BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL UNION 565, AFL-CIO

and

SUB-ZERO FREEZER CO., INC.

Case 73
No. 66024
A-6226

(Wickus Termination)

Appearances:

Mr. William Haus, Attorney, Haus, Roman and Banks, LLP, Attorneys at Law, 148 East Wilson Street, Madison, Wisconsin, appearing on behalf of Local 565.

Mr. Michael H. Auen, Attorney, Foley & Lardner, LLP, Attorneys at Law, Verex Plaza, 150 East Gilman Street, Madison, Wisconsin, appearing on behalf of Sub-Zero Freezer Co., Inc.

ARBITRATION AWARD

Local 565, hereinafter "Union," and Sub-Zero Freezer Co., Inc., hereinafter "Company," requested that the Wisconsin Employment Relations Commission provide a panel of arbitrators from which the parties would select an arbitrator to hear and decide the instant dispute in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. Lauri A. Millot, of the Commission's staff, was selected to arbitrate the dispute. The hearing was held before the undersigned on October 30, 2006, in Madison, Wisconsin. The hearing was transcribed. The parties submitted post-hearing briefs, the last of which was received on February 4, 2007, whereupon the record was closed. Based upon the evidence and arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties stipulated that there were no procedural issues in dispute and framed the substantive issues as:

1. Was the Grievant discharged for just cause?

2. If so, is the remedy limited by Article 17, Section 3?

3. And if the remedy is not limited by Article 17, Section 3, then what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

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ARTICLE X

HELATH AND BENEFITS PLAN

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Section 3. Contributions for Coverage

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e. Effective January 1, 2007: the Company will contribute 98% towards the lowest cost HMO/Plan premium. Employees and spouses will be required to participate in wellness initiates as outlined by the Company and Union. An employee and spouse not electing to participate in wellness initiatives will contribute and additional 5% of the health care premium. An employee selecting an available higher cost HMO/Plan shall pay the increased cost between the new Company contribution and higher cost HMO/Plan.

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ARTICLE XV

DISCIPLINE AND DISCHARGE

Section 1. Any employee may be suspended or discharged for just cause, provided, however, that if such employee feels he/she has been unjustly dealt with, they may file their complaint with a Shop Steward and it shall then be handled in accordance with provisions of Article XVII. If it is found that such employee has been unjustly discharged or suspended, then he/she shall be restored to employment with full seniority rights and paid for all time lost at the usual rate of compensation, unless in arbitration a discharge is converted to a suspension, provided the complaint is registered with the Employer within seventy-two hours of the suspension or discharge.

Section 2. Where an hourly employee is called to a supervisor for the purpose of investigating a matter that could lead to disciplinary time off, he/she will be informed of the nature of the matter to be discussed. All disciplinary actions taken by the Company shall be done in the presence of a Shop Committee person or Steward. The Union shall promptly be given a copy of any reprimand.

Any employee who works for six (6) months without committing another offense of the same nature shall have all references to disciplinary action expunged from the employee's personal record and thereafter return to Step 1 of the reprimand procedure as to the offenses of that nature. The record will not be expunged for offenses listed in paragraphs three, four and five of this section for one year regarding the documentation of worker's compensation or unemployment compensation claims.

Misconduct under the following areas shall be subject to immediate discharge or the by-passing of any of the following intermediate disciplinary steps: insubordination, stealing, fighting, possession or sale of drugs on Company premises and being intoxicated on Company premises.

Creating a hostile work environment and/or sexual harassment will be subject to disciplinary action, up to and including discharge.

Dishonesty and defective workmanship shall be subject to disciplinary action up to and including a three (3) day suspension. Any further violations of the same nature shall subject the employee to discharge.

Reprimand procedure: (Minor Offenses)

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ARTICLE XVI

MANAGEMENT

Section 1. Where this Agreement does not specifically address a matter management has the exclusive right to deal with the subject and may act unilaterally. Management's right to so act, subject to specific terms elsewhere in this Agreement, includes the right to: assign work; transfer production; introduce new or different production methods, processes or procedures; establish and enforce policies, rules and regulations; determine or change the number and types of employees needed to perform any work; demote, suspend or fire for just cause; promote employees; hire; layoff; set shifts; make work assignments; transfer employees; establish production levels; determine job

content; and take whatever other actions are reasonably necessary to efficiently and profitably run the business.

Section 2. Management is also expected to be solely responsible for decisions hours and working conditions. Nothing in this Agreement, therefore, limits management's right to deal exclusively with: product quality, design and materials; the amount, volume or timing of production; the prices of products; equipment facilities or technology; the hiring, selection or conditions of employment of nonunit employees; or any matter that is not a mandatory subject of bargaining under the NLRB.

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ARTICLE XVII

ADJUSTMENTOF GRIEVANCE

Section 1. Should any difference arise between the Employer and the Union and its members as to the meaning and application of the provisions of this Agreement, there shall be no work stoppage or strike, nor shall the Employer resort to a lockout, nor shall there be any work stoppage or strike authorized by the Union, nor lockout by the Company during the life of this Agreement. For the purpose of this Agreement the term grievance shall mean any dispute between the Employer and the Union, or between the Employer and an employee or group of employees concerning the effect, interpretation, application, claim of breach, or violation of this Agreement. An earnest effort shall be made to settle such difference immediately as set forth herewith following the grievance procedure.

