

Archer #2

IN THE MATTER OF ARBITRATION

between

EMPLOYER, INC.

Company

and

EMPLOYEE

Arbitration Proceeding, January 29, 2001

ISSUE:

This arbitration was processed under the Employer Peer Review and Arbitration Procedure for Hourly Team Members. At the outset of the hearing, the parties stipulated that this case was properly at the arbitration stage of this procedure and that Ms. Employee's protest of her discharge was arbitrable and was properly before me as the sole arbitrator for resolution.

CHRONOLOGY:

Arbitration Proceeding:	January 29, 2001
-------------------------	------------------

Award:	February 27, 2001
--------	-------------------

ARBITRATOR: Edward P. Archer

DECISION AND AWARD

Edward P. Archer, Arbitrator. This arbitration was processed under the Employer Peer Review and Arbitration Procedure for Hourly Team Members. At the outset of the hearing, the parties stipulated that this case was properly at the arbitration stage of this procedure and that Ms. Employee's protest of her discharge was arbitrable and was properly before me as the sole arbitrator for resolution.

I. Factual Background

The circumstances which gave rise to Ms. Employee's discharge are not in dispute. Ms. Employee was employed as a part-time clerk in the housewares department at the Employer Store #165 in City A, State A since the store was opened approximately three years before. She had not previously received any formal disciplinary action though she had recently been informally counseled for failure to fully complete her job assignments. She worked the 10:00 p.m. to 6:00 a.m. shift and her principle duties were to stock and straighten up the shelves.

On June 20, 2000 Ms. Employee began her shift at 6:00 a.m. The store had cut back on the hours of all its employees and hers had been cut back to 23 hours per week. She was attempting to qualify for a loan to purchase a car and needed additional hours at the store to combine with her 40 hour a week day job at the boys and girls club as an art instructor to qualify for the car purchase. Accordingly, at her request the store scheduled her for the June 20 shift in a different department, the gift department.

Partway through her shift that night, Night Store Director Person 1 asked store detective Person 2 to observe Employee's work because of a concern that Employee may have been

sleeping on the job and misusing company time. Person 2 observed Employee's work from 3:10 a.m. until she clocked out at 6:00 a.m. and recorded his observations in notes which he subsequently on that same shift reduced to a written report. He testified from that report, and his testimony as to her actions during that time period is not disputed by Employee.

He testified that at the outset of his observation of Employee at 3:11 a.m. she detoured with her flat top cart of gift items to the women's department of the store where she did some shopping for about 15 minutes. She then left for her assigned gift area and left her cart there to return to the women's department. At 3:55 a.m. she went into the women's restroom and stayed there until 4:11 a.m. She then went to the break room where she made a personal phone call for about six minutes. She left the break room at 4:19 a.m. and went to the learning center and put her head down to rest. She then went back to the gift area with her cart but left to return to the women's restroom at 4:30 a.m. where she stayed until 4:44 a.m. She then shopped in the woman's department and purchased some additional items, paid for them and took them to her car in the parking lot. She returned to the store at 5:05 a.m. and went right to the women's restroom again, where she stayed until 5:50 a.m. At 5:50 a.m. she went to the non-smoking break room and made a phone call which lasted about three minutes. After she completed her phone call she punched out and left.

Person 2 submitted a report with the above observations of Employee's work to be read by Hard Line Team Leader Person 3 the next morning. Person 3 testified that when he came to work at 10:00 a.m. that morning the gift area did not look good. The products had not been pulled forward on the shelves. It had not been re-categorized with like items together and products had not been brought from the storage area to restock the shelves. When Employee reported to work that evening Person 3 talked with her. He told her it was important that she be

completely honest with him and asked her what she had done the night before. She said she had worked 3 L-carts and then conditioned her department the rest of the night. He asked if she had a medical condition that would keep her off the sales floor for any length of time. She said, "no." He told her of Person 2's report and asked her if she had been pushing her cart through different departments and shopping. She said she didn't know but she acknowledged she had done some shopping. He asked her if she had been in the restroom from 3:55 to 4:11 a.m. She said she had gone to the restroom to use it. He asked about the six minute phone call in the break room. She said she had made that phone call and she knew phone calls were to be limited to three minutes, but she said she was on break at the time. He showed her her time card which established she was not on break at the time of her phone call. She acknowledged then that she knew she had not been on break. He asked her if she had gone to the learning center and put her head down. She said she was resting. He then asked her about her second fifteen minute trip to the restroom She reported she was using it She then acknowledged her second shopping trip to the women's department was also not on break time. And when she was asked about her third trip to the restroom - this time for 45 minutes - she broke down and said, "you got me" and she admitted that she slept on all three of her trips to the restroom that night.

