

Grissom #1

IN THE MATTER OF THE ARBITRATION BETWEEN:

EMPLOYEE, (This is a non-union arbitration award)

AND

EMPLOYER,

Termination - September 26, 2003

ARBITRATION OPINION AND AWARD

This Arbitration was conducted under Employer's APPEAL PROCEDURE on April 21, 2004 at the Hotel A in City A, (Joint Exhibit #1). Pursuant to the closing arguments of the parties and the receipt of the Transcript, this Arbitration Opinion and Award is rendered.

FACTS

This Appeal under Employer's APPEAL PROCEDURE was filed on September 30, 2003 by Employee alleging that her termination from employment on September 26, 2003 for violating the Employer's Theft Policy was not for just cause. Appellant Employee requests that she be reinstated and made whole for wages and benefits lost (Joint Exhibit #2). Ms. Employee, hired on October 19, 1989 with fourteen (14) years of service with the Employer, was a Greeter in the Loss Prevention Department at Store No. 24 in City A, assigned to the 11:00 A.M. - 8:00 P.M. shift, Monday through Friday. The issue in this case is whether under Employer's APPEAL PROCEDURE, the discharge of Appellant Employee was for just cause.

It is undisputed that Employer, Inc. maintains a Theft Policy as well as a Code of Conduct Manual for Loss Prevention Training. The Theft Policy is set forth below (Employer Exhibit #6).

Theft and Unauthorized Possession of Employer Property

Team members involved in or having knowledge of a theft or unauthorized possession of property from the Employer, fellow team Members, vendors, or suppliers will be terminated, regardless of the amount or value of the merchandise, their work record or length of service. Team members involved in theft are subject to prosecution.

Section 7 of Employer's Loss Prevention Training Code of Conduct states as follows (Employer Exhibit #3):

7. Theft

Loss Prevention team members who are involved in the theft of monies or property will be subject to termination. Loss Prevention team members who have knowledge of theft by a second party and do not take appropriate action will be subject to termination. Appropriate action would mean reporting theft to the Loss Prevention Team Leader or investigating the theft for the purpose of apprehension.

It has been established that Ms. Employee was the recipient of all policies and procedures contained in the Associate Handbook inclusive of the Theft Policy and the Code of Conduct Manual (Employer Exhibits #7 and 4). While these aspects of this case are not in dispute, it remains to be seen on the evidence, whether the termination of Ms. Employee was or was not for just cause. As such, a review of the testimony and documentation in this matter is now in order.

TESTIMONY

The Employer, in support of its position that the termination was for just cause, called former Loss Prevention Manager at Store No. 24 Person 1 who testified as follows: He was the immediate supervisor of Ms. Employee at the time of her discharge. Her job as a Greeter entailed meeting customers at the entrances and making certain that merchandise did not leave the store

inappropriately. If she observed any such developments, she was to ask the customer for a receipt and if none was produced, she was to report this to the Loss Prevention Office.

Mr. Person 1 testified further as follows: On September 16, 2003, a Store Detective advised him that she saw Ms. Employee take a fountain soda cup to the "Fountain Express" pop dispenser where she filled it without paying for the drink and left the store. It has been established that "Fountain Express" was installed in all of Employer's stores in early 2003; that customers and employees desiring to consume a pop drink from the dispenser, are supposed to get a plastic cup from any checkout lane, pay for the beverage there and then proceed to the dispenser to pour their drink. Refills are not permitted unless a second drink is purchased. Mr. Person 1 testified that he was told that Ms. Employee, after punching out, took a "Fountain Express" cup that she had at her work station, wiped it out and proceeded to walk through a U-scan self-service checkout lane but did not pay for another "Fountain Express" drink; that as denoted, she poured herself a drink and departed (TR. 15-22).