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Section 3. In any grievance or dispute where it is determined in arbitration that the award shall be applied retroactively, the period of retroactivity shall be no more than ninety (90) calendar days at straight time base rate. The arbitrator shall render a decision to the parties within ninety (90) days from the date of the arbitration hearing.

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BACKGROUND AND FACTS

The Company manufactures luxury kitchen appliances, refrigerators and freezers, wine storage units and under counter units. The Grievant was hired by the Company in 1993 to full-

time employment, most recently in the capacity of Crating Parts Maker. The Grievant received a three-day suspension in 2002.

The Company sent all employees a letter dated March 1, 2006 regarding medical premiums and wellness initiatives. The letter explained that employees would be contributing two percent (2%) to their medical insurance premiums beginning in 2007 and that if the employee did not follow the wellness initiatives, then he would pay an additional five percent (5%) surcharge on medical insurance premiums. The wellness initiative required that employees complete a health risk assessment, have an annual physical and be smoke free or participating in a smoking cessation program. The letter identified various dates in March when nurses from Meriter Hospital would be at the Company facility to complete the assessment testing.

The Grievant was terminated on April 11, 2006. His termination letter read as follows:

RE: Brent Wickus-Termination for violation of workplace violence policy

Dear Dave,

Based on Brent Wickus' disciplinary history, the events that transpired 3/29/06 and Brent's conduct during his investigatory interview, the company is terminating Brent's employment effective immediately.

Best Regards,

/s/
Fred Neuman
Dir HR
Sub-Zero Freezer Co., Inc.

cc: Kathleen Haraughty
Brent Wickus

The Union filed a grievance on April 12, 2006 alleging a violation Article XV, Section 1 inasmuch as the Grievant was discharged without just cause.

In addition to the above, the following individuals testified at hearing regarding the events that occurred on March 29, 2006.

Heidi Wolf

Wolf is an employee of Meriter Hospital and was sub-contracted by Meriter to perform health risk assessment testing. Wolf was at the Company facility on March 29, 2006. Wolf

testified that she spoke to the Grievant and his wife when they entered the break room where the health risk assessment were being conducted. Wolf recalled that she asked the Grievant and his family whether they had an appointment and that the Grievant's wife responded that they did not need an appointment. Wolf testified that the Grievant's wife was agitated and that she was attacking the Company Human Resources personnel. Wolf testified that the Grievant was not saying anything when she was conversing with the Grievant's wife.

Wolf was unable to appease the Grievant and his wife as to the health risk assessment and she suggested to the Grievant that he go to human resources. During the Grievant's absence, Wolf and the Grievant's wife continued to speak. Wolf recalled that the Grievant's wife spoke loudly, that she was disruptive and that she was not happy. Wolf testified that she had a sick feeling and felt uncomfortable.

Wolf testified that her patient, William Crittenden, tried to reinforce what she was saying to the Grievant and his wife. Wolf testified that Crittenden tried to calm down the Grievant and his wife. Wolf stated that she did not feel physically intimidated by the Grievant or his wife, but that she felt more comfortable because Crittenden was in the room.

Wolf concluded that the Grievant as not happy. She reached this conclusion by just looking at him. She recalled that she did not hear him say anything, but saw his lips move. She observed him just stand next to his wife.

Kathleen Lively

Lively is an employee of Meriter Hospital and was sub-contracted by Meriter to perform health risk assessment testing at the Company. Lively was present in the break room testing area on March 29, 2006. Lively observed the interaction between Wolf, the Grievant, the Grievant's wife and Company employee William Crittenden. Lively testified that neither the Grievant nor his wife threatened her or made physical gestures toward her. Lively testified that the Grievant's wife was upset and that there was tension in the break room.

William Crittenden

Crittenden is a two-year employee of the Company with no relationship with the Grievant other than seeing him walk by at the facility. Crittenden had no relationship nor had he ever seen Wolf or Lively prior to March 29, 2006. Crittenden testified he heard Wolf inquire as to whether the Grievant had an appointment. Crittenden viewed the Grievant's wife's body language and concluded that she was "unhappy" or "agitated". Crittenden heard the Grievant's wife speak in a loud tone that she did not have an appointment, but wanted some answers. Crittenden testified that although the Grievant did not say anything, he was supportive of his wife in her conversation with Wolf.

Crittenden was present when the Grievant's wife inquired as to who would received the results from the health risk assessment. Crittenden observed the Grievant and his wife sitting.

Crittenden described the Grievant's wife as aggressive**,** tense, and dissatisfied with Wolf's responses. The Grievant did not say anything during this conversation. The conversation between the Grievant's wife and Wolf continued regarding the medical results. Crittenden intervened, stood up, and responded that the Company would not "do anything illegal as far as looking at somebody's health records and risk a lawsuit." Crittenden acknowledged that his standing up impacted the Grievant. Crittenden testified that the Grievant responded to Crittenden's remarks in a loud aggressive manner and moved closer to Crittenden when he responded.

