

Beitner #1

**VOLUNTARY LABOR ARBITRATION
EMPLOYER'S TERMINATION APPEAL PROCEDURE**

In the Matter of the Arbitration Between:

EMPLOYEE,

-and

EMPLOYER

Arbitrator: ELLIOT I. BEITNER

OPINION AND AWARD

An arbitration hearing was held on March 17, 2004 at the Hilton Hotel in City A, State A. The arbitration hearing was scheduled and conducted in accordance with the Termination Appeal Procedure of Employer. At the hearing, the parties had an opportunity to present sworn testimony, to cross-examine witnesses and to offer documentary exhibits into evidence. The parties also filed post-hearing briefs which were received by May 10, 2004, at which time the hearing was declared closed.

The claimant represented herself at the hearing but her brief which bears her signature was filed by an attorney who either prepared it or assisted her in the preparation.

BACKGROUND

Employee began working for Employer on August 22, 1992 and worked as a deli team leader at its City A store until her termination on October 3, 2003 for gross misconduct. The Employer's Termination Appeal Procedure (TAP) is a procedure for office, management and professional (OMP) employees who are not covered by a collective bargaining agreement to

challenge their termination. The claimant filed an appeal of her termination which was denied and then processed to this arbitration hearing. The appeal alleges that her termination was not for just cause, was an unlawful retaliation for taking a medical leave in violation of the Family Medical Leave Act (FMLA), and for complaining about harassment, and based on her race in violation of federal and state statutes.

The Termination Appeal Procedure provides for arbitration to be conducted in accordance with the applicable provisions of the Employment Dispute Resolution Rules of the American Arbitration Association.

The TAP contains specific restrictions on an arbitrator's authority. It provides:

The arbitrator's authority shall be limited to deciding claims arising out of or relating to the team member's termination from employment. The arbitrator shall have 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 must consider and rule on every issue within the scope of the arbitrator's authority which was specified on the Termination Appeal Form or which was raised at the arbitration hearing and which was not resolved prior to arbitration.

In reaching a decision, the arbitrator shall interpret, apply and be bound by applicable federal, state or local law. The arbitrator shall have no authority, however, to add to, detract from, change, amend or modify any law, handbook, rule, policy or procedure in any respect. Nor shall the arbitrator have authority to consider or decide any matters which are the sole responsibility of the Employer in the management and conduct of its business.

If the arbitrator finds that the team member violated any lawful Employer rule, policy or procedure established by the Employer as just cause for termination, and finds that the team member was terminated for that violation, the team member's termination must be upheld and the arbitrator shall have no authority to reduce the termination to some lesser disciplinary action.

The incident giving rise to the termination occurred on September 22, 2003. Employee, after noticing that some sliced turkey meat was left on the slicer, asked who had left the meat there. Person 1, a deli clerk under her supervision, said that he had. Person 1, who was waiting on a customer, had inadvertently sliced more turkey than needed. Employee asked him to weigh

the meat to determine its price and Person 1 complied with the request. Person 1 told her the price but Employee apparently did not hear what he said and asked him again in a loud voice for the price. Person 1 responded in a similar loud voice which the claimant took as being disrespectful. She instructed him to follow her into a cooler in the deli area.

Although there is a dispute between the claimant, Person 1 and Person 2, another deli clerk who was working at the deli counter about what was said by the claimant in the cooler, the evidence is persuasive that the claimant admonished Person 1 for his "disrespectful" behavior toward her. During their discussion in the cooler, the claimant complained that Person 1 had shown a lack of "fucking respect toward her" and used the "f" word more than once. Person 1 stated that she used the "f" word once or twice. Person 2 testified that she heard Employee yelling at Person 1 in the cooler complaining about his "fucking attitude" and "fucking working" and that Person 1 yelled back at her using the same language. The claimant denied yelling or using the "f" word. She stated that she asked Person 1 if he was happy working in the deli department and told him that it was a good job. When Person 1 left the cooler he was visibly upset and left the area to take a break and smoke a cigarette. Person 1 stated he told Employee that he was going on break but Employee did not hear him. When she came out of the cooler, Person 1 was gone. She went to the office to see if he had clocked out on break and found that he had. When Person 1 returned she spoke with him in the office and asked him where the "f..." he had been. Person 3, a service area team leader, was in her office and heard the confrontation. She stated she was shocked that Employee had treated Person 1 the way she did.