Mr. Person 1 testified further as follows: On September 18, 2003, he interviewed Ms. Employee who confirmed that she knew that free refills were prohibited. According to Mr. Person 1, Ms. Employee also stated that recently she had gone through U-scan #1 and paid for a refill with a complimentary coupon. But when he showed her a video tape which had captured her movements, it was clear that she had walked directly through the U-scan and past the cashier (Keith) without paying for the refill. Mr. Person 1 testified that at this, Ms. Employee gasped and said she had "forgotten", was in a hurry, had problems at home and was short of money. Mr. Person 1 also testified that at the interview, Ms. Employee stated that when the "Fountain Express" was first installed, she would regularly get refills but that when the signage went up - "PLEASE, NO FREE REFILLS", and Store Director Person 2 reminded staff that such refills

were not allowed, she only did it a few times thereafter (Employer Exhibit #1). Mr. Person 1 testified additionally that in response to his question as to why she continued to get free refills when she knew it was wrong, Ms. Employee said she did not know and realized it was "stupid." Ultimately, Ms. Employee acknowledged to Mr. Person 1 that on September 16, 2003 at the end of her shift, she had taken a "Fountain Express" cup from underneath her Greeter stand that she had purchased earlier in the day, wiped it out and then walked behind the U-scan stations through #4 without making any attempt to pay for another "Fountain Express" pop; that then, carrying her cup in hand, she went to the "Fountain Express" machine, filled it up with pop and left the store for the day (TR. 23-30).

Pursuant to her September 18, 2003 interview with Mr. Person 1, Ms. Employee prepared a statement of acknowledgment and admission in the terms set forth below (Employer Exhibit #2):

While working for Employer #24 in the capacity of a Greeter committed the following offense at the end of my shift on Tuesday the 16th of September.

I took my Fountain Express cup from underneath the Greeter stand that I had purchased earlier in the day and wiped it out. I then walked behind the U-Scan stations #1 - #4 and walked through #4 without making any attempt to pay for another Fountain Express pop. I carried the cup in my hand and then went down to the Fountain Express machine and filled it up. I then left for the day.

On at least two other occasions I have done the same thing and obtained a free drink by refilling my existing cup.

I admit that I was aware that refills were not allowed; however, I obtained them anyway and did not make an attempt to pay for them.

The value of one Fountain Express drink with tax is \$1.05.

I admit that I intended to deprive Employer of the use, benefit or payment of the product I took by not paying for it.

I make this statement voluntarily and no threats, promises or pressures of any kind have been used to make me answer any questions or to make this statement.

I understand this statement may be used at any hearing.

I understand this statement to be true to the best of my knowledge.

Employee /s/

Date: 9-18-03

Mr. Person 1's written statement on the matter under review is in this record as Employer Exhibit #5. His testimony was provided in conformance with this incident Report. Mr. Person 1 testified that on September 18, 2003, on-duty Manager Person 3 suspended Ms. Employee pending further investigation and that he forwarded all related information to the Human Resources Office recommending that Ms. Employee be terminated for violation of Employer's Theft Policy; that subsequently on September 26, 2003, pursuant to the confirming recommendation of Human Resources Director Person 4, Store Director Person 2 effectuated Ms. Employee's termination (TR. 31-34).

Ms. Person 4, West-Central Human Resources Director, testified with respect to the Theft Policy in this record as Employer Exhibit #6. As a Retailer she advised, Employer with thousands of employees must protect its assets. Ms. Person 4 testified that on September 18, 2003, Mr. Person 1 had contacted her and forwarded both his Report and Ms. Employee's written Admission to her attention; that after a full review, she recommended termination to Store Director Person 2 who discharged Ms. Employee on September 26, 2003 (TR. 37-49).

This concluded the Employer's presentation.

Appellant Employee testified on her own behalf as follows: She acknowledged that she did not pay for the refill at issue. However, Ms. Employee advised that she did not intend to steal and had used poor judgment. She agreed that her actions were wrong but stated that she had gotten free refills many times in the past without anyone raising questions about it. Ms.

Employee also testified that she had heard that two (2) other store employees had previously been suspected of theft but were not discharged. Further, that she was told by a Greeter that an employee had walked out of the store with food merchandise but was allowed to return and pay for the consumable items (TR. 51-56).

Ms. Employee additionally testified that she felt it was unfair for the Employer to have provided an unfavorable reference in her attempt to secure a job at ANOTHER COMPANY. Whether this occurred has not been substantiated. Ms. Employee also stated that in her view, the Employer's charge that she had violated its Theft Policy, was an excuse to lay her off in connection with savings and cost cutting measures (TR. 57-61).

On cross-examination, it was established that Ms. Employee had not been involved in the investigations of the two (2) employees she alleged had been suspected of theft; had not observed any such actions and had only heard about these purported events from others. Likewise with respect to the employee she said had been permitted to pay for merchandise after returning to the store. Ms. Employee completed her testimony by stating that she believed that Employer, Inc. administered the Theft Policy inconsistently and that other Team Members had told her that they too had gotten free refills from the "Fountain Express" (TR. 62-64).

