

Glazer # 10

FEDERAL MEDIATION AND CONCILIATION SERVICE

IN THE MATTER OF THE VOLUNTARY ARBITRATION BETWEEN

Employer

-and-

Union

GR.: Tim Saturn/Discharge

ARBITRATION OPINION AND AWARD

ISSUE

WAS THE DISCHARGE OF THE GRIEVANT FOR JUST CAUSE, AND IF NOT, WHAT SHOULD BE THE REMEDY?

An arbitration hearing under the rules of the Federal Mediation and Conciliation Service was held on August 15, 2007. Testifying for the Employer were: Kaden Pluto, Area Production Manager; Jennifer Venus, Human Resources Administrator; Jack Mars, Human Resources/Safety Manager and Mark Mercury, Vice President, Human Resources and Safety, Mideast. Tim Saturn, the Grievant, testified for the Union. Comprehensive post-hearing briefs were submitted by the parties.

BACKGROUND

Tim Saturn was discharged on November 3, 2006 for excessive absenteeism, after he failed to provide a requested medical excuse for certain FMLA days. The Union asserts that the discharge was contrary to just cause and the provisions of the FMLA.

The discharge letter said:

CONFIDENTIAL VIA CERTIFIED MAIL

November 3, 2006

Mr. Tim Saturn

1731 First Orbit

City, State 12345

Dear Tim:

On July 20, 2005 you were issued a verbal reprimand for excessive absenteeism.

On September 7, 2005 you were issued a written warning for excessive absenteeism.

On April 10, 2006 you were issued a three (3) day suspension without pay and informed that further infractions would subject you to termination for excessive absenteeism.

In each instance, disciplinary action was properly administered in accordance with Article 8, Section 3, of the collective bargaining agreement.

In August 2006, you began missing an unusual number of days without providing documentation as to your whereabouts. Specifically, our records indicate that you missed August 5th, 11th 12th, 14th, 17th, 18th, 19th, 24th, 26th, 28th, 29th, 30th, 31st, September 1st, 7th, 29th, October 11th, 13th, 14th, 16th, 18th, 20th, 24th and partial days on October 23rd, 26th, and 28th.

As we have repeatedly explained to you, we do not know if these absences were to attend to your child or if they were for yourself. We have explained your rights and entitlements under the FMLA and repeatedly requested documentation to support an FMLA leave. Despite our numerous requests, you have failed to cooperate.

On October 17th, you were given a letter from Tom (sic) Asteroid,

Assistant Plant Manager, compelling you to produce this documentation. Finally, on Wednesday, October 25, 2006, I informed you that you had until Monday, October 30, 2006 to provide this information or face disciplinary action. On October 31, 2006, you were suspended without pay pending termination.

Throughout this entire process you have displayed a defiant tone and refused to comply with this basic information request. We have no choice but to consider the days missed referenced above as unexcused. As such, your employment is terminated effective immediately.

Please contact me regarding personal belongings you may have at the plant.

Sincerely,

/s/

Kaden Pluto Area Production Manager/Acting Interim Plant Manager

During the grievance process the Union wrote its position as follows:

Time limits were not followed. Employer suspended Mr. Saturn but fired him. No contract language. Merits are that Mr. Saturn's doctor told him this was all he would need.

Mr. Saturn received an oral warning for absenteeism on July 20, 2005, a written warning for absenteeism on September 8, 2005 and a three day suspension on April 12, 2006 for absenteeism. Pursuant to Article VIII, this placed Mr. Saturn at the "subject to discharge" level of discipline as of the date of his final absences. Mr. Saturn also received an oral warning on April 12, 2006 for being a no-call, no-show.

Mr. Saturn was certified for intermittent FMLA leave on October 3, 2005 based upon the serious heart condition of his son. This FMLA leave was approved by the Employer. The certifying cardiologist wrote that the son would require testing and treatment for symptoms. The Employer's form required Mr. Saturn to provide periodic reports as needed. It said:

7. While on leave you will be required to furnish us with periodic reports every *per Dr. notes (indicate interval of periodic reports as appropriate for the particular leave situation)* of your status and intent to return to work (*see § 825.309 of the FMLA regulations*). If the circumstances of your leave change and you are able to return to work earlier than the date indicated on the reverse side of this form, you will be required to notify us at least two work days prior to the date you intend to report for work.