Robin Pavel

Pavel is an employee of the Company in the capacity of Human Resources Assistant and has held that position for one and one-half years. Pavel was in her office at her desk, on March 29, 2006 when Gary Johnson entered the office. The Grievant followed immediately thereafter. Johnson asked about the procedures and process for the health risk assessment. Pavel responded that employees needed a booklet and appointment. The Grievant interrupted Pavel and stated that he didn't know he needed an appointment and that nothing had been sent to him in the mail. Pavel testified that the Grievant was speaking loudly and quickly and that he was gesturing with his arms and pacing. Pavel returned to her computer to view the appointment schedule and indicated to Johnson and the Grievant that there were two open appointments that afternoon. Johnson accepted an appointment. The Grievant responded to Pavel that he had to work that afternoon and therefore could not accept the appointment. Pavel left the room and went across the hall to obtain the booklets. Pavel testified that when she was out of the room, she heard Johnson tell the Grievant to calm down. Pavel returned to the office, gave Johnson and the Grievant a booklet and left. Pavel testified that she was "freaked out" by the incident.

Gary Johnson

Johnson is an employee of the Company. Johnson testified that he was not an acquaintance or friend of the Grievant. Johnson testified he was unhappy that he was expected to participate in this case and that others did not have to participate. Johnson confirmed that he was in the human resources office with the Grievant on March 29 and that the Grievant interrupted his conversation with Pavel. Johnson could not recall whether he told the Grievant to calm down or not. Johnson recalled that the Grievant was pacing like he had somewhere to go. Johnson did not conclude that the Grievant had behaved inappropriately in the human resources office.

Additional facts, as relevant, are contained in the **DISCUSSION,** section below.

ARGUMENTS OF THE PARTIES

Company Initial Brief

The Company maintains that the Grievant was discharged for cause.

The Grievant was abusive on March 29, 2006 at the Company worksite and created a hostile work environment. The parties' collective bargaining agreement recognizes that employees found to have created a hostile work environment shall be subject to disciplinary action up to and including discharge. Within 12 minutes time, the Grievant seriously upset two women and caused another to feel "uncomfortable". Ms. Wolf became physically ill as a result of the incident and Ms. Pavel backed away from the Grievant. Regardless of the reason for the Grievant's frustration, it does not justify his abusive conduct.

The Grievant is not credible. The Grievant's memory was selective. His testimony was inconsistent and unreasonable. Why would Pavel offer him an appointment if he hadn't told her he didn't have one? Why would four disinterested witnesses – Wolf, Lively, Crittenden and Pavel – whose recollection of the events of March 29 are consistent, conspire against the Grievant?

The Grievant was dishonest with management when confronted regarding his conduct. When asked about the incident, the Grievant was unwilling to recognize that he had done anything wrong. The Grievant consistently asserted that his behavior was normal. The Grievant's refusal to admit any wrongdoing demonstrates that he will not likely change his behavior.

The Grievant has a history of exhibiting abusive behaviors and had been warned that he needed to watch out and not become angry at work. The Grievant admits he was told by management to control his behavior or risk punishment for creating a hostile work environment. The Grievant has a reputation in the Company for being confrontational. The Company appropriately considered the Grievant's abusive history and forewarning when making its decision to terminate his employment.

The Grievant's history and past behavior was appropriately considered by the Company when evaluating his discipline. Past practice and contract language support the Company's position. The Company has never removed discipline from employee files. The term "expunge" in the labor agreement means "to not consider for purposes of the reprimand procedure". Since "expunge" is not defined in the labor agreement, the parties' practice of not removing discipline from personnel files should be followed as the accepted meaning of "expunge".

The language of the Article XV prohibits behaviors that establish a hostile work environment and states that they are not subject to progressive discipline. The language of returning to Step 1 references progressive discipline and since a hostile work environment

offense does not follow this procedure, the expungement language of Article XV only applies to offenses that are initially subject to the progressive discipline procedure. If the parties intended the four-step progressive disciplinary procedure to apply when an employee is guilty of a creating a hostile work environment, then the specific clause addressing hostile work environment violations is meaningless. As a result, the parties could not have intended the four-steps to be followed with this type of violation.

The Union points to a 1985 arbitration award as evidence that the Company deviated from the labor agreement when it terminated the Grievant. That award reinstated an employee because the Company considered discipline imposed greater than six months before the termination. The facts in this case distinguish it from the 1985 decision. First, the Grievant was guilty of creating a hostile work environment. Second, the parties' practice has changed since 1985 and that practice should be followed. Third, that award is not entitled to the same precedential effect as judicial decisions and therefore, this Arbitrator is not bound by its conclusion.

Although no remedy is warranted, assuming *arguendo* that the Arbitrator concludes otherwise, the Arbitrator is bound by Article XVII, Section 3 and is limited to awarding 90 days of back pay. A patent ambiguity exists between Article XVII and Article XV which provides full back pay benefits. To apply one provision is this context would violate the other provision. Since there is ambiguity, the parties rely on extrinsic evidence. The parties' bargaining history from 2002 clearly establishes that the Union knew that the 90 days was a limitation since they bargained to double the number of days of back pay. Moreover, the 1988 award submitted by the Union does not address the relationship between Article XV and Article XVII and so it should not be considered. It is speculative for the Union to rely on a 28 year old award. Four years of bargaining history is a more accurate reflection of the parties' understanding of the meaning of their agreement.

