

Glazer #11

FEDERAL MEDIATION AND CONCILIATION SERVICE

IN THE MATTER OF THE VOLUNTARY ARBITRATION BETWEEN

Employer

-and-

Union

Roger Star/ Discharge

ARBITRATION OPINION AND AWARD

ISSUE

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

Employer makes power and relay panels in one division, and snowplows in another. Roger Star, a wireman in the panel division with 3.5 years of seniority, was terminated on March 30, 2007, for two incidents on March 27, which were said to have violated the Company's harassment policy. The Company notes that the Grievant had recently received a two day suspension for acts, that included harassment. It wrote in the termination notice:

EMPLOYEE TERMINATION RECORD 3/30/07

Employee	Name:	Roger	Star
Shift			1st

Type of Discipline: Termination

Reason for Termination: Harassment Policy Violation

On Tuesday, March 27th, 2007, two incidents occurred in the wiring area in which you violated the Employer Harassment Policy again, despite recently having been trained in preventing harassment in the workplace.

The first incident involved a co-worker from third shift. After the co-worker questioned you about missing labels on a panel you had worked on, you got hostile, vulgar and intimidating with the employee. You told the co-worker "you're too fucking lazy to put them on yourself and "you have not been here long enough to fucking question my work"

The second incident involved an exchange between you and a co-worker, just minutes later. While you were talking with another co-worker she asked you several times about a work assignment for the day. After several attempts to get your attention you finally "blew up" (in your own words) and told her amongst other things to "shut the fuck up!", "if I wanted to hear bitching I would have stayed home" and "you are worse than my mom". This incident was originally reported by an employee in the area and not the victim of your rant. Later after seeing the victim leaving her supervisors office you called her "a fucking cunt" to another coworker.

Both of the incidents above created a hostile, offensive and intimidating workplace for the people involved as well as other employees in the immediate work area. This is a violation of our Harassment Policy and can not be tolerated.

In consideration of your recent two day suspension which among other things included harassment and intimidation of fellow employees you are being terminated effective immediately.

Jason Neptune

A grievance was filed on April 2, 2007 requesting the Grievant's reinstatement and a make whole remedy. Transcribed arbitration hearings under the rules of the FMCS were held on September 10 and October 20, 2007. Testifying for the Employer were: Jack Jupiter, Area Supervisor; David Saturn, Pre-Tester; Karen Mercury, Wireperson; Harold Sagittarius, Wireperson; Phillip Pegasus, Wireperson; Jason Neptune, Vice President of Operational Excellence; Bruce Leo, Manufacturing Manager; Matt Virgo, Manufacturing Manager; Martha Venus, Director of Human Resources; Dustin Libra, Vice President of Accounting and Stanley Pluto, Executive Vice President and Chief Operating Officer. Testifying for the Union were: Roger Star, Grievant; Gerald Polaris, Wireperson; Nicholas Whirlpool, Chief Steward and Dylan

Libra, Steward. Comprehensive post-hearing briefs were submitted by the parties.

BACKGROUND

The Company has unilaterally imposed work rules, which in Rule #8 prohibits, “harassing any employee in violation of the Company’s anti-harassment policy.” There is a four step disciplinary process, which can be bypassed. The process says:

Disciplinary Process

In general, work rule violations will be dealt with using progressive discipline. A typical progression would be as follows:

First Violation -Recorded verbal warning

Second Violation - Written warning

Third Violation - 2 day suspension

Fourth Violation - Termination

However, depending on the seriousness of the violation, any or all of the progressive steps can be bypassed and an employee may be discharged without warning.

During training on the harassment policy in 2007, which the Grievant attended, harassment was defined, in part as: Verbal or physical conduct that isolates, denigrates, or shows hostility or aversion toward an individual/co-worker. The Company also established a “zero tolerance” policy regarding fighting in the work place. The events leading to the Grievant’s discharge began on the morning of March 27, 2007 when a co-worker, Harold Sagittarius, registered a complaint against Star to Jack Jupiter. Sagittarius stated that the Grievant had told another co-worker, Karen Mercury to “shut the fuck up” during a conversation, and that he had “blown up on her”. Mercury was then called into Jupiter’s office, where he described Mercury

as being “physically upset”.

On March 28, Jupiter spoke with David Saturn about the incident. Saturn advised him that there was a previous confrontation between himself and the Grievant on the 27th, when the Grievant told him that he was “fucking lazy”. This became a second basis for the Grievant’s discharge.

