

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :  
 of a Dispute Between :  
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 LOCAL 150, SERVICE AND HOSPITAL : Case 30  
 EMPLOYEES INTERNATIONAL UNION : No. 42487  
 : A-4468  
 and :  
 :  
 MERITER HOSPITAL, INC. :  
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Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., 788 North  
 Jefferson Street, P.O. Box 92099, Milwaukee, Wisconsin 53202, by  
Mr. William S. Kowalski, appearing on behalf of the Union.  
 Axley Brynelson, 2 East Mifflin Street, P.O. Box 1767, Madison,  
 Wisconsin 53707-1767, by Mr. Michael J. Westcott, appearing on behalf  
 of the Employer.

ARBITRATION AWARD

Local 150, Service and Hospital Employees International Union,  
 hereinafter referred to as the Union, and Meriter Hospital, Inc., hereinafter  
 referred to as the Employer, are parties to a collective bargaining agreement  
 which provides for the final and binding arbitration of grievances. The Union,  
 with the concurrence of the Employer, requested the Wisconsin Employment  
 Relations Commission to appoint an arbitrator to hear and decide the instant  
 dispute. The Commission appointed Coleen A. Burns as arbitrator. Hearing was  
 held on September 20, 1989. The hearing was not transcribed and the record was  
 closed upon receipt of post-hearing briefs on October 30, 1989.

STIPULATED ISSUE:

Was the grievant, Mark Pierce, discharged for just  
 cause?

If not, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE:

Article III. Employer Rights

Section 1. Scope

The parties recognize that this contract addresses the  
 employer-employee relationship existing between the  
 Hospital and its employees in the collective bargaining  
 unit represented by the Union, and that the rights and  
 duties between them in their relationship are those of  
 employer and employee.

It is agreed that, except as otherwise expressly  
 limited by this Agreement, the management of the  
 Hospital and the direction of its work force including,  
 by way of example and not by way of limitation, the  
 right to select, hire and assign employees, promulgate  
 and enforce reasonable rules and regulations it  
 considers necessary or advisable for the safe, orderly  
 and efficient operation of the Hospital, direct and  
 assign work, determine work schedules, transfer  
 employees between jobs or departments or sites, fairly  
 evaluate relative skill, ability, performance or other  
 job qualifications, introduce new work methods,  
 equipment and processes, determine and establish fair  
 and equitable work standards, select and implement the  
 manner by which the Hospital's goals and objectives are  
 to be attained, and to discharge employees for just  
 cause or relieve employees from duty for lack of work  
 or other legitimate reasons are vested exclusively with  
 the Hospital, but this provision shall be construed to  
 harmonize with and not to violate other provisions of  
 this Agreement.

It is further understood that all functions of  
 management not otherwise herein relinquished or limited  
 shall remain vested in the Hospital.

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Article XXIV, Grievance and Complaint Procedure

Section 3. Arbitration

If the matter is not settled in STEP 4, the grievance may be submitted to arbitration upon written request of either party delivered to the other within ten (10) working days of the mediation meeting. Should the matter go to arbitration, the party desiring arbitration shall request the Wisconsin Employment Relations Commission to appoint a staff member of the WERC to serve as arbitrator for the dispute.

A. Limitations

The arbitrator shall not have the power to add, modify, or change any of the provisions of this Agreement.

B. Arbitration Cost

The fees and expenses for the arbitrator and the transcript of the arbitration hearing shall be borne by the party who loses the arbitration case. Each party shall bear the cost of its own witnesses, exhibits and counsel.

Article XXV, Discharge and Discipline

Section 4. Sequence of Disciplinary Action

Any employee may be disciplined for just cause or for performance which is less than satisfactory. Ordinarily, such discipline would include the sequence of verbal warning, written warning, suspension, and termination. Certain actions by the severity of their nature will require immediate progression to discipline including suspension or termination. In all cases, written notification shall be provided to the employee which will indicate the current step of the disciplinary process and the reasons for the disciplinary action. In the cases of written warning, suspension, and termination, the Union shall be notified in writing by the Hospital at the same time the information is provided to the employee, and a copy of these disciplinary actions will be placed in the employee's personnel file.

In all cases of discipline for performance reasons, the supervisor will assist the employee in developing an action plan to alleviate the performance deficiencies.

Should this plan not result in the correction of the deficiencies, further disciplinary steps will be taken.

Continued failure by the employee to correct the performance deficiency may result in suspension or termination, subject to Article XXV, Grievance and Complaint Procedure. Unsafe practice will result in appropriate, immediate action.

BACKGROUND:

Mark Pierce, the Grievant, was hired as a full-time Housekeeper I on February 11, 1985. On June 21, 1988, the Grievant received a Formal Notice of Reprimand or Disciplinary Action which stated, in relevant part, as follows:

DESCRIPTION OF INCIDENT

On Sunday, May 22, 1988, you were on call for Meriter-Methodist's Environmental Services Department. Due to an illness in our department, Martin Swetmore, Group Leader for that day, called you at 6:50 A.M. and asked you to come into work. Instead of reporting to work as requested, you began to question Martin as to why you had to come to work, implying that you were being set up. Martin felt that your tone and questions were aggressive and inappropriate, and found your language to be offensive. Initially you said you would come to work if Martin would punch you in at 7:00 A.M. When he refused, you told Martin you would not come into work because your back hurt.