The Company discharged the Grievant for cause. He lost his temper, upset co-workers and contractors thereby creating a hostile work environment and was dishonest when asked about his behavior. The Grievant was forewarned and refused to take responsibility for his actions. The grievance should be denied.

Union In Reply

The Union maintains that the Grievant was discharged without just cause and that he is entitled to reinstatement and a make whole remedy which includes back pay consistent with the express terms of the parties' labor agreement.

The evidence presented by the Company does not establish a factual basis for discipline. The Grievant's behavior was not such that he created a hostile or offensive work environment nor can the Grievant be held accountable for the conduct of his non-employee spouse. The Company attempts to find the Grievant's use of hand gestures, his pacing and his refusal to make an appointment as improper. The Company compares the Grievant's conduct

to the egregious behaviors which appropriately meet the definition of a hostile or offensive work environment such as seeking sexual favors in exchange for money, bringing nude photos to work and grabbing at body parts of co-workers. The Company did nothing more than rely on personal emotional reactions and concluded that the Grievant was guilty.

It is unclear to the Union whether the Company is holding the Grievant responsible for his wife's conduct. On the one hand, the Company asserts that it is not, but then proceeds to attribute what it perceives as aggressive behavior on behalf of the Grievant's wife as inappropriate and contributing to existence of a hostile work environment. The Company cannot have it both ways.

The Company has ignored the fact that the collective bargaining agreement provides for the expungement of discipline. The Company considered discipline from 2002 in making its decision to terminate the Grievant. The labor agreement states that discipline shall be expunged. Neuman does not have the right to unilaterally apply his will to a term of the agreement. The fact that the term "expunge" is not specifically defined in the agreement does not make it ambiguous or meaningless. Moreover, the Company's argument that discipline may not be expunged because federal and state law require retention of the records is absurd.

There is no ambiguity or conflict between Articles XV and XVII. Article XV applies to cases of wrongful discharge or suspension. Article XVII is more general. Contract interpretation requires that specific provisions have greater effect than general provisions and that attempts should be made to harmonize all terms of an agreement. Numerous additional principles of contract interpretation are applicable and a contract clause should not be rendered meaningless based on an "average reader's" understanding. The meaning and interrelationship between these two sections was determined 28 years ago. The Company had plenty of opportunities to bargain changes to these contract provisions. The fact that the Company does not like its exposure to back payments does not create a scenario which justifies ignoring the clear language of the parties' agreement.

The Company is not consistent in imposing discipline. Another employee who explicitly threatened a supervisor's family was not discharged while an employee who simply expressed his dissatisfaction in a relatively benign manner was discharged.

The Union respectfully submits that just cause did not exist to discharge the Grievant and he should be reinstated with a full make whole remedy as mandated by Article XV.

DISCUSSION

This is a discharge case. The Grievant was terminated as a result of two incidents at the Company facility on March 29, 2006. The Company concluded that the Grievant violated the Workplace Violence Policy. The Union maintains that the Grievant did not violate any Company policy and his behavior, while not stellar, was not inappropriate or deserving of any level of discipline. Given these vastly different views of the incidents, I am compelled to

determine what occurred on that date before proceeding to the issue of whether just cause existed. Therefore, the starting point is a review of the events of March 29, 2006.

This case involves both the behavior of the Grievant and the Grievant's wife. The Company maintains that the behavior of the Grievant's wife was not considered, relied upon or recognized for purposes of the Grievant's discharge. I find it worthy to note that the Grievant is responsible for his wife's behavior when she is at the Company facility as his guest. But, given the Company's position that it did not consider her behavior, I will not address it in the context of this decision except in those circumstances when it is relevant to my ultimate finding.

Events of March 29, 2006

The Grievant, his wife and his child arrived at the Company facility at approximately 1:30 p.m. on March 29, 2006 for the sole purpose of completing a health risk assessment. The Grievant was not on-duty or in pay status. The Grievant was involved in two separate incidents in two different locations at the Company facility; the first in the break room and the second in the human resources office.

Incident in Break Room

The health risk assessments were conducted in the Company break room for all employees interested in paying a reduced portion of the health insurance premium. Employees received written notice of the dates in which Meriter hospital would have nursing staff at the Company facility to conduct the assessments. The Grievant arrived at the break room, with is wife and child, expecting to complete the health risk assessment and proceed to work his 2 p.m. scheduled shift. The Grievant's wife had taken vacation time from her job in order to complete the assessment that afternoon.

The Grievant did not have an appointment. The Union argues that the Grievant's letter did not require that he make an appointment. A review of exhibit 5, which is purportedly the letter mailed to the Grievant, indicates that it is probably the first and last page of the document distributed to employees. While it is possible that the Grievant received an incomplete letter, it is difficult to imagine how just one letter in all that were distributed at the Madison job site could be deficient. Moreover, the Grievant was the only employee to arrive at the assessment site without an appointment. I do not find the Union's argument persuasive.

