

those with both positive and negative test results, at the time of hire, who will eventually develop into clinical "cases" of the disorder of interest. Only after such studies have been performed can the ability of a test to predict the later development of a disorder be established. At the current time, there are virtually no medical tests available that predict future occurrence of work-related disease in otherwise healthy workers with sufficient certainty to meet the requirements established in the ADA legislation.

### *Summary*

In summary, the use of preplacement medical examinations has been severely limited by the ADA. Under the ADA examinations can be performed only if they are offered to all applicants and can be used to deny employment only if the results indicate that the worker is incapable of performing the job (even with reasonable accommodations) or if the worker's health is at imminent, substantial risk of harm. Tests that reliably predict future occurrences of work-related disease in otherwise healthy workers are not currently available.

## MANAGEMENT PERSPECTIVE

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### **Introduction**

Medical and health issues highlight the arbitration agenda of the 1990s. Discipline or discharge due to an employee's physical or mental disability can be grieved. Employers may order psychiatric or psychological testing of workers to determine fitness for their jobs. No-smoking policies and AIDS issues are increasingly arbitrated. Health insurance benefits and cost containment measures continue as major items at the bargaining table and in arbitration hearings. This paper discusses these topics by reviewing selected recent arbitration decisions.

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### Physical and Mental Disabilities

A disability may prevent the employee from performing the duties of the job. The disabled employee can be a safety risk to fellow employees. These cases often present conflicting medical evidence from the grievant's physician and the company's medical experts. "When health and medical issues are placed before a lay Arbitrator he obviously must proceed with caution and care. And where there is conflicting medical evidence . . . the problem is accentuated."<sup>1</sup>

#### *Inability to Perform Duties*

Arbitrators agree that an injured or disabled employee may be dismissed for inability to perform the job but frequently differ on the sufficiency of the proof.

Non-disciplinary termination of an Employee due to a physical or medical condition is a recognized prerogative of Management. There is a general rule which Arbitrators follow, however, and that is while an Employee may be terminated for non-disciplinary reasons, there must be just cause for the termination and medical reasons fall in this category.<sup>2</sup>

In *Mead Corp.*<sup>3</sup> the company claimed the grievant failed to keep his diabetic condition under control with proper rest and diet. The arbitrator recognized that management can terminate an employee for a disability when continued employment would jeopardize the individual or other employees.<sup>4</sup> The grievant had worked over fourteen years without a serious diabetic reaction. He experienced personal difficulties related to his divorce and at the same time his physician changed his insulin dosage. The employee had several diabetic seizures during this time but did not inform the company of the contributing factors.

Arbitrator Heinsz concluded that discharge may have been proper if the employee "had no excuse for neglecting his condition and causing the seizures which occurred and the attendant safety hazards."<sup>5</sup> The severe emotional distress the employee suffered as a result of his family problems, however, was an

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<sup>1</sup>*Mobil Oil Corp.*, 81 LA 1090, 1095 (Taylor, 1983).

<sup>2</sup>*Id.*

<sup>3</sup>81 LA 1000 (Heinsz, 1983).

<sup>4</sup>*Id.* at 1003; see also *Owens Corning Fiberglas*, 58 LA 764 (Doyle, 1972); *Kennecott Copper Co.*, 45 LA 616 (Gorsuch, 1965); *Stauffer Chem. Co.*, 40 LA 18 (Hale, 1963).

<sup>5</sup>81 LA at 1003.

excuse which, given the employee's work record and evidence that the causes of the diabetic seizures had been resolved, made the discharge improper. The employee was reinstated and the discharge was modified to an involuntary, unpaid medical leave of absence.

In *Mobil Oil Corp.*,<sup>6</sup> where an employee's seizures were due to an epilepsy-like illness, the arbitrator found discharge improper because there was a serious conflict between the employee's doctor's opinion that the employee was able to return to work and the company doctor's determination that the employee was unable to perform the duties of his job. Arbitrator Taylor stated:

[T]he Company is obligated to consider all relevant and reliable medical evidence . . . and where there is a serious conflict of medical evidence to seek impartial medical inquiry.<sup>7</sup>

After three instances of deficient performance within eight months resulting in progressive discipline, the employer in *Pepsi-Cola General Bottlers, Inc.*<sup>8</sup> discharged a route salesperson. The final incident occurred after the employee returned to work following a stroke. Arbitrator Madden criticized the company for failing to determine if the final incident resulted from the grievant's medical condition and premature return to work and ordered reinstatement conditioned upon a medical examination.

