Ables 1

Before
ROBERT J. ABLES

JAN 3 1 1994

Employer,

and

Union

Proceedings: Employer-directed disciplinary hearing: August 20, 1993.
Arbitration hearing: December 8, 1993. Witnesses at arbitration hearing sworn; not sequestered.
No transcript. Tape recording by arbitrator. Closing statements.
Date of Decision: December 21, 1993.

I. ISSUE

The issue under the 1991 collective bargaining agreement and grievance by the Union, on behalf of the Employee, classified as an airplane refueler, is whether the Employer, conducted a fair and impartial hearing on the property when considering charges against the Employee. The charges state that he failed to display an identification card and driver's license, while working, and, secondly, that he was guilty of misconduct on the job by sexually harassing a female employee of Company 1, a customer of the employer. Also, putting in question whether the Employee did, in fact, resign his job at the end of the hearing instead of being discharged, upon being found guilty of those charges, as the employer maintains, or not, as the Employee, supported by the union, maintains.

II. FINDINGS

A. Resignation

The question whether an employee has resigned his or her job comes in all sizes and shapes. Influential in answering that question include factors such as time and place of the act, voluntary

or induced, verbal or written, associated circumstances to show intent, action taken by the employer in reliance on the representation and cases where a resignation has been declared, but rescinded immediately or soon thereafter.

In short, circumstances control.

Here, there is some doubt the Employee resigned his job at the hearing, conducted by the employer, considering the charges against him. That doubt is based on evidence from principals of both parties that the Employee had some agreed amount of time to declare -- in writing -- his intentions about resigning. Also, the employer took no action, to its detriment, in reliance on its understanding that the Employee had resigned. The Employee made unmistakably clear, very soon after the disputed fact, whether he had resigned at the disciplinary hearing, that he did not and had no intention of resigning.

More fundamental than those considerations in favor of the Employee that he did not resign his job is that the hearing during which the charges were considered against him was not conducted fairly. Although, at the Employer- directed hearing, the Employee and his union representative requested that the employer produce complaining witnesses against the Employee, the employer produced only a written statement from the complaining woman who said that the Employee had sexually harassed her. The Employee, at the hearing, strongly denied these charges in each particular, and he offered an arguably plausible explanation that the sexual harassment charges were brought against him vindictively, following a work-related confrontation between him and the complaining female Company 1 employee. This confrontation involved sex -- as in the differences between male and female -- but did not involve sex as in physical intimacy or taking advantage of job rank.

The Employer's hearing officer at the end of the hearing, making clear that he had found the Employee "guilty" of the charges of sexual harassment, thought it understandable that the Employee and his union representative would at least consider that the Employee should resign, rather than be discharged, as was then the alternative given him[1].

'The charge against the Employee that he failed to display his ID card (which also serves as his driver's license) on duty clearly is an incidental part of the charges against him which were considered at the Employer-directed hearing on August 20, 1993. Supervisor Person 1, who suspended the Employee on August 14, 1993 for the then-developing charges against the Employee for sexual harassment, did not know the Employee had not been displaying his ID until the suspension for the other charge had been ordered. No person or party was fined. Drivers of fuel trucks commonly forget to wear their ID, a matter which can be rectified in a few minutes with a temporary card, with little or no chance of significant discipline against such employee. The charge against the Employee for failing to possess and display his ID -- which he admitted -- is not a major consideration in the case whether the Employee had a fair hearing leading to the disputed resignation.

Without an opportunity to ask questions of the complaining woman, or otherwise to challenge her representations that the Employee had sexually harassed her, it cannot be concluded that the Employee received a "fair and impartial hearing", as required by agreement of the parties in Article 12, Section (a)1 of the contract.

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[1] 'The charge against the Employee that he failed to display his ID card (which also serves as his driver's license) on duty clearly is an incidental part of the charges against him which were considered at the Employer-directed hearing on August 20, 1993. Supervisor Person 1, who suspended the Employee on August 14, 1993 for the then-developing charges against the Employee for sexual harassment, did not know the Employee had not been displaying his ID until the suspension for the other charge had been ordered. No person or party was fined. Drivers of fuel trucks commonly forget to wear their ID, a matter which can be rectified in a few minutes with a temporary card, with little or no chance of significant discipline against such employee. The charge against the Employee for failing to possess and display his ID -- which he admitted -- is not a major consideration in the case whether the Employee had a fair hearing leading to the disputed resignation.