Upon arrival in the break room, the Grievant and his family were greeted by Meriter Nurse Wolf and asked whether they had an appointment. When told that they needed an appointment, the Grievant did not respond. The Grievant's wife communicated with Wolf regarding the need for an appointment. [1] Again, the Grievant did not speak other than to

[1] The Grievant's wife was agitated by the fact that an appointment was required. She communicated her dissatisfaction to Wolf.

verbally indicate "yes" and non-verbally shaking his head in agreement with his wife that an appointment was not necessary. Wolf testified that the Grievant wasn't doing anything during this conversation. Lively testified that the Grievant was "passive, quiet" in comparison to his wife. Tr. 44.

The Grievant then left the room and went to human resources. While he was out of the room, the Grievant's wife continued to speak with Wolf regarding the health risk assessment. When the Grievant returned, his wife questioned Wolf as to where the results of the health risk assessment would be housed and who would have access. Wolf responded that Meriter would have the results and that the Company would not have access. The Grievant's wife challenged Wolf and Company employee William Crittenden stood up, interrupted, and joined the conversation**.** Crittenden acknowledged that he had a direct impact on the Grievant and instigated the Grievant's response. As a result of Crittenden, the Grievant took a step closer to Wolf and Crittenden and responded that big employers have access to employee medical records. The Grievant continued stating that large employers regularly engage in activities that may be unlawful and if the large employer desires to look at employee medical records, they will find a way to do so. Crittenden described the Greivant's manner as "a little aggressive, just vocally, not physically". Tr. 77.

Company Human Resources Director Fred Neuman spoke to the Grievant, Wolf, and three employees regarding the incident. Two employees that were present in the break room [2] had no recollection of the incident. Employee Crittenden described to Neuman his recollection. When questioned by Neuman, the Grievant did not view his interaction or involvement as worthy of discipline. Wolf was not immediately concerned regarding the incident as evidenced by her decision to not mention it to either the Company or Meriter. [3] Lively did not provide Meriter or the Company a statement or her impression of the incident at the time it occurred. Lively testified that neither the Grievant or his wife threatened her nor engaged in physical gesturing toward her.

There is no question that Wolf was negatively affected by the conversation with the Grievant's wife. She testified that she was nervous, tense and at one point, a "sick feeling" came over her. But these responses are directly attributable to the Grievant's wife and not the Grievant. Wolf stated that the sick feeling was "because the more she talked, I mean she was

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[2] The two employees, Jennifer Shapiro and Chad Wohlrab, were likely completing their health risk assessment in the break room when the Grievant and his family arrived. Both were spoken to by the Company and neither recalled an incident or confrontation.

[3] The genesis of this discharge is of interest. The Grievant's wife telephoned Meriter Hospital and made a complaint regarding the manner in which she was treated by Wolf. Neither Wolf, Lively nor Pavel initiated a complaint on or shortly after the March 29. It was only after Meriter contacted the Company that the Company, and specifically Neuman, became aware of the situation. Neuman testified that "Kathleen" informed him of the situation on March 29 prior to his leaving the facility**,** but there is no evidence in the record to establish the identity of "Kathleen". The only "Kathleen" that testified in this case was Kathleen Lively who indicated that she had not spoken to Neuman nor the Company about the incident.

very angry…" Tr. 14. Once again it is necessary to point out that the Company indicated it did not discipline the Grievant for his wife's actions nor has it stated that the Grievant's failure to intervene was the cause of the discharge.

Wolf was aware that the obligation to participate in the health risk assessment in order to reduce benefit from a reduced health insurance premium was not well received by the employees. As a result, Wolf was prepared for the some level of resistance from employees.

The total time in which the Grievant and his wife were in the break room was five to seven minutes. The Grievant left and was out of the break room for four to six minutes. He returned to the break room and they were in it for one minute and then left. Therefore, Grievant had a maximum of eight minutes during which to create an environment which caused others reasonably fear for their safety or to establish "extreme emotional distress". While I don't doubt that there are individuals that are able to create that level of disruption in an eight (or less) minute timeframe, an individual that nods his head in the affirmative, says "yes" in agreement with his wife, and asserts that large employers conspire to illegally obtain and/or distribute employee medical records has not created such an unyielding or dangerous environment.

Incident in Human Resources Office

The Grievant left the break room at the recommendation of Wolf. He arrived in the Human Resources office directly behind Gary Johnson. Johnson inquired of Human Resources Assistant Robyn Pavel the process and procedure to complete the health risk assessment. Pavel began explaining the process – obtain a booklet, make an appointment – and the Grievant interrupted to say that an appointment was not necessary and that it didn't say anywhere that an appointment was necessary. According to Pavel, the Grievant was speaking quickly and loudly, was pacing and he was waving his arms in the air.

When Johnson and the Grievant arrived in Pavel's office, she was at her desk in the back portion of the office. Pavel moved forward to greet and assist Johnson and the Grievant. When Pavel stepped backward, she went to her computer. Pavel testified that she moved back because she "wanted to get away from him and try and calm him down…" Tr. 98. I do not find that the Grievant or his behavior caused Pavel to move away from the Grievant and Johnson. Rather, she backed away from them when she was returning to her computer to determine when she could offer Johnson an appointment time.