Person 2 who overheard some of the confrontation in the cooler, testified that she has heard the "f" language used before in the store but it was the treatment of Person 1 and not the

language used that bothered her. She reported the incident to the co-team leader and told her that she felt uncomfortable working with the claimant.

Employee testified that Person 1 told her in the cooler that women in the deli department were taking advantage of him by asking him to move heavy items and that he was tired of working in that department. She said that she told him he had a good job working for Employer and that he could be transferred to a different department if another job became available. She denied yelling or using profanity. She said she conducted a test the next day by walking into the cooler and screaming as loud as she could. A co-employee was standing outside and said he could not hear her.

Employee testified that she was the only African American team leader in the food area and believed she was being discriminated against because of her race and her medical condition. She was off work in the summer on medical leave and returned to work wearing a temporary colostomy bag.

Person 4, a store director in training, testified that he told the claimant about one month before the incident that it was not a good idea to talk to an employee in the cooler. He could not remember if he had instructed her not to take employees in the cooler or had merely told her that it is not in her best interest to do so.

Person 5, the Store Director, testified that the claimant had previously worked at Employer's City B Store and bid on and was awarded a promotion to the City A Store. He stated there were other African American team leaders at the store. He interviewed Employee on September 26, and read statements to her from witnesses but did not identify who wrote them. She admitted being in the cooler with Person 1 but denied yelling or swearing. She said she took him into the cooler because it was close to the deli counter and private. She told Person 5 that she

did not remember Person 4 talking to her about not taking employees into the cooler. Person 5 testified that he tested whether voices from the cooler could be heard outside the cooler and that they could be heard.

Person 5 stated the claimant was terminated because she violated policies relating to honesty, dignity and respect and language, terminology and sensitivity. He was most concerned about the claimant's denying yelling and swearing during her confrontation with Person 1 and believed this was a violation of the Employer's honesty policy. He said the Human Resource Department recommended termination and that he agreed with the recommendation.

Issues

1. Whether the Employer had just cause to terminate Employee?
2. Whether Employer's decision to discharge Employee was based on race in violation of applicable federal and state law?
3. Whether the Employer's termination of the claimant was unlawfully discriminatory on the basis of a disability in violation of applicable federal and state laws?
4. Whether Employer's decision to discharge the claimant was retaliatory in violation of the FMLA for taking a medical leave during the summer before her discharge and returning wearing a colostomy bag?
5. Whether the discharge was unlawfully retaliatory because the claimant complained about harassment by another team leader in February, 2003?

Relative Employer Policies

Language, Terminology and Sensitivity

Out of respect for the dignity and sensitivity of all people, you must avoid the use of verbal or written language likely to offend or be misunderstood by the intended, and unintended, listener or observer.

We should be aware that the attitudes, actions and images we convey by spoken or written word, accent, and gesture are a function of the experience and background of the listener or reader as well as the speaker or writer.

Vulgar or profane words inserted for color or emphasis, will offend someone in every group, are detrimental to the speaker writer, and must be eliminated.

Words or phrases that are demeaning, or have connotations of condescension or subservience, even when used innocently or through habit, are not less offensive to the person sensitized to them. Once such sensitivity has been discovered, usage must be discontinued and their meaning to the speaker or writer be re-evaluated.

Intentional and/or continued disregard for the sensitivity of others to the spoken and written word will result in disciplinary action up to and including termination.

Notice

To: All Team Members

Regarding: Honesty

In order to be a strong and healthy Employer in today's business world, we depend on you to be totally honest. The Employer believes strongly that there can be no exception to this rule in light of the nature of our operation which deals with such a wide variety of merchandise. This longstanding condition of employment has been and must continue to be applied and enforced throughout the Employer.

Just as you expect the Employer to be honest with you at all times, likewise we expect you to be totally honest at all times. This total commitment is a must.

Based on this, we require you to be totally honest with guests, the Employer, fellow team members, vendors, suppliers, etc. Team members involved in theft or unauthorized possession of property from any of these sources will be terminated.