It is understandable the employer would be reluctant to press its customer, Company 1, to produce a complaining witness at a quasi-judicial hearing[2], but fundamental due process does not permit accepting that charges, in a one-on-one case, can be considered proven without some opportunity for the employee charged to test the accuracy or validity of the charges, as by cross examination at a hearing -- or, at least, by deposition.

The Employee, an 18-year employee, age 57, is a person for whom controversy on -- and, evidently, off -- the job is no stranger.

Neatly dressed, articulate in speech and correspondence, he seemed to be more a chief executive of at least a mid-sized Employer than a truck driver. Nevertheless, he is loud, argumentative, litigious, and overbearing in manner, certainly when challenged about work performance. These personality traits were described not only by Employer witnesses but by union officials his supporters in this dispute. In a common phrase, therefore, much of the Employee's grief, he brought on himself.

The charges of sexual harassment against the Employee are not ripe for decision here, but the facts and circumstances associated with those charges will better explain whether or not he resigned his job -- which is the question now in dispute.

B. Triggering Event

On August 12, 1993, the Employee resigned his job as lead refueler, and became one of a number of refuelers assigned to refuel customers of the employer, one of which was Company 1.

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[2] The union, before the arbitration hearing, requested, in writing, the Employer to produce the complaining witness at the arbitration hearing. That witness did not appear at the arbitration hearing; nor is there evidence that the Employer asked the complaining witness or her employer to make her available for that purpose, the Employer holding to its position that it was not good business practice to ask a customer to produce a witness at a hearing -- not even when the only evidence against the Employee is held by the complaining witness.

The events leading to his disciplinary suspension and, subsequently, to the Employer-directed hearing about pending charges against him, occurred on August 14, 1993, a Saturday. The Employer, on that day, was short three refueler employees, a significant percentage of assigned drivers. The Employee was assigned to refuel Company 1 airplanes. Due to complaint by Company 1 officials about a work-related confrontation between the Employee and Person 2 of Company 1, evidently a baggage car operator, the Employee was reassigned to duties in another area of operations -- Company 1 Shuttle. Shop Steward Person 3 participated in that decision.

In that reassigned area, certain Company 1 pilots overheard the Employee seemingly berating a Company 1 agent in very loud terms, thus inducing another complaint against the Employee. It developed however that the Employee was not giving that agent a hard time; rather he was explaining the unwarranted reasons for his reassignment to the Company 1 Shuttle area of operations. No complaint for this event is pending against the Employee.

Also on August 14, 1993, Person 2, supported by her supervisor, filed a written statement alleging that the Employee had sexually harassed her -- apparently[3], on three successive days, August 12, 13 and 14, 1993, two of which were days the Employee no longer operated as the lead refueler.

On these events, Person 1 suspended the Employee, without pay, pending investigation and decision on the charges of sexual harassment.

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[3] Person 2's written statement of charges was not introduced in evidence at the arbitration hearing, the Employer giving as reason certain concern about Equal Employment Opportunity requirements. The union did not ask that the written charges be introduced in the record. Similarly supporting written statements by Person 2's supervisors Person 4 and Person 5 were not introduced in evidence. Apparently, those officials had no personal, independent, information about the Employee's actions or words leading to Person 2's charge of sexual harassment, but their statements were intended to support the claim.

C. Hearing

Upon due notice, the Employer-directed hearing was held on August 20, 1993[4].

Person 6, Assistant Operations Manager, was the presiding officer. Also attending that hearing were Person 1, the Employee's supervisor, the Employee, and Shop Steward Person 3.

Testimony at the arbitration hearing by each of the named persons varied as to time and emphasis on the charge of the Employee not possessing and displaying his ID card. However, because the Employee admitted such failure, the charge was proved[5].