In *Pemco Aeroplex, Inc.*,<sup>9</sup> involving an employer's no-fault absenteeism policy, the discharge of an employee with a 36 percent absentee rate was upheld. Arbitrator Baroni concluded that many of the absences due to epileptic seizures could have been avoided had the grievant taken his prescribed medication. However, in *Kansas City Area Transportation Authority*<sup>10</sup> the termination of a bus driver pursuant to a 120 point/no-fault policy was set aside. In each of his last two years the driver was involved in a serious accident and was absent 50 percent and 41 percent of the time. Many of the grievant's absences were due to work-related depression and posttraumatic stress following the accidents. Arbitrator Cohen found the discharge was not for just cause.

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<sup>6</sup>*Supra* note 1.

<sup>7</sup>*Id.* at 1095.

<sup>8</sup>98 LA 112 (Madden, 1991).

<sup>9</sup>98 LA 105 (Baroni, 1992).

<sup>10</sup>98 LA 57 (Cohen, 1991).

Although the decisions are by no means uniform, a number of recent awards have upheld discharges for absences even though caused by medical conditions.<sup>11</sup> Employers, of course, argue that the reason for the absence is irrelevant; the fact of the absence alone should constitute just cause.

*Risk to Employee or Others*

Arbitrators generally take the position that management has the right as well as the responsibility to act where an employee's physical or mental condition endangers the employee or others.<sup>12</sup> The action may include transfer, demotion, layoff, leave of absence, or termination. Just cause for termination has been found where "the disability is of such kind and degree as to make unduly hazardous to himself or to others his employment in any job in his employer's facility which he is qualified to fill and which is available to be assigned to him."<sup>13</sup> Where the risk is only to the disabled employee's health and not the safety of others, however, arbitrators have come to differing conclusions.

The first view is that it is proper to refuse employment where there is a risk to the employee. A mining company, *Peabody Coal Co.*,<sup>14</sup> properly refused to recall a laid-off worker when a medical examination disclosed a large hernia. Under the contract a recalled employee "shall be allowed to work at that mine unless he has a physical impairment which constitutes a potential hazard to himself or others." The agreement also specified, however, that employees cannot be refused recall over their objection "without concurrence of a majority of a group composed of an Employer-approved physician, an Employee-approved physician, and a physician agreed to by the Employer and the Employee, that there has been a deterioration in physical condition which prevents the Employee from performing his regular work." The *Peabody* grievant relied on the fact that he had worked after developing the hernia and before his layoff and was capable of performing the work. Thus, he claimed, there had been no "deterioration." The grievant's own testi-

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<sup>11</sup>*Quarto Mining*, 95 LA 1169 (Brunner, 1990); *Philip Morris U.S.A.*, 94 LA 41 (Dolson, 1989); *Dimco-Gray Co.*, 85 LA 650 (Seinsheimer, 1985); *Champion Int'l Corp.*, 81 LA 1285 (Flannagan, 1983). *But see LeFarge Corp.*, 92-1 ARB ¶8150 (Stephens, 1991).

<sup>12</sup>See generally Elkouri & Elkouri, *How Arbitration Works*, 4th ed. (BNA Books, 1985), at 722-24.

<sup>13</sup>*Stauffer Chem. Co.*, *supra* note 4, at 26.