Person 3 prepared a report of this conversation with Employee and sent it, together with Person 2's report, to Team Relations Specialist Person 4. Ms Person 4 reviewed the reports and recommended that Employee be discharged for her hour and fifteen minutes of sleeping on the job, together with her forty minutes of shopping and fifteen minutes of personal phone calls and ten minutes of resting in the training center.

Based upon this recommendation Employee, who had not been scheduled for work since she left work on June 21, was discharged on June 29, 2000. It is that discharge that is being

challenged in this arbitration proceeding.

Employee testified that she performed all of the work duties that she had been assigned to do by her supervisor on the night in question. She admitted having slept during all three of her observed visits to the restroom. She said she didn't intend to sleep the first time but that she did intend to sleep the second and third times. She said she was so tired from working her two jobs that her eyes were crossing - she couldn't really stand. Under cross examination she didn't deny Person 2's report that she had been sleeping, shopping and making personal phone calls on store time. And she acknowledged that her actions that night were wrong but said she didn't feel they justified her summary discharge.

She asserted several considerations which she felt should be considered in her defense. First she contended that in the instance of one prior employee and a supervisor, the store had attempted to awaken them to return to work rather than let them sleep and then discharge them. She felt Person 2 should have notified management when he observed her stay in the restroom for a prolonged period the second time that evening and management should have confronted her at that time to caution her against sleeping. In addition she contended that the store had not adhered to its own policy of conducting a prompt investigation and imposing discipline promptly - in waiting from June 20 to June 29 before discharging her. She contended she had no notice that sleeping on the job was an offense that was dischargeable for a first violation.

She noted the store's policy which lists misuse of company time as an offense subject to progressive discipline and lists terminable offenses as "theft, destruction of company property, fighting, fraud, consumption, time card fraud" but not sleeping on the job. She urged that discipline for sleeping on the job had not been uniformly imposed because she had seen supervisor Person 5 sleeping on the job on three different occasions and she had seen loss

prevention employees (store detectives) watching him sleeping in the computer room and he had not been discharged. She contended the store had not taken her work record and the duration of her work record into consideration. She had worked for the store for approximately three years and she had no prior formal discipline. She admitted Person 3 had talked with her about not always completing her duties but she said he told her she was generally a good worker but at times she was not up to par. She said he explained he had seen her stock up to sixteen skids in one night. She told him her body wouldn't let her do that every night and most of the men didn't stock as well as she did. She also contended that her race and sex may have been a factor in her discharge as Person 5 was a white male and he was not discharged for his sleeping on the job whereas she, as an African-American female, was discharged for her first offense of sleeping on the job. Finally, her case raises the question of whether the penalty of summary discharge fit her "crime" of sleeping on the job and whether her short lived need to work, what were in effect two full time jobs, to qualify for her car loan should be considered as a mitigating circumstance.

Other pertinent evidence was from former employee Person 6 who testified in a conference call. Ms. Person 6 testified she had observed Person 5 sleeping on the job three times in the learning center on the midnight shift in 1998 She didn't report this to management and didn't know if management was aware of his sleeping on the job.

Ms. Person 4 testified in rebuttal that her goal for timely discipline is that it be imposed within seven to ten days from the offense. She said she distinguishes between intentional sleeping on the job (where the employee tries to hide his or her sleeping on the job, such as this case where Employee slept in the women's restroom where security could not observe her) and unintentional sleeping on the job, such as for example when an employee dozes off in a meeting. For intentional sleeping on the job an employee is discharged for a first offense regardless of the

employee's work record. For unintentional sleeping on the job the sanction is progressive discipline. Person 4 testified that in the twenty-seven stores in State A and Illinois there had been thirty cases of employees sleeping on the job. Twenty-two were terminated for a first offense. Of those twenty-two, thirteen were white and eight were African-American. Of the employees charged with sleeping on the job who were not discharged for a first offense, six were white.

II. Discussion and Decision

The primary question to be arbitrated in this case is whether Employer had just cause to discharge Ms. Employee. Ms. Employee also questions whether she was discriminated against because of her race or her sex.

Addressing this second question first, there is not sufficient evidence to sustain Employee's contention that either her race or sex was a factor in the Company's actions in this case. She relies solely on what she contends was different treatment during the investigation process of supervisor Person 5. She cites no other evidence that she or any other employees of her race and sex were treated discriminatorily. Mr. Person 5 is a white male, but the evidence pertaining to Employer's treatment of him is sparse. Person 6 testified that she observed Person 5 sleeping in the learning center three times. But she also testified that she did not report these observations to management and as far as she knew management was not aware of his sleeping on the job. The only other evidence pertaining to Person 5 came from Employee herself. Employee testified that she observed loss prevention employees watching Person 5 sleeping and waking him up. She contends Employer should have awakened her, as it did Person 5, and its failure to do so evidences race or sex discrimination.