In August of 2006, Mr. Star received a two day suspension for insubordination and harassment of other employees. He was warned at that time that “any future work rules violations will result in your immediate termination.” Following the Grievant’s termination, Phillip Pegasus, advised the Company that he had had an incident with the Grievant two months prior to the final March situation.

David Saturn testified that he is a pre-tester for the panels, and that he checks the work of other wiremen. He said that on March 27, 2007, he questioned Roger Star about labels on the wiring. Saturn said that at the time that Star placed labels on the wiring, that that was the appropriate procedure, but that the protocol had changed, apparently without the Grievant’s knowledge.

Saturn said that the Grievant told him that he “hadn’t been there long enough to be questioning his work.” The Grievant is also quoted as saying that Saturn was “too lazy to cut off the labels himself.” Saturn did not hear any profanity from the Grievant.

Saturn said that he did not like the way that the Grievant spoke to him, but that he was used to dealing with people. He did say that Star did not intimidate him.

After the Grievant called him lazy, Saturn cut off the labels, and went over to Star, and said, “Here you go buddy, I’ve cut them off for you.” Saturn then placed the labels on Star’s

shoulder, “just to show what he had said to me wasn’t going to bother me.” The Grievant further said, according to Saturn, that “he didn’t have to be an asshole.” Saturn said that he replied “you’re the one being the asshole.” The Grievant, according to Saturn, apologized to him a few days later and he said that he told him “no problem” and shook Star’s hand.

Saturn also witnessed the Mercury incident. He said that Karen Mercury asked the Grievant if he was working in the panel, and the Grievant said to her, “Can’t you see I’m talking.” She continued to ask about the panel and the Grievant said to her “shut the fuck up.” Mercury responded, “I don’t have to listen to this” and then went away. Saturn said that the Grievant spoke loudly to Mercury.

Saturn testified that profanity is common in the workplace. He added that he did not feel harassed by his incident with the Grievant.

Karen Mercury testified that on the morning of March 27, she approached the panel where Star was working and asked if he was in the panel. The Grievant did not respond and she said that she asked him again if he was in the panel. At that point Mercury said that the Grievant jumped up and “told me to shut the fuck up, I’m having a conversation.” Ms. Mercury testified that she was shocked by the Grievant’s comment.

Ms. Mercury said that she later saw the Grievant working on another panel, and he said to her, “If I wanted to get bitched at, I would have stayed home with my wife.” She also said that he said “fuck” a couple of times.

Mercury said that she told Star, “Roger, just shut up.” Ms. Mercury stated that she was not intimidated by the Grievant’s statements to her. She adds that she has never heard another employee say “shut the fuck up”. Ms. Mercury testified that she did not register a complaint

against Star, because she didn't want to raise problems. Ms. Mercury stated when asked if she believed that the Grievant should be fired, "Yes, I guess."

Ms. Mercury said that she interrupted a conversation between the Grievant and another employee at the panel. She further stated that she raised her voice on the third occasion when she asked if the Grievant was in the panel. In response to the Grievant's comment about staying home with his wife, Ms. Mercury said that she stated, "If I want to be yelled at, I could stay home with my husband."

Ms. Mercury said that her exchange with the Grievant did not bother her any more that day or that week. She said that she was a "little upset", but she did not have any serious problems with Mr. Star.

Harold Sagittarius interposed the complaint against Mr. Star. He said that he heard the Grievant tell Mercury to "shut the fuck up" in a loud voice. Sagittarius further testified that the Grievant talked to him later that day and said, "If the fucking cunt would have shut her mouth, it wouldn't have happened."

Sagittarius testified that he raised the complaint against the Grievant because he didn't feel that the Grievant had treated Mercury properly. Sagittarius further stated that Ms. Mercury raised her voice somewhat during the interchange with Star, and that they were both loud.

Sagittarius was previously disciplined, but not discharged, for falsifying a doctor's slip. He received a written warning for that infraction in 2006. Sagittarius also received discipline for not being in his work area, and he received a recorded verbal warning for speeding in the parking lot on three occasions. Eventually, on November 16, 2006, Sagittarius received a two day suspension for using his cell phone at work.

Sagittarius testified that profanity is common in the workplace. He added that he didn't know that the doctor's excuse that he presented was forged by his daughter.