On October 17, 2006 the Employer requested Mr. Saturn to provide medical authorization, for what it regarded as an unusually high number of FMLA absences in August, 2006. Previously, on August 16, 2006, the Employer requested Mr. Saturn to update his certification for FMLA leave by October 3, 2006.

Mr. Saturn declined to provide the medical support for his August absences, and he was suspended and then terminated. Supervisor Justin Green wrote on October 31, 2006:

From: Justin Green

Sent: Tuesday, October 31, 2006 5:16 AM

To: Kaden Pluto

Subject: Tim Saturn

I met with Tim, Brad Neptune and Malcolm Comet before starting the shift and asked Tim for the paperwork due last night concerning his absent days as requested by HR. He denied having them. I told him that those days are then considered unexcused and for that reason, he is suspended pending disciplinary action. I mention that he could call you this morning on which he said no. I ask him for a reliable phone number where you could call him and he said that he don't (sic) want to talk to you, that you can call his lawyer if you want to. He seems to be expecting this and was very cordial with the suspension.

Mr. Saturn submitted his 2006 request for intermittent FMLA leave based upon his son's heart condition on October 3, 2006.

The Employer noted that customarily Mr. Saturn used four to five days a month for FMLA leave. However, in August of 2006, the FMLA usage increased to 13 days. Kaden Pluto, the production manager, said that he asked Mr. Saturn to provide doctor notes to excuse the Grievant's absences in August. The original FMLA certification indicated that the Grievant would be using two to six days per month, depending on symptoms, of FMLA leave.

Mr. Saturn was quoted as saying that he would be falsifying a document if he asked a doctor to excuse his absences, since he did not go to the doctor with his son. Mr. Pluto said that he told the Grievant that he just wanted to make sure that what the Grievant did was related to his son's heart condition. Mr. Pluto testified that he heard rumors that the Grievant was working on the side as a handyman, but he did not investigate that claim.

Jennifer Venus, the HR administrator, testified that she did not believe that the 2006 FMLA certification from the doctor in October was sufficient to explain the excessive absences in August. She indicated that the Employer was looking for an explanation for the Grievant's increased use of FMLA time in August.

Jack Mars, the safety manager, testified that Mr. Saturn told him during an October 2006 meeting that he could not provide a doctor's slip, because he hadn't seen a doctor for his son's condition in August. Mr. Mars said that the Grievant was told that all the Employer needed was a doctor's explanation that the Grievant's absence could be related to his son's heart condition. The Grievant is quoted as saying in response that he

didn't have to comply, and that he would be contacting his lawyer. Mr. Mars said that the Employer told Mr. Saturn that it wanted to help, and that all it wanted was something from him to show that his absences were related to his son, and the problem would go away.

The vice president of Human Resources, Mark Mercury, indicated that he had lost a son to a heart condition, and that he understood Mr. Saturn's situation. He said that all he wanted was some verification that the absences were related to the son's condition, and that the issue would go away. He felt that he had a right to ask for verification, because of the increased volume of FMLA usage in August. Mr. Mercury said that the Grievant told him he wouldn't get a doctor's note.

Tim Saturn was hired in November of 2003 as a mechanic on the second shift. He said that his son had a congenital heart condition, and that he had experienced two pacemaker surgeries. His son was eight years old at the time of his discharge.

Mr. Saturn testified that he usually required five days a month to care for his son. However, in August of 2006 he said that his son began to experience severe behavioral problems due to his heart condition. He noted that he had three other children that his wife was caring for at the time.

Mr. Saturn said that he wanted to improve his son's behavior without using medication and through diet, and that this required him to stay with his son at home. Mr. Saturn said that during August he did not go with his son to the doctor for his behavior problems, but that he did consult with the doctor over the phone.

Mr. Saturn said that he told the Employer that he could not provide a doctor's note, because he did not take his son to the doctor. He added that he told the Employer

that he would be guilty of falsification if he provided a doctor's slip.

