Fullmer #1

IN THE MATTER OF ARBITRATION

Between

EMPLOYER,

-and

EMPLOYEE

Employee Termination Grievance

OPINION AND AWARD

This case' concerns the discharge of the Grievant, Employee, on September 30, 1999 for "violation of policy – accurately reporting of time and honesty policy".

I. FACTS

A. Background Facts

The Employer operates a number of retail food and hard good stores in Michigan and State A. Some of its employees are represented by unions and others are not. Those which are not are covered by the Employer's Termination Appeal Procedure, which is quoted in relevant portion below (Jt Ex. 1). The Grievant worked at one of the Employer's non-union stores, i.e. that in City B, State A (hereafter sometimes referred to as "the Store"). She had worked there for

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[1] Employer, Inc (hereafter referred to as "the Company") has established a "Termination Appeal Procedure" (Joint Ex 1) which provides in for settlement of some disputes through a grievance and arbitration procedure. A dispute has arisen between the parties concerning the discharge of the Grievant, Employee (hereafter referred to as "the Grievant") on September 30, 1999 for "violation of policy – accurately reporting of time and honesty policy". The Union's grievance (Joint Ex. 2) concerning this matter was dated September 28, 1999. It was submitted to arbitration before the arbitrator under the Termination Appeal Procedure. A hearing was held on October 24, 2000 at the Hotel A in City A, State A. Both advocates made opening statements and presented and cross-examined witnesses. A transcript was taken Post hearing briefs were filed by both parties and were received by the arbitrator on approximately December 26, 2000. The Company was willing to stipulate that the grievance was both procedurally and substantively arbitrable, that the time limits in the grievance procedure had either been met or waived and that the arbitrator has been properly chosen and has jurisdiction to hear the case. The Grievant was unwilling to so stipulate.

some 28 years and at the time of the events in question was classified as an administrative retail assistant or store secretary She was employed for a 40 hour week. The Manager of the store was Person 1.

The Grievant's work station was at the "front" of the store near the Manager's office. There are two rooms in the "back" of the store, one a conference room and one a break room. Employees in the Grievant's category are entitled to two fifteen minute paid breaks, one in the morning and one in the afternoon. There is no predetermined set time for these two breaks Employees are, obviously, not required to punch out during these breaks With respect to lunch breaks, employees in the Grievant's category are scheduled for one unpaid 30 minute lunch break. There is no predetermined set time for the lunch break Employees are required to punch out during the lunch break.

B. Facts Leading to the Grievance

We turn to the events of July 14, 1999. The testimony is somewhat murky as to whether the Grievant took her morning paid 15 minute break in accordance with the general policy. The written statement that the Grievant gave on September 3, 1999 (Employee Ex 5) says that she did, i.e. "had a break in the morning." The Grievant was of course not required to punch out for this break and did not do so.

At around lunch time, one of the Grievant's colleagues ordered carry out food from Restaurant A. The Grievant joined the group in the break room consuming the Restaurant A offerings. She did not clock out during what was deemed to be a "lunch break". The details of this event will be discussed in more detail subsequently.

Eventually her non-clocking out was discovered in August during the investigation of another employee. An investigation of the Grievant's non-clocking out during the lunch break

was commenced The Company concluded that the event indeed was a lunch break and that the Grievant had not clocked out. On September 30, 1999 the Grievant was discharged for.

"Termed for Violation of Policy – Accurately Reporting of time and honesty Policy"

On September 28, 1999[2] the grievance at issue was filed. It consisted of a one page single spaced document, which in essence claimed:

> "For starters I would like to say that I feel I was discharged unjustly I have no recollection of what happened on July 14, 1999. When I gave 'my' statement Deb Person 1 told me what to say and Dave Gordon wrote it. .. .I have served Employer for over twenty eight years with honesty and integrity I have earned the admiration of many at Employer including the past five Store Directors I have served as Retail Administrative Assistant for. I also have knowledge of many Team Leaders who have violated Employer policy only to be warned or have a statement placed in their file. Why was I not given the same treatment?
>
> (Joint Ex 2)

The grievance was processed through the steps of the Termination Appeal Procedure to arbitration.

II. POTENTIALLY APPLICABLE PROVISIONS

Election to Arbitrate

If the team member is not satisfied with the answer of the HR C/S department and desires to arbitrate his or her claims, the team member must elect arbitration in accordance with the procedures below.

