

Glendon #5

ARBITRATION

EMPLOYER, INC.

-and-

EMPLOYEE

Termination Appeal

SUBJECT

Termination for conduct unbecoming an Employer team member; alleged harassment of and interference with fellow employee and insubordination.

ISSUE

Was Employee terminated for just cause?

CHRONOLOGY

Termination: June 17, 1998

Termination appeal filed: June 23, 1998

Arbitration hearings: March 11 and 12, 1999

Briefs received: May 6, 1999

Award issued: June 5, 1999

SUMMARY OF FINDINGS

Appellant's continued harassment of and interference with a fellow employee, in spite of repeated counseling and warnings and in defiance of direct orders to cease such misconduct, violated Employer rules and was just cause for his termination.

BACKGROUND

Appellant Employee worked for the Employer approximately eight years, all in the Loss Prevention Department at Store No. 65. At the time of his termination, on June 17, 1998, he was a Greeter. As such, he was assigned to a post at the main customer entrance to the store, where he greeted customers, offered assistance, and maintained surveillance for purposes of protecting customer and employee safety and preventing loss of store assets. His only duties away from that location were to attend to first aid kits and a trash compactor on the west wall of the store near the grocery office. The reason for his termination, as listed on the Termination Change of Status form, was "conduct unbecoming an Employer team member."

Specifically, his alleged misconduct involved continued harassment of and interference with a fellow employee and insubordination in that he persisted in such misconduct in defiance of management warnings and directives to end it, in violation of Employer and Loss Prevention Department rules which prohibit such behavior and identify it as a basis for disciplinary action "up to and including discharge." The Department Rules in question are set forth in the Department Code of Conduct Manual as follows:

Conduct Unbecoming a Loss Prevention Associate

- Insubordination or willful disobedience of assignments or instructions.
- Threatening, intimidating, coercing or interfering with any associate at any time or using abusive language toward an associate.
- Sexual harassment or harassment of any nature to another person.

The other employee involved was Person 1, the Hardware Department Team Leader. Appellant and Person 1 began dating in early March 1998. (That in itself was not a problem; the Employer has no policy against employees dating or even marrying each other; in fact Person 1

subsequently married one of her subordinates in the hardware department, Person 2, and took his name as her own.) Appellant took their relationship very seriously, so much so that he purchased an engagement ring and tried to give it to Person 1 on two occasions. Although they had picked out the ring together, she did not accept it from him because she was not ready to become engaged. In April, Person 1 began having concerns about the relationship: that it was developing too fast, that appellant was paying her too much attention and spending too much time with her at work; that in doing so he was acting unprofessionally at work; and that he was not allowing her enough private "space." She expressed those concerns to appellant, as he acknowledged, but to no avail, and in early May she broke off the relationship, to his dismay.

For the next several weeks appellant persistently attempted to rekindle the relationship. He approached Person 1 repeatedly and tried to talk to her in the store, phoned her at work and at home, went to her home and refused to leave when asked to do so and generally made a complete nuisance of himself. He does not deny any of this; in fact, when questioned by store management after being suspended but before termination, he admitted he had been "harassing" Person 1 and his behavior toward her during those weeks accurately could be characterized as "stalking." Consistent with that, Person 1 went to court for a Personal Protective Order which was issued on June 5, 1998 and prohibited appellant from entering onto the property where Person 1 lived, following her or appearing within her sight, appearing at or interfering with her at her workplace, calling her on the phone, and approaching her in public places or on private property.

Person 1 also asked store management to intercede in the situation and make appellant leave her alone. It is undisputed that he was repeatedly counseled, both by his own first assistant, Loss Prevention Team Leader Person 3, and other members of store management, including

Store Director Person 4, and they warned him to cease all contact with Person 1 in the store. On May 23, Person 3 gave him this specific warning (as recorded by store detective Person 5, who sat in on the interview):

I've sat and talked to you once in here, once in the cafe about this. Once I had Person 5 ask you to leave. Like I said, I know there are emotions involved, but it's affecting work. So, for now on you are to have no contact with her, pretend like you don't even know her. If it happens again, you will be suspended right on the spot. This is official now, no contact at all. Have someone else do the first aid kits so you do not have to leave the front. She's talking about restraining orders. This is now considered a harassment issue.

Appellant's response to that warning was "all right, OK." Person 3 then asked him if he had "anything to add," to which appellant responded, "Sorry."