Jason Neptune, the vice president for operational excellence, testified that when the Grievant received his prior two day suspension, he seemed relieved to still have his job, and promised to become a better employee. The vice president indicated that other employees have been disciplined for using vulgar language towards co-workers. He also said that in the Saturn incident, he didn't want employees, such as the Grievant, trying to intimidate quality testers.

Mr. Neptune said that termination is required under the Company's work rules for a violation after a two day suspension. He added that subsequent to the Grievant's termination, a Phillip Pegasus, on April 3, 2006, advised him of an exchange between himself and the Grievant. Mr. Neptune further testified that the Grievant told him that he owed Ms. Mercury an apology.

Martha Venus, the director of Human Resources, testified that other employees have been disciplined for abusive and harassing behavior.

Roger Star states that on March 27, he had a conversation with David Saturn about taking the labels off of the wires. He felt that it was Saturn's job to take the labels off, and that his refusal showed that he was lazy. Star also said that he told Saturn that he hadn't been there long enough so as to tell him (Star) to do his job. Star says that he was unaware of the change in the protocol regarding the labels. The Grievant further states:

Later, probably about five to ten minutes later, he - he approached me with labels and set 'em on my shoulder, and told me, "There you go, buddy, I took them off for ya." And, I told him, I said, "Well, you don't have to be an asshole about it." And he - he walked away.

Thereafter, Mr. Star said that he felt that he was being bothered by Karen Mercury, while

he was talking with another employee. He said that she kept repeatedly stating “Are you in this panel?” Star said that Mercury walked away but came back with the same questions. The Grievant testified that he then told her, “Shut the fuck up, Kathy.” Mr. Star said that he and Mercury had comments about husbands and wives and that he told Mercury that he would have stayed home with his wife had he wanted to be bitched at.

Mr. Star testified that he had never had previous problems between himself and Ms. Mercury. The Grievant further denies speaking with Sagittarius and referring to Mercury as a “cunt”. The Grievant said that he asked to apologize to Mercury, because he understood that the comments he had made to her were inappropriate. Mr. Star also said that he apologized to David Saturn.

Gerald Polaris testified that Ms. Mercury kept getting louder when she continued to ask the Grievant if he was in the panel, and that the Grievant eventually told her to “Shut the fuck up.” Polaris said that Mercury and the Grievant were having an argument, but he doesn’t think that it was that bad.

Nicholas Whirlpool testified that profanity is frequently used in the workplace. Stanley Pluto, the executive vice president, indicated that the Grievant was terminated for intimidating David Saturn, for intimidating Karen Mercury, and for later using the “fucking cunt” language to Harold Sagittarius. Mr. Pluto added that the Grievant was at the termination stage of discipline when he made his final remarks.

POSITION OF THE UNION

It is argued that the Grievant’s conduct did not create a violation of the Company’s harassment policy, and principles of harassment, as described in Elkouri and Elkouri, *How*

Arbitration Works. The Union notes that Saturn testified that he was not intimidated by the Grievant's comments and further that his work was not affected by the Grievant's statements to him.

The Union further asserts that Saturn and the Grievant reconciled, and that there were no ongoing problems. It is contended that the Grievant engaged in, at most, shop talk.

Regarding Karen Mercury, it is denied that the Grievant said "shut the fuck up" until the second discussion with Mercury. The Union further argues that Mercury interrupted the Grievant repeatedly and engaged in repartee about their respective spouses. Also, it is noted that Mercury was not intimidated by the Grievant, and that her work remained unaffected. The Union emphasizes that Ms. Mercury did not initiate a complaint against the Grievant, and that she only said, "Yes, I guess" when asked if the Grievant should be fired.

The Union denies that any other employees in the area of the Grievant's comments were harmed. Further, it is denied that the Pegasus incident shows misconduct on the part of the Grievant.

The Union emphasizes that the alleged violations by the Grievant do not involve harm to a victim under the Company's harassment policy. It is further noted that the Grievant's conduct was not repeated, and that no one's work was affected by the Grievant's alleged comments.

The Union asserts that there was disparate treatment. It contends that the Grievant did not receive prior verbal and written warnings, and that he was therefore terminated after two steps of the disciplinary process, as opposed to the traditional four steps.

The case of Harold Sagittarius is cited where he received a reminder for three separate work rule violations, and only a recorded verbal for three speeding infractions in the parking lot.

Also, it is noted that Sagittarius only received a written warning for falsifying Company records. Thereafter, it is noted that Sagittarius received a two day suspension but not termination, for improper use of a cell phone.

