibit #2). According to Ms. Employee, she had advised Team Leaders Person 4 and Person 5 of her back difficulties and that sometimes when she went on "breaks", she was suffering from back pain caused by pushing and pulling in her job duties; that this compelled her to sit down (TR. 161-168).

Ms. Employee testified further as follows: In the summer of 2001, she was told about the surveillance camera and shown the tabulations of excessive time spent in the smoking break room (Employer Exhibit #5). Then, the meeting conducted by Mr. Person 2 on August 20, 2001. In this connection, Ms. Employee testified that at the meeting, Mr. Person 2 said nothing about excessive time in the break room. Ms. Employee testified further that after the surveillance results in June 2002, she met with Mr. Person 5 and provided a written statement (Joint Exhibit #4b); that subsequently on July 3, 2002, she was called to the Office and told that she was being terminated (TR. 168-175).

On cross-examination, Ms. Employee answered as follows: She strained her back seventeen (17) years ago and the Indemnity document states that she could return to work without restrictions two (2) weeks from the date of the application (1/29/86 - Appellant Exhibit #2). Ms. Employee acknowledged that the document does not indicate that longer or more frequent "breaks" are needed. Still, according to Ms. Employee, Team Leaders Person 4 and Person 5 authorized her to sit down when she requested. In this, she adjusted her earlier testimony that they gave her permission to take extra "breaks." Ms. Employee was constrained to acknowledge that she did not tell Mr. Person 5 this during her June 24, 2002 Interview and did not indicate in her written statement that she had been given supervisory permission to rest in a sitting position (Joint Exhibit #4b). Ms. Employee, in reference to the inordinate amount of time she had spent in the smoking break room, answered that if she was in there beyond her allotted time, she had permission from her supervisors. Ms. Employee confirmed that in her leadership role, she was supposed to set an example for her Team Members. She completed her testimony by stating that she should have been given progressive discipline (TR. 176-199).

This concluded the Appellant's presentation.

On Rebuttal, Fashion Lines Team Leader Person 4 testified that after the 2001 instances of breakroom abuse, he talked to Ms. Employee "one-on-one" and emphasized the seriousness of her offense. He testified further that he never gave her permission to take longer or extra "breaks" and also never gave his approval for her to sit down based upon any information from her that she was experiencing back pain. Further on Rebuttal, Mr. Person 5 testified that he too never gave Ms. Employee permission to take longer or extra "breaks" or to sit down during the performance of her job responsibilities (TR. 200-209).

This concluded the presentations of the parties.

ISSUE

Was the discharge for just cause?

DISCUSSION

A study of all of the elements in this case finds that the termination of Appellant Employee was for just cause. The closest scrutiny has been employed here, particularly because of Ms. Employee's long service to the Employer (thirty (30) years) and her employment record which is devoid of previous discipline. But the totality of the evidence weighs heavily against Ms. Employee and it has been clearly established that notwithstanding specific warnings about her abuse of "break" time in the summer of 2001, she continued to disregard Rules and policies, thereby placing herself in jeopardy of termination. The grounds upon which Ms. Employee's termination is upheld, are enumerated below.

- 1) As a Woman's Fashion Team Leader, Ms. Employee maintained a leadership role and was responsible for assuring that Team Members under her supervision adhered to their "break" times, lunch period time lines and timely arrived to work as scheduled. If not, her job was to counsel them and effectuate "positive discipline" if necessary (Joint Exhibit

