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130 LA 1363
Grand Traverse Pavilions
Decision of Arbitrator

August 13, 2012

In re GRAND TRAVERSE PAVILIONS [Traverse City, Mich.] and TEAMSTERS LOCAL 214

Arbitrator(s)

Arbitrator: Lee Hornberger

Headnotes

LEAVES OF ABSENCE

[1] Sick leave abuse — FMLA ‣116.2504 ‣94.553 ‣118.6481

Employer did not have just cause to discharge employee who took Family and Medical Leave Act leave on weekend that she attended Zumba training class out of town, where she had anxiety attacks on Friday and Saturday, days for which she took leave, and took class on Sunday.

DISCHARGE

[2] Investigation ‣118.306

Employer did not properly investigate employee who took Family and Medical Leave Act leave on weekend that she attended Zumba training class out of town, even though it conducted good-faith investigation, where it gave incorrect dates for conversation between grievant and supervisor, took undated and/or possibly incorrectly dated statements from witnesses, did not take written statement from supervisor on crucial conversation, did not adequately respond to phone records, and did not conduct lengthy investigative meeting with grievant.

[3] Investigation ‣118.306

Employer did not have just cause to discharge employee who took Family and Medical Leave Act leave on weekend that she attended Zumba training class out of town, despite contention that grievant was evasive during investigatory meeting, where employer was under wrong impression that she had gone to class on Friday and Saturday, when she took leave, rather than Sunday when she had class, employer did not ask specific questions of grievant to find out why she did not work on Friday and Saturday, meeting lasted at most 10 minutes, grievant was nervous, and investigatory interview can be stressful.

LEAVES OF ABSENCE

[4] Sick leave abuse — FMLA ‣116.2504 ‣94.553

Employer did not have just cause to discharge employee who took Family and Medical Leave Act leave on weekend that she attended Zumba training class out of town, despite contention that court case holding that employer did not violate act if it had “honest belief” in denying leave controls, since “honest belief” test and “just cause” requirement are different.

BACK PAY

[5] Amount ▸118.806

Back pay owed improperly-discharged certified nurses aide is reduced 20 percent, where she did not apply for all available jobs, and returned to attending college, which partially limited her availability for employment.

Attorneys

Appearances: For the employer—John P. Racine Jr. (Sondee Racine & Doren PLC), attorney. For the union—Michael L. Fayette (Pinsky Smith Fayette & Kennedy LLP), attorney.

Opinion Text

SICK LEAVE ABUSE

Opinion By:

HORNBERGER, Arbitrator.

Introduction

This arbitration arises pursuant to a Collective Bargaining Agreement (CBA) between Teamsters Local 214 and the Grand Traverse Pavilions. The Union contends that the Pavilions discharged Certified Nurse Aide (CNA) W__ without just cause. The Pavilions maintains that W__'s discharge was justified by her allegedly providing false information for Employer

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records when she claimed FMLA leave and using FMLA leave of absence for a reason other than stated at the time the request was made.

Issue

The parties stipulated that the issue to be resolved in the instant arbitration is whether there was just cause to discharge the grievant, and, if not, what should the remedy be.

Relevant Contract Language

ARTICLE IV

Section 4.3 Work Rules

The Union recognizes the exclusive right of the Organization to establish work rules and regulations governing the conduct of employees and to require the observance of rules, regulations, and standards.

ARTICLE VII
GRIEVANCES

Section 7.1 Grievances

Step 5:

Powers of an Arbitrator. The arbitrator shall have no power to alter, amend, add to or subtract from the express terms of this Agreement or make any recommendation with respect thereto. It shall be the obligation of the arbitrator to make an effort to provide the parties with a decision within thirty (30) days following the conclusion of the hearing.

Section 7.4 Claims for Back Wages

All claims for back wages shall be limited to the amount of wages that the employee would otherwise have earned, less any unemployment compensation and all other employment compensation received from any source during the period in question.

ARTICLE IX
DISCIPLINE AND DISCHARGE

Section 9.1 Just Cause

The Organization will not discharge or suspend any employee for disciplinary reasons without just cause. Discharge will be proper written notice to the

employee and the Union citing specific charges against such employee. Such notification shall be made immediately and shall be given the Union via written notification to a steward on duty with a copy sent to the Business Representative at the Teamsters Detroit Office address. The principles of progressive discipline will normally be followed, except in serious cases.

ARTICLE XI
LEAVES OF ABSENCE

Section 11.5 Employment During Leave

If an employee uses a leave of absence for a reason other than the reason stated at the time the request is made, the employee may be terminated. Employees shall not engage in employment elsewhere while on leave, unless agreed to in writing by the Organization.

Facts

Introduction

Grand Traverse Pavilions is a county-run facility that provides assisted living to elderly residents. Teamsters Local 214 represents three bargaining units of employees at the facility, including a unit of general employees which includes Certified Nurse Aides. The Union and the Employer have a long-term collective bargaining relationship in excess of twenty years.