But three days later appellant was back at it again, following Person 1 around the store and trying to engage her in conversation although she repeatedly asked him not to talk to her. Person 5 observed that and Person 1 asked her and grocery manager Person 6, who was manager-in-charge of the store that day (it being Person 4's day off) to do something about it. Appellant was brought in for an interview with Person 6, in which he acknowledged the previous warnings, said he understood how serious the situation was, and promised to stop contacting Person 1. Person 6 decided not to suspend him, in part because of those acknowledgments and promises on his part, and in part because Person 1 had said she did not want him to lose his job. But he warned appellant that if he "talk[ed] to Person 1 again, there will be a suspension," told him he would "talk to Person 4 on this," and asked, "Now do you clearly understand?" to which appellant gave an affirmative reply.

Appellant resumed pestering Person 1 the very next day, however, and Person 3 met with him again and gave him a written warning on a form called an Associate Interview Report (AIR). It reads as follows:

The reason for the report is: To document an unacceptable behavior. For the past two weeks your job performance has been unacceptable. You had been dating Team Leader Person 1. She then ended the relationship. Since that time, you have let the break-up affect your job performance. You have not been at your post. Instead you have been walking through the store looking for Person 1. This is not only a misuse of Employer time but a harassment issue. Person 1 has made it clear that she does not want to have any contact with you and I have told you numerous times the same thing. Still you leave your post to go and talk with her. That is considered insubordination. I also told you in our last conversation that if you attempted to contact her that you would be immediately suspended. Yesterday, 5-28-98, you again left your post and went to the hardware department to talk with Person 1. You were talked to again by the Manager-in-Charge but were not suspended. You have been given numerous chances to stop this behavior, but you have not. This document is to let you know that if you have any contact with Person 1, anywhere on Employer property again, you will be subsequently terminated.

Person 3 said he gave appellant the AIR near the end of his shift and made it clear to him in conversation that even such things as pacing back and forth near Person 1 and staring at her would be considered improper conduct and a violation of the directive to have no contact with her whatsoever. He also testified appellant read the AIR carefully, said he understood and agreed with it, and again said he was sorry.

Despite all of that, appellant returned to the store less than two hours after his shift ended, saw Person 1 in the café taking a break with a co-worker, remained outside the café for as long as she was there, pacing back and forth and staring at her, and when she left and walked back toward her department he followed her. Again he attempted to engage her in conversation, saying he wanted "to work things out." Again she told him she had no interest in that and asked if she would have to get Person 3 to make him leave her alone. He then left, saying he was going to see Person 3 himself, but Person 3 already had left the store and appellant apparently did too; but he came to Person 1's home again that night and refused to leave until she said she was going to call his mother to come and get him. (Appellant lived with his parents, and his mother also is a Employer employee at Store No. 65.) Person 3 learned all this the next day and reported it to

Person 4, who called appellant in for another interview, during which appellant admitted he had come back to the store after receiving the AIR and made contact with Person 1, even though he knew that would lead to termination. He also admitted he had interfered with Person 1, engaged in disorderly conduct on store premises, been away from his post visiting and loitering in other areas of the store, and generally that his work performance had been unsatisfactory. He also acknowledged those were grounds for termination, but asked for another chance on the condition that management "make sure I'm where I'm supposed to be" at all times and "if I'm not where I'm supposed to be, I'm done."

Person 4 reminded appellant that he already had been given numerous warnings and additional chances to reform his behavior, which appellant acknowledged. Then he suspended him pending further investigation and consultation with the Employer's Office of Management and Professional Relations. Appellant was brought back to the store for still another interview on June 8, during which he admitted harassing and stalking Person 1, and ultimately Person 4 decided, consistent with OMP's recommendation and after appellant declined the opportunity to resign with severance pay, to terminate him. Appellant then filed a Termination Appeal Form, in which he stated he believed he had been terminated without just cause because the Employer had asked him more about his relationship with Person 1 off work than in the store and that they "had a good relationship, until her superiors caused interference and put pressure on her to end our friendship."

Consistent with those assertions, in arbitration appellant testified that even though he had harassed and interfered with Person 1 after she broke up with him, had failed to reform his behavior despite repeated counseling and warnings from store management, and had defied direct orders to refrain from any and all contact with her even though he had been specifically

warned that such contact would lead to (first) suspension and termination, he still believes that store management did not like Person 1 dating him, put pressure on her to break off their relationship, and treated him unfairly by being more concerned with the effects of his harassment and interference on Person 1 than with his emotional travail over the break-up. He also said he thought store management should have offered him professional counseling and assistance to deal with his emotional problems, although he conceded he never asked for any. He also conceded he had a long talk with Person 4 in which the store director listened to his feelings about the relationship with Person 1, but complained that Person 4 offered him no real emotional support, only unfeeling advice to "move on" from the break-up.