After consulting with her computer and determining that appointments were available for the Grievant and Johnson, Pavel walked past the Grievant and Johnson, crossed the hall and obtained booklets for both of them. Once they had their booklets, both exited the human resources office and the Grievant returned to the break room.

Pavel testified that she heard Johnson tell the Grievant to calm down when she was in the office across the hall which would have been at the conclusion of her conversation with

Johnson and the Grievant. The Grievant confirmed that Johnson had told him to settle down, although he recalls that it occurred prior to entering the human resources office. Johnson has no recollection of making such a statement. The evidence establishes that the Grievant was upset and was behaving in such a way that would cause another employee, with whom who he had no personal relationship, to recommend that he calm down.

It is clear that Johnson did not want to be involved in the case. His memory was clearer when asked questions by Union counsel. He did not recall making a statement to the Grievant that the Grievant admits he made. Having acknowledged that, I have no reason to discredit the testimony he offered. Johnson estimated that the total amount of time he was in the human resources office was 20 seconds. Pavel believed it took her three or four seconds to leave the room, go across the hall and obtain booklets. That leaves 16 seconds for the Grievant to behave in such an egregious manner as to cause Pavel sufficient distress to violate the Workplace Violence Policy.

After the Grievant left Pavel's office, Pavel went to the break room to inform Wolf of Johnson's appointment. Pavel observed the Grievant and his wife whispering. The Grievant and his wife were discussing whether they would go to their own physician to complete the health risk assessment. Pavel was not fearful of the Grievant, did she alter her behavior, nor did she warn Wolf to watch out for the Grievant. It is inconsistent with the Company's conclusion that Pavel was so harmed by the Grievant's behavior in the human resources office that less than two minutes after the event, which allegedly caused her extreme emotional distress that she did not find it necessary to caution Wolf that the Grievant was potentially dangerous.

Thereafter, Pavel spoke to a co-worker, Stephanie Connors, about the exchange with Johnson and the Grievant. Pavel did not report it to a supervisor. It was only after Neuman came to Pavel that she informed him as to what occurred. Had Pavel been sufficiently upset to meet the criteria of the Workplace Violence Policy, she would have reacted differently after the incident was concluded.

Pavel testified that she believed the Grievant was upset with her based on "the tone of his voice and the way he was pacing around and waving his arms". Tr. 111. This is insightful. Pavel's concern at the time of the incident centered on who the Grievant was upset with and not on the manner in which the Grievant exhibited his frustration.

Pavel was an inexperienced human resources professional interacting with an employee who questioned whether she had done her job. His questioning was confrontational and emotional, but not disrespectful. He did not use profanity or direct any comments at Pavel. He did not threaten her, either verbally or physically. He did not infringe on her personal space, make advances at her or raise his fist to her.

Did just cause exist to terminate the Grievant?

Article XVI of the labor agreement provides the Company with the right to impose discipline, including discharge, provided it meets the just cause standard. The methodology of a just cause analysis looks first to whether the employee engaged in the behavior for which he was disciplined and second, whether the discipline imposed reasonably reflects the employer's proven disciplinary interest. I therefore turn to the two separate incidents to determine whether the Company has met the just cause standard.

The Grievant's discharge letter indicates that he was terminated for the events that occurred on March 29, 2006 and the Grievant's "conduct during his investigatory interview". Fred Neuman, Company Corporate Human Resources Director, testified that the Grievant was discharged for violating the Workplace Violence Policy and creating a hostile work environment. Neuman further acknowledged that the Company considered the Grievant's 2002 discipline and a verbal job counseling when it decided to terminate the Grievant.

The Company has a Workplace Violence Policy that prohibits the following:

* Injuring another person physically;
* Engaging in behavior that creates a reasonable fear of injury in another person;
* Engaging in behavior that subjects another individual to extreme emotional distress;
* Possessing, brandishing, or using a weapon while on Sub-Zero/Wolf premises or engaging in Sub/Zero/Wolf Business;
* Damaging property intentionally;
* Threatening to injure an individual or damage property; and
* Committing injurious acts motivated by, or related to, domestic violence or sexual harassment

With regard to March 29, the Grievant was involved in two separate incidents – one in the break room and a second in the human resources office. The Company does not distinguish either incident as more or less serious in comparison to the other nor does it indicate that the two, in concert, were the basis for the termination. As a result, I must conclude that the Company viewed each incident as a violation of its Workplace Violence Policy and that the two incidents taken together, along with the Grievant's prior disciplinary record and his "conduct during the investigatory interview" constituted the Company's basis for discharge.

The Grievant did not violate the Company Workplace Violence Policy on March 29, 2006. The evidence does not support **a** finding that either Wolf or Pavel were fearful of the Grievant, that they suffered extreme emotional distress or that they were threatened by the Grievant. The evidence does support a finding that Wolf and Pavel were uncomfortable. A

single incident of discomfort, while not appropriate, does not support the most severe disciplinary sanction.