Background

W__ was hired by the Pavilions as a Certified Nurse Aide (CNA) on March 19, 2008. She is a mother with two children. She signed for the Employee Handbook on April 9, 2009.

CNA duties included taking care of residents, answering alarms, and dressing and otherwise helping residents.

W__ worked the night shift. The night shift is from 10:30 p.m. to 6:30 a.m. She was scheduled to work every Sunday night but got Mondays off. She gets more time with her children when she works the night shift.

There are usually four CNAs on the night shift. If a CNA is absent, the other three CNAs have to pick up the slack

Registered Nurse Amy Miller was the immediate supervisor of W__. W__ preferred working the night shift so she could attend Zumba during the day. On many occasions W__ came to work sleepy. W__ was passionate about Zumba. She talked about it all the time.

W__ has the medical condition of panic attacks, anxiety, and a little bit of depression. In May 2011 she was "certified" for panic attacks. She has been hospitalized for this a couple of times. She takes medication, including Limctal, Lexapro, and a third medication as needed. She received a letter from Pavilions approving her taking the medications. The medications do not interfere with her job.

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W__ has been involved with Zumba for two years. Zumba did not interfere with her normal work schedule. She signed up for the Chicago Zumba training a couple weeks ahead of time. Chicago was the "Zumba Gold" certification. There was a pre-paid $200.00 registration fee.

The Week Immediately Before Friday, August 19, 2011

Ms. Miller heard of the Chicago trip at least a week ahead of time. W__ was asking for a substitute. W__ was not trying to hide anything.

W__ said to Miller at least a week before Friday, August 19, 2011, that W__ was going to call in because she was going to attend a Zumba class out-of-town. Ms. Miller said to W__, "You're not going to use FMLA, are you?" W__ responded "No." Prior to Friday, August 19, 2011, Ms. Miller talked on the phone with Scheduler Shellie Way about W__ calling in. Ms. Miller did not realize it would turn out to be an issue. Ms. Miller knew W__ had used FMLA before. She was giving Ms. Way a "heads-up."

Attley Sims worked the same shift as W__. W__ informed Sims on more than one occasion prior to August 19, 2011, that W__ would be calling in on August 19, 20, and 21, 2011, to go to Chicago for the Zumba training.

W__ initially tried to get a replacement for her at work for the August 19-21, 2011, weekend. She did not find a replacement. She decided to drive to and from Chicago on Sunday, August 21, 2011. According to W__, it was okay to arrive in the middle of the Chicago class.

When W__ worked at the Pavilions, she had a young couple living at her house. They paid nominal rent and watched her children. The couple left one night with no prior notice. While she was at work, they packed up and left.

Friday, August 19, 2011, Activity

Shellie Way prepares the schedule for the CNAs. She talked with Ms. Miller Friday morning, August 19, 2011, before W__ called in. Ms. Miller gave Ms. Way a heads-up. Ms. Miller said W__ was interested in leaving Traverse City for that weekend and trying to get substitutes. Ms. Miller was concerned that W__ might call in that weekend.

W__ called the Employer three times that weekend. She called in at 8:23 p.m., Friday, August 19, indicating FMLA; 8:24 p.m., Saturday, August 20, indicating FMLA; and 7:35 p.m., Sunday, August 21, 2011, not indicating FMLA. The voice-mail receiver records times in five-minute window periods so these times could be several minutes off either way.

According to W__'s sister, Whitney Scholl, W__ suffers from panic attacks. Panic attacks run in the family. Ms. Scholl has been present during these attacks. On August 19, 2011, W__ was very emotional. She had been crying. She was stressed out. W__ was upset because she was going to Chicago and Ms. Scholl could not go with her.

Kristina Dunn is a friend of W__. They met via Zumba classes. Ms. Dunn is familiar with the W__'s panic attacks. She has been with W__ after the panic attacks. They talk regularly. W__ lets Ms. Dunn know when she is having a rough time. Ms. Dunn's house is "a secure place for" W__. Ms. Dunn has a basement bedroom where W__ and her children sometimes stay.

According to Ms. Dunn, W__ was having a rough day on Friday, August 19, 2011. Things were not going right with the children or daycare. W__ stayed at Ms. Dunn's home Friday evening. W__ was distraught and emotional. "She was not in any condition to go to work."

Shawn Beaudrie is a Registered Nurse Supervisor who works at the Pavilions. He is a close friend of W__. According to Mr. Beaudrie, W__ suffers from panic attacks. Prior to Friday, August 19, 2011, he knew that W__ had signed up for the Chicago Zumba training.

According to Mr. Beaudrie, on Friday W__ was "very nervous, distraught." They talked with each other. W__ was almost "manic." He tried to calm her down. W__ stresses over things such as work, money and relationships.

