Glendon #3

ARBITRATION

EMPLOYER

-and-

EMPLOYEE

SUBJECT

Termination for multiple consecutive "no call/no show" days; alleged discrimination and retaliation.

ISSUE

Was Employee's employment terminated for just cause?

CHRONOLOGY

Termination: September 26, 1997

Termination Appeal filed: October 6, 1997

Arbitration hearing: April 14, 1998

Transcript of hearing received: May 13, 1998

Award issued: June 11, 1998

SUMMARY OF FINDINGS

Termination of appellant's employment was for just cause, based on either the stated ground of multiple consecutive no call/no show days or the fact that he abandoned his job. Appellant presented no proof of discrimination or retaliation by the Employer, and evidence showed that it reasonably accommodated his needs and desires regarding job assignments and schedule. Therefore his appeal is denied.

BACKGROUND

Appellant Employee's date of hire by the Employer as a full-time employee was January 18, 1994. (He worked a few summers before that as a temporary employee.) His last day of work was September 3, 1997. The Employer terminated his employment on September 26, 1997 for the stated reason that he was "no call/no show" for more than three consecutive scheduled shifts. The Employer took such action in accordance with a policy announced in a "Notice To All Team Members," dated March 20, 1992, which in pertinent part read as follows:

> FAILURE TO WORK YOUR SCHEDULED HOURS WITHOUT NOTIFYING YOUR FIRST ASSISTANT OR THE PERSON DESIGNATED BY YOUR FIRST ASSISTANT DURING YOUR SCHEDULED TIME WILL BE CONSIDERED A NO CALL/NO SHOW.
>
> TEAM MEMBERS WHO FAIL TO CALL OR SHOW UP FOR THEIR SCHEDULED HOURS WILL RECEIVE DISCIPLINARY TIME OFF WORK WITHOUT PAY UP TO AND INCLUDING DISCHARGE. IN ADDITION, ANY TEAM MEMBER WHO IS NO CALL/NO SHOW FOR THREE CONSECUTIVE SHIFTS WILL HAVE THEIR EMPLOYMENT TERMINATED FOR REASON.

It is undisputed that appellant neither reported for work on his scheduled shift nor called his first assistant (or anybody else at the Employer) on September 4, 5, 6, 9 and 10, 1997.

He did not report for work on September 2, either, but his second level supervisor, Person 1, called him that afternoon and set up a meeting for September 3, at which appellant was given a "Positive Discipline Memo" for recurrent absenteeism. The disciplinary step marked on the memo was "Written Reminder." The "Description of Incident" was "WBI -- 8/16 & 8/20 & 8/21 & 8/22." (WBI stands for "won't be in," denoting that appellant was absent on each of those days but reported such absence by

calling in.) The Notice also listed three previous disciplinary actions for absenteeism: "casual discussion" on May 21, 1997; "Oral Reminder" on June 6; and a "Written Reminder" on June 25. In the box entitled "Comments," the September 3 notice said: "Next Step - DML."

DML stands for "Decision Making Leave," which is the third disciplinary step listed at the top of the Positive Discipline Memo form. According to Person 2, appellant's First Assistant (direct supervisor), that is a day off with pay, during which the employee is to think about his future with the Employer. Person 2 said appellant also was told verbally during the September 3 meeting that the discipline if he missed another day would be a decision making leave. She also testified that after grievant said he was missing days because he had sore feet, Person 1 asked him what kind of job he wanted and appellant responded that he would like a sit-down job with less noise and vibration than was typical in the Retail Support Center where they worked. Person 2 said no such jobs were available at that facility and the only one she knew of was a third shift position at another facility. However, she explained that appellant already had the closest thing at the RSC to a sit-down job: an auditing position in the "inter-box carousel area," to which he had been assigned pursuant to notes from a podiatrist who recommended that he "take 30 minutes off his feet per each hour worked" based on a diagnosis of "Metatarsalgia Bilateral."