Wolf testified that she was aware that the health risk assessment obligation was not well received by the employees. She further indicated that her contact with the Company, a human resources employee, had informed her of this. Pavel, who was also a human resources employee, would likely have been apprised of the employees' lack of reception to the health risk assessment/wellness expectations. Thus, while I am not condoning the Grievant's unbecoming responses, I cannot find that it was unforeseen or so egregious to warrant termination.

The Grievant's disciplinary sanction was rooted in Article XV of the labor agreement which states:

> Creating a hostile work environment and/or sexual harassment will be subject to disciplinary action, up to and including discharge.

Creation of a hostile work environment is not mutually exclusive to violating the Company Workplace Violence Policy. As previously addressed, the Grievant's behavior did not rise to the level of violating the Company Workplace Violence Policy. Although the parties' labor agreement references "hostile work environment", neither the agreement nor Company policy define "hostile work environment". As such, it is necessary to consider what constitutes a hostile work environment.

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The term, hostile work environment, originated in civil rights laws and specifically, was discrimination based on sex or otherwise known as sexual harassment. In MERITOR SAVINGS BANK V. VINSON, 447 U.S. 57, 106 S. Ct. 2399, 2407 (1986) the Supreme Court recognized unlawful harassment as that which is unwelcome, is "sufficiently severe or pervasive" so as to alter an employees working conditions, and "creates an abusive working environment". In 1993, the Court further defined a hostile work environment by a variety of conditions including "the frequency of the discriminating conduct; its severity; whether it is physically threatening or humiliating; or a mere offensive utterance; and whether it unreasonably interferes with an employee's performance. HARRIS V. FORKLIFT SYSTEMS, INC. 510 U.S. 17, 114 S. Ct. 367, 371 (1993). Establishment of a *prima facie* case for a hostile work environment claim, pursuant to Title VII requires that the complained of behavior is directed the victim because of protected class and not for some other reason.

There is no evidence to suggest that the Grievant's behavior in either of the March 29 incidents was prompted by or because of the anything other than his dissatisfaction or "unhappiness" with the health risk assessment process and appointment situation. The Grievant, to a very limited degree, communicated his displeasure with the health risk assessment process to Wolf and Pavel. Conversely, the Grievant's wife communicated her displeasure with Company human resource personnel, the health risk assessment process, and challenged the ethics of Company personnel in a direct challenging manner which caused

discomfort to Wolf. But, discomfort does not, in a single instance unrelated to a protected class, necessarily create a hostile work environment. The discomfort Wolf and Pavel experienced was short-lived. Wolf, although flustered, continued to see patients and completed her workday. Wolf did not report the incident to her employer or the Company until her own behavior was criticized. Pavel continued her work day without interruption and was not impacted by seeing the Grievant less than five minutes following an incident which the Company viewed as so serious that it justified termination. The evidence does not support a finding that the Grievant created a hostile work environment.

Consideration of Prior Discipline

The Company relied on the Grievant's past discipline when reaching its decision to discharge. The Union challenges that reliance on the basis that the Grievant does not have a disciplinary history because the parties' agreement requires that past discipline be expunged from the Grievant's record.

Article XV of the parties' agreement states in relevant part;

> Any employee who works for six (6) months without committing another offense of the same nature shall have all references to disciplinary action expunged from the employee's personal record and thereafter return to Step 1 of the reprimand procedure as to the offenses of that nature. The record will not be expunged for offenses listed in paragraphs three, four and five of this section for one year regarding the documentation of worker's compensation or unemployment compensation claims.

The Grievant was disciplined in 2002. Greater than 6 years have passed since this discipline. The Company differs in its interpretation of expunge or expungement and advances multiple arguments in support of its position. First, it argues that "expungement" in this context is ambiguous. I do not find that to be the case. There is a commonly understood meaning to "expunge," especially in the context of disciplinary actions. Next, it maintains that the Company has practice of maintaining all disciplinary actions within an employees personnel file. The Company points out that it has followed this practice for greater than six years and the Union had full knowledge that it was not removing disciplinary notices or documents from employee files. Assuming *arguendo* that the Union has acquiesced to the Company's practice, the fact that the Company has followed a practice in direct contradiction to the plain language of its labor agreement does not make it acceptable.

The Grievant is entitled to the "cleansing process" as articulated by Arbitrator Peter Davis in a prior award between the parties. See SUB-ZERO FREEZER CO., INC. V. LOCAL UNION 565, SHEET METAL WORKERS' INTERNATIONAL ASSOC., AFL-CIO, A-3735 (Davis, 1985). In that decision, Davis found that Article XV, Section 2 of the labor agreement did not allow the Company to consider discipline issued greater than 6 months prior. Davis defined

'expunge" in the same manner in which the Union argues and I am persuaded that "expunge" is entitled to its commonly understood meaning.

As to the Company's reliance on the verbal conversation between the Grievant and Neuman when Neuman informed the Grievant that he needed to control his behavior, the Company chose to not discipline the Grievant. It must live with that decision. As such, it was inappropriate for the Company to consider that conversation in making the decision to terminate the Grievant.