According to W__, on Friday, August 19, she was "on edge" before the children were picked up by their father. After the children were picked up, her world fell apart. She was struggling for someone to watch the children. The rental couple situation had just fallen apart.

On Friday, W__ talked with Mr. Beaudrie, her sister, and Ms. Dunn. She had to leave Mr. Beaudrie's by 9:00 p.m. Friday, to go to Ms. Dunn's house for the night. She decided that she could not work Friday night because she was "an emotional wreck." She stayed in the

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basement bedroom at Ms. Dunn's Friday night.

W__ called into the Employer at 8:23 p.m., Friday, August 19, indicating FMLA.

Saturday, August 20, 2011, Activity

On Saturday morning, W__ taught two Zumba classes. According to Ms. Dunn, "it uplifted her." Exercise makes her feel better. She does ten classes a week. The Zumba classes went "okay" that Saturday.

Ms. Scholl talked with W__ by telephone on Saturday, August 20, 2011. "She was still upset."

W__ felt basically the same on Saturday as she had felt on Friday. She was trying to get the basement cleaned up in her home where the young couple had stayed.

W__ on Saturday eventually got the rental car for the trip to Chicago. She rents cars for trips because of the poor condition of her own car. She did not know if she would be well enough to drive to Chicago on

Sunday. She got the car just in case.

W__ was suffering panic attacks on Friday and Saturday. According to Mr. Beaudrie, on Saturday, W__ "was not in any condition to go to work." She left Mr. Beaudrie's house to go to Ms. Dunn's house. Mr. Beaudrie rented a car for W__ to use on Sunday.

W__ stayed at Ms. Dunn's house Saturday night. W__ had a rental car with her for the drive to Chicago. W__ was still trying to decide whether to drive to Chicago Sunday morning. "She was not stable emotionally." Ms. Dunn felt uncomfortable with W__ going to Chicago.

W__ called into the Employer at 8:24 p.m., Saturday, August 20, 2011, indicating FMLA.

Sunday, August 21, 2011, Activity

W__'s cell phone records show that she called her mother from Traverse City at 6:23 a.m., Sunday, and called the Pavilions from Chicago at 6:31 p.m., Sunday.

W__ left Traverse City for Chicago around 6:40 a.m., Sunday morning, August 21, 2011. The drive to Chicago went okay. She arrived at the Zumba class during the lunch period. The class ended early around 5:00 p.m. Chicago time. She left Chicago with the goal of getting to work by 10:30 p.m. Traverse City time. She thought she had enough time to do this. But she got caught in Chicago traffic. She had to call the Pavilions from Chicago to give notice of a non-FMLA absence.

At 6:31 p.m. Sunday, August 21, 2011, W__ called into the Employer, not indicating FMLA. According to Ms. Scholl, on Sunday afternoon, August 21, 2011, W__ texted Ms. Scholl and let her know that W__ was stuck in traffic in Chicago.

Monday, August 22, 2011, Activity

Ms. Way listens to the call-ins to the Employer on Monday mornings and confirms them. She forwards the voice-mails to Human Resources.

Sometime After Sunday/Monday, August 21/22, 2011

Ms. Miller talked with W__ after Sunday, August 21, 2011. Ms. Miller did not know there was an issue at that time. W__ told Ms. Miller that she took Friday, August 19, off "to rest," drove to Chicago on Saturday, August 20, and attended the Zumba event in Chicago on Sunday, August 21, 2011. At that time, there was no discussion of W__'s reasons for calling in. Ms. Miller's post-Chicago conversation with W__ was "before August 24." Ms. Miller was the supervisor on at least August 20 and 21, 2012. Ms. Miller asked W__ "what was your weekend like?" It was a typical conversation. Ms. Miller knew W__ had not worked Friday night, August 19, 2011. W__ told Ms. Miller that she "wanted to rest." W__ also said she drove to Chicago and back and had a "good time" during the weekend. W__ told Ms. Miller that she did not stay over and did not have a hotel room in Chicago. W__ told Miller that she drove "through the night" to Chicago. Ms. Miller was not investigating. She was just having a conversation. According to Ms. Miller, W__ did not have an obligation to tell her the truth during this conversation. W__ said that she had hoped to return to work Sunday night, August 21, 2011. She said she could not get back.

Ms. Miller reported this conversation by telephone to Shellie Way, a benefits person in Human Resources. W__ had previously said nothing about using FMLA.

Human Resources Director Robert Barnes testified that Ms. Miller talked with W__ after W__ returned from Chicago. He has no explanation for the August 23 date rather than August 24 on Ms. Way's statement. When he

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spoke with Ms. Miller, it was very clear to him that she had spoken with W__.

W__ does not agree with Ms. Miller's testimony that W__ told Miller that W__ had rested on Friday and driven to Chicago on Saturday.