Person 1 called appellant again on September 10 and asked him to attend another meeting the next day, which he did. At that meeting, when asked why he had neither reported for work nor called on his preceding five scheduled work days, appellant gave two responses: first, that he did not feel up to working on September 4, understood he

would be fired if he did not report because Person 1 had told him on September 3 that he would be if he missed one more day, and decided to save the Employer the trouble of firing him; second, that he felt he couldn't keep doing his job and wanted to get away from the noise and vibration and "get healthy." Person 2 recorded those statements in notes made during the meeting, and appellant did not dispute their accuracy. She also testified (and her notes so reflect) that she reminded him that he had been told his next discipline for absenteeism would be a decision making leave, not termination.

At the conclusion of the September 11 meeting, Person 1 told appellant he was not terminated but was "suspended until further notice," the matter would be investigated further, and OMP Relations would review it and recommend a final disposition. Senior OMP Relations Specialist Person 3 testified that after review he recommended termination in accordance with the published no call/no show policy, to which he said there were no exceptions other than circumstances making it impossible for an employee to report or call. Person 3 said he was satisfied from reviewing documents and talking to Person 1 and Person 2 that appellant had not been told he would be fired for his next absence, and no exception was warranted in this case. He said he made that recommendation to Person 1, who concurred and carried it out by meeting with appellant and informing him of his termination.

In arbitration appellant gave essentially the same explanation as he gave to Person 1 and Person 2 on September 3. He said he understood he would be fired if he missed one more day of work for any reason after September 3, and since he did not feel he could continue in his assigned position with the foot pain he was experiencing and the Employer had not offered him a different assignment, he simply did not bother to go to

work or call to say he wouldn't. He admitted receiving the Positive Discipline Notice saying the "next step" would be a "DML," but said he merely put it in his locker without really reading it. He therefore asserts that termination for alleged no call/no show violations was a fiction and could not be for just cause because in fact he was terminated for being absent and his absences were due to his physical condition.

Appellant said he did not receive the no call/no show notice, but admitted a general familiarity with the no call/no show policy. He said he knew he was supposed to call in before his shift if he would be absent, and he acknowledged he had received a day off for not doing so in June 1996. (Person 2 said it was her practice to give new employees a copy of the notice, but she had no proof or specific recollection of giving appellant one.)

In his written appeal of the termination, appellant indicated that he not only thought he had been terminated without just cause but also believed he was a victim of discrimination and retaliation. The form asks an appellant to specify what he believes is the basis for the alleged discrimination, "e.g., race, color, national origin, sex, age, religion, marital status, handicap, height, weight, veteran status or other," and appellant circled "other."

His explanation for that allegation was fourfold: that Person 1 made a comment to him in 1995, after appellant said he could not attend an RSC golf outing that August, that "it was the politically correct thing to do," which he took as an indication that people who went to such outings "would be treated favorably"; that another employee had told him another supervisor said he was "slow and worthless" and only had his job because his name was Employee; that Person 1 told him he was "treated special" because of his

name; and that Person 1 did not immediately give him a special schedule when he asked for one in April 1997. Appellant explained that he is involved in competitive rowing, for which he trains in the early morning hours, so he asked for a schedule other than the usual first shift start time of 7:30 a.m. He conceded the Employer did accommodate him in that regard, with a start time of 11 a.m. and a four-day week, and also granted him leaves of absence. But he complained that the schedule accommodation was not made sooner than it was and said he would have preferred to start an hour or so earlier than eleven o'clock.

The gist of his retaliation claim was that he did not get promoted or awarded a raise after he completed an internship and he felt that Person 1 and others retaliated against him in various ways (again having to do mostly with his desire for easier work or a schedule more to his liking) for complaining about that.

The Employer contends appellant's termination must be upheld because it is clear he was terminated strictly in accordance with the no call/no show rule, which has been consistently enforced and previously had been enforced against appellant himself, and under Section L. of the Termination Appeal Procedure an arbitrator is "bound by any applicable Employer handbooks, rules, policies and procedures" and upon a finding that an associate has "violated any lawful Employer rule, policy or procedure established by the Employer as just cause for termination . . . the associate's termination must be upheld." Regarding his claims of discrimination and retaliation, the Employer notes that appellant neither claimed nor proved he was a member of a legally protected class and points out that even if his foot problems were construed as a disability, it complied with his doctor's recommendation for time off his feet, although no such recommendation was

in effect in September 1997 in any event. As for the retaliation claim, the Employer argues there was no proof of retaliatory motive or action by Person 1 or Person 2 and notes that the termination decision was based on a recommendation by Person 3, who was not included in appellant's scattershot accusations of retaliation.