The Employer contends appellant's termination was fully justified by his admitted violations of Employer rules and defiance of specific warnings he received both verbally and in the AIR. It argues his complaints about unfair treatment are totally unfounded and points out that if he felt need of counseling – a need he never expressed to management –he could have obtained it any time through the Employee Assistance program, which he surely knew about after eight years of employment and which is prominently mentioned in the Team Member Handbook.

Appellant contends his termination was unjust because the Employer did not direct him to or offer him counseling through the Employee Assistance Program, and because management did not intervene in a more positive manner to help him cope with his emotional trauma after the break-up with Person 1. In light of his fragile emotional state at that time, appellant argues he did not intentionally violate any Employer rule or harass, stalk or interfere with Person 1. He also argues he was treated unfairly in that the Employer did not give mitigating consideration to his long service and lack of previous discipline.

DISCUSSION AND FINDINGS

It probably is true that appellant's emotions and judgment were adversely affected by his anguish over and unwillingness to accept the break-up with Person 1. But it also is true that each time a manager talked to him about his admittedly inappropriate behavior he did not ask for any help in dealing with those problems or indicate any lack of understanding about the inappropriateness of his actions. To the contrary, every time he acknowledged he had acted inappropriately and promised to stop.

It also is true that the managers were remarkably patient and sympathetic. Appellant may not have felt Person 4 was sufficiently supportive in suggesting that he "move on" from the broken relationship with Person 1 and be open to other romantic possibilities. But if so that feeling says more about appellant's self-absorbed attitude than about the store director's motives or actions, as does his continuing complaint that management showed more concern for Person 1 than for him. Viewed objectively, that advice in particular and the managers' interaction with him during that period in general were reasonable and supportive. He gave them ample reason to take an entirely disciplinary approach to the situation, but until he made it clear that he would not respond appropriately their approach was more in the nature of friendly concern. Perhaps Person 4 or one of the other managers could have suggested he call the Employee Assistance Program. But they cannot be said to have acted unreasonably or unfairly by failing to do so, since the existence of that program was well publicized and known to appellant and he was free to call for help on his own initiative.

The plain facts were that appellant was so intent on winning Person 1 back that he refused to accept or come to terms with the end of that relationship. That being the case, he cannot avoid personal responsibility for his actions by blaming management for not being

sufficiently sensitive to his emotional trauma or sufficiently proactive in getting him help that he refused to acknowledge any need for. Those managers had a store to manage and even if they were less concerned with his lovelorn anguish than with the problems he was causing Person 1, which were interfering not only with her personal life but also with store operations, there was nothing unfair or unreasonable about that.

The argument that because of his fragile emotional state appellant cannot be said to have intentionally violated Employer rules or refused to comply with managers' orders is ingenious, and his attorney deserves full marks for it. But there is no evidence to support it. Grievant acknowledged in his arbitration testimony that he was fully aware of what he was doing, knew it was wrong, and understood the warnings that he must cease and desist from such misconduct if he wanted to keep his job. He gave similar responses when the managers counseled and questioned him, even going so far as to voluntarily characterize his behavior as "stalking." At no time has he claimed that he lost control of his faculties or the ability to reason; summing up his state of mind in his arbitration testimony, he said he was "heartbroken" and although he claims he finally is over that, he still blames management for forcing Person 1 to break off the relationship. That is a preposterous claim for which there is not a whit of evidentiary support, and again says much more about his own frame of mind and unwillingness to accept responsibility for his own misconduct than it does about any purportedly unjust motive or action by the Employer.

It is clear that appellant did violate Employer rules prohibiting harassment and interference with other employees and that by persisting in such behavior in defiance of repeated counseling and explicit verbal and written warnings he also was insubordinate. It is equally clear that, unsound though his judgment may have been, those violations were intentional and the

Employer was fully justified in holding him to account for them. With regard to appellant's length of service and lack of prior discipline, they certainly were deserving of consideration, but they hardly can be said to outweigh the extremely serious and repetitive nature of his misconduct.

Furthermore, even if I were inclined to give appellant more credit for those arguably mitigating factors than the Employer did, that could not be a basis for setting his termination aside or reducing it to less severe discipline, because under the Termination Appeal Procedure an arbitrator is "bound by any applicable Employer handbooks [or] rules" and

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.

Appellant's rule violations are described in the Team Member Handbook as grounds for possible "discipline, up to and including discharge." Therefore his termination "must be" and will be upheld.

AWARD

The appeal of Employee's termination is denied.

Paul E. Glendon,

Arbitrator

June 5, 1999