<sup>14</sup>84 LA 511 (Duda, 1985).

mony, however, indicated that the hernia had grown from golf-ball size to softball size. Arbitrator Duda applied the following rule regarding potential risk:

[I]n evaluating the question of whether there has been a deterioration in physical condition which prevents an employee from performing his regular work, it is proper to inquire as to both potential risk as well as present capabilities.<sup>15</sup>

A different viewpoint is illustrated by *Southwest Forest Industries*,<sup>16</sup> where it was held that the company had no right to discharge a worker for failure to follow a doctor's instructions to lose weight following a low-back injury. The company argued that the grievant was "an accident waiting to happen" and was concerned that the employee's obesity would cause reinjury. Although the employer does have a right to discharge an employee for conduct which adversely affects the company's interests, Arbitrator Cohen concluded that the worker's failure to lose weight did not adversely affect the company's interests.<sup>17</sup> This case is another example of the unwillingness of arbitrators to uphold discharges based on management's speculation that employees' off-duty conduct will negatively impact job performance.

#### *Burden of Proof*

When the question of an active employee's physical ability or health arises, the employer has the burden to justify demotion, suspension, leave, or termination. Employees who have been on sick leave and seek to return to work must establish that their health has improved sufficiently to perform their regular job duties without undue health risks.

In *Dana Corp.*<sup>18</sup> the grievant suffered from hereditary hearing loss which, even with hearing aids, sometimes prevented him from communicating. The grievant was placed on sick leave due to his physician's description of his disability as "nerves—severely anxious and fearful" and "safety hazard at work due to hearing loss." When the grievant sought to return to work eleven months later, he presented a medical release which stated simply: "May return to work 4/23/90." The employer rejected his

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<sup>15</sup>*Id.* at 514.

<sup>16</sup>79 LA 1100 (Cohen, 1982).

<sup>17</sup>*Id.* at 1103.

<sup>18</sup>92-2 ARB ¶8078 (Florman, 1991).

release. Arbitrator Florman upheld the employer's refusal to allow the grievant to return to work, finding it reasonable for management to require clarification whether the grievant's hearing was compatible with the work environment and whether the physician still viewed the grievant as a safety hazard.

The same burden-shifting can occur when the employee does not desire to return to work from a disability leave. In *South Carolina Electric & Gas Co.*<sup>19</sup> the arbitrator found that an injured worker had the burden of showing that he was still unable to work due to his injuries. The employee had suffered a series of work- and nonwork-related injuries. The company offered him light-duty work following a one-year leave after an on-the-job injury. The grievant refused to report and did not respond with adequate medical proof that his physical condition prevented him from returning to work. The three doctors who examined him gave conflicting opinions on his fitness. Arbitrator Haemmel held that the employer had just cause to terminate the grievant and its decision to do so was reasonable and proper. The "nondisciplinary discharge" was based on the grievant's inability or unwillingness to resume his job or to provide definitive medical evidence of the nature and extent of his condition.

The employer may challenge or refuse to accept as definitive a release from the employee's physician if it receives other competent medical information that the employee's physical condition prevents the employee from working safely. However, absent an agreement that the company physician is the only source of proof, the employer cannot ignore a report from the employee's physician.<sup>20</sup> Indeed, the quality of the personal physician's opinion may require exclusive reliance on it.<sup>21</sup> In *Kaiser Foundation Health Plan, Inc.*<sup>22</sup> the employee's physician provided an unrestricted work release after reviewing her job duties. The employee was a clerical worker who had suffered hand and wrist injuries. Arbitrator Knowlton reversed the employer's refusal to reinstate the employee based on a hand surgeon's conflicting opinion, finding his report flawed because he did not review the grievant's job description or take the grievant's specific job duties into consideration.

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<sup>19</sup>92-1 ARB ¶8081 (Haemmel, 1991).

<sup>20</sup>*Alofs Mfg. Co.*, 82-2 ARB ¶8452 (Daniel, 1982).

<sup>21</sup>*Central Soya Co.*, 92-1 ARB ¶8156 (Morgan, 1992).

<sup>22</sup>92-1 ARB ¶8121 (Knowlton, 1991).

*Psychiatric Examinations*

Employers may require psychiatric examinations when there is a substantial basis for concluding that employees are incapable of performing job duties or endanger their own or co-workers' health and safety or customer relations.<sup>23</sup> However, in *Public Service Co. of New Mexico*<sup>24</sup> Arbitrator McBrearty distinguished psychological testing (by a clinical psychologist holding a Ph.D.) from a psychiatric examination, holding that contract language permitting medical examinations did not include psychological tests by nonphysicians.