DISCUSSION AND FINDINGS

No matter what appellant may have understood his status to be under the Employer's progressive discipline system for absenteeism when he left the meeting with Person 1 and Person 2 on September 3, 1997, it is clear that his actual status was two steps removed from termination, not one. Had he bothered to read the Positive Discipline Memo he received that day, instead of merely tossing it into his locker and forgetting about it, he would have known that, because it explicitly stated that his "next step" would be a "DML." Thus his claim that he believed he would be fired for his very next absence, no matter when it was or what caused it, was either disingenuous or mistaken. And if it was mistaken, the mistake was his and he had only himself to blame for it.

It is equally clear that appellant was not terminated simply for recurrent absenteeism under the Positive Discipline procedure, but for being no call/no show on more than three consecutive days, and that such termination was based on and entirely in compliance with the Employer's no call/no show policy as enunciated in the March 1992 notice. It is not entirely clear that appellant ever got a copy of that notice, the Employer having presented no specific evidence to contradict his claim that he did not. But it is clear that he was generally aware of the no call/no show policy, knew that he was required to call in before any shift for which he was scheduled but would not report, had received previous discipline under such policy, and despite such awareness he did not call

in or report on September 4, 5, 6, 9 and 10. Thus it is undisputed that he was no call/no show on five consecutive days.

As stated in the no call/no show notice, "any team member who is no call/no show for three consecutive scheduled shifts will have their [sic] employment terminated for reason." There certainly is nothing unlawful about that policy, nor has appellant claimed there is. Thus it must be concluded that he violated a lawful rule or policy established by the Employer as just cause for termination, that he was terminated for that violation, and, as Section L. of the Termination Appeal Procedure requires, the termination therefore "must be upheld."

It also might be observed that even if appellant is taken at his word, one would have to conclude that the Employer had equally valid alternative grounds for termination. He said he simply did not bother to report for work and apparently had no intention of doing so ever again, for two reasons: to save the Employer the trouble of firing him for absenteeism, and because he "wanted to get healthy" and did not feel that he could attain that objective if he kept his job. He gave no indication of intention to take any action to get his job back until the Employer called him in and, after review, formally terminated his employment pursuant to the no call/no show policy. These facts compel a conclusion that appellant abandoned his job and the Employer would have had just cause, even without reliance on that policy, to formalize such abandonment by notice of termination.

His claims of discrimination and retaliation do not change this result, nor were they sufficiently coherent or substantive to warrant extended discussion. Essentially he harked back to past events and random comments that made him feel discriminated against, but produced no evidence whatsoever connecting them to the termination.

Furthermore, objective consideration of his complaints leads one to conclude that if there was any discrimination in this case it was in appellant's favor, not to his disadvantage.

His personal desires to work an unusual schedule and his podiatrist's recommendations that he have a job that permitted him to be off his feet at least thirty minutes per hour were accommodated, as were his requests for leaves of absence. He may have preferred a slightly different starting time even more to his liking than 11 a.m. and working conditions totally free from noise and vibration and permitting him to sit down all the time; but it is not clear that he ever clearly expressed those desires prior to September 3, 1997, and it is clear that the Employer had no obligation to fulfill them and did not discriminate against him, because of his name or for any other reason, by not doing so. Nor is there any proof of retaliation in the termination, as to which the primary decision maker was Person 3, with whom appellant had no day-to-day relationship and to whom he ascribed no discriminatory or retaliatory motive in any event.

Having read, heard and carefully considered all of appellant's various complaints and recriminations about what he perceived as acts of discrimination or retaliation, I am convinced they amounted to nothing more than that: subjective perceptions, having no basis in reality and demonstrating an unfortunate tendency toward self-absorption on appellant's part rather than any improper motive or action by the Employer. Accordingly, his claims of discrimination and retaliation are rejected, the termination of his employment is found to have been for just cause and is upheld, and his appeal is denied.

AWARD

Employee's appeal of the termination of his employment is denied.

Paul E. Glendon,

Arbitrator

June 11, 1998