BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LEVY PREMIUM FOOD SERVICE d/b/a LEVY RESTAURANTS

and

UNITE HERE, LOCAL 122

Case 1
No. 64548
A-6159

(Grievance Mediation)

Appearances:

Mr. Bruce MacKenzie, General Manager, Wisconsin Center District, 400 West Wisconsin Avenue, Milwaukee, WI 53203, and **Ms. Lisa Owens**, Regional Human Resources Director, 2301 South Lake Shore Drive, Chicago, IL 60616, on behalf of the Employer.

Mr. Sam Gallo and **Ms. Christine Vidmar**, Representatives, UNITE HERE, Local 122, 744 North Fourth Street, Suite 230, Milwaukee, WI 53203, on behalf of the Union and the Grievant, Gloria Isom.

ADVISORY MEDIATOR'S OPINION

According to the terms of the 2003-06 labor agreement between the above-listed parties, the parties jointly selected Sharon A. Gallagher, WERC Arbitrator and Mediator, to act as grievance mediator of a dispute between them concerning the December 9, 2004 discharge of Gloria Isom. The parties agreed to meet with the Mediator on June 9, 2005, at Milwaukee, Wisconsin, at which time the parties met with the Mediator in joint session, they relayed the facts of the case and gave the Mediator documents regarding the case. The Mediator asked questions of the parties in joint session and both parties were given full opportunity to argue their positions before the parties broke into separate caucuses. The Mediator then shuttled between the parties' caucuses in an attempt to settle the case.

During mediation, the Mediator advised the parties how she would have resolved the grievance had she been appointed Arbitrator of the case and the reasoning/analysis she would have employed.[1] However, the parties were unable to reach agreement on a settlement of the grievance and they requested that the Mediator prepare this advisory opinion (pursuant to Article 10, Step 4), setting forth her opinion regarding how the case would likely be resolved and on what basis should the parties proceed to arbitration. The parties agreed to waive the requirement that this opinion issue 24 hours after mediation was concluded.

RELEVANT CONTRACT LANGUAGE

SECTION 9. DISCIPLINE AND DISCHARGE

9.1 Just Cause and Progressive Discipline: It is the policy of the Employer to base the discharge of a non-probationary employee on just cause. The sole right to discipline and discharge an employee for just cause is retained by the Employer. The Employer will endeavor to use progressive discipline for all offenses except as set for in Section 9.4 below. All discipline shall be in writing, presented to the employee for signature as soon as practical, (except verbal warnings which shall be noted in the employee's file), and a copy shall be provided to the employee at the time the employee signs, and faxed to the Union as soon as practical.

9.2 Work Standard: It is understood between the parties that all work shall be in compliance with the Levy Standard. Consistent poor work not up to the Levy Standard shall subject the employee performing such work to discipline up to and including discharge.

9.3 Rules and Regulations: The Employer shall have the right to adopt and put into effect reasonable rules and regulations, including, but not limited to, rules that enable the employees to meet the Levy Standard and rules and regulations established by the District Facilities. An employee may be disciplined (up to and including discharge) for misconduct or breach of the Employer's rules and regulations that amount to just cause.

. . .

9.6 No Call/ No Show: Employees may receive discipline up to and including termination for occurrences of no call/ no shows. Each day of a no-call/no-show is a separate occurrence. If an Employee is a no-call/no-show on two separate occurrences, he/she shall be terminated.

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1 During mediation, the Mediator made suggestions for settlement of this case and she drafted language for a side letter to the contract, copies of which she gave to the parties for their consideration.

9.7 Call Offs: Employees may receive discipline up to and including termination for occurrences of call-offs. An occurrence of calling off will be assessed against an employee if he or she is scheduled for a particular shift but then calls off as unavailable. An occurrence will not be assessed if the employee can show that the call off was caused by (a) a bona fide illness of the employee, (b) a funeral of an immediate family member (defined as the employee's spouse/domestic partner, parents, children, sisters, brothers, grandparents, mother-in-law, father-in-law, son-in-law, or daughter-in-law) or (c) a refusal to work a shift on a revised schedule posted after 6:00 p.m. on the prior Thursday. To establish a bona fide illness, the employee must provide an explanation in sufficient detail and specificity to enable the supervisor to make a judgment as to whether the call off was actually caused by illness. Each day of a call off is a separate occurrence. If an Employee calls off on three separate occurrences in a rolling six (6) month period, he/she/ shall be terminated.

9.8 Warning Notices: Warning Notices not resulting in suspension issued to an employee shall not be considered after twelve (12) months of their issuance with regard to discipline unless such warnings deal with multiple instances of moral turpitude.

FACTS PRESENTED AT MEDIATION:

The Grievant, Gloria Isom, was first employed by the Employer's predecessor and continued her employment with Levy Restaurants (hereafter Levy or Employer) without a break until her December 9, 2004 termination.[2] As of December 4, 2004, Isom was one of the most senior employees in the bargaining unit.

On July 7, 2004, Isom called off work and explained that as she had helped her neighbor clean up after a fire, she was too tired to come into work. On July 12, 2004, Isom called off again. On neither occasion did Isom assert she was ill. On July 13th, Levy counseled Isom regarding her call-offs but it did not inform Isom that call-off for illness would be excused if she presented a doctor's note. Isom did not grieve Levy's crediting her with a call-off or her counseling pursuant to Article 9 for these instances.

On Saturday, December 4, 2004, Isom called off by calling her supervisor Brian Smallcombe's voicemail and leaving the message that her knee was hurting and she could not come to work. On Monday, December 6, Smallcombe spoke to H.R. Director Chris Williams about Isom's absence and Williams immediately began an investigation of the situation. Williams did not ask Smallcombe whether he believed Isom's illness was bona fide.