On the charges of sexual harassment, Person 6 read each charge aloud and gave the Employee opportunity to respond, seriatim. The Employee denied each such charge (whatever they were, specifically). He denied them long, loud and repeatedly. The essence of his denials was that Person 2 was vindictive in her charges of sexual harassment because, on August 14, 1993, the Employee had chastised her for blocking his refueling truck with her baggage carts. He commented that, as a beautiful, well-formed young female, who tended to distract other refuelers from work on their assignments, she should not be so obvious in her own work assignments.

Person 6 characterized the charges as the Employee saying to Person 2 that she was beautiful, gorgeous, and driving his men crazy[6].

According to Person 6 and not otherwise rebutted the hearing took at least twice as long as other disciplinary hearings he had previously conducted, numbering around 100.

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[4] The charges in an Employer notice to the Employee on August 17, 1993 were: "Misconduct and Failure to Follow Rules and Regulations (working on the AOA without identification and driver's license)".

[5] For reasons already noted, the charge that the Employee did not possess and display his ID or his driving without a license is not a major consideration on the question whether the Employee resigned or whether he received a fair and impartial hearing. As to the ID charge, the Employee received a fair hearing, his long, repetitive, noisy explanation to the contrary notwithstanding that he tried early on the shift to persuade Person 1 to give him time off to get a temporary ID.

[6] All of those at the hearing testified to heated discussions and arguments. The Employee, being concerned that he was too exercised about the charges being discussed, asked Person 3 to speak for him. Person 6 insisted however that the Employee speak to the facts since he was the only one who could do so. The presiding officer committed no prejudicial error by insisting that the 0 Employee speak for himself as to these matters.

D. End of the Hearing

At the end of the hearing, the best evidence is that: Person 6 talked to union official Person 3 separately, as was his custom in disciplinary hearings; Person 6 made clear to Person 3 that he considered the Employee guilty on both counts and that discharge should be expected; Person 3 asked for the option of getting the complaining Company 1 person to appear at the hearing or, failing that, that the Employee be permitted to resign rather than be discharged.

Person 6 agreed only to the option that the Employee resign. Person 3 talked separately with the Employee, explaining consequences following discharge and resignation, recommending resignation as less disadvantageous, particularly with respect to other future employment; and the Employee asked Person 6 for, but was denied, an opportunity to consult with his attorney, having only ten minutes with Person 3 to decide his option to take discharge or to resign.

The four attendees at the hearing reassembled. Each gave an account of actions taken, or words spoken, as follows:

Person 1: Person 6 said the Employee was guilty of the ID and misconduct charges; "they" (referring to Person 3 and the Employee) brought up the matter of resignation; the Employee said "If I listen to the shop steward and Person 6 I would resign"; Person 6 said a written resignation would be accepted; Person 3 asked whether a verbal resignation would be accepted, now; he (Person 1) "formed the impression he [the Employee] would resign".

Person 3: the Employee said (to me), "If I do what you and Person 6 say, I should resign"; the Employee was to get back in writing to declare his intentions; the Employee did not say he was going to resign.

Person 6: Person 3 said the Employee was resigning (before the Employee came into the room); I said "Okay fine. Let [the Employee] come in. Let [the Employee] tell me he is resigning"; I said to the Employee "I understand you are resigning"; the Employee said "I did not do it" (referring to the sexual harassment charges); I said resign or not, no other hearing (with Company 1 employees); the Employee said "yes" (presumably, to resigning); "I said give it to me in writing"; the Employee asked for an opportunity to call his lawyer; I said Shop Steward Person 3 is your representative; the Employee said he was resigning but wanted time to write his resignation; I said "how much time?"; the Employee said he would go back home and write the resignation.

The Employee: "When we came back" (from his talk with Person 3), "Person 6 asked what I was going to do. I said if I listen to the shop steward and to you then I will have to quit. I repeatedly said no -- I did not do what was charged"; Person 6 said he wanted a letter that I had quit.

E. Effect of Last Action and Words at the Hearing

The facts do not support a finding that the Employee quit or resigned his job on August 14, 1993. As he never wrote the referenced letter of resignation, there is no hard evidence that he ever resigned[7].