Following his conversation with you, Martin called Alice Needham, A.M. Supervisor, at home and Alice adjusted work assignments to accommodate the staffing shortage.

Alice also decided that if the language you used was any reflection of your mood, it would be better if you didn't come into work.

Shortly after 7:00 A.M., you called Martin and said you were coming to work. When Martin explained that you were no longer needed and that the schedules had been adjusted, you became upset again and began to use inappropriate language. Even though Martin told you not to come in, and asked that you discuss any problems you had with Alice, you arrived at work around 8:00 A.M. You paged Martin and began to discuss the issue once again in an offensive manner.

Alice Needham and Pat Retrum, P.M. Supervisor, discussed this issue with you when you returned to work on Monday, June 13, 1988. Your recollection of the incident was similar, but you did not consider your behavior offensive.

Offensive or abusive language is determined by those who have to listen to it. Employees should not be subject to an offensive, abusive or threatening work environment.

#### PROPOSED DISCIPLINARY ACTION

In the future if there is a reoccurrence of abusive or offensive language, or implied or actual threats, additional disciplinary action will be taken up to and including termination.

On October 12, 1988, the Grievant received a Formal Notice of Reprimand or Disciplinary Action which stated, in relevant part, as follows:

#### DESCRIPTION OF INCIDENT

Around 10:20 P.M. on October 4, 1988 Pat Retrum went to 3 East to speak with Rey Natera. Rey was standing in the doorway of the women's center library/meeting room; Kim Bradley had the #6 elevator on hold talking to Rey. I entered the elevator with Kim and before we got the elevator off of hold Mark Pierce came down the corridor and said, "who in the fuck has the elevator on hold?" Mark then came up to the elevator, saw me, dropped his head and left. Mark later came to the office and apologized for talking like that and said, "it just slipped out."

The apology, although well intended, does not undo the damage to Meriter's or the department's image if a patient, visitor or another employee would have heard or had to work around this type of offensive language. This type of language is offensive and unacceptable at Meriter. As a result of an incident in May of this year we discussed the definition and use of abusive or offensive language. At that time we stated that reoccurrence of offensive language would result in further disciplinary action. We also mentioned that offensive or abusive language is determined by those that have to listen to it.

#### PROPOSED DISCIPLINARY ACTION

In the future, if there is a reoccurrence of language that is found offensive by another individual while at work, further disciplinary action will be taken up to and including termination.

On May 10, 1989, the Grievant was assigned various cleaning duties at the Employer's Meriter/Methodist Hospital. At approximately 6:30 p.m., the Grievant removed a vacuum from its storage closet on the second floor and vacuumed in his assigned areas. At approximately 7:15 p.m., the Grievant brought his cleaning cart and vacuum to the lobby area. Shortly thereafter, the Grievant was approached by two other employees, Don Copeland and Sindu Mengistu, one of whom indicated that Mengistu would like to use the vacuum. Upon obtaining the Grievant's consent, Mengistu left with the vacuum. Approximately one and one-half hours later, the Grievant retrieved the vacuum and returned to the lobby area. At approximately 9:30 p.m., the Grievant went on a break, leaving the vacuum in the lobby area. When the Grievant returned from break, the vacuum was gone. Suspecting that Mengistu had taken the vacuum, the Grievant returned to Mengistu's work area.

The Grievant found Mengistu in the cafeteria and indicated that he wanted the vacuum. Mengistu, who was vacuuming, protested. During the ensuing discussion, the Grievant pulled the vacuum's plug from the wall and Mengistu shoved the vacuum towards the Grievant, causing the vacuum to fall toward the Grievant's knee. The Grievant grabbed the vacuum and left the cafeteria.

Not more than fifteen minutes later, Union Steward Ed Vares, who was acting as the lead worker, was paged by Mengistu. Vares had observed a portion of the cafeteria incident. When Vares returned the page, Mengistu, who was crying, told Vares that she had encountered the Grievant on Floor 2B and that the Grievant had said things. Finding it difficult to understand Mengistu's other statements, Vares decided to speak with Mengistu in person. During the ensuing conversation, Mengistu told Vares that the Grievant had insulted her and her family. Vares decided that he needed to speak with the Grievant to hear the Grievant's story and to better understand Mengistu's complaints.

When Mengistu and the Grievant met at the Grievant's work area, the conversation became acrimonious. Vares separated the two and advised each to make a written statement of the night's events as there was bound to be a further investigation of Mengistu's complaint of the Grievant's conduct.