Dishonest team members hurt everyone. They can jeopardize everyone's job security through their actions. If you should become aware of anyone who is dishonest, it is your responsibility to notify a first assistant or loss prevention. Failure to do this will result in termination of employment.

We hope that this restatement prevents any misunderstanding from occurring in the future. If you have any questions, please contact your first assistant.

Employer, Inc.

Welcome to Employer!

* * *

Treating each other with proper dignity and respect is more than just a promise at Employer; it's a way of life! This is our promise to you and our expectation of each Employer team member.

* * *

Standard of Conduct

Team leaders, managers, professional and Loss Prevention team members have a direct responsibility for protecting Employer assets and upholding Employer policies and procedures. Because of their position, these team members are held to a higher standard of conduct.

POSITIVE DISCIPLINE

In policy, Positive Discipline is a total management system for administering and managing discipline. In practice, Positive Discipline is a supervisory method for solving people problems and building higher performance.

Why we use Positive Discipline at Employer instead of punishment:

Punishment is effective only in the short term: its gets immediate results that sometimes do not last. Punishment can create associate anger, apathy, and absence. Positive Discipline, on the other hand, has lasting results because:

* * *

You should use Positive Discipline when:

1. Earlier conversations with the associate have not proven successful.
2. The associate knows exactly what is expected and then does not perform.
3. The associate knows how to do the job or is aware of the rules and policies.
4. Nothing is recognized as preventing the associate from correcting the problem.

NOTE: Positive Discipline is not used for situations involving theft, insubordination, fighting, threatening a supervisor or associate, or other serious offenses.

Positive Discipline is a three step process:

1. Oral Reminder
2. Written Reminder

3. Decision Making Leave

Discussion and Decision

The claimant alleges that she was unlawfully discharged because of her race, disability and utilization of the FMLA but failed to offer any evidence to substantiate these allegations. She failed to establish a prima facie case of discrimination. Initially a claimant, in establishing a prima facie case, must show 1) he/she was in a protected classification; 2) he/she was performing his/her job satisfactorily; 3) he/she was discharged; and, 4) he/she was treated differently than similarly situated persons outside of his/her protected class. Even if claimant had met this burden and had established a prima facie case, it would constitute, only, a rebuttable presumption of discrimination. Here, the claimant's only evidence of alleged discrimination was a) that she is African American and b) that she was off during the summer on Family Medical Leave and returned wearing a temporary colostomy bag. She failed to establish that her discharge was because of her race or medical condition or that she was treated differently than similarly situated persons outside of her protected class and that she was performing her job satisfactorily on the day in question. Therefore, the claims of racially motivated discrimination and disability and medical discrimination are rejected.

There was also no testimony presented that her discharge was retaliatory because she complained of harassment by a co-leader in February. The claimant has complained to the Employer that the co-leader called her at home. The Employer responded by talking to the co-leader and assuring the claimant that it would not occur again. The claimant testified that the Employer should have also required the co-leader to apologize to her. This evidence hardly establishes that a complaint made in February 2003 of harassment was a reason for her discharge in October, 2003.

The claimant was discharged for allegedly violating Employer policies dealing with honesty, language, terminology and sensitivity, and treating fellow employees with "proper dignity and respect". At issue then is whether the claimant violated any or all of these policies. In order to determine whether any of these policies were violated it is first necessary to make credibility determinations as to which witness or witnesses testified most accurately about what had occurred.

There is no magic way, of course, for a fact finder to determine credibility. However, certain standards have developed that are helpful in making such determinations. These include the bias or self interest of the witness, the corroboration of testimony and inherent probability. Here, the claimant is the party in interest. She was terminated and has appealed her termination with the goal of setting aside her termination and regaining employment. Her self interest does not render her testimony unbelievable but subjects it to greater scrutiny.