August 23 and/or 24, 2011, Activity

Ms. Way spoke with Ms. Miller after W__ returned to work. Ms. Miller gave Ms. Way the heads up on the buzz in the unit. Ms. Way testified that it is "possible" that her written statement should say August 24 rather than August 23, 2011.

August 30, 2011, Human Resources Interview With Ms. Wood

During the August 30, 2011, interview with W__, W__ was told that the Employer had witness

statements. Mr. Barnes asked her to explain. W__ responded "I work for a bunch of women and they tend to be a bunch of back stabbers." She denied she had prior conversations with co-workers. She had no medical explanation for FMLA. She said she had not sought medical attention on Friday, August 19, or Saturday, August 20, 2011. Mr. Barnes did not specifically ask W__ what time she went to Chicago. According to Mr. Barnes, his interview of W__ lasted "a maximum of ten minutes." "She was nervous." The Director of Nursing was there. Mr. Barnes is "sure it's a very stressful time when an employee comes in" for an investigative interview. He asked W__ "Is there anything else I need to consider?"

According to W__, the investigatory interview meeting with Mr. Barnes lasted around four minutes. He only asked her a few questions. When she talked with Mr. Barnes, he said he had witness statements saying that she had said she was going to call in FMLA for those three days. According to W__, these individuals are "lying" when they say she said she was going to call in.

September 1, 2011, Discharge

Mr. Barnes and Director of Nursing Holly Edmondson investigated the discharge decision. This resulted in the September 1, 2011, discharge notice to W__. The discharge notice stated:

> [W__] provided false information for our records when she claimed FMLA leave Friday, August 19[,] and Saturday, August 20. [W__] used FMLA leave of absence for a reason other than stated at the time the request was made. This is a violation of Sec. 1, 18b of the Employee Handbook, Section 11.5 of the General Unit agreement & abuse of FMLA.

Before the discharge, Mr. Barnes received witness statements, interviewed those employees, and interviewed W__. W__ had "telegraphed" that she was going to take the days off. The voice mail tapes told him that she claimed FMLA for the first two days. After considering the employees' statements and the other information, it was clear to him that there was a misuse of FMLA and he decided to terminate W__.

If there is a personal call-in, there is "no problem," other than accumulating a point under the absentee point system. Employees have to call in at least two hours ahead of time. There is a voice-mail recording. Someone listens to the recording later.

The Pavilions has considerable problems with employee use of FMLA. The CNA group uses FMLA leave beyond the national average, and more than the other employee groups at the Pavilions concerning intermittent leave. 31% of CNAs are eligible for intermittent FMLA. The national average is 2%. The dietary group is 7%. The Pavilions' unionized workforce is 16.3% eligible for intermittent FMLA leave.

The Pavilions does not have a program to catch anyone. If specific information is received, there will be an investigation. There have been two prior FMLA episodes. There was "concrete evidence." The situations were investigated and the employees discharged. There has been no prior situation where there was a false FMLA claim and the employee was not discharged.

If an employee calls in and claims FMLA, it is accepted unless there have been multiple FMLA reasons on file. In that case, the employee would be asked for which reason.

Under the absentee policy, the employee's anniversary year is used. At five, six, and seven absences there is a conversation with the employee. The eighth absence is a verbal warning. The ninth absence is a written warning. The tenth absence is a three day suspension. The eleventh absence is discharge. On the employee's anniversary date, the absence record is set back to zero.

Mr. Barnes knew from prior paperwork that W__ had FMLA certification for "anxiety"

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and "panic attacks." Mr. Barnes "assumed it was for a panic attack." This apparently meant that, in his opinion, the FMLA claim that weekend was for an alleged panic attack. W__ had not seen a doctor. Mr. Barnes had no one who had actually seen W__ on Friday or Saturday. According to Mr. Barnes, there was no evidence that it was not FMLA except for W__ telling people ahead of time that she was going to have three days off. It was "blatantly clear to [him] that … the employee was telegraphing" she was not going to work that weekend. W__ had not told the truth about not telling other employees ahead of time.

The Union provided Mr. Barnes with statements. Mr. Barnes believed statements from W__'s friends and relatives would be biased. There would need to be a doctor there to verify. There would need to be someone who had experienced it before.

The fact that W__ had worked at the Zumba gym on Saturday was important to Mr. Barnes. Mr. Barnes

was familiar with anxiety and depression.

According to Mr. Barnes, panic attacks can come on instantly. Sometimes they go away in seconds, sometimes hours. The individual can sometimes then be exhausted. Zumba is a physical thing. According to Mr. Barnes, Zumba would give some panic attack persons some type of relief.