Both those arguing for and against the resignation having occurred, accept that, when reassembled after Person 3 talked with the Employee, the Employee said that, if he listened to his

[7]The Employee's letter to General Manager Person 7, on August 25, 1993, confirming a previous telephone conversation, states "I do not resign my position with Employer". His quite literate letter two days later, on August 27, 1993, to Person 7, follows through on his promise to explain relevant circumstances, including that: while serving in the lead person, Person 2, "a very attractive woman was conducting herself in what seemed to be a suggestive manner... [which] was distracting the men working under my supervision", noting in defense of the charges against him that he did not assault, threaten, "or even proposition her". The Employee opposed his "termination".

shop steward and to Person 6, he would resign. This is a conditional thought. Person 6 understandably pressed him to decide: quit or be discharged. The Employee continued to temporize, emphasizing that he was not guilty of charges of sexual harassment, asking for a reopened hearing with Company 1 witnesses, and for an opportunity to talk with his lawyer. Person 6, not convinced that he had received a resignation from the Employee, which he could count on to complete action on the case, asked for the resignation in writing.

It is correct, as the employer argues, that a verbal resignation can have full force and effect, and that the Employer has no power to force an employee to submit a written resignation, but the very insistence by Person 6, that the Employee "put it in writing", supports an inference that matters concerning such resignation were not wrapped up at the end of the Employer-directed hearing.

The Employee, very soon thereafter, in writing, specifically and forcefully stating that he had not resigned blocks any argument the employer may have that the Employee should be prevented from claiming he had not resigned and decided too late that he had changed his mind.

F. Other Findings about How the Hearing was conducted

On collateral points, the Employee's argument is not persuasive that the hearing on August 20, 1993 was deficient, because it was not designated an investigative hearing. The Employee and his shop steward knew the charges (including misconduct) and the reasons for them, and they got due notice of the hearing. Also, the Employee, in his inimitable style, had more than ample opportunity to learn and respond to the charges.

G. Conclusion

The Employer's deficiency in the case is that it did not pin down that the Employee had resigned. Significant also is the Employer's failure to give the Employee and his union representatives[8] an opportunity to face the complaining Company 1 employee, constituting failure of fundamental due process and a violation of Article 12, Section (a)1 of the contract, by not assuring that the Employee received "a fair and impartial hearing".

All circumstances considered, the Employee did not resign his job and the Employer did not give the Employee a fair hearing, as the parties agreed was required by the contract.

No opinion is expressed on the merits of the charges of sexual harassment.

H. Remedy

The parties having agreed that the issue is whether the Employee received a fair and impartial hearing, and not whether the employer had just cause to discharge the Employee, the remedy for the employer's stated violation is open[9].

Fairness being the objective of the proceeding, the appropriate remedy must start with requiring the Employer to conduct a new hearing, to include a presumption that the Employee has not -- to this point -- resigned his job and that, at such new hearing, the Employee shall have an opportunity to confront his accusers on the sexual harassment charges, all matters of back pay and seniority to be considered on just cause findings in that proceeding. In lieu thereof, in the Employee's discretion, the Employee may, until January 15, 1994, resign his employment and, if he does so, the employer shall pay the Employee what he would have earned in his regular job as

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[8] Including Person 8, Vice President at Large of the District, who early in the dispute on September 2nd, 1993 by letter to Person 7 asked that the Employee be given an opportunity to face his accusers, and on November 30th, 1993 also by letter to the General Manager, asked that named Company 1 employees appear at the arbitrational hearing.

[9] Article 12, Section 2.(g) provides that, in a discharge case, if the arbitrator finds that just cause did not exist for the discharge, "the employee shall be reinstated with full back pay and seniority rights plus any outside earnings which shall not be deducted from the back pay". Discharge not being the subject of this proceeding, that remedy need not be applied in this case.

refueler, from the time he was suspended without pay on August 14, 1993, to the time of such resignation, but not later than January 15, 1994.

II. DECISION

The decision is in accordance with the opinion.

So Ordered.

Dated: December 21, 1993