On October 11, 2006 Mr. Saturn said that the doctor told him that his son had a leaky heart valve. He also said that the doctor told him that the October 2006 certification was "all they (the Employer) needed to know", relative to his August absences. Mr. Saturn did not share his doctor's statement with the Employer.

In his October meeting with the Employer, Mr. Saturn said that he told the Employer that he had to take care of his son in August, and that "my doctors don't live with me."

Mr. Saturn testified that none of his August absences related to work as a handyman, but solely were caused by his son's condition. He added that his son has improved, and his behavioral problems are no longer an issue.

Mr. Saturn said that his doctor could have written a note, but that he told him that his October 2006 certification was all that he needed.

PERTINENT CONTRACT PROVISIONS

ARTICLE VIII CONDITIONS OF EMPLOYMENT

Section 1. The Employer continuously strives to provide a safe and healthy work environment for the employees. Pursuant to this end, the employees will be required to participate in the Employer sponsored Hearing Conservation Program as well as periodic health monitoring. The monitoring will be at the Employer's cost and employees will be paid for the time necessary for their involvement. Participation in such testing does not preclude an employee from exercising any rights they may have.

Section 2. It is agreed between the parties hereto that it shall be the responsibility of each employee to notify the Employer prior to his shift starting time if he is to be absent from work for any reason whatsoever. Failure to notify makes the employee subject to immediate discipline as follows during any twelve (12) month period. First violation - verbal warning; Second violation written reprimand; Third violation Three day

suspension without pay; Forth violation subject to discharge. Any employee who is subject to disciplinary action under this Section shall receive a written notice of such within four (4) scheduled working days with a copy going to the Union and the Steward. Failure on the Employer's part to issue such notice will result in such disciplinary action being void.

Section 3. If any employee fails to report for duty without securing permission from plant management shall, on the fourth (4th) occurrence, be subject to a verbal reprimand. If an employee fails to report for duty a second time within twelve (12) months of a prior violation, he/she shall be subject to a written warning; if an employee fails to report for duty a third time within twelve (12) months of a prior violation, he/she shall be penalized by a three (3) day disciplinary suspension without pay; if an employees fails to report for duty a forth time within twelve (12) months of a prior violation, he/she shall be subject to termination.

Any employee leaving work claiming sickness shall be charged with a day of absence under this section if he/she has completed less than six (6) hours of work.

An employee is entitled to three tardiness infraction of up to twenty (20) minutes in a twelve (12) month period. After three infractions, the penalty for additional infractions shall be:

1. 1. Verbal warning
2. 2. Written warning
3. 3. Three day disciplinary suspension without pay
4. 4. Subject to termination

For purposes of this provision, tardiness beyond twenty (20) minutes will subject the employees to the first step as described above. Any future tardiness beyond twenty (20) minutes within a twelve (12) month period will result in continuation of progressive discipline as described above.

Any employee who has an excessive absentee record will be subject to a meeting with Union representation present to determine the future status of the employee. Any decision reached by the Employer is subject to the grievance procedure.

Any employee who is subject to disciplinary action under this Section shall receive a written notice of such within four (4) scheduled working days with a copy going to the Union and the Steward. Failure on the Employer's part to issue such notice will result in such disciplinary action being void.

It is understood and agreed by the parties hereto that Section 1, 2, and 3 of this Article VIII are subject to the grievance procedure of this Agreement in the event any employee is disciplined under the above Section.

...

ARTICLE XX

MANAGEMENT RIGHTS

The Employer reserves and retains the right to direct, manage and control the business and the work force, except to the extent that this Agreement specifically provides to the contrary.

This includes, but is not limited to: the right to plan, direct and control operation; to determine when work is to be performed; to determine, alter, revise, change or eliminate any or all means, methods, processes, materials and schedules of production; to determine the existence, number, composition and size of crews; to determine, combine, or change the duties of jobs; to establish operations and work standards; to determine whether and what extent the work required in this business shall be performed by employees covered by this Agreement; to temporarily transfer employees between jobs, shifts and departments in order to maintain efficient or economical operations; to cease operations wholly or partially; to transfer work elsewhere; to hire, discipline suspend or discharge for cause, layoff, transfer, promote or demote; to make and enforce reasonable rules; and to instruct and train employees. These rights shall be limited only to the extent that this Agreement specifically so provides.