The issue at arbitration is often whether a "substantial basis" to question fitness exists. In *Southern Indiana Gas & Electric Co.*<sup>25</sup> Arbitrator Katz found that the company was not justified in requiring a psychiatric examination prior to returning the employee to work after a gunshot injury. There was no evidence that the gunshot wound was not purely accidental, and the employee's previous emotional problems were held insufficient to justify the examination.

In a recent decision<sup>26</sup> Arbitrator Hill construed a contract clause requiring an employee to "present medical evidence that s/he is physically capable of returning to work." A driver education teacher with a long history of depression was placed on medical leave in 1988, his psychiatrist wrote a release in July 1989, and the following month the teacher told the district personnel officer that he had two "relapses" and would soon undergo a mental health examination. The employee refused to submit to a second examination or provide his doctor's medical records for evaluation, contending that his doctor's release was conclusive. The arbitrator held a second opinion was reasonable.

A federal district court ruled in *Murray v. Pittsburgh Board of Education*<sup>27</sup> that no probable cause hearing was required before a school district could order a medical examination of a teacher. The decision to seek a psychological evaluation was supported by evidence of excessive absences, often following confrontations with other school employees.

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<sup>23</sup>Marmo, *The Arbitration of Mental Illness Cases*, 1980 Lab. L.J. 403, 406.

<sup>24</sup>82-2 ARB ¶8494 (McBrearty, 1982).

<sup>25</sup>79 LA 590 (Katz, 1982).

<sup>26</sup>*West Des Moines Community School Dist.* (Hill, 1990) (unreported; available through Iowa Public Employment Relations Board).

<sup>27</sup>759 F. Supp. 1178 (W.D. Pa. 1991).

*Involuntary Mental Health Leaves*

It is proper to place employees on involuntary medical leave to undergo psychotherapy when they pose a potential hazard to themselves and co-workers. In *City of Chicago*<sup>28</sup> the employee, a civilian investigator in the police department, had been the subject of several written reports of inappropriate behavior and verbal threats to fellow employees and supervisors. Because the employee was not terminated but placed on one year's unpaid medical leave, Arbitrator Goldstein found a reasonable cause standard rather than a just cause standard applied. The arbitrator stressed that the written reports of erratic behavior were not sufficient supporting data for reasonable cause to require the involuntary leave. Instead, these reports were "triggers" for a psychological exam. The involuntary leave was based on the results of that exam. Because the psychological expert's unrefuted opinion was that the employee was not fit for duty, the arbitrator found reasonable cause for the involuntary leave.

A federal court held that a Texas school district did not violate due process rights of a teacher placed on medical leave after school district officials perceived that she had emotional problems hindering her classroom performance.<sup>29</sup> The teacher was given written notice of the district's request, as well as an oral explanation of the district's reasons. The district allowed the teacher to respond by participating in a psychiatric exam by the doctor of her choice. Her psychiatrist concluded that the medical leave was appropriate and that she should be excluded from the classroom.

**No-Smoking Rules**

Arbitrators have generally upheld no-smoking rules.<sup>30</sup> Unilateral company implementation can be improper, however, where the contract requires prior consultation with employee committees on health and safety issues.<sup>31</sup>

<sup>28</sup>96 LA 876 (Goldstein, 1990).

<sup>29</sup>*Brown v. Houston Indep. School Dist.*, 763 F. Supp. 905 (S.D. Tex. 1991).

<sup>30</sup>See, e.g., *Wyandot Inc.*, 92 LA 457 (Imundo, 1989); *Honeywell, Inc.*, 92 LA 181 (Lennard, 1989); *Acorn Bldg. Components*, 92 LA 68 (Roumell, 1988); *Methodist Hosp.*, 91 LA 969 (Reynolds, 1988); *J.R. Simplot Co.*, 91 LA 375 (McCurdy, 1988); *Dayton Newspapers*, 91 LA 201 (Kindig, 1988); *Michigan Bell Tel. Co.*, 90 LA 1186 (Howlett, 1988); *Des Moines Register & Tribune Co.*, 90 LA 777 (Gallagher, 1988).

