Kelman 1

FEDERAL MEDIATION & CONCILIATION SERVICE

In the Matter of the Arbitration between

EMPLOYER

-and-

UNION

Grs: Employee 1 and Employee 2

Before Arbitrator Maurice Kelman

OPINION AND AWARD OF THE ARBITRATOR

The matter was heard on August 22, 2002, in City A, Michigan. Post hearing briefs were exchanged on September 18.

Before the arbitrator are the discharges of Employee 1 and Employee 2. Hired in July 2001 as welders, the grievants were terminated eight months later for alleged violation of the company's workplace violence policy. Article 14, sec. 1 of the CBA guarantees that "the Company shall not discharge or suspend any employee without just cause." The question accordingly is whether the employer has demonstrated sufficient cause for the discharges in this case.

Factual background

Employee 1 and Employee 2 lived together for a number of years but separated late in 2001, not long after hiring in at Employer. Employee 2 began dating a woman named Person 1, but in January 2002 the grievants reconciled and Employee 2 broke off his relationship with Person 1. Person 1 did not go gentle into the good night of extinguished romance. Instead she mounted a campaign of verbal harassment against her perceived rival, Employee 1, featuring angry confrontations at grievants' home and outside the plant as well as many abusive phone calls. Once Person 1 even reached Employee 1 in her hospital bed to express the hope that "your heart busts." On another occasion Person 1 boasted of having done "eight to fifteen." Employee 1 checked with a friend in the police department and found out that Person 1 indeed had served prison time on a manslaughter conviction for killing the other woman in a love triangle.

On February 26 Person 1 escalated from tongue lashing to physical assault. The grievants left the plant at the noon lunch break and were walking across Some highway toward Employee 1's car, which was parked on a lot often used by Employer workers, next to a tavern. An automobile driven by Person 1 suddenly turned from a side street onto southbound Some and swerved into the turn lane where Employee 1 and Employee 2 were waiting for the traffic to clear, forcing them to leap back into the northbound lanes to avoid being struck.

When grievants got to their car they drove to a nearby gas station and placed a 911 call from the outdoor pay phone. Then they drove back to the parking lot and sat in the car to wait for the police to arrive. Person 1 circled back on Some and pulled into the lot alongside the driver's side of the Employee 1 vehicle. Person 1 jumped out, wielding a metal baseball bat. Employee 1 reached into the back seat for her son's baseball bat. (Grievants maintain that it was plastic but, as will appear, there was contrary testimony on the point.)

No blows were struck but after a heated verbal exchange Employee 1 got back into her car at Employee 2's urging. Person 1 returned to her own car, backed up and pulled around to the passenger side of the Employee 1 car. She opened her door and began to claw at Employee 2's face with her long acrylic nails. When she bit his finger, Employee 2 pushed Person 1 back into her car. It is uncertain whether he pummeled her with his fists or whether Person 1 banged her head against the steering wheel as she was pushed, but there is no question that she sustained an impact to her forehead.

Employee 1 pulled Employee 2 away and after locking their car the grievants began running toward the plant. As they were about to cross Some highway, Person 1's automobile came barreling past them, forcing their quick retreat to the curb. When they got across the road and entered the plant Ms. Employee 1 was still holding her baseball bat.

Inside the front hallway they encountered the production Manager 1 and Supervisor 1, one of the supervisors. Manager 1 asked Employee 1 what she was doing with a baseball bat (which he is positive was aluminum, not plastic) and she replied that some woman was chasing her and she had already called the police. Meanwhile Person 1 drove on to the company's visitor lot in front of the plant and came out of her car with her bat in hand. She started toward the front door, then turned back and put the bat in the car trunk before entering the building.

Employee 1 testified that she implored Manager 1 to bar Person 1 from entering but her nemesis was allowed to come inside. Person 1 told Manager 1 that "they jumped on me" and said she needed to telephone for the police. She was bleeding from her fingertips and had a knot on her forehead. The women were shouting threats at each other and, according to Manager 1, Employee 1 was waving her bat at Person 1. (Both grievants deny this, but I

credit Manager 1's account.) The production manager inserted himself between the combatants and they did not come to blows.

Hearing the commotion, office Manager 2 hurried from the lunch room to the front hall. She took charge of Person 1 and steered her into the front office. Employee 2 meanwhile grabbed the bat from Employee 1 and disappeared into the plant with it; the bat was later found in the break room. Within minutes the police arrived. After interviewing the participants and listening to the accusations and counter-accusations (Person 1 claiming to a skeptical officer that she had been attacked and robbed by the grievants), the police located and confiscated both bats, escorted Person 1 off the premises, but issued no tickets and made no arrests.