The team member must give written notice to the HR C/S department of the team member's election to arbitrate the termination by completing and signing Part 3 of the Termination Appeal Form Part 3 of the Termination Appeal Form must be delivered to the HR C/S department or must be postmarked no later than fourteen (14) calendar days after the date the answer was personally delivered or mailed to the team member.

If for any reason the team member does not receive a written answer from the HR C/S department within twenty-eight (28) calendar days of the date the team member submitted Part 1 of the Termination Appeal Form, the team member's claims shall be deemed to have been denied In that case, if the team member wants to challenge the termination, the team member must notify the HR C/S department in writing of the team member's intention to arbitrate the termination. The written notice must be delivered to the Vice-President Human Resource Communications/Services or must be postmarked no later than forty-two (42) days after the date the team member submitted Part 1 of the Termination Appeal Form.

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[2] Discrepancy in dates unexplained

Selection of the Arbitrator

Upon receiving a notice of election to arbitrate from the team member, the company will deliver or mail a list of at least five impartial arbitrators to the team member. The arbitrators on the list shall all be attorneys.

Within fourteen (14) calendar days of the date the list was delivered or mailed, the team member or the team member's representative must meet or confer at a mutually convenient place and time with the company's designated representative to choose an arbitrator from the list. The arbitrator shall be chosen from the arbitrators on the list by alternately striking names, the team member striking first, until only one name remains.

If the arbitrator chosen cannot serve for any reason, the last arbitrator stricken on the list shall be designated to hear the case.

Arbitrator's Authority

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 and local law and to determine whether the company 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...

If the arbitrator finds that the team member violated any lawful company rule, policy or procedure established by the company 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

III ISSUES

Was the Grievant's termination for just cause?

Did the Grievant's termination violate the "age discrimination" provisions of State A Revised Code?

IV. POSITIONS OF THE PARTIES

The Company Position

The Company urges that it has reasonable policies concerning the accurate reporting of time and honesty and that the Grievant was fully aware of these policies. The time reporting and honesty policies are cited. The policies are inherently reasonable.

The Grievant intentionally violated these policies by not recording her lunch on July 14. She was in the team center for at least 30 minutes and ate a sandwich and French fries She has not claimed that she forgot to clock out. He claim is the strained one that she was on an extended break. But, when questioned, she admitted that it was a lunch. That is what she was doing. If she believed the practice was sanctioned, she would have brought it out in her initial interviews or in her subsequent disciplinary interviews. She did not. If a practice permitting extended breaks had previously existed, there is no reason to believe that the practice had been sanctioned by Ms. Person 1 It is significant that through the rest of the summer, the Grievant changed her practice and actually reported her lunches. The Grievant had already taken one break that day so that the time taken by her in the lunch would have exceeded any applicable limitation Under any interpretation, extended breaks are to be taken only when an employee is excessively busy That was not the case with the Grievant on July 14.

The Company conducted a full and fair investigation into the Grievant's conduct. The Grievant's claims to the contrary lack merit. There was no deception and no evidence of any coercion. The whole investigation was reviewed by the Corporate Human Resources Department to assure that it was up to standard.

The Company consistently discharges employees who violate the policy on accurate reporting of time. The cases cited for disparate treatment, Person 2, Person 3 and Person 4 are off the mark. Person 2's case did not involve inaccuracies, but just one employee marking records for another Person 3's case did not involve any personal gain on his part and reflected a situation where there was a clear understanding allowing double breaks. Myer's case did involve not reporting lunch breaks, but under circumstances under which it was concluded that the policy may not have been adequately explained to the employee.

Discharge was the appropriate penalty for the Grievant's conduct. She took the whole lunch and had no reasonable explanation for the non-reporting. She enjoyed an unwarranted financial gain from her conduct. Her act was not isolated and there was a pattern of a declining recording of the number of lunch breaks. As an UM-13 team member, she was held to a higher standard and even at the hearing never showed any sense of responsibility for her conduct.

Finally, the arbitrator is reminded that he has no power to modify disciplinary penalties. The Company also maintains that the Grievant's age did not play any role in the Company's decision to discharge her. The standards under federal law and state law are the same. Since the Grievant has not presented any direct evidence of age discrimination, the applicable standard is the burden shifting standard of *McDonnell-Douglas/Burchne/Hicks*. Citations and explanations are included, with a reminder that the burden always remains with the plaintiff. The analysis boils down to that the Grievant must show that the reason given for the discharge was pretextual. The Company emphasizes that there was no showing of any bias on account of the Grievant's age. The claimed "smoking gun" of an inquiry as to pension benefits is only a matter of speculation. A person on whose behalf the Grievant made the inquiries was not discharged The Grievant was treated the same as other persons similarly situated. The same "disparate treatment" cases are cited and distinguished on the same basis.