<sup>31</sup>*VME Ams.*, 97 LA 137 (Bittel, 1991); *H-N Advertising & Display Co.*, 88 LA 329 (Heekin, 1986).



The breadth of the no-smoking rule was at issue in *VME Americas, Inc.* Smoking was prohibited in all company facilities, including buildings and adjacent areas such as grounds and parking lots. The union claimed the new rule was unreasonable. The company argued that allowing smoking outdoors would hinder efficiency because workers would walk outside to smoke. Arbitrator Bittel disagreed:

Outdoors, cigarette smoke readily dissipates. An employee smoking inside his or her own car has no discernible effect on the health or safety of others.

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In this instance the imposition and inconvenience to smokers of not being allowed to smoke outdoors or inside their own cars far outweighs any discernible benefit to the nonsmokers in the plant. It follows that the Company rule regarding smoking outside the Company's buildings is not related to safe business operations and is therefore unreasonable.<sup>32</sup>

In *Cereal Food Processors*<sup>33</sup> a smoking ban in all buildings, including locker rooms and break areas, was held related to safe operations because the company operated a flour mill, and grain dust produced was highly explosive. Although Arbitrator Madden found some merit to the union's position that the company failed to seek any input from the safety committee before issuing the new rule, the limited function of that committee under the bargaining agreement did not make the company's unilateral adoption of a more restrictive no-smoking rule a contract violation.

Employees may also file grievances where the employer lacks no-smoking policies, citing violations of contractual obligations to provide a safe and healthy working environment. In *County of Santa Clara*<sup>34</sup> the grievant, who was allergic to smoke, continually complained about other workers smoking near her. Arbitrator Koven found that, although the grievant's health was affected by the smoke in her work area, she was unusually sensitive to smoke because of her allergy. Since no other employee was shown to have suffered health problems from the

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<sup>32</sup>97 LA at 139-40.

<sup>33</sup>96 LA 1179 (Madden, 1991).

<sup>34</sup>88 LA 489 (Koven, 1986).

air quality, the county had not violated its contractual obligation to provide a safe workplace.

### AIDS Issues

Victims of acquired immune deficiency syndrome (AIDS) are protected from discrimination by the Rehabilitation Act of 1973,<sup>35</sup> the Americans with Disabilities Act of 1990,<sup>36</sup> and state and local laws.<sup>37</sup> Grievances involving AIDS may implicate just cause, seniority, sick leave, and insurance provisions of collective bargaining agreements.<sup>38</sup>

In *Cook County Board of Education*<sup>39</sup> the arbitrator found that unilateral adoption of an AIDS policy, providing for permanent removal of infected teachers from classrooms, violated the contract and state law. Both the contract and Illinois law allowed an involuntary medical leave for employees with a communicable disease. However, Arbitrator Witney concluded "the Employer has not produced any evidence to demonstrate that a teacher with AIDS is a danger to the safety of anyone in the school system." This decision is in accordance with numerous court opinions barring the removal of employees with AIDS.

Arbitrators have uniformly overturned discharges based solely on AIDS affliction.<sup>40</sup> In *Bucklers, Inc.*<sup>41</sup> the arbitrator found the termination of a machine operator suffering from AIDS "untimely and improper," despite the fact that the grievant was unable to perform his regular job and the agreement did not obligate the employer to provide another job. Arbitrator Braufman converted the discharge to an involuntary unpaid medical leave of absence and ordered that, if an AIDS specialist certified that the grievant was fit to perform his job without danger to himself or co-workers, the grievant was to be allowed to return to work without loss of seniority.

Even where discharge is found unwarranted, the employee may be unable to perform the job. The grievant's remedy may

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<sup>35</sup>29 U.S.C. §794 (1990); see *Chalk v. U.S. Dist. Court Cent. Dist. of Cal.*, 832 F.2d 1158, 45 FEP Cases 517 (9th Cir. 1987).

<sup>36</sup>42 U.S.C. §12101 (1991).

<sup>37</sup>See, e.g., Iowa Code §601A.6 (1991); Fla. Stat. Ann. §760.50 (West Supp. 1992); R.I. Gen. Laws §23-6-22 (1989).