Manager 2 debriefed the grievants in the presence of a steward. She told them they were suspended pending a determination under the company's policy against workplace violence. After securing statements from some of the witnesses and conferring with plant Manager 3 and human resources Manager 4, Manager 2 informed the grievants the next day that both were being terminated as Employer employees.

Anti-violence rules

The Company has adopted a written set of rules entitled "Workplace Violence Policy & Procedure." Copies of the policy, effective January 1, 2000, were furnished to every employee, including the grievants. Declaring a "zero tolerance for violence," the document defines violence broadly to include: "physically harming another, shouting, shoving, pushing, harassment, intimidation, coercion, brandishing weapons, and threats or talk of violence." The policy applies to rank and file workers and supervisors alike and violators are subject to discipline "up to and including discharge."

Both grievants are accused of this Rule 6 infraction:

> Harming, or threatening to harm, any person or property on Company premises, or off premises to the extent that the Company in its discretion, believes that such conduct does or may impact the work environment, or at Company functions, or any Company property wherever located.

Also cited against Employee 1 is Rule 1:

> The use, possession, or sale of any weapon on Company property, or at Company functions. Weapons include, by way of example and without limitation, any firearm, any device principally designed to cause bodily injury, any knife, or any explosive device.

Discussion

Article 5, sec. 2 of the CBA expressly empowers the company to "make and establish any rules and regulations which it considers necessary or advisable for the safe, effective and efficient operation of the business, and to determine the penalties for violation of such rules." The section goes on to state: "Such rules shall not be applied in a discriminatory fashion and the application of such rules shall be subject to the Grievance Procedure." Thus any disciplinary action, even when founded on a self-styled "zero tolerance" policy, has to pass muster under the traditional just cause standard set forth in Article 14 (Discharge or Suspension).

A standard treatise, Borenstein et al., Labor and Employment Arbitration (2d ed. 2001), sec. 19.02[5][e], makes this pertinent observation:

> No-fighting rules, including "zero tolerance policies" must be enforced reasonably. Employers sometimes argue that promulgation of a rule making fighting a dischargeable offense justifies automatic discharge in cases of violence without regard to just cause. There is general agreement among arbitrators, however, that just cause standards apply. Mitigating circumstances such as self-defense and

provocation must be considered.

The parking lot hostilities

When Person 1 accosted grievants in their parked car, Employee 1 entered into a shouting match with her. Both women waved their bats around but neither struck or had any physical contact with the other -- though Employee 1 may have pounded her bat on Person 1's car. Physical violence occurred only when Person 1 scratched and bit Employee 2 and he reacted by punching or shoving her. Because this initial affray did not take place on company property but happened at an off-premises location during the lunch period, the relevance of the Employer work rules is open to doubt.

The Employer points out that Rule 6 in terms reaches an employee's off-premises acts of violence "to the extent that the Company in its discretion believes that such conduct does or may impact the work environment." Weighing against a job connection is the fact that the parking lot fight was not between fellow employees -- the core problem which led to adoption of the new company policy -- but was a personal dispute with someone who was a complete stranger to Employer. It is true that the parking lot altercation occurred within sight of the plant -- and was witnessed by at least one Employer employee on his lunch break, Sean McAfee -- but it is not clear how "the work environment" was "impacted." There is no indication from the testimony that, for example, other Employer employees were placed in fear for their own safety or that production at the plant was disrupted. Off-duty or off-premises conduct can be the basis for discipline only if it (1) harms the employer's business, or (2) adversely affects the employee's ability to do his job, or (3) causes other employees to refuse to work with the offender. W.E. Caldwell Co., 28 LA 434 (Kesselman 1957). That nexus to employment is missing here. If the

conflict with Person 1 had ended in the parking lot next to the tavern -- i.e., if Person 1 had gone home to lick her wounds or had chosen to call the police from the gas station instead of forcing her way into the plant -there would be no grounds for disciplinary action against either grievant. The affair would not be a matter of concern to the company and, for the grievants, would simply be remembered as the lunch hour from hell.

The confrontation inside the plant

The hostilities unfortunately did not stop on the other side of Dort highway but continued onto company premises when Person 1 brazenly intruded into the plant, ostensibly to call the police but in reality to make trouble for the grievants. The question is whether Mr. Employee 2 or Ms. Employee 1 proceeded to commit any on-site violations of the Workplace Violence policy. The short answer in Employee 2's case is no. He did not engage with Person 1 at all, and at that juncture was little more than a bystander. Not a scintilla of evidence indicates that he did any of the things defined as "violence" in the written policy: "physically harming, shouting, shoving, pushing, harassment, intimidation, coercion, brandishing weapons, and threats or talk of violence."