The Grievant's discharge should be upheld and her termination appeal dismissed.

The Grievant Position

The Grievant maintains that she was on an extended break on July 14, 1999 and was therefore not required to clock out Some fifteen items of fact are cited as showing that the Grievant did not violate the "accurate reporting of time" policy. These are:

“ 1. The employee never left the City B Employer store on July 14, 1999.

2. Irregardless whether the employee was taking a lunch or an extended break, the entire 'event' did not last longer than thirty (30) minutes.

3. The employee considered the 'event' on July 14, 1999, an extended break not a lunch.

4. The employee was entitled to two (2) fifteen minute breaks per day.

5. Company policy regarding 'accurate reporting of time' did not preclude an employee from eating their lunch during one of their break periods.

6. Person 1 (store director) did not prohibit the employee from eating food while still working on company business.

7. The employee never stopped working for the company, whether she was eating lunch or on a break, while in the store

8. Forty (40) hour employees, such as Employee, did not have to clock out for their break times, only for lunch.

9. The employee's alleged violation of the 'accurate reporting of time' policy was a one time only occurrence.

10. The employee's 'statement', reflected in employee Exhibit No. 5, was not given voluntarily and was coerced. In fact, the 'statement' was written by another company employee and Janice Employee was told to sign same".

(Grievant Brief, pp 2-3, citations omitted)

Based on these aspects, the Grievant urges that the discharge was for just cause.

On the second issue, the Grievant cites the provisions of ORC which is said to prohibit an employer from discharging an employee over the age of forty without just cause. The elements established in *Barker v. Scovill,* Inc 6 State A St. 3d, 146 (1983) are cited. The Employee asserts that the reasons given by the Company for the Employee's discharge were only a pretext. The

facts surrounding the termination are cited and thence the following facts established at trial are shown as indicating the pretextual nature of the reasons asserted for the discharge:

"1. Fellow employee, Person 4, who was younger than age Forty (40), violated the company policy on 'accurate reporting of time' and was not terminated, only warned.

2. Fellow employee, Person 3, who was younger than age Forty (40), violated the company policy on 'accurate reporting of time' and was not terminated, only warned.

3. OMP Relations was involved in both the Person 4 and Person 3 investigation and concurred that they should only be warned for their violations of the company policy on 'accurate reporting of time', not terminated."

(Grievant Brief, p.3, citations omitted)

Based on these items, the Grievant asserts that she has met her burden by a preponderance of evidence. She asks that the arbitrator rule in favor of the Grievant and issue a finding that the discharge of the Employee was without just cause.

V DISCUSSION

A. Introduction

As indicated, the parties have stipulated two issues for determination by the arbitrator. One concerns the just cause of the Grievant's discharge. The other concerns whether discharge violated State A's age discrimination provisions, specifically ORC. We turn to those issues in the order stated.

B. Just Cause.

1. Introduction.

Some aspects of the present matter are not in dispute. The Company has rules concerning Accurate Reporting of Time (Co. Ex 2) and Honesty (Co. Ex. 7). The Grievant does not contend

that these rules are unreasonable or that she did not know of the rules. Neither does the Grievant contend that she did not know of the general policy that lunch breaks were to be of 30 minutes duration, were to be unpaid and that employees were to clock out during those lunch breaks. It is also clear that the Grievant did not clock out during her partaking of the Restaurant A food on July 14, 1999 (hereafter referred to as "the Restaurant A event").

What is in dispute are essentially three arguments by the Grievant. The first is that, for a number of reasons, the "Restaurant A event" was not a lunch break to which the "clocking out for lunch break" policy applied. The second is that even if the Grievant breached the "clocking out for lunch break" policy, it was the Grievant's first violation and should have been dealt with on the basis of progressive discipline rather than discharge The third is that discharge has not been imposed on others who have violated the "clocking out for lunch break" policy. We turn to these issues in the order stated.

2. The "Restaurant A event" as a Lunch Break

The Grievant seems to argue that the "Restaurant A event" was not a "lunch break" in a generic sense because employees are permitted to eat food during breaks other than lunch breaks and because the Grievant was doing work during the break. But, it seems to the arbitrator that these aspects are of small moment. One can eat a doughnut during the morning break, a candy bar during the afternoon break and a burger with fries during the lunch break. The eating of food, as such, does not denominate the break. It is rather a matter of the timing of the break, its length and to some extent the type of food ingested which denominates the nature of the break.