The following morning, Mengistu provided the Employer with a three page, hand-written statement describing the events of May 10, 1989. In the statement, Mengistu claimed that after the incident in the cafeteria, she had encountered the Grievant on Floor 2B; that the Grievant verbally assaulted her by stating "Fuck you," and "You are bullshit"; that the Grievant insulted her husband by saying "you and your husband are bullshit"; that the Grievant approached her in a physically threatening manner and yelled "I am going to kill you, if not now, in some other time"; and that Mengistu responded by running away to Floor 1B. On May 11, 1989, the Grievant was suspended pending an investigation of Mengistu's allegations.

On May 17, 1989, the Grievant received a Formal Notice of Reprimand or Disciplinary Action which stated, in relevant part, as follows:

In May of 1988, an Environmental Service's employee complained that you had used inappropriate language and actions when they called you to come to work when you were being paid to be "on call".

As a result of this incident, you received a Formal Notice of Reprimand or Disciplinary Action informing you that employees should not be subject to work in an environment where others use offensive, abusive language or an environment that they find threatening. You were told that reoccurrence of abusive or offensive language, or implied or actual threats, would result in further disciplinary action up to and including termination.

In October of 1988, a supervisor overheard you using offensive language in areas where patients, visitors and other hospital employees could overhear. Because this was a second occurrence in less than six months, a second Formal Notice of Reprimand or Disciplinary Action was issued reminding you that this type of language will not be tolerated and that reoccurrence would result in further disciplinary action up to and including termination.

On May 10th of 1989, another Environmental Services employee complained that you "verbally assaulted" her and physically threatened her.

Meriter has an obligation to our employees to create an environment that is pleasant to work in and free from threats. During the past year, you have had three occurrences of inappropriate behavior that are not acceptable to the conduct required of Environmental Services or Meriter employees and as a result, you will be terminated effective May 11, 1989.

The Grievant was terminated, effective May 11, 1989. A grievance was filed alleging that the termination violated the collective bargaining agreement. The grievance was denied at all steps and, thereafter, submitted to arbitration.

#### POSITIONS OF THE PARTIES:

##### Union:

The employer bears the burden of establishing that it had just cause to discharge the Grievant. When an employe is discharged for physically threatening another employe he may carry a "devastating" personal and economic stigma for life. As a result, the employer should be required to prove charges against the Grievant beyond a reasonable doubt.

The Union believes that the employer did not have just cause to discharge the Grievant. The evidence in this case does not establish that the Grievant

made the alleged threatening statements. The only evidence about the alleged threatening statements was provided by the testimony of Ms. Mengistu. This testimony is refuted by the Grievant, who asserts that he was never on Floor 2B at the time of the incident and denies making the statements alleged by Mengistu. It can not be presumed that a discharged employe is lying because it would shift the burden of proof on the discharged employe.

Mengistu testified that while she and the others walked to the elevator from the cafeteria area, the Grievant said to her "You'd better watch out." Vares, the only "neutral" witness to testify at hearing, did not indicate that the Grievant made such a statement. Rather, Vares indicated that the Grievant was rather calm at this point, had not raised his voice to Mengistu, and had done nothing to indicate that he was upset with Mengistu. Since the only one of Mengistu's allegations subject to verification by another witness was denied by that witness, one must question the reliability of her remaining allegations.

The Union is not aware of any motive for Mengistu to intentionally fabricate her charges against the Grievant. However, Mengistu, by her own admission, was frustrated and angry. It must be concluded that Mengistu does not have an accurate perception of the Grievant's remarks.

By all accounts, the Grievant acted reasonably in allowing Mengistu to use the vacuum cleaner and did not evidence anger over the Grievant's use of the vacuum. Thus, it is not reasonable to conclude that the Grievant would suddenly "ambush" Mengistu, or make any abusive or threatening remarks.

Since the Grievant had never met Mengistu's husband, it is difficult to believe that the Grievant would have made any derogatory statements about the Grievant's husband. The Grievant was not assigned to work on Floor 2B and would not have any reason to be on Floor 2B at the time of the alleged confrontation. Clearly, the underlying factual situation casts doubt upon the accuracy of Mengistu's testimony. Given Mengistu's emotional reaction to the events in the cafeteria, it is likely that Mengistu's account is distorted, exaggerated and inaccurate. The evidence fails to establish that the Grievant made any threatening statements to Mengistu on May 10, 1989.

Assuming arguendo, that it is concluded that the Grievant made threatening statements to Mengistu, under the provisions of Article XXV, Section 4, the appropriate disciplinary action is suspension, not discharge. Under the provisions of Article XXV, Section 4, the Employer must follow a sequence of progressive discipline, except where the employe conduct is of such "severity" as to warrant immediate progression to suspension, or discharge.

The Employer considered not only the May 10, 1989 allegation, but also considered two prior disciplinary actions. By such conduct the Employer demonstrated that it did not consider the Grievant's conduct to be sufficiently severe to warrant immediate termination. The Employer did not have the contractual right to skip the suspension step of the contractual disciplinary procedure.

