

Jason #1

IN THE MATTER OF THE VOLUNTARY ARBITRATION OF

EMPLOYER,

AND

EMPLOYEE

RE: Discharge

INTRODUCTION

This case was arbitrated pursuant to the Termination Appeal Procedure adopted by Employer, effective 12/9/91. The procedure covers all non-probationary, full and regular part-time associates, who are classified as office, management and professional, and who are not covered by a collective bargaining agreement. Under the procedure, the arbitrator is empowered to decide claims arising out of, or relating to, an associate's termination from employment. The arbitrator has the authority to determine whether the termination was lawful under applicable federal, state or local law, and to determine whether the Employer had just cause for termination. The arbitrator has no authority to reduce the termination to some lesser disciplinary action 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 further finds that the associate was terminated for that violation.

TERMINATION APPEAL FORM - EMPLOYEE

Date of Termination Appeal Form - Part 1

**DO YOU BELIEVE YOU WERE TERMINATED WITHOUT JUST CAUSE? YES
IF YES, PLEASE EXPLAIN IN DETAIL WHY YOU BELIEVE YOUR EMPLOYMENT
WAS TERMINATED WITHOUT JUST CAUSE.**

ATTACHMENT A

**DO YOU BELIEVE YOU WERE TERMINATED WITHOUT JUST CAUSE? YES
IF YES, PLEASE EXPLAIN IN DETAIL WHY YOU BELIEVE YOUR EMPLOYMENT
WAS TERMINATED WITHOUT JUST CAUSE.**

On October 7, 1997, I returned from sick leave, and reported to work at Employer Store No. 25 at Street A, City A, Michigan. Upon return, I was advised to report to the Director's Office and was advised by Store Director Person 1 that Employer had terminated my employment for the reason that I had violated store policy by performing a serious customer contact on September 10, 1997. I had initially prepared a report of the incident and had advised Mr. Person 2, Loss Prevention Manager and Trainer, that I was intending to file a supplemental report on the incident. However, being on sick leave, I was unable to prepare and file a supplemental report.

The incident for which I was advised caused my termination, was not a serious customer contact, but was appropriate detective action in accordance with Employer policies, and expectations that as a detective, to observe and confront individuals who were believed to be stealing Employer merchandise. In this particular incident, on September 10, 1997, I saw a girl select a dark colored lipstick with a dark wrapper and a Employer sticker from the cosmetic department at the south end of the store. She exited the department and did not pay at the cosmetic counter, and met up with an older lady walking to the north edge of the clothing department. At that time, I was simultaneously observing a young man wearing a big coat on this warm day, who also looked suspicious to me. I next saw the young girl at the camera aisle with her hand cupped, looking like she was hiding something. I looked from the floral department as she bit on the cellophane, tore it off, opened the lipstick package and applied the lipstick to her lips. She put the lipstick cover back on and put the tube in her pocket. At that time, I radioed for other detectives, Person 3 and Person 4 and advised that I had observed the young girl concealing lipstick. The girl then met up with the older lady and they walked past the photo lab counter.

I checked with the clerks at the one hour photo lab and inquired if the young girl had paid for the lipstick, and they confirmed that she did not. At that point, the older lady told the girl "honey, show him the receipt," whereupon the young girl pulled out a small Employer bag from her coat pocket and showed a receipt for lipstick. The older lady informed me that they would not give me her name, so I asked the young girl if she would like to go to the office to provide us with more information. The older lady said "no" and they proceeded to leave. Whereupon, Loss Prevention Manager and Trainer, Person 2

arrived at the scene and I explained to him what had happened I was later advised by Mr. Person 2 to write the incident up as a "customer contact."

It was subsequently determined that a receipt for lipstick had been obtained at the toy counter. Apparently the young girl or older lady had obtained a receipt at the toy counter for lipstick at some time during that day. The presence of the receipt is not conclusive evidence that this particular lipstick had been paid for. There are a number of scenarios as to how theft of this nature is possible.

DO YOU BELIEVE YOU WERE RETALIATED AGAINST? YES

IF YES, PLEASE EXPLAIN IN DETAIL WHY YOU BELIEVE YOU WERE RETALIATED AGAINST AND IDENTIFY THE ACTIVITY YOU BELIEVE RESULTED IN RETALIATION (E. G., FILING A CLAIM WORKERS DISABILITY COMPENSATION, MAKING COMPLAINTS TO A FEDERAL, STATE OR LOCAL AGENCY OR OTHER ACTIVITY.)

ATTACHMENT B

DO YOU BELIEVE YOU WERE RETALIATED AGAINST? YES

IF YES, PLEASE EXPLAIN IN DETAIL WHY YOU BELIEVE YOU WERE RETALIATED AGAINST AND IDENTIFY THE ACTIVITY YOU BELIEVE RESULTED IN RETALIATION (E.G., FILING A CLAIM WORKERS' DISABILITY COMPENSATION, MAKING COMPLAINTS TO A FEDERAL, STATE OR LOCAL AGENCY OR OTHER ACTIVITY.)