Regarding Patrick Capricorn, it is argued that he verbally confronted other employees, abused Company property, and in another incident, he shouted profanity at an employee. Yet, it is asserted that Capricorn only received a three day suspension. The Grievant, it is argued, was terminated for just two offenses. Numerous other instances of disparate treatment are also cited by the Union.

POSITION OF THE EMPLOYER

It is argued that the record shows that other employees have been disciplined for harassment when they behaved aggressively towards other employees and used expletives against them. The Company notes that the Grievant had previously received a two day suspension for refusing to perform work, for discouraging other employees from performing work, and for referring to another employee who did agree to perform the work as a “suck ass”. The Company emphasizes that the Grievant was warned that he faced termination for future infractions.

Employer contends that the Grievant violated its harassment policy in this instance. Regarding the Saturn incident, it is noted that the Grievant called him lazy and tried to pull rank on him. In the Mercury matter, it asserted that the Grievant told her to “shut the fuck up,” and referred to her as bitching at him. Star is further argued to have used the “F” word. Also, it is noted that the Grievant referred to Mercury as a “fucking cunt” to Sagittarius. The Company emphasizes that in all cases, it has disciplined employees who make offensive remarks.

The Grievant, it is noted, initially lied by refusing to admit that he had said, “shut the fuck up” to Mercury. Discharge is argued to be the appropriate penalty. It is also contended that Star had previously received a two day suspension for inappropriate behavior.

Disparate treatment is denied. Regarding Capricorn, it is asserted that there was no damage shown to the parts, and that no one came forward to specifically accuse Capricorn of improper behavior. The Company’s pattern of discipline is said to support the Grievant’s discharge.

The testimony of Phillip Pegasus is further said to support the Grievant’s termination. The Employer asks that the grievance be denied in its entirety.

DISCUSSION

I have carefully considered the extensive evidence and well-reasoned arguments of the advocates; however, I will focus only on those areas that are germane to my decision. The standard for discipline found in the contract is justifiable cause, which is more generally referred to as just cause. There are three essential elements of just cause: the underlying offenses must be proven, the penalty must be reasonable and appropriate, and the grievant must be afforded labor relations due process. Included within the concept of labor relations due process, is the requirement that employees be in an even-handed manner. Thus, disparate treatment is a defense under the just cause standard. With this background, I will first consider some general issues and then determine whether the discharge was for just cause.

THE EFFECT OF AFTER-ACQUIRED EVIDENCE FROM PHILLIP PEGASUS

Following the Grievant’s termination, co-worker Peter Pegasus was interviewed, at which time he described an incident involving the Grievant, which could be described as harassing behavior. The Grievant denies harassing Pegasus.

The rule in arbitration is that after-acquired evidence can be used to bolster the credibility of the Employer's actual charges against the Grievant, and to influence the arbitrator on the remedy, should he otherwise decide that reinstatement is appropriate.

Here, it is undisputed that the Grievant made certain comments to Saturn and Mercury. Pegasus's testimony, therefore, is unnecessary for a credibility determination. Regarding whether Pegasus's testimony should be considered as a potential factor in regard to the remedy, Pegasus did not report the alleged harassment, but was rather interviewed at the time of the Grievant's termination, which was two months after the alleged comments to Pegasus. Pegasus's interview by the Company was also at a time when he faced termination for violating the Company's drug policy.

Under these circumstances, where the evidence of the Grievant's alleged misconduct occurred months before the discharge, making it difficult for the Grievant to interpose a defense, and where the potential claimant was facing termination when he made his complaint, it would be inappropriate to consider Pegasus's testimony on the issue of remedy.

THE APPLICABILITY OF THE HARASSMENT POLICY

The harassment policy, by its terms, appears to refer to potential claims under state and federal law, such as sexual harassment. However, the training for the policy includes a prohibition against verbal or physical conduct that isolates, denigrates, or shows hostility or aversion towards an individual or a co-worker. Employees have been previously disciplined under the expanded definition of harassment, and this seems to have been accepted by the parties. Moreover, the work rules indicate that the Company can discipline for actions that are detrimental to the interests of the Company and its employees, and certainly hostile and

intimidating acts would fit in that category. Therefore, the Grievant is properly charged under the harassment policy.

THE DAVID SATURN INCIDENT

The discharge must be evaluated based upon the reasons set forth in the termination letter dated March 30, 2007. The first charged offense is for making “hostile, vulgar and intimidating” remarks to co-employee David Saturn, by saying in regard to labels, “You’re too fucking lazy to put them on yourself”, and “You haven’t been here long enough to fucking question my work.”