If the statements were made, they were made at the end of a long and sometime frustrating evening in which Mengistu appropriated the Grievant's vacuum, without permission, causing the Grievant to fall behind in his work. While the facts don't exonerate threatening statements, they make such statements more understandable. As Vares' testimony demonstrates, the Grievant, while not willing to admit that he had threatened Mengistu, was willing to promise Mengistu that he would avoid future disagreements. In view of Mengistu's provoking behavior, and the Grievant's subsequent expression of regret about the incident, the statements, made in the heat of the moment, do not warrant more than a minimal suspension.

If the Grievant receives an award of back pay, it should not be reduced because of the grievant's decision to leave his interim employment and attend school. A discharged employe's attempt to broaden his job skills and marketability by attending school is a reasonable attempt to mitigate damages.

Employer:

The Grievant was discharged for repeated violations of the Employer's rule against use of offensive and abusive behavior, and for threatening the life of a fellow employe.

The Union is incorrect in asserting that the employer must prove its case beyond a reasonable doubt. Since this case involved threats of violence, the employer is only required to show that it had just cause to discharge the Grievant based upon a preponderance of the evidence.

The incident giving rise to the discharge was not witnessed by any other employe. Thus, the Arbitrator must judge the credibility of Mengistu and the Grievant. Some of the few statements which can be corroborated by an independent witness, are those made in the presence of Ed Vares. Vares contradicted the Grievant's testimony that (1) the Grievant never told him that the lobby was not the time or place to discuss the incident with Mengistu; (2)

the Grievant never yelled at co-employees, and (3) that Mengistu swore at the Grievant while they were in the lobby. Moreover, one must consider that offensive and abusive behavior by the Grievant is not a recent phenomena.

The evidence of Mengistu's emotional and physical distress, the fact that the Grievant ignored Vares' request to provide a written statement of the events of May 10, 1989, and the consistency of all of Mengistu's statements are corroborative of Mengistu's testimony.

The discrepancies between the accounts of Mengistu and the Grievant cannot be attributed to poor recollection, misunderstanding or mistake. One of the parties is being untruthful. The evidence demonstrates that this untruthful party is the Grievant.

It is the obligation of the Employer to protect its employees. The Grievant's threat to kill Mengistu, in conjunction with his record of prior use of offensive and abusive language, warrants discharge. The grievance should be dismissed.

In response to the Union's contention that the employer's appropriate action was suspension and not discharge, the Employer states that the Union waived this defense because the collective bargaining agreement required this defense to be raised prior to its inclusion in the post-hearing brief. Furthermore, even if this defense was properly raised, Article XXV, Section 4 justified the employer's actions.

If the grievant was wrongfully discharged, he is not entitled to benefit from his decision to remove himself from the labor market to attend school. Attending school on a full-time basis is equated with a withdrawal from the labor market. Hence, an award of back pay for time spent in school would be inappropriate and constitute a double benefit for the grievant.

#### DISCUSSION:

The issue to be determined herein is whether the Employer had just cause to discharge the Grievant. The decision to discharge was based upon the Employer's belief that, on May 10, 1989, the Grievant verbally assaulted and physically threatened a fellow employe, Sindu Mengistu by telling Mengistu that "you are bullshit", "you and your husband are bullshit", "fuck-you", and "I'm going to kill you, if not now, in some other time." In reaching the conclusion that the Grievant had made such statements to Mengistu, Jim Rothfuss, the Employer's Director of Environmental Services, credited Mengistu's assertion that such statements had been made and discredited the Grievant's claim that he did not make such statements. There were no other witnesses to the incident. The initial question to be determined is whether Rothfuss erred when he credited Mengistu's account of the incident.

Neither side disputes the fact that, on the p.m. shift of May 10, 1989, Mengistu and the Grievant were assigned to clean various sections of the Employer's premises. Between 9:30 p.m. and 10:30 p.m., the Grievant entered the cafeteria to retrieve a vacuum which had been removed from the Grievant's work area by Mengistu. Mengistu and the Grievant present different accounts of the ensuing conversation. While the conversation was witnessed by four other employes, i.e., Star, Fetlework, Vares and Bright, only Vares, who observed only a portion of the conversation, testified at hearing.

At hearing, Mengistu recalled that she was vacuuming in the cafeteria when the Grievant, without warning, unplugged the vacuum. Mengistu further recalled that when she asked the Grievant to let her finish vacuuming, the Grievant yelled "shut-up." Mengistu recalled that she then said "here is your vacuum" and pushed the vacuum toward the Grievant, who said "you'd better watch out." Mengistu recalled that she and fellow employes, Vares, Star, and Fetlework then entered one elevator and the Grievant, with the vacuum, entered another elevator. Mengistu further recalled that as the Grievant entered his elevator, he was yelling "you'd better watch-out" and "shut-up."

According to Mengistu, she became upset during the incident in the cafeteria because the Grievant had not cooperated with her, but that she did not raise her voice. Mengistu's written statement, provided to the Employer on the morning after the incident, does not contain an allegation that the Grievant said "You'd better watch-out", nor does it refer to any behavior at the elevator. In other respects, the written account of the Grievant's conduct in the cafeteria is consistent with Mengistu's testimony at hearing.