The circumstances surrounding the reason given for my termination suggest that there may be other underlying reasons for the termination independent of the September 10, 1997 incident.

On September 16, 1997, I went on sick leave for surgery for a hydrocele repair and was placed on short-term disability, with weekly indemnity. I returned to work on October 7, 1997 and was advised that I was terminated from employment as a store detective. While I was on sick leave, I was contacted by Mr. Person 2, who insisted that I should prepare an additional report on the September 10, 1997 incident, and I advised him that I would do so upon my return to work Mr. Person 2 was obviously disturbed about my response and indicated "do you realize that others are off work also and we don't have the coverage."

Mr. Person 2 has been upset with me because of my previous contacts with the central office of Employer inquiring about store policy, favoritism and other matters. It is quite clear that Mr. Person 2 would recommend my termination for any reason, no matter how slight I do not know whether the time off medical leave was the underlying reason, or simply because of Mr. Person 2's attitude towards me. It is, however, coincidental that

the termination would take place during a period of time when I was on paid short-term disability for medical reasons.

Settlement Desired: Return to employment, reimbursement of lost wages, transferred to another unit; reimbursement of attorney fees.

ISSUES

1. DID THE EMPLOYER HAVE JUST CAUSE TO TERMINATE GRIEVANT?
2. DID THE EMPLOYER UNLAWFULLY RETALIATE AGAINST GRIEVANT?

DECISION

I have studied the evidence submitted by the parties together with their helpful post-hearing briefs. The Employer argued that it did have just cause to discharge the grievant. The Employer pointed out that it had a customer contact policy which requires store detectives to make sure that a Employer customer is in possession of stolen property before stopping him. If a customer is stopped, and is not in possession of stolen property, the store detective is disciplined. The severity of the discipline depends on whether the stopping of a customer was a serious customer contact or a less than serious customer contact. A serious customer contact occurs when a store detective stops a customer where the circumstances indicate that there was no reasonable belief that a theft had occurred or that the customer had committed it. In these situations, the Employer's practice is to suspend, without pay, for the first offense and to terminate the detective for the second offense. A less than serious customer contact occurs when a detective does have a reasonable belief that a theft occurred but the customer is not in possession of the goods. Less than serious customer contacts are disciplined by using a counseling process with a focus of improving the detective's methods so these contacts do not occur in the future. The Employer asserted that its customer contact policy is reasonable because

the Employer has a need to protect itself from liability for false arrest, as well as protecting its merchandise from shoplifters. Also, the Employer has a concern that if it stops its customers when it has a reasonable cause to believe that they may have shoplifted merchandise, Employer will become an unpleasant place to shop. Thus, the Employer instructs its detectives to stop customers only when they are sure the customer is in possession of stolen merchandise.

The Employer asserted that grievant had committed a serious customer contact on September 10, 1997 when he stopped a customer, whom he suspected had stolen lipstick. The Employer pointed out that the stop took place in the photo department and grievant should have known that she could not have purchased lipstick there. The lipstick had to have come from the cosmetic department some distance away. The Employer then argued that this was a serious customer contact because the grievant would have no way to know that the suspect had stolen the lipstick unless he had seen her do it and maintained his surveillance all the way to the photo department. Since grievant admitted he had not maintained his surveillance, the Employer asserted that he had no reasonable belief that a theft had occurred. The Employer's witnesses emphasized that store detectives are trained repeatedly so that they know that they must be sure that the person is in possession of stolen property before they make a stop. This training is reinforced in the detective training manual and detectives are warned that if they lose surveillance, a customer contact will undoubtedly occur.

The Employer also pointed out that grievant had a poor work record. Grievant had been suspended three days in September 1996 for a serious customer contact. Also, grievant had three less than serious customer contacts in 1997. Grievant also had numerous other minor disciplinary infractions on his record dating back to 1993.

Grievant argued that the incident involving the lipstick was not a serious customer contact. Grievant asserted that he had observed the suspect earlier and had observed what he regarded as suspicious behavior. Grievant was then distracted by another suspect and did not maintain surveillance, but later saw the same customer in another department of the store. He testified that he saw the suspect cupping the lipstick package in her hand as if she meant to hide it and then as he watched, she bit the cellophane wrapper and tore it off the lipstick. After using the lipstick she put the tube in her pocket. Grievant testified that he then called for backup and checked with the clerks at the photo lab to see if the suspect had paid for the lipstick. When he was told she had not paid for the lipstick, grievant decided to stop the suspect. Grievant then testified that when he approached the suspect and another woman he thought to be her mother, he showed them his identification. As he began to introduce himself, the mother immediately interrupted, saying, "Honey, show him the receipt." The young woman then pulled a small Employer bag out of her coat pocket and showed grievant the receipt for the lipstick. Grievant asked the young woman if she would come to the office and provide more information and the older woman said "No", and the two of them left. Grievant made no attempt to stop them.