Here the testimony of then Guest Service Lines Manager Person 5 indicated that the "Restaurant A event" was one of some substance He had solicited orders from the participants and the Grievant had placed an individual order Mr. Person 5 testified that the event took place

around Noon and that those participating sat down and ate their seafood. His estimate was that the event lasted at least 30 minutes (Tr. 26-30) The Grievant admits participating, although her testimony at the arbitration hearing was that she was only there for 15-20 minutes. Generically then, this was a lunch It occurred at the All-American time, i.e. e around Noon, it involved the consumption of what in the setting must be considered to be some out-of-the-ordinary food (seafood from Restaurant A's), and the food was consumed on a sit-down basis in the break room. If any confirmation is needed, it was supplied by the Grievant's statement of September 3, 1999 in which she described the event as "a lunch from Restaurant. As that lasted about thirty minutes ....". (Employee Ex. 5).[3]

The Grievant may have taken one phone call during the course of the lunch She claims so, but Mr. Person 5 denies that the lunch was any sort of a working lunch The Grievant testified several times that her recollection of the lunch was impaired by the passage of time. Even if she did take one telephone call during the course of the lunch, it did not change the fundamental character of the event as what it was, i.e. a lunch.

The more serious question is whether the Grievant was excused from

clocking out for the lunch by taking an "extended break" or a "double break". The Grievant maintains that she was in the habit of sort of husbanding her paid breaks and using them back to back when she ate a real lunch or of delaying her morning break until Noon and then extending the break so as to "burn" the both the morning break and the afternoon break during the Noon lunch Both versions sound the same to the arbitrator.

[3] The Employee challenges this statement as having been coerced But, the statement is in her own handwriting She says that it was written by one of the Company's executives and that she had to copy it because his handwriting was illegible Nevertheless, The Employee signed the statement If it was not true, she should not have signed it

The start in analyzing the matter lies in whether the Grievant took her paid morning break or not. Implicit in her testimony at the arbitration hearing is that she did not take that break. Yet, as described above, the Grievant in her statement of September 3, 1999 (Employee Ex. 9) indicated that she did take her paid morning break. Accepting this as true (see the reasoning at footnote 3, supra), the Grievant was even with the game as of Noon, i.e. she had taken her morning paid break, was on the cusp of her 30 minute unpaid lunch break, and had an expectation of taking a 15 minute paid break in the afternoon. When the Grievant sat down to her seafood, the "book" indicated that she should have clocked out.

The lunch break lasted 30 minutes by the estimates of Mr. Person 5 and by the estimate of the Grievant in her statement of September 3, 1999. (Employee Ex 5) Mr. Person 6 estimated it at 25 minutes (Employee Ex. 9) The Grievant's testimony at the arbitration hearing was that it lasted from 15 to 20 minutes The 30 minute figure is credited, for obvious reasons.

There was not a great deal of testimony at the arbitration hearing as to whether the Grievant took her paid afternoon bread or not Implicit in the Grievant's version is that she did not. This aspect is largely immaterial, because even if she forewent her afternoon break, she was still 15 minutes "in the hole" If she did not later take the afternoon break, she was 30 minutes "in the hole".

Aside from all this arithmetic, the Grievant essentially claims that she had a standing arrangement with Manager Person 1 to cluster her breaks and not clock in for lunch as she pleased. Ms. Person 1 testified that such was not the case and that it was made clear to employees that "breaks were breaks" and "lunches were lunches". (Tr. 50). Ms. Person 1 version

is somewhat authenticated by the Person 1/Employee memorandum of May 24, 1999 (Co. Ex 3) in which accurate reporting of time was stressed.

In the end, it seems rather clear. There was a new Manager, Ms. Person 1, on the scene in City B as of April, 1999. (Tr. 44) She was stressing accuracy in reporting of time and this was known to the Grievant. (Co. Ex. 3) On July 14, 1999 the Grievant took her paid 15 minute morning break. Later, around Noon, she sat down to a carry out Restaurant A lunch in the break room. She spent about 30 minutes on the lunch break. Under the standard procedures, she should have clocked out, as she herself recognized in her statement of September 3, 1999. (Employer Ex. 5) At the very least, any understanding between the Grievant and Ms. Person 1 that the 30 minutes was a "combined" break or an "extended" break should have been clearly established on record. Such was not the case. The conclusion then is that on July 14, the Grievant was on a 30 minute unpaid lunch break for which she did not clock out. It appears then that the Grievant was paid for 30 minutes more on July 14, 1999 than those to which she was entitled.