At hearing, Mengistu recalled that, following the incident in the cafeteria, she and Fetlework went to find another vacuum; that when they could not find a vacuum, she and Fetlework concluded that Mengistu was too upset to finish her work; that Mengistu decided to discuss the matter with Vares, the lead worker; that Mengistu went to Floor 2B to see if Vares was in the office doing paper work; that Vares was not on Floor 2B, but that the Grievant was; and that the Grievant yelled the following statements at Mengistu: "Shut-up", "Fuck-you", "You and your husband are bullshit", "you don't know me, who I am" and "If I don't kill you today, I kill you sometime." According to Mengistu, the Grievant was walking towards her as he was yelling, that she backed away,

and ran up the stairs to Floor 1B and paged Vares. Mengistu recalled that when Vares came to her, she was shaking and crying, and that she told Vares what the Grievant had said to her on Floor 2B. According to Mengistu, Vares told her to calm down and that together they would talk with the Grievant. Mengistu recalled that the Grievant did not want to discuss anything in front of her, that the Grievant was yelling and shouting, that Vares asked the Grievant to apologize, that the Grievant said "no", and that Vares then told the Grievant to make a written statement of the incident. According to Mengistu, she took the Grievant's threat seriously, was too scared and shaken to drive her personal car home from work and called a cab to take her home. Mengistu's written statement concerning the Grievant's conduct on Floor 2B does not contain the assertion that the Grievant yelled "shut-up" or "you don't know me, who I am." In other respects, Mengistu's testimony concerning the Grievant's conduct on Floor 2B is consistent with her written statement.

At hearing, the Grievant recalled that when he walked into the cafeteria, he said, in a joking manner, "Give up the vacuum cleaner" and that Mengistu, in a joking manner, responded "what makes you think you can take the vacuum" and "wait til I'm done". The Grievant recalled that he responded by saying that he was behind in his work and needed the vacuum; that Mengistu said "here take the vacuum"; that he unplugged the vacuum, that Mengistu snapped the vacuum back and said "I won't let you have it"; that he replied "then we both won't have it", that he sat down; that Mengistu shoved the vacuum towards him; and that the vacuum tilted on its side and landed on his leg. According to the Grievant, he was not angry and did not raise his voice, but that Mengistu had worked herself up and her voice was raised. The Grievant recalls that he returned to the lobby to finish his work and that four or five minutes later, Vares entered the lobby. According to the Grievant, Vares was screaming and hollering; that Vares pointed his finger in the Grievant's face; that Vares wanted to know what he had said to Mengistu; that the Grievant responded that Vares knew what he had said because Vares was there; that Vares responded "not that" and referred to something that had happened later; that as the Grievant responded, Mengistu yelled that the Grievant was a liar; that the Grievant asked Vares to discuss the matter in the office; that Vares responded that he was in charge and that they would discuss it here and now; that the Grievant indicated that they should discuss the matter away from Mengistu and that Vares should tell Mengistu to stay away; that the Grievant told Vares that he had never made any threats; that Mengistu then called the Grievant a "fucking liar", a "bastard", and a damn liar" and began to cry; that the Grievant told Vares that he did not appreciate what was happening; that Vares was trying to push Mengistu back; that Fetlework asked Mengistu why she was crying and told Mengistu that there was no reason to cry; that another fellow employe put his arms around Mengistu and the two walked away; that the Grievant told Vares that he was upset about Vares' approach, Vares' hollering, and Vares' placing his finger in the Grievant's face; that Vares told the Grievant that maybe he had made a mistake and that he knew how Mengistu could hold a grudge; that the Grievant told Vares that he was getting a headache and asked if he could go to the emergency room for an aspirin; that when he arrived at the emergency room, it was crowded so he stuck his head out the door for air; that Vares helped the Grievant to finish cleaning his work area and that Vares told the Grievant that Vares knew how Mengistu "was". According to the Grievant, he did not threaten Mengistu, or anyone else at the hospital; that he did not understand Mengistu's comments about her husband; that he had known that Mengistu was married, but did not know her husband; that he did not say a word when Mengistu shoved the vacuum at him; that Mengistu was not crying until after she called the Grievant a "fucking liar", "bastard" and "damned liar"; that the Grievant did not see Mengistu shake; and that Mengistu could not have been frightened because she was right on top of him when she swore at him. According to the Grievant, Vares suggested that he make a written statement; and that the Grievant did make such a statement, but did not give it to anyone. The Grievant maintains that his normal conversational voice is loud and that he has never yelled at anyone at work.