On the other hand, I accept Manager 1' version that Employee 1 traded verbal threats with Person 1, which she punctuated by waving her bat. In the circumstances the bat -even if it was plastic and not metal -- represented a weapon, since any object, including materials commonly found in the workplace, may be a weapon when used to threaten or inflict bodily injury. See, e.g., Southern Iron & Equipment Co.,65 LA 694 (Rutherford 1975) (upholding discharge for assaulting supervisor with a piece of iron).

Self-defense

The employer does not contend that its anti-violence policy requires Employer employees to practice Gandhi-like pacifism in the face of physical attack. Even the "zero tolerance" policy allows for "simple self-defense" in those circumstances. Employer's brief, p. 7 n.2. But the company believes both grievants should be considered willing participants in the fight with Person 1. They forfeited the justification of self-defense, it is argued, when they stepped out of their car to confront the aggressor Person 1 in the parking lot rather than retreating immediately by car or on foot to a place of safety -- such as the plant or the gas station from where they had just called the police. This of course assumes that the parking lot conflict is actionable under the company's disciplinary rules, and, as noted, I do not consider the off-duty/off-premises event to be one that was related to Employer employment.

In any event the case law the company cites for its duty-to-retreat argument appears to address the proper use of lethal force against the aggressor. As stated in People v. Riddle, 467 Mich. 116, 120 (2002): "One who is involved in a physical altercation in which he is a willing participant -- referred to at common law as a 'sudden affray' or a 'chance medley' -- is required [court's emphasis] to take advantage of any reasonable and safe avenue of retreat before using deadly force [my emphasis] against his adversary, should the altercation escalate into a deadly encounter." Employee 1, it bears repeating, never actually struck Person 1 at all. And Employee 2's pugilistic response to being scratched and bitten was neither lethal nor extreme. In the heat of the moment one does not finely calibrate the minimum amount of force needed to repel the assailant. Moreover, retreat instead of resistance was not necessarily risk-free, as evidenced by Person 1's second attempt to run the

grievants down with her car as they were fleeing back to the plant.

The grievants' defensive actions during the parking lot encounter closely parallel the Sherisse Spottsville case. In that prior case a supervisor -- Spottsville -- pulled a knife on the wife of a fellow Employer employee (Tillman) who had been her paramour. When the man intervened, Spottsville struck and scratched him. He fought back and managed to take the knife away from the assailant. Ms. Spottsville was discharged but no disciplinary action was taken, or even seriously considered, against Mr. Tillman. I am sure that Manager 2, the disciplinarian in both Spottsville and the present case, did not intentionally discriminate against Employee 1 and Employee 2, but I am unpersuaded by the employer's attempt to distinguish Tillman from the grievants. At least in the parking lot phase, Employee 1 and Employee 2 were no more "willing participants" in a fight than was Mr. Tillman.

The point at which the excuse of self-defense fails is when Ms. Employee 1 carried her bat into the plant, failed to surrender it to Manager 1, and brandished it against the unarmed Person 1, all the while vowing to "beat her ass." While Person 1 had no business following the grievants into the plant and perhaps should have been kept from entering the building, the fact remains that once inside the vestibule she was surrounded by three or four men and was hardly in a position to injure Employee 1. It is undeniable that Person 1 was the instigator and the principal culprit in this whole affair, but unfortunately during the endgame Employee 1 "lost it" by needlessly wielding a bat and threatening to harm her adversary on company property.
I have found no basis for disciplinary action against Employee 2, but the question remains as to penalizing Ms. Employee 1 for her unjustifiable behavior on plant premises.

No one doubts the employer's (or for that matter the union's) strong commitment to maintaining a nonviolent workplace. But "zero tolerance" does not supersede just cause either in

the sense of measuring individual culpability or choosing a suitable penalty. The company policy itself does not automatically require every violator to be fired without consideration of relative culpability or the presence of mitigating facts. It declares that offenders are subject to discipline "up to and including "discharge -- the clear implication being that not every incident necessitates the loss of the wrongdoer's job. Inasmuch as Employee 1 is nine parts victim and only one part transgressor, discharge is much too draconian a punishment. A two week disciplinary suspension, on the other hand, would be an appropriate sanction and is harsh enough to demonstrate to other employees the seriousness of the company's anti-violence policy.

A W A R D

1. The discharge of Employee 2 is set aside. The Company shall offer him immediate reinstatement with unimpaired seniority and shall make him whole for lost wages and benefits. Interim earnings, if any, shall be deducted in computing back pay.

2. The discharge of Employee 1 is set aside and her penalty is reduced to a suspension of 10 days. She shall be offered immediate reinstatement with unimpaired seniority and shall be made whole for lost wages and benefits with the exception of the 10 day wage penalty. Interim earnings, if any, shall be deducted in computing back pay.

MAURICE KELMAN, Arbitrator

Dated: October 4, 2002.