We turn then to the argument that discharge was too severe a penalty.

4. Discharge As Too Severe a Penalty.

The Grievant argues that her 28 years of service with the Company make it improper for the Company to discharge her for her first violation of the rules at issue and that progressive discipline should have been used instead. But, the Termination Appeal Procedure under which this matter was submitted to arbitration preclude the arbitrator from considering this argument "If the arbitrator finds that the team member violated any lawful company rule, policy or procedure established by the company 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."

Even if the issue were one which were within the arbitrator's jurisdiction, it is far from clear that the Grievant's years of service would preclude the imposition of the discharge penalty since matters concerning the abuse of payroll records are traditionally considered as among the group of serious offenses meriting the imposition of the discharge penalty.

3. The Disparate Penalty Argument

As indicated, the Grievant maintains that the discharge penalty has not been imposed on others who have violated the "clocking out for lunch break" policy and that it violates just cause principles to have it imposed on her The cases cited are those of employees Person 2, Person 3 and Person 4 The principle cited is one which is frequently considered to be a valid one. But the key is whether in fact the cited cases are similar to the cases of the Grievant. We turn to that inquiry.

The Person 2 case involved one Person 2 who was a management trainee back in 1997. He apparently was supposed to punch the time clock in and out at the start and end of his shift, but was forgetful and did not do so. (Tr.162). It fell to the Grievant to fill in his time reports for the missed punches during the week Although the management was exasperated with him, no disciplinary action was taken and he was eventually converted to a 48 hour week.[4] But, the Grievant was responsible for correcting the non-punches so as to accurately reflect Mr. Person 2's actual time worked, including his non-paid lunches. In her testimony at the arbitration hearing, the Grievant indicated that she had no knowledge of any instance in which Mr. Person 2 took a lunch break which was "on the clock". (Tr 188). There is thus no proof in the record that Mr. Person 2 committed any offense, or specifically that he committed the same offense that the

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[4] Such employees are not required to punch time clocks

Grievant committed.

The Person 3 case involved one Person 3. He apparently had a team member with whom he had made an explicit arrangement for to utilize the two 15 minute paid breaks back to back in lieu of an unpaid 30 minute lunch break. On the occasion in question, Mr. Person 3 reviewed the payroll records and noted that the team member had taken a 30 minute break at lunch time and apparently forgot about his arrangement with her Mr. Person 3 then got into the computer and changed the 30 minutes to an unpaid lunch break This was discovered and Mr. Person 3 was warned about the impropriety of making such changes in his team members payroll records. He was told that he would be discharged if he did this again (Tr 140). But, the case of Mr. Person 3 is distinguishable from the present case in several respects. First, Mr. Person 3 was dealing with the records of another employee, not his own. Second, there was no financial gain for Mr. Person 3 from his records alteration, only a detriment to his team member who was essentially incurring a loss of 30 minutes time that she had actually worked. Third, Mr. Person 3's actions occurred under the administration of a Store Manager other than Ms Person 1.

The Person 4 case involves one Missy Person 4. The case is on point to the extent that it did involve an employee who took a lunch break without punching out. But, the incident occurred in 1997 during the administration of a prior Store Manager who was new in the position. Investigation by the corporate Human Relations staff indicated that it was not clear that Ms. Person 4 had fully understood the policy and it also was not clear that the incumbent Store Manager had adequately explained and emphasized the policy Under the circumstances Ms. Person 4 was given only a written warning.

But, the Person 4 situation is to be contrasted with the present case in which, as indicated above, the reporting policy had recently been reviewed with the employees by Ms. Person 1 only

a few months in advance of the events at issue (May 24, 1999), with the Grievant herself writing the memorandum of the meeting. (Co. Ex 3) It is also significant that two other employees were discharged along with the Grievant at the same time in 1999, for the same offenses, i.e. Person 7 and Person 8. The Grievant and Mss. Person 7 and Person 8 were thus treated in a non-discriminatory fashion. The fact that three years before, one employee, Ms Person 4, was given only a written warning, under the circumstances described, cannot be held to have been disparate treatment of a magnitude sufficient to lead to the conclusion that the imposition of the discharge penalty against the Grievant was a violation of just cause standards.