ARTICLE XXIV

NON-DISCRIMINATION

...

Section 3. The parties mutually agree to comply with the provisions of the Family Medical Leave Act of 1993 and the American with Disabilities Act of 1990.

POSITION OF THE EMPLOYER

It is asserted that the Grievant was properly terminated under Article VIII, insofar

as he was at the discharge level of attendance violations, and his August absences were unexcused. The Employer maintains that it could properly require a doctor's excuse under the FMLA for the Grievant's August absences, and that because he failed to provide them, he was properly terminated.

The Employer emphasizes that it was empathetic to the Grievant's situation, and that the managers only asked for him to give them "something", to avoid a problem. The Employer argues that the Grievant failed to explain his August absences, and that therefore the termination was appropriate.

POSITION OF THE UNION

It is contended that Mr. Saturn's son suffered from behavioral problems that are well known to be associated with heart problems in children. The Union maintains that the Grievant took FMLA time to deal with the problem with his child, and that required the additional absences in August.

The Union argues that the Grievant felt that it would require a falsification, for him to provide a doctor's excuse, since he took care of the child at home and not at the doctor's office. The Union further argues that the Grievant's doctor told him that the October certification would be sufficient to cover the August absences.

The key to this case from the Union's perspective, is that the Employer should have had its health care providers contact the Grievant's physicians pursuant to 29 CFR 825.307(A). It is argued that the Employer was required to contact the Grievant's physicians, if it wanted additional information. The Employer, it is asserted, violated the FMLA by requiring the Grievant to provide a note from his doctor to cover his absences.

The Employer is also said to have violated Article VIII, since the Grievant provided reasons for his absences. The Union further argues that although the Grievant did not tell the Employer in October of 2006 that his doctor had told him that the October certification was “all that he needed”, the Employer nevertheless had a duty to contact the Grievant’s physician for more information.

DISCUSSION

I have carefully reviewed the well-reasoned arguments of the parties; however, I will focus only on those areas that are relevant to my decision.

The Union argues that the Employer should not have contacted Mr. Saturn directly for medical information regarding his increased use of FMLA leave in August, rather than going directly to Mr. Saturn’s doctors for that information. It cites CFR 825.307, which states, in pertinent part:

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- (A) If an employee submits a complete certification signed by the health care provider, the Employer may not request additional information from the employee’s health care provider. However, a care provider representing the Employer may contact the employee’s health care provider, with the employee’s permission, for purpose of clarification and authenticity of the medical certification.

This provision of the FMLA would not seem to be appropriate to the facts of this case. The Employer had accepted the October 2005 medical certification, which covered the August, 2006 absences. The issue in this case pertains to whether the August dates fell within the October 2005 certification.

If the Grievant had provided a letter from his doctor saying that the August dates fell within the certification, the Employer was willing and would have had to accept the dates as excusing Mr. Saturn under the FMLA. Therefore, because the issue in this case pertains to the veracity of certain claimed FMLA dates, and not to the underlying certification, CFR 825.307 does not apply.

The provision of the FMLA cited by the Employer also is not relevant. It cites CFR 825.311(B) as allowing additional medical proof. The Employer cites the following language:

When the need for leave is not foreseeable, or in the case of recertification, an employee must provide certification (or recertification) within the timeframe requested by the employer (which must allow 15 days after the employers request) or as soon as reasonably possible under the particular facts and circumstances...If an employee fails to provide medical certification within the pertinent circumstances, the employer may delay the employee's continuation of FMLA leave. If the employee never produces the certification, the leave is not FMLA leave.

The Employer requested a recertification for FMLA leave, effective October of 2006, and Mr. Saturn provided that certification. Therefore, the requirements of CFR 825.311(B) were met.

I am persuaded that this matter is controlled by the October 2005 Employer response to request for FMLA leave. That response cites CFR 825.309 as requiring periodic reports. Paragraph 7 stated:

7. While on leave you will be required to furnish us with periodic reports every *per Dr. notes (indicate interval of periodic reports as appropriate for the*

particular leave situation) of your status and intent to return to work (*see § 825.309 of the FMLA regulations*). If the circumstances of your leave change and you are able to return to work earlier than the date indicated on the reverse side of this form, you will be required to notify us at least two work days prior to the date you intend to report for work.