2 Levy Restaurants took over the Union's labor agreement and its employees when it took over the food and beverage operations at the Wisconsin Center District in July of 2003. The predecessor's contract expired on 11/17/03 and Levy negotiated its own contract with the Union for the term 11/18/03 through 11/17/06.

Isom's next scheduled workday was December 9, 2004. Williams called Isom to a meeting with management when she arrived at work on December 9th to discuss her call-offs. At this meeting, Isom stated that she was not feeling well on December 4th; that her knee was hurting her; and that this was why she called off that day. Williams asked Isom whether she had gone to the doctor on December 4th. Isom responded in the negative. Williams then stated that because Isom did not have a doctor's note covering her call-off on December 4th, Levy could not prove that her absence was a bona fide illness under Article 9, she would be terminated. Isom was then discharged on December 9, 2004, for calling off for illness (her third call-off in a rolling six month period), on December 4th and not presenting a doctor's excuse when she returned to work, in order to prove her illness was bona fide.

The Union filed a grievance on Isom's behalf on December 9, 2004. On December 14th, Isom produced a doctor's note indicating she suffered from knee pain due to arthritis in her right knee. In her grievance, Isom indicated that Levy knew that she suffered from arthritis in her knee as she had received permission to leave work on one occasion due to knee pain prior to December 4, 2004.

The Employer submitted no policies or work rules to the Mediator concerning this case, stating none exist thereon. H.R. Director Williams indicated that he trains and orients employees and in doing so he regularly reads through Section 9.7 with employees but he has never specifically told employees that they need to bring in a doctor's excuse in order to make sure they are not credited with an occurrence for a call-off for illness.

After the 2003-06 contract was executed, General Manager MacKenzie stated that all employees should have been informed in pre-shift meetings with their supervisors (which meetings occurred across the 45 days following the March, 2004, ratification of the contract) that they needed to bring in a doctor's excuse for every call-off for illness. Levy admitted that the Union was not apprised of these meetings or their content. Also, it has never occurred that an employee was sent home to retrieve a doctor's excuse he/she forgot before the employee would be allowed to return to work after a third call-off, the last of which was assertedly for illness.

ISSUES IN MEDIATION

1. Whether there was just cause for Isom's discharge.

2. Whether a doctor's excuse/note is required to prove an illness is bona fide.

DISCUSSION

In the Mediator's opinion, the language of Section 9.7 is clear and unambiguous. It defines a "bona fide illness of the employee" as being "established when the employee provides "an explanation in sufficient detail and specificity" so that the supervisor can "make a judgment as to whether the call-off was actually caused by illness." This language makes no reference to a doctor's note or excuse, nor does it require that the explanation be in writing. In the Mediator's view, if the parties had mutually intended that a valid doctor's excuse would constitute the only "explanation" sufficient to establish a bona fide illness, they could easily have written that language into the Agreement. They did not do so, leading to a conclusion that the requirement of a doctor's excuse was not agreed to by both parties. Also, the Employer offered no bargaining minutes or proposals to support its claim on this point.

Given the fact that the Mediator found the language of Section 9.7 to be clear, the evidence raised by the Employer and discussed in-depth at mediation regarding what was said at bargaining over the 2003-06 Agreement would not be relevant or admissible to vary the clear language of Section 9.7 under the rules of proper arbitral construction. In any event, even if the arbitrator admitted the evidence, the Mediator believes it would be insufficient to show that the Employer made it clear to the Union in negotiations and that that the Union agreed in negotiations that a doctor's excuse would be required for every call-off for illness to prove it was bona fide pursuant to Section 9.7.

In addition, the evidence submitted in mediation failed to show that the Union knew or should have known or that it was ever notified that the Employer would only accept a doctor's excuse as proof of a bona fide illness away from the bargaining table. This was so because the two prior cases mentioned by the parties at mediation (Brown and Washington) did not concern the specific issue in this case and the circumstances of those cases did not clearly put the Union on notice of the Employer's interpretation of Section 9.7. Rather, the instant case is the first one between the parties that raised the specific issues involved in this case.

The fact that Levy has no distributed rules/policies which clearly notify employees that they are required to bring in a doctor's excuse every time they wish to get credit for a bona fide illness also weighs against the Employer's assertions herein. In this regard, the Mediator notes that no evidence was proffered to show that, prior to December 4th, Isom was aware of the requirement that she present a doctor's excuse on her first day back at work after a call-off for illness. The fact that Isom presented a doctor's note supporting her assertion that she has an arthritic knee condition on December 14th during the processing of the instant grievance, did not constitute any kind of waiver or admission: The document shown to the Mediator merely supported Isom's claim that she had an arthritic knee and that her knee was hurting her on December 4th but it did not attempt to and was not offered as an excuse for her December 4th call-off. The Mediator also found it significant that the contract clearly requires the employee's supervisor to exercise his/her judgment whether the employee's illness is bona fide. In Isom's case, her supervisor, Brian Smallcombe, never made this contractually

required judgment call. Nor did management ask Smallcombe if he believed Isom's illness on December 4th was bona fide before it discharged Isom on December 9th. Furthermore, Levy admitted that it does not require a written excuse to qualify for the funeral leave exception to Section 9.7.

Given the extreme penalty Isom suffered on December 9, 2004, the Mediator felt that based upon the evidence shared with her at mediation on June 8, 2005, the Employer would not be able to meet its burden of proof that it had just cause to discharge Isom on December 9, 2004, and that an arbitrator would likely order Levy to reinstate Isom and make her whole.

Dated at Oshkosh, Wisconsin, this 30th day of June, 2005.

Sharon A. Gallagher /s/
Sharon A. Gallagher, Mediator/Arbitrator

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