- #6). In her supervisory capacity, Ms. Employee was hardly in the position to disregard the same requirements expected of her Team Members, especially to the exigent extent established in these proceedings.
- 2) As a forty-eight (48) hour Team Leader, Ms. Employee was entitled to three (3) fifteen (15) minute "breaks" and a thirty (30) minute lunch period. Her allowable daily "off time" was one (1) hour and fifteen (15) minutes. However, during the period between July 21, 2001 and August 2, 2001, Ms. Employee was recorded on camera in the smoking breakroom to have made twenty-one (21) visits for as total of fifteen (15) hours and thirty eight (38) minutes. This represented ten (10) hours and thirty-eight (38) minutes in excess time spent in the breakroom (Employer Exhibit #5). Frankly, it is difficult to imagine any employee spending that much time "on break" away from daily job responsibilities.
 - 3) Pursuant to this discovery, Store Director Person 2 conducted a meeting on August 20, 2001 with all Team Leaders where he addressed the importance of complying with "break" time parameters and stressed the seriousness of the policy violations manifested by some ten (10) Team Leaders including Ms. Employee. Mr. Person 2 thereupon warned that the surveillance camera would remain in the smoking breakroom and could be reactivated in the future. He further stated that store business was not to be conducted in the breakroom. On the evidence, Ms. Employee simply disregarded these warnings and according to her testimony, continued to perform store-related business in the breakroom. Whether in actuality, Ms. Employee was involved in such business, has not been substantiated.
 - 4) On August 27, 2001, Fashion Lines Team Leader Person 4 convened a "one-on-one" discussion with Ms. Employee regarding the excessive amount of time she had spent in

the smoking breakroom. In the undersigned Arbitrator's assessment, this follow-up conference on the heels of Store Director Person 2's August 20, 2001 meeting, had to get Ms. Employee's attention. The expectation was that there certainly would be no reoccurrence.

- 5) Notwithstanding, pursuant to a second surveillance of the smoking breakroom between June 2, 2002 and June 8, 2002, Ms. Employee and five (5) other Team Leaders were discovered violating precisely the same Policy - excessive time spent in the breakroom far in excess of their allotted three (3) fifteen (15) minute "breaks" and the thirty (30) minute lunch period. All such Team Leaders were terminated with the exception of Ms. Person 7 who had not been provided a "one-on-one" meeting with supervisors. It was determined via the surveillance camera that Ms. Employee had spent thirteen (13) hours and fifty-two (52) minutes in the breakroom during the specified week (Employer Exhibit #8). This constituted seven (7) hours and thirty-seven (37) minutes in excess of her allowable "break time." Considering the prior warnings, Ms. Employee's conduct is inexplicable.
- 6) Ms. Employee has testified that due to a back injury sustained in 1986, she still experienced pain in 2002 which required her to seek a place to sit down. In this connection, it is noted that the Indemnity form relative to her "back strain" is dated 1/17/86 with an indication thereon that she could return to work without restrictions on 1/29/86 - two (2) weeks later (Appellant Exhibit #2). On this score, Supervisors Person 4 and Person 5 testified that although Ms. Employee asserted that they gave her permission from time to time to "sit down", she in fact never made such requests and they did not provide any such approval to her collectively or individually.

- 7) It has been further established that at her Interview on June 24, 2002, Mr. Employee did not inform Mr. Person 5 that she had medical problems that required her to take longer or more frequent "breaks" or that caused her to have to sit down.
- 8) It has further been established that OMP Representative Person 6 had no medical information at his disposal when he was considering the disciplinary action to be taken in Ms. Employee's case. The evidence also indicates that it is within the Employer's discretion to apply progressive discipline but that due to the seriousness of Ms. Employee's offenses, the discharge penalty was imposed.
- 9) Ms. Employee's written statement dated June 24, 2002, mentions nothing about supervisory permission to sit down or take longer or extra "breaks" (Joint Exhibit #4b).
- 10) A major element taken into consideration by the undersigned Arbitrator in the disposition of this case is Ms. Employee's credibility. Unfortunately, she found it necessary to provide untruthful testimony in these proceedings, to wit: She denied that Mr. Person 2 at the August 20, 2001 meeting, said anything about individuals taking excessive time in the breakroom (TR. 169; 181). Ms. Employee further testified that if she spent extra time in the breakroom, she had permission to do so (TR. 184). On the evidence, these statements were simply not true. If the undersigned Arbitrator had any reservations about upholding this discharge, these aspects of Ms. Employee's testimony, weighed heavily against her and solidified the determination that she has not taken responsibility for her conduct and that the discharge was for just cause. Further, there is no evidence of discrimination or retaliation in this case.

It is determined that the termination of Appellant Employee was for just cause. The Appeal of Ms. Employee is denied.

AWARD

The termination of Appellant Employee was for just cause and is upheld. The Appeal is denied.

David W. Grissom

Arbitrator

July 16, 2003