October 14, 2011, Step 4 Meeting

According to Mr. Barnes, at the October 14, 2011, Step 4 meeting there were no statements provided from Whitney Scholl or Shawn Beaudrie. The phone records were given to him. There is no identification of whose phone number it is. The telephone companies did not recognize the records. Mr. Barnes did not provide to the Union at the Step 4 meeting the times of the weekend three phone calls to the Pavilion's voice-mail system. Kristina Dunn's name and information never came up during the grievance process. He never heard of it until the arbitration hearing. Mr. Barnes did not hear of the W__'s problems, children's' problems, etc., until the arbitration hearing.

Teamsters Local 124 Secretary-Treasurer Cheryl Langdon has been the Union liaison with the Pavilions for twenty-three years. The Pavilions was provided with a copy of the cell phone records at the Step 4 meeting. The Pavilions was told that the phone records were from Verizon. She saw a copy of the employee statements before the Step 4 meeting. She received a copy to keep after the Step 4 meeting.

According to W__, she indicated at the Step meeting that she had stayed at Ms. Dunn's house.

W__ obtained the cell phone records from Verizon. These records do not contain text message information. The records reflect, in part, the following calls.

8/19 … 8:19 PM … …-…-3150 … Traverse City …

8/20 … 8:20 PM … …-…-3150 … Traverse City …

8:21 … 6:23 AM ……-….-2552 … Traverse City …

8:21 … 6:31 PM ……-…-3150 … Chicago … .

W__'s Activities Since Discharge

W__ continued to teach the local Zumba classes after the September 2011 discharge. The numbers assigned to her vary from week to week. She is able to do extra classes once in a while.

She has applied for CNA positions "at a lot of places." She has applied to at least two local major CNA utilizers. On the other hand, she has not applied to some other local major CNA utilizers.

W__ has "gone back to school." She is taking basic prerequisite courses at Northwestern Michigan College. She lives with her mother.

Contentions of the Parties

1. For the Pavilions

The Pavilions contends that W__ knew in advance that she was not going to work as scheduled on Friday-Sunday, August 19-21, 2011, because she wanted instead to go to a Zumba class in Chicago that weekend. She falsely claimed on Friday and Saturday evenings that she could not work at the Pavilions and took FMLA leave for those two pre-planned absences. W__ was dishonest with the Employer. She furnished false information for the Employer's records. She used leave for reasons other than the reason claimed. The Employer has consistently discharged employees found to have falsely claimed FMLA leave.

According to the Pavilions, the overwhelming weight of evidence proves that W__ did as

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the Employer alleges. W__ has serious credibility problems. Her story should not be believed. The Employer had many reasons to conclude that W__'s absences from work on Friday and Saturday nights were due to her prearranged trip to Chicago, and not to any sudden onset of a panic attack. Contrary to her self-serving assertion that she intended to work all three days that weekend, the testimony and evidence from disinterested witnesses is irrefutable. W__ had no intention of coming to work those three days. She had every intention of calling off for all of them.

The employee has the duty to mitigate damages by seeking a position similar to that which was lost. W__ failed to mitigate her damages. She did not exercise due diligence and failed to make reasonable efforts to mitigate her damages.

The Employer contends that it had just cause to discharge W__ and requests that I deny the grievance.

2. For the Union

The Union contends that the Employer did not establish just cause for the discharge of W__. The Employer presented no real evidence to contradict W__'s need for FMLA for her medical condition of anxiety when she asked for leave on Friday and Saturday. W__ has lost everything as a result of this unsupported discharge. She deserves to be returned to work with full back pay and to be made whole.

It is the Employer's burden to establish that it had just cause to discharge W__. The Employer is claiming fraud in obtaining FMLA. Fraud is often thought of as a crime of moral turpitude and, when crimes are involved, the standard an Employer has to meet is typically "beyond a reasonable doubt." Some arbitrators hold, however, that in such circumstances the standard of proof is "clear and convincing." Elkouri & Elkouri, *How Arbitration Works* (6th ed.), pp. 949-950. The Employer's evidence does not establish that W__ "provided false information for our records."

W__ followed the appropriate procedures for calling in for FMLA.

The Union requests that I rule that the Employer had no just cause to discharge W__ and that the Employer be required to reinstate W__ with full seniority and make her whole.

Discussion and Decision

The Collective Bargaining Agreement provides that an employee cannot be discharged without just cause. Article 9.1 It is well established in labor arbitration that where, as in the present case, an employer's right to discharge an employee is limited by the requirement that any such action be for just cause, the employer has the burden of proving that the discharge of an employee was for just cause. Therefore the Pavilions had the burden of persuading me that the discharge of W__ was for just cause.

"Just cause" is a term of art in collective bargaining agreements. "Just cause" consists of a number of substantive and procedural elements. Primary among its substantive elements is the existence of sufficient proof that the employee engaged in the conduct for which she was discharged. Other elements include a requirement that an employee know or could reasonably be expected to know ahead of time that engaging in a particular type of behavior will likely result in discharge; the existence of a reasonable relationship between an employee's misconduct and the punishment imposed; and a requirement that discipline be administered even-handedly, that is, that similarly situated employees be treated similarly and disparate treatment be avoided.