Grievant asserted that it could not be determined whether the receipt was for the actual lipstick that the customer had in her possession and contended that this customer may have been in possession of stolen merchandise. Grievant suggested he was discharged for this minor offense because he is being retaliated against by his supervisor, Person 2. Grievant indicated in his testimony that he was on sick leave shortly after this incident and that Mr. Person 2 had called him at home and asked him to prepare a supplemental report. Grievant testified that during this conversation, Mr. Person 2 became angry because he did not have enough store detectives to cover the schedule and he wanted grievant to return to work.

After examining all the facts and arguments, the first question that must be resolved is whether this was a serious customer contact. In deciding whether an incident is a serious customer contact or something less, the Employer's determination is normally based on whether the grievant had a good reason to stop the customer. In the less than serious customer contacts, typically, what happens is that the detectives observe customers taking merchandise and concealing it, and then try to leave the store. As the detective follows them, either the customer changes his mind about stealing the merchandise or becomes aware that he is being observed and surreptitiously dumps the stolen merchandise on a shelf while momentarily out of sight of the detective. When the customer is stopped he does not have the stolen merchandise. In these situations, the store detective is counseled about technique. The detective is warned to check where merchandise can be dumped before stopping a customer so that there will be less customer contacts in the future.

The serious customer contacts are typically situations where a detective has observed what appears to be a crime but fails to check to make sure or loses surveillance for such a length of time that the suspect could have purchased the item or returned it. The Employer emphasizes in its training that detectives are not to make stops unless they are certain that the customer is in possession of the stolen merchandise and when circumstances are such that the detective cannot be sure, then the stop must be aborted. In this case, the Employer asserted that when grievant first observed the customer and then decided to follow someone else instead, there was a five or ten minute gap in the surveillance of this suspect. Thus, the Employer states that there could not have been any reasonable belief that she was in possession of stolen merchandise because she could have paid for it during the five or ten minutes that the grievant was not watching her.

In his defense, grievant stated that when he saw the suspect again in the photo department, he observed her concealing the lipstick and later using it and placing it in her pocket. At that point, grievant asserted that under Michigan law he had probable cause to believe that a crime had been committed and therefore was not in violation of the customer contact policy.

In deciding this issue, I find that this was not a serious customer contact. In this situation, it was apparent that the customer did not pick up the lipstick in the photo department but rather at some other location within the store. Although grievant had observed her take the lipstick, he had not maintained surveillance so he should not have stopped the suspect. But it is not true that he had no reason to believe that she was in possession of stolen merchandise. More importantly, however, the Employer convinced me that it has a customer contact policy to protect itself from liability for false arrest and to make sure its customers are not unduly hassled while they are shopping. The Employer informed me that "in loss prevention parlance, 'apprehension,' 'arrest,' and 'stop' are used interchangeably in referring to apprehending a guest for shoplifting. A check of Black's Law Dictionary shows that the terms apprehension and arrest require taking away someone's liberty or taking him into custody." In this case, there was no arrest. Grievant did not take the customer to the office, and did not restrain her. As soon as she produced a receipt, she walked away. Thus, in this instance, the Employer had no real exposure to a false arrest complaint and I find that the Employer's serious customer contact policy was not violated. Also, very little hassling of the customer was involved. The evidence shows that grievant was not even finished introducing himself when the mother advised the daughter to show him the receipt. The daughter immediately did so and when asked by grievant to go to the office she refused and walked away. Therefore, there was very little interference with these customers.

The next issue that needs to be addressed is the Employer's investigation of this incident. The procedure to be used is described in Joint Exhibit 44. It states in part: "The Loss Prevention Manager/Team Leader must complete a physical walk-through of the circumstance as part of the investigation. Upon completion, the Loss Prevention Manager/Team Leader will identify the customer contact as either serious or less than serious. If the customer contact is determined to be serious, the situation must be reported to a corporate investigator/trainer and OMP team relations specialist immediately." In this case, I find this procedure was not followed. The Loss Prevention Manager/Team Leader was Person 2. Because grievant had previously complained that Mr. Person 2 had not been fair to him, Mr. Person 2 asked not to be involved in grievant's discipline. His request was granted, but no substitute Loss Prevention Manager was appointed and no physical walk-through of the circumstances took place. The Employer argued that this made no difference in this case because it was fully aware of the circumstances and a walk-through would not help. However, there was a dispute concerning how serious this incident was and whether grievant had a reasonable belief that the suspect was in possession of stolen merchandise. It may be that a walk-through would not have been helpful, but the procedure requires a walk-through to be done. The obvious reason is to be absolutely sure that before an employee is terminated, every precaution is taken to insure that he is being treated fairly. Here, this safeguard was eliminated and I find that the termination was improper for this reason also.

The arbitrator finds no evidence of retaliation so that charge is dismissed.

AWARD

The grievance is granted. The Employer may discipline grievant for a less than serious customer contact for the incident of September 10, 1997. The Employer is ordered to reinstate the grievant with back pay less interim earnings per Procedure 237, page 4 of Joint Exhibit 1.

Peter D. Jason

Arbitrator

DATED: January 15, 1999