This is a very weak seed to rest a case of discrimination on. Even accepting Employee's testimony, Person 5 may have been sleeping during his break period. And even if he was

sleeping on work time, the opportunity to wake Person 5 was much different than the opportunity to wake Employee Employee slept in the woman's restroom on three separate occasions. The first two times were for fifteen minutes each. The third time for forty-five minutes. It would not have been appropriate for Person 2 to enter the women's restroom to see if she was sleeping. As she urged in one point of her presentation, it was very possible that she was having difficulties of one kind or another which caused her to stay in the restroom for fifteen minutes on each of her first two trips to the restroom. It was less likely that she had legitimate reason to be in the restroom for her last forty-five minute stay. Nonetheless, Person 2's failure to notify management and have a woman manager check in on her at the time hardly is proof of discrimination. Person 2 was a store detective who had been assigned to observe Employee's work that evening. It wasn't until Employee finally confessed to Person 3 the next day that she had slept in the restroom all three of her observed trips there that the store had direct evidence that she had slept on the job. Employer's contention that it did not discriminate against its employees based on race for sleeping on the job was more compelling. Of the twenty-two employees discharged for sleeping on the job, thirteen were white and only eight were African-American. While there was no comparable breakdown of how many were men and how many were women, nor was there any evidence offered of discriminatory treatment to women employees. The fact that Person 5 was a man was not sufficient proof that Employee was discriminated against because she was a woman. It was Ms. Person 4's recommendation that she be discharged. And the store had a legitimate business reason for discharging Employee for three instances of sleeping on the job, two of which were admitted to be intentional, together with other work time misused to engage in personal shopping and telephone calls. In short, I find that Employee did not meet her burden of proof that she was discriminated against in any manner because of either her race or sex.

Did Employer have just cause to discharge Ms. Employee? I agree with Company Counsel that it is unfortunate that Ms. Employee was discharged after over two years of successful service to the store. She had an unblemished work record prior to her discharge. The counseling Person 3 may have given her did not constitute formal disciplinary action. And it was also distressing that Employee was working two forty hour a week jobs just to qualify financially to buy a car. She urged in her closing statement that she was just trying to get through her shift so that she could have her car. Clearly she was seeking to buy a car which was beyond her means. She sought the extra work shift from management and she refused to report her inability to work it to management to be sent home solely because of her desire for that car. While I can empathize with her efforts to get ahead, they do not detract from Employer's right to insist that she not sleep on the job. She did so not once but three separate times. And during the entire almost three hour period when she was observed, she did very little work. Mostly when she was not sleeping, she was on the phone making personal phone calls of longer duration than Employer allows or was shopping on work time.

Employer's rule does not specifically list sleeping on the job as a dischargeable offense. However, sleeping on the job is in effect stealing time from the employer and so it is on the same level of offense as theft from the employer. Theft is listed as a dischargeable offense. The offenses listed as dischargeable offenses must be read as examples of dischargeable offenses. While sleeping on the job is not such an unusual offense that management can claim it could not have foreseen employees doing it, nonetheless, just cause does not require management to foresee every type of dischargeable conduct and itemize each one as a dischargeable offense. Because sleeping on the job is an offense that is foreseeable and common sense would lead one to believe it was an offense subject to serious penalty and because it is regularly treated as a

dischargeable offense in commercial practice, the Company is not foreclosed by just cause limitations from imposing the discharge penalty for such a serious offense.

Finally, there was no unreasonable delay in imposing the discharge penalty on Ms. Employee in this case. Person 3 discussed the matter with her at his first opportunity when she reported to work the very next day. He told her at the end of that discussion that her misconduct could lead to discipline up to discharge. While in an ideal world the rest of the disciplinary process would not have taken another seven or eight days, this delay did not prejudice Employee's case or otherwise bar Employer's discipline of her. In short, from the evidence in the record Employer's has uniformly discharged employees, regardless of their work record, for intentionally sleeping on the job. It has done so for twenty-two other employees in State A and State B. The facts in this case are undisputed. Ms. Employee slept three separate times totaling approximately an hour and fifteen minutes during work time on her work shift on June 20-21, 2001. She spent most of the rest of her observed time on that shift conducting her own personal business in violation of rules she admitted she was aware of. On these facts, I must find that Employer had just cause to discharge her.

AWARD

Based on the foregoing analysis I find Employer had just cause to discharge Ms. Employee and it did not discriminate against her based upon either her race or her sex in doing so. Her discharge is therefore sustained.

Decided this 27th day of February, 2001.

Edward P. Archer, Arbitrator