For the following reasons, I conclude that W__ was not discharged for just cause and that she should be reinstated with benefits, full seniority, and partial back-pay.

W__ planned on going to the Chicago Sunday Zumba training class. It was very important to her. She unsuccessfully tried to get replacements for the weekend.

W__ was certified for FMLA intermittent leave for anxiety attacks. She had a history of anxiety attacks.

On or immediately before Friday, August 19, 2011, W__'s live-in babysitter family left with no prior notice. She was stuck with resolving this unanticipated problem. She had anxiety attacks and appropriately called in FMLA on Friday and Saturday.

The Employer did not know of the Friday and Saturday anxiety attacks. W__ left for Chicago after 6:23 a.m., Sunday. The Employer was not informed of this until much later.

After W__ returned to work, she told her immediate supervisor that she rested on Friday and drove to Chicago on Saturday. The

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Employer believed W__'s "Friday rest/Saturday drive" statement. The statement was not true.

Relying, in part, on W__'s Friday rest/Saturday drive statement, the Employer discharged W__ on September 1, 2011.

On October 14, 2011, the Union provided the Employer with the phone records that verified that W__ was in Traverse City at 6:23 a.m., Sunday, and hence W__'s "drive Saturday" statement was incorrect.

[1] Since W__ was having anxiety attacks on Friday and Saturday, she was FMLA qualified. She was not able to leave Traverse City until Sunday morning.

W__ did not provide false information for the Employer's records when she claimed FMLA leave on Friday, August 19, and Saturday, August 20. She did not use FMLA leave of absence for a reason other than stated at the time the request was made. She did not violate Employee Handbook, Section 1, 18b; CBA, Section 11.5; or abuse FMLA leave.

There is enough responsibility to go all the way around in this case. This responsibility includes W__'s Friday incorrect rest/Saturday drive statement, the failure to clear this up at the August 30, 2011, investigative meeting, and the Employer's response to being provided with the phone records on October 14, 2011.

The Employer makes several serious arguments concerning the situation. I have seriously considered each of them.

The Employer argues that the phone records are a fabrication. This argument does not control because based on a preponderance of the evidence the phone records are genuine and accurate. The Union provided a copy of the phone records to the Employer at the October 14, 2011, Step 4 meeting. This was before the Employer provided the Union with the times of W__'s phone calls to the Employer. The phone records have the exact times that correspond with the later revealed Employer records. The phone records were not sprung at the June 2012 hearing. Everybody had time to consider them and gather evidence concerning them. The phone records produced by the Union look somewhat different from the phone records attached to the Employer's post-hearing written submission. The Union produced records were obtained from the phone company after the phone calls. The Employer produced records appear to be a phone bill. It is reasonable that the two would look somewhat different.

The Employer argues that W__ falsely claimed FMLA leave and provided false information for the Employer's records. This argument does not control because W__ did not falsely claim FMLA leave or provide false information in asking for the leave. W__ was having anxiety attacks or in after effects from anxiety attacks when she called in FMLA on Friday and Saturday. W__'s "Friday rest" and "Saturday drive" comments to Ms. Miller were made after W__ returned from Chicago and were not made as part of the procedure to obtain FMLA leave.

The Employer argues that W__ asked her co-employees to cover for her during the weekend in question. This argument does not control because W__ did not ask her co-employees to cover for her. W__ did not anticipate or communicate an intention of asking for FMLA leave until she was involved with panic attacks on Friday and Saturday.

[2] The Employer argues that it conducted a fair, prompt, and thorough investigation. This argument does not control because even though the Employer conducted a good faith investigation, the investigation incorrectly took the "rest — drive" post-Chicago W__-Ms. Miller conversation and placed it pre-weekend, took undated and/or possibly incorrectly dated statement/s from witness/es, did not take a written statement from Ms. Miller concerning the crucial Friday rest/Saturday drive conversation did not adequately respond to the phone records once they were provided on October 14, 2011, and did not conduct a lengthy investigative meeting with W__ wherein, for example, W__ might have been asked specific questions addressing the Friday rest/Saturday drive conversation and exactly what happened day to day during the weekend.

The Employer argues W__'s story does not add up and W__ had a serious credibility problem. This argument does not control because W__'s story does add up once it is realized that (1) she was in Traverse City at 6:23 a.m., Sunday, (2) the Friday rest/Saturday drive conversation was after the weekend, not before the weekend, and (3) there was serious evidence of W__ having anxiety attacks on Friday and Saturday.

The Employer argues that the Chicago Zumba class lasted from 8:30 a.m. to 5:30

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p.m. This argument does not control because W__ was in Traverse City at 6:23 a.m., Sunday, and then drove to Chicago. She would inherently not have been in Chicago for another six hours. When she got to the class site during the lunch hour, she signed the Zumba sign in sheet.