CRF 825.309 states, in paragraph C:

- (C) It may be necessary for an employee to take more leave than originally anticipated. Conversely, an employee may discover after beginning leave that the circumstances have changed and the amount of leave originally anticipated is no longer necessary. An employee may be required to take more leave than necessary to resolve circumstance that precipitated the need for leave. In both of situations, the employer may require that the employee provide employer reasonable notice (i.e., within two business days) of changed circumstances where foreseeable. **The employer may also obtain information on such changed circumstances through requested status reports.** (Emphasis Supplied)

Therefore, it would seem that the FMLA would allow status reports where more leave is taken than originally intended. The applicable October 2005 medical certification states that Mr. Saturn would be taking two to six days of leave a month, “depends on symptoms”. Mr. Saturn’s utilization increased in August of 2006 to 13 days. This would allow the Employer to obtain a status report from Mr. Saturn following the increased use of leave. That status report could reasonably be in the form of a doctor’s verification for the days that were taken.

Further, there was nothing in the FMLA that prohibits the Employer from

challenging the validity of days taken under the FMLA. Also, under general principles of labor relations, an Employer can question the validity of the use of sick days by an employee.

If an employer were precluded from requiring medical verification for an FMLA day, where it questioned its authenticity, an employee could claim an FMLA day, and be seen at a casino in Las Vegas, with no opportunity for the employer to challenge the validity of the date by requesting a letter from a doctor. Therefore, the Employer could request medical verification for the Grievant's use of additional days in August.

The Employer's request for a medical explanation for Mr. Saturn's August usage, which exceeded the two to six days listed in his medical certification, was appropriate. The Grievant's failure to provide that information for his doctor created a violation of the attendance rules in Article VIII. Since Mr. Saturn was at the "subject to discharge" level of discipline for attendance, discipline was appropriate.

Discharge, however, is not mandatory under Article VIII, and Article VIII is still covered by the just cause provisions of the contract. In this case, discharge would not be reasonable and appropriate under the just cause standard.

It is true that Mr. Saturn should have, under accepted principles of labor relations, provided the doctor's report, and then filed a grievance if he felt that the Employer was acting improperly. Moreover, although Mr. Saturn relied on assurances from his doctor that the October 2006 certification was sufficient, he never shared that information with the Employer. In any event, a doctor's assurance would not absolve him from his responsibilities under the contract.

Having said that, the doctor's statement to Mr. Saturn that the October 2006 certification was sufficient is a mitigating factor. More importantly, the Employer was willing to accept "something", and apparently, almost anything, to excuse the Grievant's absences in August. Clearly, had any doctor written a statement, the Grievant would have been excused for taking care of his son's behavioral problems in August, which were related to his serious heart condition.

Mr. Saturn was misinformed that a doctor's note would have caused a falsification, since the Employer only wanted an opinion from the doctor that the Grievant's absences were related to his son's heart condition. The Employer was not requiring the Grievant to have actually seen the doctor

However, the Grievant's misinformation is also a mitigating factor. The FMLA law and related issues involving doctor's excuses created a complicated situation, which could have confused Mr. Saturn. Had Mr. Saturn not labored under the misunderstanding that a doctor's excuse would represent a falsification, he could have easily presented a doctor's excuse that would have absolved him for his August absences.

Therefore, under the just cause standard, Mr. Saturn should be reinstated. That is a fair and reasonable result under the just cause standard. However, there should be no back pay and benefits, because of the Grievant's failure to follow a reasonable request of the Employer to provide medical verification for FMLA days that exceeded the number that were listed by the Grievant in his FMLA application. Moreover, the Grievant never did provide a formal medical reason for his absences in August, and especially at the time of his termination. No other contractual violations have been established.

AWARD

For the foregoing reasons, the Grievant shall be reinstated with seniority, but without back pay and benefits.

Mark J. Glazer Arbitrator

November 12, 2007