<sup>38</sup>Abrams & Nolan, *AIDS in Labor Arbitration*, 25 U.S.F. L. Rev. 67, 74 (1990).

<sup>39</sup>89 LA 521 (Witney, 1987).

<sup>40</sup>See generally Hauck, *AIDS and Arbitration*, 1990 Lab. L.J. 293, 296.

<sup>41</sup>90 LA 937 (Braufman, 1987).

then be limited to payment of medical bills during the period of wrongful discharge and provision for continuing group health insurance. This was the case in *Nursing Home*,<sup>42</sup> where the employer improperly discharged a worker with AIDS. Arbitrator Sedwick found that the correct action was a medical leave or suspension until the worker no longer had a communicable disease. Since reinstatement was not possible and back pay was not an issue, the employer was ordered to reimburse the employee for medical expenses and allow him to continue health care coverage under the provisions of the agreement.

Two reported cases illustrate arbitral reaction to workers' fear of AIDS. In *Minnesota Department of Corrections*<sup>43</sup> the arbitrator found discharge improper for a guard who refused to conduct a "pat search" of an inmate because of his fear of AIDS. Arbitrator Gallagher agreed with the state that discharge was generally appropriate for refusal to follow a supervisor's order, but other guards' fears had been accommodated by permission to wear gloves. In *Veterans Medical Center*<sup>44</sup> maintenance workers demanded hazardous duty pay for cleaning a room where human immunodeficiency virus (HIV) research was conducted. Although Arbitrator Murphy understood the employees' concern about the dangers of working in the room, no additional pay was warranted. Because of the precautions undertaken by the researchers, the workers were not subjected to even potential personal injury, a requirement for the award of extra pay.

### Health Insurance Issues

With the dramatic increase in the cost of health care, employers may attempt to reduce benefits, require greater employee financial participation, streamline plan administration, or introduce cost-saving features.

Where the contract provided that all full-time employees were eligible for group health insurance, the arbitrator in *Minnesota LPN Association*<sup>45</sup> found no requirement that the insurance benefits provided at the execution of the agreement remain unchanged during its life. The employer, who self-funded the plan, introduced cost-containment measures, including co-pay-

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<sup>42</sup>88 LA 681 (Sedwick, 1987).

<sup>43</sup>85 LA 1185 (Gallagher, 1985).

<sup>44</sup>94 LA 169 (Murphy, 1990).

<sup>45</sup>92-1 ARB ¶8058 (Ver Ploeg, 1991).

ments, utilization review, and a preferred provider organization. Arbitrator Ver Ploeg stated three reasons for her conclusion that negotiations were not required. First, the contract suggested flexibility by referring to benefits provided "at the present time." Second, the changes were reasonable. Finally, the contract did not guarantee that employees' insurance terms would remain unchanged during the agreement.

Similarly, where the contract required that the employer, *Ryder Truck Rental*,<sup>46</sup> provide a health insurance plan "as may be amended from time to time," and the plan had in fact been modified not only in negotiations but during the life of the contract, the employer did not violate the current agreement by amending its plan. The modification required employee co-payments and increased deductibles. Arbitrator Gibson found that the quoted contract language expressly recognized the employer's right to change the plan.

In *Kirk & Blum Mfg. Co.*,<sup>47</sup> a case involving an employer's change to a preferred provider plan (PPO), Arbitrator Seinsheimer found that the new plan provided the same benefits as the existing plan. Thus, there was no violation of the agreement.

### A Management Perspective

Most managers and human resource professionals would support the following:

1. Illnesses or injuries that present actual or potential risks to employees or fellow-workers constitute cause for a nondisciplinary termination, transfer, medical leave, or refusal to return employees to active employment.
2. Arbitrators should endorse reasonable efforts by employers to promote safe and healthy working conditions. Merck & Co., America's most admired corporation, lists among its principles and responsibilities for health care reform "individual consumer responsibility for maintaining good personal and family health status." Likewise, employers believe that, in exchange for such benefits as company-paid sick leave, health insurance,

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<sup>46</sup>*Ryder Truck Rental*, 96 LA 1080 (Gibson, 1991).

<sup>47</sup>91-2 ARB ¶8569 (Seinsheimer, 1991).