At hearing, Union Steward Vares recalled that, when he walked into the cafeteria, the Grievant was sitting in a chair, holding onto the vacuum cord. According to Vares, the Grievant was telling Mengistu that he needed the vacuum and that he had given Mengistu plenty of time, and that Mengistu was asking the Grievant to please let her finish, explaining that she had to vacuum a little space. According to Vares, there was not any "real shouting", but that Mengistu got exasperated, said "here take it," and shoved the vacuum toward the Grievant, causing the vacuum to fall over towards the Grievant's knee. Vares did not know if the Grievant grabbed the vacuum before it hit his knee. Vares recalled that the Grievant entered an elevator; that Vares and one other employe went to the third floor; that between 5 and 15 minutes later, Mengistu paged Vares; and that Mengistu seemed to be upset or angry, "emotionally amplified." Vares recalled that when he telephoned Mengistu, Mengistu was crying; that she appeared to be more upset than when she left the cafeteria; Mengistu referred to Floor 2B, talked about the Grievant and things that he said; and that since Vares could not make sense of what Mengistu was saying, he decided to speak with her personally. Vares recalled that when he spoke with Mengistu, Mengistu told Vares that she had encountered the Grievant on Floor 2B; that Mengistu appeared to have been crying; that Mengistu's eyes were red; and that Mengistu was agitated. Vares could not recall exactly what Mengistu said at that time. He did recall that Mengistu was not too specific,

but did state that the Grievant had insulted her and her family. Vares recalled that he told Mengistu that they should go to the lobby to talk to the Grievant. Vares recalled that the Grievant refused to talk with Mengistu present but did not recall that the Grievant said that it wasn't the time and place to discuss the matter. Vares recalled that the Grievant told Vares that he would agree to avoid emotional strain in future relations with Mengistu; that when Vares returned with Mengistu, both Mengistu and Vares raised their voices and made accusations against one another; and that when it appeared that nothing was being resolved, Vares told each to take a few minutes to collect themselves and to write down statements because Mengistu had said she wanted something done about the incident. Vares denied that Mengistu said "fucking liar", "bastard," or damn liar" while in his presence. Vares stated that he had never heard Mengistu swear at anyone and that he had heard the Grievant yell at people at work before.

At the time of the May 10, 1989 incident, Mengistu was a part-time employe who had worked with the Grievant for approximately one and one-half years. It is not evident that the Grievant and Mengistu had any history of prior conflict. Thus, the evidence of their prior relationship does not warrant the conclusion that Mengistu was hostile toward the Grievant, or had any reason to fabricate charges against the Grievant.

Vares, who observed the final scenes of the incident in the cafeteria, recalled that while there was no real shouting, Mengistu got "exasperated" when the Grievant would not allow her to finish her vacuuming and shoved the vacuum toward the Grievant, causing it to fall over towards the Grievant's knee. Mengistu's own statements indicate that Mengistu was upset because the Grievant's conduct affected her ability to complete her work assignment and she was offended by the failure of the Grievant to provide the cooperation that she felt was her due. The Grievant recalled that Mengistu, who had been joking, worked herself up and raised her voice.

Regardless of which account is credited, the evidence of Mengistu's conduct and demeanor at hearing indicates that Mengistu was upset by the Grievant's conduct in the cafeteria. Moreover, Mengistu's testimony that, when she failed to find a replacement vacuum, she became too upset to work, indicates that the cafeteria incident affected Mengistu more strongly than the evidence of Mengistu's conduct and demeanor in the cafeteria would suggest. Mengistu's reaction to her failure to find a replacement vacuum was excessive and suggests that Mengistu's reaction to the events in the cafeteria may have been more upsetting to Mengistu than the events would reasonably warrant. Upon consideration of the record as a whole, it is reasonable to infer that the Grievant's conduct in the cafeteria provided Mengistu with a motive to fabricate her account of the Grievant's conduct on Floor 2B. However, for reasons discussed below, the undersigned is not persuaded that Mengistu did fabricate such charges.

As discussed *supra*, Mengistu's testimony at hearing differs in some respects from her written statement of May 10, 1989. Specifically, Mengistu's testimony, unlike her written statement, contains an assertion that, during the cafeteria incident, the Grievant yelled "you'd better watch-out" and that, during the incident on Floor 2B the Grievant yelled "shut-up" and "you don't know me, who I am." Mengistu's written statement of May 11, 1989 was not a verbatim account of the events of May 10, 1989. Thus, the fact that Mengistu's testimony at hearing includes assertions that were not included in the written statement of May 11, 1989 does not, in and of itself, serve as a basis for discrediting Mengistu. A comparison of Mengistu's testimony at hearing and her written statement of May 11, 1989 does not reveal any prior inconsistent statement. The internal consistency of Mengistu's statements concerning the events on Floor 2B gives rise to the inference that Mengistu is telling the truth.

Vares recalls that when he responded to Mengistu's page, Mengistu was crying. Vares further recalls that Mengistu seemed more upset than when he had left her following the cafeteria incident. Vares recalls that when he met with Mengistu to discuss the page, Mengistu's eyes were red, as if she had been crying, and that she was agitated. One may reasonably conclude that an encounter of the type which Mengistu claims occurred on Floor 2B would be far more upsetting to Mengistu than the encounter with the Grievant in the cafeteria. Vares' testimony indicates that there was a change in Mengistu's physical and emotional state consistent with heightened distress. The evidence that Mengistu appeared to be more distraught than when she left the cafeteria, is supportive of the conclusion that Mengistu had the encounter with the Grievant on Floor 2B. There is, however, record evidence which suggests that Mengistu's heightened distress was due to another intervening event, *i.e.*, the failure to find a replacement vacuum cleaner. While the evidence of Mengistu's heightened distress is consistent with a finding that Mengistu did encounter the Grievant on Floor 2B, as she claims, it is not conclusive proof that she had such an encounter.