The Employer argues that there is no way for the Employer to determine and document the veracity of each employee's FMLA claim and that absenteeism is typically occurring with CNAs. This argument does not control because this case involves whether W__ provided false information in claiming FMLA leave on Friday and Saturday, and the related issues of the timing of the rest-drive conversation with Ms. Miller, the Friday-Saturday anxiety attack situation, and W__'s location at 6:23 a.m., Sunday.

[3] The Employer argues that W__ was evasive during the investigative meeting. This argument does not control because (1) the Employer was under the incorrect assumption that the Friday rest-Saturday drive comment was made before the weekend rather than after and asked no specific questions to clarify this, (2) the Employer did not ask specific questions of W__ to find out exactly why she did not come to work on Friday or Saturday, (3) the meeting lasted "a maximum of ten minutes," (4) W__ was "nervous" and (5) "it's a very stressful time when an employee comes in" for an investigatory interview.

The Employer argues that *Meijer, Inc.*, 108 LA 631 (Daniel, 1997), controls. This argument does not control because (1) the *Meijer* grievant had received prior disciplines for the same reason for which that grievant was eventually discharged, and (2) the *Meijer* grievant intentionally lied ahead of time about why he was asking for leave. W__ neither had prior disciplines for dishonesty or FMLA leave abuse nor made misrepresentations in her Friday or Saturday FMLA telephone calls.

[4] The Employer argues that *Seeger v. Cincinnati Bell Telephone Co.*, 681 F.3d 274 [18 WH Cases2d 1831] (6th Cir., 2012), controls. This argument does not control because the "honest belief" test and the CBA "just cause" requirement are different. In *Seeger*, Seeger appealed the District Court's order dismissing his claim that Bell violated FMLA when it terminated his employment on the ground of disability fraud. The Sixth Circuit (Judges Griffin and Siler) held Bell's honest belief that Seeger committed disability fraud shielded Bell from liability. According to the Sixth Circuit, a plaintiff is required to show more than a dispute over the facts upon which the discharge was based. The honest belief rule does not require that the employer's decision-making process be optimal or that it left no stone unturned. The inquiry is whether the employer made a reasonably informed decision before taking an adverse employment action. The falsity of a defendant's reason for terminating a plaintiff cannot establish pretext under the honest belief rule. As long as the employer held an honest belief in its reason, the employee cannot establish pretext even if the employer's reason is ultimately found to be mistaken, foolish, trivial, or baseless. An optimal investigation of interviewing the employee and some or all of his witnesses is not a prerequisite to application of the honest belief rule.

Senior District Judge Tarnow dissented. He believed a reasonable jury could conclude that Bell's given reason for discharging Seeger was not an honest belief. According to the dissent, the overwhelming weight of evidence supports Seeger's contention that Bell's investigation was so poor and one-sided as to be unworthy of credence and thus not sufficient to satisfy an honest belief.

The Union makes several serious arguments concerning the situation. I have seriously considered each of them.

The Union argues that W__ did not make the "Friday rest/Saturday drive" statement to Ms. Miller. This argument does not control because W__ made this statement to Ms. Miller during either the Tuesday, August 22, shift, or the Wednesday, August 23, shift. Ms. Miller testified with clarity that after Sunday, August 21, she worked with W__. Miller asked W__ "How did your weekend go?" W__ responded that she took Friday off to rest, drove to Chicago on Saturday, and the event was on Sunday. During cross-examination, Ms. Miller testified that she worked with W__ a "day or two after [W__] got back" and Miller believed the conversation was on August 23. On cross-examination, Ms. Miller testified that during the conversation W__ further indicated she was hoping to come to work Sunday night but she could not get back. Ms. Miller was "not investigating." It was just a "conversation." W__ testified that "I don't agree with [Ms. Miller's] testimony

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that I told her that I rested on Friday and I drove to Chicago on Saturday." W__'s denial of making the "Friday rest/Saturday drive" statement may be the result of a mistaken recollection or an error in perception. The Employer did not get a written statement from Ms. Miller concerning this crucial conversation. The Employer's October 20, 2011, Step 4 response alludes to "W__ [] telling employees of her intent to take work off *to rest up* for and attend a Zumba training class in Chicago." Emphasis added. The Employer obtained a signed typed statement from Ms. Way. The statement does not have a typed date but "8-24-11 Wed" is written on it. Way's statement says, in part: "… I spoke with [Ms. Miller] on Tuesday morning, August 23rd…. [Ms. Miller] also stated that the reason for Erin's call in on *Friday night was so she could rest* and that *Saturday night's call in was so that she could drive* down there and that she attended the conference on Sunday…." Emphasis added. Ms. Way testified that it was "possible" that the date should be August 24 instead of August 23. Mr. Barnes prepared a typed statement dated August 31, 2011. His statement indicated, in part "… 8-24-11 [Ms.] Way e-mailed statement to me regarding her conversation with [Ms.] Miller." Mr. Barnes called Ms. Miller and discussed the weekend W__ situation with Miller. There is no reference in the Barnes' statement about the "Friday rest/Saturday drive" conversation. Based on my