The record supports that the Grievant made hostile remarks to Saturn, although the record also clearly supports that Saturn did not feel intimidated by them. Of importance, is Saturn’s response to the Grievant’s comments. Saturn, after a period of time, put the labels on the Grievant’s shoulder, while stating words to the effect, “Here you go buddy.” Saturn’s actions represent provocative and inappropriate behavior, which could have provoked a fight.

Yet, Saturn was not disciplined. Again, it is important to remember that Saturn put the labels on the Grievant’s shoulder and made the disparaging comments, after there had been a “cooling off period” subsequent to the Grievant’s comments. The disparate treatment doctrine precludes discharge of the Grievant for the Saturn incident. The Grievant was discharged, yet Saturn received no discipline at all. Further, Saturn did not initiate a complaint against the Grievant, Saturn and the Grievant apologized, and Saturn expressed that no harm was caused by the Grievant’s actions. Consequently, discharge was inappropriate for the Saturn incident.

THE KAREN MERCURY INCIDENT

Mercury was wrong to break into Star’s conversation with another employee without saying “Excuse me” first. However, Star was also wrong to ignore Mercury’s questions about whether he was in the panel. Both Mercury and the Grievant were loud.

The key issue was the Grievant's decision to stand up during the conversation and to say to Mercury in a loud voice "Shut the fuck up". Mercury was shocked by the comment, though she was not intimidated. In fact, Mercury later told Star to "shut up". Mercury and Star also engaged in repartee about their respective spouses.

The Grievant's "shut the fuck up" statement was wrong, and he recognizes that it was. The statement goes beyond the shop talk found in the plant. There is no evidence that comments like the Grievant's occur regularly, or that they are permitted. The Grievant's comments were also "fighting words", that could have led to a problem in the plant.

Mr. Star's comment was hostile and demeaning, and was properly disciplined under the harassment policy and the rule.

THE GRIEVANT'S COMMENT TO SAGITTARIUS ABOUT MERCURY

The Employer further references Star's comment to Sagittarius about her being a "cunt" or a "fucking cunt". I decline to find that there is sufficient evidence to support that this comment occurred, or that it would support the Grievant's discharge in this matter.

IS DISCHARGE REASONABLE AND APPROPRIATE UNDER THE JUST CAUSE STANDARD?

The Grievant was at the discharge stage under the Employer's work rules. It must be remembered, however, that these rules are unilateral and are subject to the just cause standard found in the contract, which requires the penalty to be proportional to the offense. The Grievant had previously received a two day suspension, which was not grieved. He was therefore at the discharge step, when he committed the actions that were shown in this case.

This is a close case insofar as Star finds himself facing discharge for saying "shut the fuck up" to a co-employee who seems to get along with him, who was not unduly disturbed by

his comment, and who did not register a complaint against him. However, the record suggests that the Grievant has a propensity to bully co-employees, based upon the earlier incident relating to his two day suspension, and the Saturn incident.

The Grievant's conduct and disciplinary record requires serious discipline. However, the disparate treatment doctrine determines the ultimate result in this matter. WAS THERE

DISPARATE TREATMENT?

On November 15, 2006 Patrick Capricorn was given a three day suspension for "fighting and harassment policy violations". He was charged with provoking another employee to the point that that employee pushed Capricorn down on the ground. Capricorn had received a previous warning for violations of the harassment policy. Yet, Capricorn was not discharged.

Thereafter, Capricorn, on January 3, 2007 verbally confronted an employee to stop making parts and then pushed a cart loaded with parts into a building column. The Company wrote in Exhibit 17:

EMPLOYEE WARNING RECORD

11/16/06

Employee Name: Patrick Capricorn

Shift 1st

Type of Discipline: 3 day suspension

Reason for Warning: Fighting and Harassment Policy Violation

On Wednesday, November 15th, 2006, at approximately 8:30 A.M., an argument occurred between you and Charlie Andromeda in the assembly area. During the argument, you provoked Chad to the point that he pushed you with enough force that you fell backwards to the ground. This type of behavior will not be tolerated in the work place. The incident created an extremely hostile work environment for all co-workers in the area.

You were given a previous warning in 2005 for a violation of harassment policy when you created a hostile work environment for another employee. Because of your actions yesterday towards Chad you are being

given a 3 day suspension without pay. The suspension will begin on Thursday, November 16th, 2006. You are to return to work on Tuesday, November 21st, 2006.