Person 2, on the other hand is a disinterested witness. No evidence was presented that she had any prior disagreements with or bias against Employee. Her testimony is unequivocal that she heard yelling and swearing emanating from the cooler while she worked in the counter area. Person 3, the Service Area Team leader, was in her office when the claimant confronted Person 1 about where he had gone after leaving the cooler. No testimony was presented that she had had any difficulties with Employee or harbored any bias against her. Her testimony was credible and believable. Person 1, although he was involved in the confrontation with Employee, did not appear to have had any prior difficulties with her or be biased against her. He did not present a claim of improper treatment. It was only after Person 2 complained to a supervisor that he was asked about what occurred and to make a statement. He forthrightly acknowledged yelling also

in the cooler and also using the "f" word. He also testified that he did not remember the claimant using the "f" word in the office confrontation.

I conclude that it is inherently more probable that the testimony of Person 1, Person 2 and Person 3 is more credible than the claimant's testimony and that, in fact, she did yell at Person 1 and did use the "f" word. Therefore, I conclude that the claimant did violate the policy dealing with language, terminology and sensitivity and that there was just cause to discipline her for that violation.

I also conclude that the claimant did not treat Person 1 with proper dignity and respect in their confrontation. The Employer's "standard of conduct" imposes a higher standard for team leaders, managers, professional and loss prevention team managers and require them to uphold Employer policies and procedures.

The most serious charge against the claimant and the major reason cited for termination was her alleged violation of the honesty policy but the term "honesty" is not defined in the policy. It seems probable that the policy was adopted in order to prevent theft of Employer products and assets. The written policy states:

... The Employer believes strongly there can be no exception to this rule in the light of the nature of our operation which deals with such a wide variety of merchandise. (emphasis added) ...

... Team members involved in theft or unauthorized possession of property from any of these sources will be terminated.

Dishonest team members hurt everyone. They can jeopardize everyone's job security through their actions. If you should become aware of anyone who is dishonest, it is your responsibility to notify a first assistant or loss prevention. Failure to do this will result in termination of employment.

The fact that the claimant denied swearing or yelling does not constitute, in my opinion, a violation of the Employer's honesty policy as it was intended and as it is written. It is not unusual

for employees involved in a confrontation to have different memories of and present disparate versions of what occurred without consciously lying about what occurred. Employees can be influenced subconsciously to remember things differently in accordance with their self interests.

While Person 4 had previously advised her that it was not in her best interest to take an employee in the cooler for a discussion, he testified that what he offered was advice and not an order to her. Therefore, her testimony that Person 4 did not order her not to take employees in the cooler was not untruthful. I conclude that the grievant did not violate the honesty policy and therefore her termination cannot be based on the fact that the honesty policy provides for termination.

I have also concluded that the employee violated the language and treatment of others policies and such violations warranted discipline.

While the termination appeal procedure restricts an arbitrator's authority it provides that an arbitrator determine whether there was Just cause for termination. Only the honesty policy provides for termination and I have determined that that policy was not violated. A just cause determination is often a two step process. First, it involves a determination of whether an employee is guilty of misconduct, i.e., in this case of violating a Employer policy and I have determined that misconduct was established. The second determination is whether the discipline assessed was appropriate and consistent with Employer disciplinary policy.

The Employer has a Positive Discipline Policy which provides for corrective discipline aimed at correcting behavior rather than of punishment. Positive Discipline provides for a three step disciplinary progression consisting of: an oral reminder, a written reminder and a one day decision making leave. The type of misconduct that was proven is the type that lends itself to the Positive Discipline program and is the type of behavior that is subject to correction. The

misconduct involved a discreet date and event. No evidence was presented that it was continuing misconduct over a period of time. It is determined that the appropriate discipline should be a written reminder for violation of the language, terminology and sensitivity policy and the policy requiring treating other employees with proper dignity and respect.

It is held that the Employer did not have just cause to terminate the claimant. Her discharge is set aside and reduced to a written reminder in accordance with the Positive Discipline program. She shall be returned to her prior position with back pay less any interim earnings, Unemployment Compensation payments and any other setoffs permitted under the Employer's TAP. While the Employer is obligated to return the claimant to her prior position, it can reassign her to another store as the grievant requested at the hearing if the reassignment is agreeable to the claimant. Jurisdiction is maintained for ninety (90) days solely to resolve any disputes that may arise relating to the implementation of the award.

ELLIOT I. BEITNER, Arbitrator

June 14, 2004