

Jacob #3

VOLUNTARY LABOR ARBITRATION TRIBUNAL UMPIRE SYSTEM

In the Matter of:

EMPLOYER

-AND-

UNION

ISSUE: Discharge

The grievance in this matter arises out of the discharge of Employee 1, who was engaged in a physical altercation with Employee 2, a co-worker. Both the Grievant and Employee 2 were employed as building attendants on September 20, 2000.

Grievant was discharged on October 24, 2000, for the following reasons: "fighting, physical violence in the work place."

Although Grievant did not appear at the hearing, her statement was submitted by her counsel as Union Exhibit 8. Because she was not present at her hearing, I am reprinting her statement of September 21, 2000 herein:

"September 21, 2000

On September 20, 2000 I was in the senior lounge with Employee 6. The little girl named Child 1 came back there with a message from Employee 2 asking if I wanted to go to CVS with her. I told Child 1 to tell her no and that I wanted to know if she had my money or my book. This ultimatum was given because we had made a deal that she would buy my Psychology book from me. However, she has had the book for some time and the money she was going to give me was to help me buy my books for this semester. On September 19, 2000 I asked in the office alone if she had my money, she gave me some story about people owing her. Well, I have nothing to do with that. A few minutes passed and she came to the senior lounge.

Telling me how childish I was and calling me 'rnfs' so I told her okay and bye 'bitch' she walked away then stormed back in and told me that I better not call her anymore bitches. I took this as a threat so I called her another one and she pushed my face with her index finger. I then pushed her away and she sung again. She scratched my arm and neck so I grabbed her hair. I heard Employee 6 saying stop but I was not about to let her go until Mr. Employee 3 or someone else came in. When Mr. Employee 3, Employee 4 and Employee 5 came in Employee 2 had me against the wall and I still had a hold on her hair.

Apple Building Attendant"

[Union Exhibit 8].

Witness Employee 6 was present in the senior lounge at the Place, as indicated in Grievant's September 21, 2000, statement. Employee 6 corroborated Employee's 1 statement to the effect that Employee 2 sent a child back to the senior lounge to ask Employee 1 to go to the drug store with her. She corroborated the fact that Employee 1 asked Employee 2 for the return of her book or the \$20.00 cost of the book. Employee 1 also called Employee 2 a bitch as she was leaving the room, then turned around, and the next thing Employee 6 noticed was that both Employee 1 and Employee 2 had their fists raised above their heads, and one of the parties had the other in a stranglehold, and the other was holding the other one by her hair. Employee 1 tried to break the fight up, but could not do so. She then ran looking for assistance. Employee 4 and Employee 5 returned to the senior lounge with her to break the fight up.

Employee 6 concluded her testimony by stating that she believed that Employee 2 was the aggressor because it was she who returned to the senior lounge and began fighting with Employee 1, after Employee 1 called her a bitch.

Employee 3 testified that he came running when Employee 6 said "they're fighting." He followed Employee 6 to the senior lounge where he observed Employee 2 on top of Employee 1, holding her down. Employee 1 was holding Employee 2's hair. Employee 6, Employee 4 and Employee 3 separated them. Employee 3 then sent them home for the day.

Employee 4 testified that she, Employee 3 and Employee 6 separated the two combatants. She heard Employee 1 screaming for Employee 2 to let her go. The three were able to separate the two; however, as soon as the two were separated, Employee 2 lunged at Employee 1 again, according to Employee 4.

The Employer's position is that both Employee 1 and Employee 2 engaged in a Class IV offense. The guidelines for managers and supervisors in reviewing employee actions and

administering discipline provide that "the penalty for a Class IV offense in the absence of substantial mitigating circumstances shall be a thirty (30) day suspension, pending discharge without the requirement of any prior progression."

The Employer's position is that, whether or not Employee 1 was the aggressor, she was a willing participant in a Class IV offense, and that the Employer has a policy of zero tolerance for violence in the work place. Accordingly, the appropriate discipline was a twenty-nine (29) day suspension pending discharge, and the discharge of Employee 1. The Employer contends that Employee 1 was not a victim, but rather a willing participant in that she should have walked away. That instead she chose to prolong the confrontation with Employee 2 by calling her a bitch.

The Union's position is that Employee 2 was leaving the room when Employee 1 called her a bitch, Employee 2 turned back and attacked the Grievant. It is folly to state that if you are attacked you get fired. The Union's position is, if you were attacked, you protect yourself, and that the Employer actually failed to provide a safe work environment.

The Employer in rebuttal stated that, had Employee 1 not called Employee 2 a bitch, no fight would have broken out.

Employee 1 is sitting in the senior lounge at the back of the Place when Employee 2 sends a youngster back to invite her to go shopping with her at a local drug store. This infuriates Employee 1, who has been trying to recover \$20.00 from Employee 2 for a book which Employee 2 agreed to buy from her. She then informs Employee 2, who has come back to the senior lounge, that it was disrespectful to send a youngster to invite her to the drug store, and that Employee 2 should either pay the \$20.00 that she owes her, or return the book. At which point Employee 2, about to leave the room, and in fact one foot out the door, hears Employee 1 call her

"bitch." Then begins the mayhem. The women entangle each other, and Employee 2 being the heavier of the two, according to the testimony much heavier, lands on top of Employee 1. Employee 6 rushes for help; help arrives and Employee 6 and the help, Employee 3 and Employee 4 separate the two struggling women.

No question that the Employer has a zero tolerance policy for work place violence. The question is, did they both deserve to be terminated. Employee 2 has accepted the discharge that was delivered to her, and Employee 1 has appealed.

The Employer acknowledges that, even if Employee 1 was not the aggressor, she was a willing participant. Should the willing participant then be discharged for engaging in a struggle to separate herself from her attacker?

The incident would not have occurred but for the fact that Employee 2 first sent a youngster back to ask Employee 1 a harmless question, which infuriated Employee 1, because she felt Employee 2 was avoiding returning the \$20.00 which she owed her. Employee 2 came back to the senior lounge and was about to leave when Employee 1 called her a name, at which point the spark was ignited that led to the tangle between the two women. It appears to me that Employee 2 put the entire situation into play, and it is Employee 2 who initiated the activity which led to the confrontation and laying on of hands. I am not convinced in my mind that Employee 1 is deserving of discharge. I believe there is a question here of relative culpability. Employee 1's mouth didn't help the situation, but Employee 2 disrespect of Employee 1, and laying her hands on Employee 1 certainly escalated what could have been a peaceful resolution of the confrontation between the two women. I don't think, however, that Employee 1 is without fault. Employee 1 must suffer a penalty because of the use of her mouth in this situation.

Accordingly, I am rescinding the discharge, but am not awarding any back pay to Employee 1 because of her relative culpability.

AWARD

The grievance is SUSTAINED in part; no back pay is awarded to Grievant.

PAUL JACOBS

Umpire

Dated: August 16, 2002