This is your final warning. Any future work rule violations will result in further discipline up to and including discharge.

Jason Neptune

Incident Documentation

1/3/07

Date of incident: January 3, 2007

Time of incident: 8:30am approx.

Location: Boss paint system line hanging area

This incident was reported to myself at approximately 9:00am by another supervisor. This supervisor had been notified by one of his employees involved in the incident.

Incident description:

A welder delivered a cart of parts to the storage area and when he arrived Patrick Capricorn verbally confronted the employee to stop making parts. Paul then proceeded to push a loaded cart of parts violently into a nearby building column causing an impact. Several employees were witness to this behavior.

Matt Virgo

Matt V. and I spoke to Paul at 7:00 a.m. Tuesday, January 9, 2007. We discussed the 2 incidents attached. I told Paul he is very close to losing his job and those outbursts described by Mike are inexcusable. We made it clear that any yelling or angry outbursts would not be tolerated.

J.N.

Capricorn was not discharged for the January 3 incident; neither was he disciplined.

Mr. Pluto testified that the Company's investigation showed that Capricorn properly asked employees to stop making parts so that he could catch up. Mr. Pluto further said that it couldn't be determined that Capricorn intentionally pushed the cart into the column, and that in

any event, there was no damage to the cart or to the parts. Mr. Pluto contrasted Capricorn's case with another, where the employee was discharged after damaging a helmet that he had thrown down to the ground.

Both Capricorn and the Grievant were at the discharge stage when their final incidents occurred. The Employer fired the Grievant, but not Capricorn, evidently because it felt there was no harm to the cart or the parts. Importantly, Work Rule #5 makes it wrongful for an employee to deliberately abuse Company property, tools or equipment. There is no requirement that the parts or cart be damaged for their to be a violation of the rule. Importantly, the *Random House Dictionary of the English Language* defines **abuse** as "to use wrongfully or improperly". It is wrongful and improper to push a cart and parts into a column.

The evidence does not support that Capricorn accidentally pushed the cart into the column, or that it would otherwise be appropriate for an employee to push a cart of parts into a column. Capricorn's conduct clearly represents an abuse of Company equipment and parts.

There is disparate treatment in the Capricorn and Star cases, which are contemporaneous. While the Employer says that there was no harm to the cart or parts in the Capricorn situation, it must be noted that neither Mercury nor Saturn registered a complaint of being harmed. Further, while Mercury said she was "shocked" by the Grievant's statement, she also said that she was not intimidated, and her production was not harmed. Mercury did say that she was "a little upset" by the Grievant's comments, but she was able to work with him that day and thereafter.

It was not shown that there was "no damage" in the Star case, as there was in the Capricorn cart incident, but there wasn't clear and substantial damage in the Star case, as there was in the helmet incident. Therefore, the Grievant should face a penalty, but discharge is too

serious of a punishment under principles of just cause and disparate treatment. The Grievant was not shown to have committed a serious harm, the Capricorn standard, and therefore discharge was inappropriate. If the Employer in the future does not want “actual harm” to be the standard, it must make that intent known to the Union. Under the particular facts of this case, the discharge should be set aside.

WHAT SHOULD BE THE PENALTY?

The Grievant should be reinstated with seniority; however, there should be no back pay and benefits. The Grievant did make Mercury a “little upset”. He did have a prior serious discipline on his record. This was not a simple “no damage” case, although the disparate treatment standard will not permit discharge,

Mr. Star must understand that he has to improve his conduct towards his co-employees if he is to retain his job in the future. Accordingly, it is appropriate that the Employer direct Mr. Star to engage in employee assistance or counseling, if it chooses, which will hopefully provide him with the insight necessary to keep his employment. The Grievant should also retain his position at the pre-discharge step of progressive discipline. He must further understand that retaliation against any of the employees who testified against him or who registered complaints against him, will produce his discharge.

AWARD

For the foregoing reasons, Mr. Star shall be reinstated with seniority, but without back pay and benefits. He will remain at the pre-discharge stage of progressive discipline. Further, the Company may direct Mr. Star to obtain employee assistance or counseling. Mr. Star must understand that future violations of the harassment policy will cause his discharge. He must also

understand that any form of retaliation against employees who testified in this proceeding or who complained against him, will cause his discharge.

January 21, 2008

Mark J. Glazer Arbitrator