The Grievant's Conduct during Investigatory Interview

In making its decision to terminate the Grievant, the Company relied, in part, on what it determined to be a lack of truthfulness on the Grievant's part when questioned by Neuman regarding the events of March 29. The Grievant's responses, though not what the Company desired, where not dishonest. The Grievant was asked whether he had "engaged in inappropriate behavior" and whether he had "participated" in the incidents. He was asked his opinion and he answered. The questions the Company asked were not fact driven. Had the Company asked specific questions as to what the Grievant had said to Wolf and what the Grievant had said to Pavel, then the Company would be a position to assert that he was dishonest. The Company did not ask these types of questions. Rather, it asked for his subjective evaluation of his own behavior to which he responded. The Grievant's responses during the investigatory interview were not dishonest and should not have been considered as such by the Company.

Conclusion

The Grievant was disciplined for violating the Company Workplace Violence policy, creating a hostile work environment, his prior discipline and his responses to Neuman during the investigatory interview. The evidence does not establish that the Grievant violated the Workplace Violence Policy. The evidence does not support a finding that the Grievant created a hostile work environment. The Company should not have considered the Grievant's prior discipline nor should it have considered his responses during the investigatory interview as dishonest. The Company did not have just cause to terminate the Grievant.

Remedy

Having concluded that the Grievant's discharge lacked just cause, I turn to the issue of remedy. The parties point to two allegedly conflicting sections of the labor agreement which purportedly establish parameters to remedy in this matter. The Company relies on Article XVII Adjustment of Grievances, Section 3 which provides that:

> In any grievance or dispute where it is determined in arbitration that the award shall be applied retroactively, the period of retroactivity shall be no more than ninety (90) calendar days at straight time base rate. The arbitrator shall render a

> decision to the parties within 90 (90) days from the date of the arbitration hearing.

Meanwhile, the Union directs the Arbitrator to Article XV, "Discipline and Discharge", Section 1 which provides that:

> Any employee may be suspended or discharged for just cause, provided, however, that if such employee feels he/she has been unjustly dealt with, they may file their complaint with a Shop Steward and it shall then be handled in accordance with provisions of Article XVII. If it is found that such employee has been unjustly discharged or suspended, then he/she shall be restored to employment with full seniority rights and paid for all time lost at the usual rate of compensation, unless in arbitration a discharge is converted to a suspension, provided the complaint is registered with the Employer within seventy-two hours of the suspension or discharge.

When two portions of a collective bargaining agreement appear to be in conflict with one another, it is necessary to determine first whether such a conflict exists, and if so, which section is controlling. It is further necessary to rely on the principles of contract construction for guidance.

Looking first to the intent of the two sections, the section relied on by the Company is Article XVII which is the Grievance procedure and Section 3 is that part of the grievance procedure which specifically addresses arbitration. The section provides that when there is a grievance and it is arbitrated and there is a retroactive award, then the period of retroactivity is limited to 90 days. This applies to all grievances and disputes, regardless of the issue or issues in dispute.

In comparison, the section relied upon by Union is part of the Discipline and Discharge article. Section 1 provides first that the Company may suspend or discharge an employee only for just cause. The section directs the employee disciplined who believes they have been treated unfairly to the procedures contained in Article XVII and spells out that for those employees found to have been unjustly discharged or suspended, then he/she is entitled to full restoration of employment with payment for all time lost, unless in arbitration a discharge is converted to a suspension.

These two sections set the limitations on remedy. Article XVII**,** Section 3 is general. It applies to all grievances or disputes and does not require that the matter proceed or be resolved at arbitration in order for the remedy to be awarded. Article XV, Section 1 is specific to discipline and discharge cases that are arbitrated. Specific language is preferred over general language inasmuch as:

> People commonly use general language without a clear consciousness of its full scope and without awareness that an exception should be made. Attention and

> understanding are likely to be in better focus when language is specific or exact, and in case of conflict the specific or exact term is more likely to express the meaning of the parties with respect to the situation than the general language.

Elkouri & Elkouri, *How Arbitration Works*, 6th ed. (2003) pl. 470 citing the "Restatement (Second) of Contracts", Section 203 cmt. E (1981).

The evidence establishes that the Union negotiated the removal or modification of Article XV, Section 1 or the 90 day retroactive award limitation during 2000 bargaining. The Union's decision to negotiate that language establishes that it recognized that the language had meaning. The Union argues that past bargaining history should not be considered because it was an error on the part of the prior business agent. Regardless of whether it was in error or not, it remains part of the bargaining history, but in this instance, I do not find the Company's argument more compelling than the language of the agreement.

AWARD

1. The Grievant was discharged in violation of the just cause provisions.

2. No, the remedy is not limited by Article XVII, Section 3.

3. The appropriate remedy for the violation found in item one is as follows: The Company shall immediately expunge all references to termination from the Grievant's personnel files and it shall make him whole without interest for all money and benefits, including overtime, that he otherwise would have earned but for his termination, plus any monies he would not have received but for his termination.

4. I shall retain jurisdiction for at least sixty (60) days to resolve any questions involving application of this Award.

Dated at Rhinelander, Wisconsin, this 3rd day of July, 2007.

Lauri A. Millot /s/
Lauri A. Millot, Arbitrator

LAM/gjc
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