This concluded Appellant Employee's presentation.

On Rebuttal, Human Resources Manager Person 4 testified that layoffs within the Employer commenced on January 3, 2004, four (4) months after Ms. Employee's termination and that no Greeters were laid off. Further, that in her thirty (30) years with the Employer, many, many employees had been terminated for Theft; that in the matter of the Gas Station Team Leader who had taken food merchandise out to his car, he had returned to the store within one

(1) minute or so and paid for the consumables which apparently constituted his lunch (TR. 67-73).

This completed the presentations of the parties in this dispute.

ISSUE

Was the termination of Appellant Employee for just cause?

DISCUSSION

On September 26, 2003, Appellant Employee, a fourteen (14) year employee, was terminated for the violation of Employer's Theft Policy. It has been established by independent evidence and Ms. Employee's acknowledgments, that she was familiar with the Theft Policy as well as the contents of the Loss Prevention Code of Conduct and had been the recipient of both documents (Employer Exhibits #6 and 3). In this connection, Ms. Employee's responsibility as a Greeter in Store No. 24, was not only to welcome customers at the entrance(s) but to watch for individuals who might appear to be leaving the store without paying for merchandise. If such a person could not produce a receipt upon her inquiry, she was to alert the Loss Prevention Office. In other words, part of Ms. Employee's responsibility was to check on the honesty of others.

The Theft Policy, embodied in the Associate Handbook, is enunciated in clear and unequivocal terms, to wit:

Theft and Unauthorized Possession of Employer Property

Team members involved in or having knowledge of a theft or unauthorized possession of property from the Employer, fellow team members, vendors, or suppliers will be terminated, regardless of the amount or value of the merchandise, their work record or length of service. Team members involved in theft are subject to prosecution.

As denoted, under the Policy, any Team Member who is involved in or has knowledge of a theft or unauthorized possession of property, will be terminated regardless of the amount or

value of the merchandise, their work record or their length of service. A careful study of the evidence in this case finds that unfortunately for Ms. Employee, there are no mitigating factors which would serve to reduce the termination penalty and that her discharge was for just cause. This determination is predicated upon the evidence as set forth below.

It has been established through Employer witnesses, documentation and Ms. Employee's admissions, that on Tuesday, September 16, 2003, she took a "Fountain Express" cup she had kept underneath her Greeter stand, wiped it out to make it appear that it had not been used, then walked behind the U-scan stations through U-scan Station #4 without making any attempt to pay for another "Fountain Express" pop (refill). Ms. Employee then proceeded with cup in hand to the "Fountain Express" dispenser where she filled it up. She thereupon left the store having consumed the drink; drank it as she left or consumed it later.

Ms. Employee has acknowledged that on at least two (2) other occasions, she had obtained a free drink by refilling a cup she had retained. In this, Ms. Employee has admitted that she was aware that free refills were not permitted and that she knew that her actions were wrong. It has been established that the value of a "Fountain Express" drink is \$1.05 including tax. On September 18, 2003 during her interview with Loss Prevention Manager Person 1, Ms. Employee prepared a written statement of Admission comprehending the above description of events which took place on September 16, 2003 (Employer Exhibit #2).

The undersigned Arbitrator has given the most careful consideration to Ms. Employee's Arbitration testimony. Clearly, Ms. Employee regrets her actions but in expressing recognition that her conduct was wrong, she nevertheless allowed a certain defiance to enter in as she suggested that the Employer used the Theft Policy against her as a pretense to get rid of her. This aspect of Ms. Employee's testimony did not serve her well and does portend questions as to

whether she has accepted full responsibility for her actions. In any event, the Employer has established by clear and convincing evidence in conjunction with Ms. Employee's admissions, that her conduct on September 16, 2003 in obtaining a refill from the "Fountain Express" dispenser and not paying for it while knowing it was wrong, did constitute a violation of Employer's Theft Policy and was just cause for termination.

On the evidence as specified in this discussion, it is determined that the termination of Ms. Employee effective September 26, 2003, was for just cause and is upheld. Ms. Employee's Appeal is denied.

AWARD

The termination was for just cause and is upheld Ms. Employee's Appeal is denied.

David W. Grissom

Arbitrator

May 20, 2004