At hearing, Vares recalled that the page from Mengistu occurred no more than fifteen minutes after he had left Mengistu, following the cafeteria incident. According to Vares, Mengistu's agitation made it difficult to make sense of all the remarks which she made during the telephone conversation in



which he returned her page. Vares recalled, however, that Mengistu mentioned Floor 2B and stated that the Grievant had said "things" to her. Vares further recalled that when he met with Mengistu to discuss the page, Mengistu indicated that she had gone to Floor 2B, that she had run into the Grievant, and that Mengistu said that the Grievant had insulted Mengistu and Mengistu's family. While Vares could not recall the exact statements made by Mengistu, the statements that he recalled Mengistu making are consistent with Mengistu's written account of the incident on Floor 2B provided to the Employer on the day after the cafeteria incident, as well as with Mengistu's testimony at hearing. The consistency of Mengistu's statements concerning the events on Floor 2B supports the conclusion that Mengistu is recalling the events accurately and truthfully.

Vares neither confirmed, nor denied, Mengistu's testimony that the Grievant yelled "you'd better watch out" while the Grievant was in the cafeteria and at the elevator. By Vares' own admission, he could not recall all of the statements which were made during the evening of May 10, 1989. Under such circumstances, Vares' silence concerning the alleged statement does not, as the Union argues, raise a serious doubt as to Mengistu's credibility.

According to Vares, less than fifteen minutes elapsed from the time he left Mengistu in the elevator and she paged Vares to report the incident on Floor 2B. Fifteen minutes is not much time in which to plot revenge and fabricate a story. The relatively short interval between the cafeteria incident and Mengistu's reporting of the incident on Floor 2B militates against the conclusion that Mengistu fabricated her account of events on Floor 2B.

The record fails to reveal what, if any, statements were made to the Employer by the Grievant during the investigation of the incident of May 10, 1989. 1/ At hearing, the Grievant stated that when Vares confronted the Grievant concerning Mengistu's complaint about the Grievant's conduct on Floor 2B, the Grievant denied that he had made any threats to Mengistu. This testimony by the Grievant was neither confirmed nor contradicted by Vares at hearing and, thus, stands unrebutted. At hearing the Grievant reiterated that he did not threaten Mengistu.

According to the Grievant, when Vares confronted the Grievant concerning Mengistu's complaint about the Grievant's conduct on Floor 2B, and the Grievant denied making any threats, Mengistu called the Grievant a "fucking liar," a "bastard" and a "damn liar". According to the Grievant, Vares was present when Mengistu made these statements. Vares, however, expressly denies that Mengistu called the Grievant a "fucking liar," "bastard" and a "damn liar". According to Vares, he has never heard Mengistu swear at any employe. The Grievant's assertion that he had never yelled at a fellow employe was also expressly contradicted by Vares at hearing.

It is not evident that Vares, a Union Steward, has any motive to fabricate his testimony concerning the events of May 10, 1989, nor is there any other basis to conclude that Vares is not a truthful witness. Accordingly, the undersigned credits Vares' testimony contradicting the Grievant's assertion that the Grievant has never yelled at fellow employes. Vares admittedly did not recall the specifics of all of the statements made during the course of the evening of May 10, 1989. However, neither Vares' testimony, nor manner at hearing, indicates that Vares was unsure of whether or not Mengistu called the Grievant a "fucking liar," "bastard" or a "damn liar." Vares' testimony, contradicting the Grievant's assertion that Mengistu called the Grievant a "fucking liar," "bastard" and a "damn liar," is entitled to be credited herein.

The fact that statements of the Grievant subject to corroboration by a "neutral" witness were expressly contradicted by the "neutral" witness provides the undersigned with a reasonable basis to question the veracity of the Grievant's other statements. A comparison of Vares' testimony with that of Mengistu's testimony fails to disclose such an express contradiction by Vares. Unlike the Grievant, Mengistu is not discredited by any testimony of Vares.

Following the incident in the cafeteria, the Grievant and Mengistu entered separate elevators. The Employer does not argue, and the record does not indicate, that the Grievant stalked Mengistu, or lay in ambush knowing that Mengistu would soon arrive on Floor 2B. Indeed, it is not evident that the Grievant would have had any prior knowledge that Mengistu would be on Floor 2B. As the Union argues, the Grievant did not have any work assignment on Floor 2B. However, there are locker rooms on Floor 2B and it is the location of the time clock. It is not inconceivable that the Grievant would have had some personal business to attend to on Floor 2B. Nor, given that the office is on Floor 2B, is it inconceivable that Mengistu would go to Floor 2B seeking Vares. Contrary to the argument of the Union, it is not inherently incredible that Mengistu and the Grievant would be on Floor 2B at the time of the alleged

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1/ The Grievant, unlike Mengistu, did not follow Vares' instruction to provide the Employer with a written statement concerning the events of May 10, 1989.

incident.