- and employee assistance programs for chemical dependency, employees have the obligation to follow work-related directives promoting fitness.
3. Because of skyrocketing health insurance expenses, employers must have the flexibility to introduce cost-saving measures which do not alter negotiated eligibility, benefits, or plan administration provisions.
  4. In evaluating an employer's refusal to accept a physician's medical release, arbitrators must realize, in Arbitrator Traynor's words, that a "friendly doctor" is often "willing to do a favor for a long-time patient."<sup>48</sup> A single company-paid clinic to conduct all examinations and process all medical information is well worth the cost. Employers should not hesitate to direct specific job-related questions to physicians. For example: In light of this employee's history of back injuries and recent disc surgery and considering the job description, can the employee safely and efficiently lift 50-100-pound ladles of molten iron up to 4-6 hours per shift?
  5. When deciding the reasonableness of rules or discipline involving off-duty conduct such as drug use or smoking, arbitrators must consider the impact on absenteeism, efficiency, insurance costs, or the employer's liability under the emerging negligent hiring theory.<sup>49</sup>

There is some authority that an employee's physical or mental disability alone constitutes just cause for discharge.<sup>50</sup> However, under the Rehabilitation Act or Americans with Disabilities Act or in states with disability anti-discrimination laws, reasonable accommodation by employers is required. A hasty employer acts at its peril and is risking a civil rights case.

In July 1992, when the ADA takes effect, disabled persons who with reasonable accommodation can perform the essential functions of a job are protected against discrimination.<sup>51</sup> A

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<sup>48</sup>*General Mills, Inc.*, 69 LA 254, 262 (Traynor, 1977).

<sup>49</sup>See Hill & Delacenserie, *Procrustean Beds and Draconian Choices: Lifestyle Regulations and Officious Intermeddlers—Bosses, Workers, Courts, and Labor Arbitrators*, 57 Mo. L. Rev. 51, 110, 169-71 (1992).

<sup>50</sup>See *Smith v. Fort Madison Community School Dist. Bd. of Educ.*, 293 N.W.2d 221 (Iowa 1980).

<sup>51</sup>See *Associated Grocers of Me.*, 91-2 ARB ¶8437 (McCausland, 1991) (discharge improper for employee released for "gradual return to work" and no light duty jobs offered).

whole new set of medical and health issues await unions, employers, the EEOC, advocates, and arbitrators.

### LABOR PERSPECTIVE

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As related by Dr. Gerr in his excellent paper demonstrating how conflicting medical testimony should be evaluated, these medical issues in arbitration are not easy to resolve. This paper will focus on two recent cases involving the involuntary removal from duty of Chicago police officers for psychiatric reasons and will discuss the manner in which the arbitrators reviewed the evidence. This issue has taken on added significance due to the increased public concern over the use of force by police officers in apprehending suspected criminals. Police departments may be under increased pressure to intensify the psychological evaluation of police officers.

In any analysis of a psychiatric removal from duty, it is important to understand that this determination is far more subjective than the objective test data used to distinguish medical fact from medical opinion. David P. Miller advised this distinguished group as to the differences between objective medical fact (e.g., weight, temperature, pulse rate, blood pressure) and medical opinion. We may know that an employee is quite overweight, but if the reason for obesity is an important issue, the "facts" concerning that condition may tend to be more subjective than objective.<sup>1</sup> A psychiatrist's or a psychologist's examination of a patient through testing is based more on subjective evaluations, and such testing tends to blur the distinction between medical fact and medical opinion. Nevertheless, the arbitrators in the two cases to be discussed herein evaluated conflicting opinion and facts to determine the fitness for duty of both police officers.

The resolution of the conflicting medical testimony was not the only issue raised in these cases. The issues included the nature of the medical or psychiatric examination and its relation to the officers' job duties, burden of proof, the quality of the medical evidence (i.e., written medical reports or oral testi-

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<sup>1</sup>Miller, *Use of Experts in Arbitration—I. Expert Medical Evidence: A View From the End of the Table*, in *Arbitration and Social Change*, Proceedings of the 22nd Annual Meeting, National Academy of Arbitrators, ed. Somers (BNA Books, 1969), 135.