5. Conclusion as to Just Cause

As indicated in the above discussion, the 30 minute lunch breaks under the time recording rules at the Grievant's store were to be taken off the clock and the Grievant should have been punched out. She had been warned about this and had been a participant in the training of other employees. The arbitrator is not empowered to convert the discharge to a lesser penalty and the Company seems to have contemporaneously imposed the discharge penalty upon two other employees as well as the Grievant. The disparate penalty doctrine is not applicable and it cannot be held that the Grievant's discharge was without just cause.

We turn to the ORC Sec. 4112.14 claim.

C. The ORC Sec. 4112 Claim

The parties have stipulated that the arbitrator is to decide whether the Grievant's termination violated the "age discrimination" provisions of State A Revised Code Sec. 4112 14.5 This provision provides that:

> "(A) No employer shall discriminate in any job opening against any applicant or discharge without just cause any employee aged forty or older who is physically able to perform the duties and otherwise meets the established requirements of the job and laws pertaining to the relationship between employer and employee."

The leading case cited by the Grievant is that of Barker v Scovill, Inc 6 State A St 3d, 146 (1983). That case indicated the following analytical framework, relying on the applicable federal authorities.

> "As modified to fit a claim of age-based wrongful discharge, Plumbers and McDonnell Douglas require first that the plaintiff establish a prima facie violation of R C 4101 17, by showing (1) that he was a member of the statutorily-protected class, (2) that he was discharged, (3) that he was qualified for the position, and (4) that he was replaced by, or his discharge permitted the retention of, a person who did not belong to the protected class.
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> In order to avoid an adverse finding, the employer-defendant must then, under the second step of the Plumbers and McDonnell Douglas analysis, provide a legitimate, nondiscriminatory reason for plaintiff's discharge Finally, if defendant does advance permissible grounds for the dismissal, plaintiff must counter and prove by a preponderance of the evidence that the reasons which defendant articulated for the firing were merely a pretext for unlawful discrimination.. Thus, a failure either to set forth facts which constitute a prima facie case of employment discrimination or to issue the requisite evidentiary rejoinder to the asserted lawful basis for the subject discharge mandates the dismissal of an R C 4101 17 action "

The preliminary aspects of the Barker test need not be belabored. Both the Company and the Grievant agree that the age discrimination issue turns on whether the Company's advanced articulated reasons for the firing were pretextual or not. The main evidence cited by the Grievant for the claim of pretextuality is that the Grievant contacted the Company's Pension Department in City C, Michigan on August 5, 1999 to explore the subject of early retirement.

There is no evidence indicating that such a call was not made. But, to have had any influence on the decision making process concerning the Grievant's discharge, the fact of that telephone call would have obviously have to have been communicated to the decision makers There was no such evidence, and Ms. Person 1 denied knowing about the call There certainly was no evidence that the matter was mentioned to the Grievant during the course of the investigation and/or that there were any other specific remarks indicating any gerontophobia on

the part of the decision makers. Aside from this aspect, there is no indication as to why such an inquiry would trigger the Grievant's discharge. The Company claims that the Grievant's early retirement benefits had long since vested. One would suppose that if Ms. Person 1 were eager to get rid of an aged administrative retail assistant, she would have welcomed the prospect of the Grievant going on early retirement. In any event, the two other employees discharged at the same time that the Grievant was discharged, i.e. Ms Person 8 and Ms. Person 7, were not above the age of 40 at the time of their discharge and were thus not within the protected class. This tends to indicate that the reason asserted for the Grievant's discharge were not pretextual ones directed solely at the Grievant because of her age.

The Grievant's post-hearing brief also relies upon the Person 3 and Person 4 cases discussed above. Both of these employees were outside the protected class, i.e. e. under 40 years of age. But, for essentially the same reasons discussed above, the arbitrator is not satisfied that these two cases furnish an example of disparate treatment based on age.

The State A provisions are considered governing rather than the federal ones.

VI. CONCLUSION

To the extent that it may not be otherwise clear, the first stipulated issue, i.e. that concerning the merits of just cause is answered in the negative, i.e. the Grievant's termination was for just cause. The second stipulated issue, i.e. that concerning whether the Grievant's termination violated the `"age discrimination" provisions of State A Revised Code Sec 4112 14 is also answered in the negative, i.e. it did not violate that provision. The award draws its essence from the arbitrator's interpretation of the stipulated issues because it is these provisions which the Grievant has cited.

VII. AWARD

Grievance denied.

Jerry A. Fullmer

Arbitrator

6th day of February, 2001