As the Union argues, the Grievant had acted reasonably in granting Mengistu permission to use the vacuum earlier in the shift. As the Union further argues, Vares' testimony does not indicate that the Grievant was visibly upset at the time of the cafeteria incident. However, as the Union acknowledges, Mengistu's appropriation of the vacuum while the Grievant was on break, had an adverse impact upon the Grievant's ability to finish his work. Thus, it is not inconceivable that the Grievant found Mengistu's conduct to be a source of irritation. Moreover, the Grievant's conduct in unplugging the vacuum and refusing Mengistu's request to permit her to finish her remaining area suggests that the Grievant's spirit of cooperation had evaporated and that he had become exasperated. Contrary to the argument of the Union, the evidence of the Grievant's conduct prior to the time of the alleged incident on Floor 2B does not persuade the undersigned that Mengistu's account of the Grievant's conduct on Floor 2B is incredible.

As the Union argues, the Grievant was not acquainted with Mengistu's husband. However, the undersigned doubts that the statement "you and your husband are bullshit" would be made with an intent to be factual. The lack of acquaintance with Mengistu's husband does not persuade the undersigned that the Grievant would not make such a statement. As the Grievant acknowledged at hearing, at the time of the incident, the Grievant was aware of Mengistu's marital status. It is odd, but not incredible, that the Grievant would have made such a reference to Mengistu's husband.

According to the Grievant, the events on Floor 2B described by Mengistu never occurred. As the Employer argues, the conflicting testimony concerning the events on Floor 2B cannot be ascribed to poor recollection, misunderstanding, or mistake. Either Mengistu or the Grievant has been untruthful. Upon consideration of the above, the demeanor of the witnesses at hearing, and the record as a whole, the undersigned credits Mengistu's account of the incident on Floor 2B.

Crediting Mengistu, the undersigned is persuaded that on May 10, 1989, following the incident in the cafeteria, the Grievant encountered Mengistu on Floor 2B; approached Mengistu in a threatening manner; told Mengistu "you are bullshit", "fuck you", "you and your husband are bullshit"; and made the statement that "I am going to kill you, if not now, in some other time." By verbally assaulting and physically threatening a fellow employe, the Grievant engaged in conduct which provided the Employer with just cause to discipline the Grievant. The question to be answered is whether the discipline imposed i.e., termination, is consistent with the provisions of Article XXV.

Article XXV of the parties' collective bargaining agreement provides that "ordinarily", discipline will involve "verbal warning, written warning, suspension, and termination." The Article further provides that "certain actions by the severity of their nature will require immediate progression to discipline, including suspension or termination." As both parties recognize, the provisions of Article XXV provide the Employer with a right to bypass the "ordinary" sequence of progressive discipline.

Prior to the incident giving rise to the discharge, the Grievant had received two written "Formal Notice of Reprimand and Warning," one on June 21, 1988 and a second on October 12, 1988. Each "Notice" contained the allegation that the Grievant had used offensive language to a fellow employe. In the June 21, 1988 "Notice" the Grievant was given the following warning:

In the future, if there is a reoccurrence of abusive or offensive language, or implied or actual threats, additional disciplinary action will be taken up to and including termination.

In the October 12, 1988 "Notice" the Grievant was given the following warning:

In the future, if there is a reoccurrence of language that is found offensive by another individual while at work, further disciplinary action will be taken up to and including termination.

The Union did not grieve the content of either notice.

While the Union does not concede that the Grievant made the comments on Floor 2B attributed to him by Mengistu, the Union argues that if the Grievant is found to have made such comments, the appropriate discipline is a suspension, not a discharge. The Arbitrator disagrees.

The Grievant's comments to Mengistu on Floor 2B were not made in the heat of an argument between two employes. The comments occurred after the incident in the cafeteria and it is not evident that Mengistu engaged in any conduct on Floor 2B which was either threatening or provoking to the Grievant. The Grievant's comments, which were made while he and Mengistu were alone on Floor 2B, served no purpose other than to harass, frighten and intimidate Mengistu. The Grievant's comments involved the use of profane language and

threatened Mengistu, an individual of considerably smaller physical stature than the Grievant, with physical harm. The undersigned is satisfied that the Grievant's conduct on Floor 2B on May 10, 1989 was of sufficient severity to warrant discharge under the terms of Article XXV.

As the Union argues, the Employer did give consideration to the fact that the Grievant had received the two prior disciplinary "Notices". Contrary to the argument of the Union, this consideration did not require the Employer to impose a disciplinary suspension, rather than a discharge.

Based upon the above and the record as a whole, the undersigned issues the following

AWARD

1. The Employer had just cause to discharge the Grievant, Mark Pierce.
2. The grievance is hereby denied and dismissed.

Dated at Madison, Wisconsin this 8th day of February, 1990.

By \_\_\_\_\_  
Coleen A. Burns, Arbitrator