carefully listening to and watching Ms. Miller's testimony on direct and cross-examinations, the Friday rest/Saturday drive statement was made by W__ to Miller two or three days after W__ returned from Chicago. When this conversation was communicated by Miller to Way and Barnes, they incorrectly merged the post-weekend W__ statements with the pre-weekend W__ statements.

[5] The Employer contends that W__ failed to sufficiently mitigate her damages because her job search was allegedly not sufficiently diligent. A wrongfully discharged grievant must make reasonable efforts to mitigate damages by seeking and accepting replacement employment. W__ was not required to apply for each and every job that might exist. She need only make a reasonable effort. The Employer had the burden of proving that W__ failed to mitigate her damages. The Employer had the burden of proving that there were substantially equivalent employment opportunities available, and that W__ failed to use reasonable diligence in looking for employment. Elkouri & Elkouri, *How Arbitration Works* (6th ed.), pp. 1224-1228; and Elkouri & Elkouri, *How Arbitration Works* (6th ed, 2010 Cum Supp.), pp. 467-468. W__ applied for CNA jobs at several local employers of CNAs. She failed to apply for CNA jobs at several other prominent employers of CNAs. To a certain degree, she returned to attending college which partially limited her availability for employment. Some employers of CNAs would not wish to hire her because of the reason for her discharge from Pavilions. Based on the totality of the circumstances, the back-pay award is reduced by twenty percent because of partially incomplete mitigation attempts.

While on FMLA leave, W__ worked at her Zumba job Saturday morning, August 20, 2011. The Employer indicates "section 11.5 of the CBA provides, in pertinent part, 'If an employee uses a leave of absence for a reason other than the reason stated at the time the request is made, the employee may be terminated.'" W__'s voice mail messages requested leave for "FMLA." W__ had an approved designation for intermittent leave for panic attacks with "episodic flare-ups." Based on the totality of the evidence, W__ was having episodic flare-ups that Friday and Saturday. It is undisputed that panic attacks can come on instantly, sometimes they go away in seconds, sometimes in hours, and Zumba would give some panic attack persons some type of relief. It was reasonable for W__ to believe that she could legitimately work the Zumba job on Saturday morning. W__ did not take the FMLA leave in order to work at Zumba. The Zumba job was consistent with W__'s Pavilions' job. It was also consistent with W__ having panic attacks.

The crucial points in this case concerning just cause include (1) W__ left Traverse City for Chicago no earlier than 6:23 a.m., Sunday, August 21, 2011; (2) W__ did not drive to Chicago on Saturday; (3) W__'s statement to Ms. Miller that W__ rested on Friday and drove on Saturday was not true; (4) W__ was having anxiety attacks on Friday and Saturday; (5) W__ was certified for intermittent FMLA leave for anxiety attacks; (6) W__ would reasonably believe on Friday and Saturday that she was entitled to call in for

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FMLA leave because of the anxiety attacks; (7) the Employer had a copy of the phone records as of October 14, 2011; and (8) the CBA and the totality of the circumstances.

The crucial points in this case concerning back-pay include (1) W__ failed to a degree to mitigate her damages; and (2) the CBA and the totality of the circumstances.

This decision neither addresses nor decides issues not raised by the parties.

AWARD

Having heard or read and carefully reviewed the evidence and argumentative materials in this case and in light of the above discussion, the grievance is granted in part and denied in part. There was not just cause to discharge W__. The Employer will reinstate W__ to her former position with full benefits and no loss of seniority and with eighty percent back-pay. As of the date of her reinstatement, the number of absences on W__'s Attendance Tracking Form for March 19, 2012, to March 18, 2013, will be three. The twenty percent reduction of the back-pay will be calculated after the interim earnings and unemployment compensation, if any, are deducted, not before.

The back wages shall be limited to the amount of wages that W__ would otherwise have earned, less any unemployment compensation and all other employment compensation received from any source during the period in question. CBA, section 7.4.

I will retain jurisdiction of the present grievance until November 30, 2012, to resolve disputes, if any, regarding the remedy directed herein. If, on or before 4:30 p.m., November 30, 2012, the Union or the Employer advises me by e-mail or other writing of any dispute regarding the remedy, my jurisdiction shall be extended for so long as is necessary to resolve disputes regarding the remedy. If I am not advised of the

existence of a dispute regarding the remedy directed herein by that time and date, my jurisdiction over this grievance shall then cease.

- End of Case -

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