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

LABOR PERSPECTIVE

JOEL A. D'ALBA*

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.[1] 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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*Asher, Gittler, Greenfield, Cohen & D'Alba, Ltd., Chicago, Illinois.

[1]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.

mony), and the nature of the remedy to be awarded. In addition, a significant doctor-patient testimonial privilege can and should be raised in connection with any adversary proceeding involving employees and medical evidence.

These decisions illustrate how difficult medical matters have been resolved under one collective bargaining contract. The employer's medical evidence was rejected due to the failure of its medical examiners to relate their examination to the duties of the job, thereby impliedly rejecting the trend among arbitrators to give greater weight to the medical conclusions submitted by the employer's physicians. Notwithstanding the success of these cases and reinstatement of the police officers to their former positions, the union subsequently determined that its interests would be better served to have medical professionals make these determinations rather than persons not trained in medicine. As a result, a rotating panel of physicians now resolves these questions.

Psychological Removal From Duty

In the Chicago Police Department, officers placed on the departmental medical roll at full pay for psychiatric reasons were eventually placed on involuntary leave of absence once their available medical time had been exhausted. At that point, the officers were placed into nonduty disability pension status and no longer had standing in the department. The union, Fraternal Order of Police, Chicago Lodge No. 7, protested these actions in a series of arbitration decisions which are unpublished.[2] In both cases, the union filed grievances pursuant to the just cause clause of the collective bargaining agreement, which provides: "No officer covered by this agreement shall be suspended, relieved from duty or disciplined in any manner without just cause."

Both arbitrators concluded that the involuntary removal from duty for psychiatric reasons was governed by this just cause clause because of the words "relieved from duty."[3] The section does not distinguish between disciplinary and nondisciplinary reasons for removal from duty, and an employee who is removed from duty is harmed equally whether the action is

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[2]*City of Chicago*, Grievance No. 129-84-04 (Witney, 1987); *City of Chicago*, Grievance No. 11-84-04 (Goldberg, 1985).

[3]*City of Chicago*, Grievance No. 129-84-04, *supra* note 2, at 48; *City of Chicago*, Grievance No. 11-84-04, *supra* note 2, at 24.

based upon disciplinary or nondisciplinary considerations. In both cases, the employer did not assert that the officers had been removed from duty for disciplinary reasons. Thus, the legal standard for determining the employer's action in these cases was just cause.

Contrast this test with the different standard considered by arbitrators in nondisciplinary psychiatric removal from duty cases.[4] Gerr talked about the legal standard to be used in judging such medical cases and indicated his preference that medical doctors not be bound by a legal standard due to the difficulty of understanding it. My perspective is that the collective bargaining agreement should contain a just cause clause to govern the removal of employees for any reason, including psychiatric reasons. This test is a more rigorous one than that used by some arbitrators in nondisciplinary cases.

In the case decided by Arbitrator Goldberg, the officer had been referred for psychological testing following a shooting incident. No disciplinary action was taken against him for this incident. He was examined by the department's contract clinical psychologist, meaning that the psychologist was not a direct employee of the department. His responsibilities included evaluating recruit candidates and determining whether police officers were fit for duty. With considerable experience in this field, he had evaluated over 250 police officers and was aware of the duties of police officers in Chicago based upon his talking to many officers and spending six work shifts riding with police officers.

The psychologist interviewed the grievant, reviewed a computer printout of civilian complaints filed against him, and administered the Minnesota Multiphasic Personality Inventory (MMPI). The psychologist also used the forensic investigation technique of interviewing collateral sources. He interviewed the officer's estranged wife, her divorce attorney, and a suburban police department sergeant, who had investigated a claim by the officer's wife that the officer had falsely accused her of carrying a weapon and threatening another woman. The psychologist interviewed the wife, the police sergeant, and the divorce attorney by telephone, and relied upon these sources of infor-

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[4]*City of Fenton*, 76 LA 355 (Roumell, 1981) (city must show it did not act in arbitrary or discriminatory manner); *Arandell Corp.*, 56 LA 833 (Hazelwood, 1971) (reasonable grounds to remove employee and risk or danger employee created). *But cf. Babcock & Wilcox Co.*, 72 LA 1073 (Mullin, 1979) (employer did not have just cause to discharge employee whose doctor diagnosed psychoneurosis).

mation to conclude that the officer should not be returned to full active duty. Relying upon the Diagnostic and Statistical Manual III, the psychologist concluded that the officer had "paranoid personality traits" and "suspected paranoid personality." A supervisor interviewed by telephone described the grievant in positive terms and stated that he "does not use his authority to abuse people,"[5] but questioned the appropriateness of the grievant's firing his weapon during the incident which prompted the psychological referral.

Shortly after the officer was relieved from duty, he consulted a psychologist in private practice, who conducted diagnostic interviews and a full battery of psychological tests, including Wechsler Adult Intelligence Scale-Revised, Rorschach Ink Blot, Thematic Apperception, and Psychological Screening Inventory. Based upon these interviews and tests, the psychologist concluded that there was no evidence of psychosis or psychopathology demonstrated in the psychological tests.

The grievant was also referred by the police pension board to a psychiatrist for evaluation and a clinical psychologist for testing. The clinical psychologist hired by the pension board performed a full battery of psychological tests, even more extensive than the tests performed by the grievant's own psychologist. The interviews and psychological testing with the battery of tests were necessary because no single test is 100 percent valid under all circumstances nor does one test measure all aspects of personality functioning.

The pension board psychologist testified that an experienced clinician can frequently detect faking in personality tests, particularly if more than one test is given. The department's psychologist testified that he disregarded the MMPI test results involving the grievant because he believed the grievant was faking. The pension board psychologist concluded that the grievant did not appear to have lost intellectual control or to have "severe regressive emotional reactions," and that the grievant might overreact emotionally under conditions of severe stress but would not have lost control. He stated that, when attacked, the grievant would fight back—a tendency found in many police officers. This clinical psychologist, like the one used by the department, was aware of the job duties of a Chicago police officer and had tested police officers.

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[5]*City of Chicago*, Grievance No. 11-84-04, *supra* note 2, at 4–5.

The pension board's psychiatrist reviewed the psychologist's report and test findings, and testified that the grievant did not have a paranoid personality disorder and that the grievant "was without a mental impairment sufficient to prevent him from working with competence in his assignment as a Chicago police officer."[6] He concluded that the grievant had some paranoid personality traits, including a tendency to be easily slighted and quick to take offense, and a readiness to counterattack when a threat was perceived, but the presence of paranoid traits did not mean that a person had a mental disorder.

A key component of the department's case rested with its psychologist's use of collateral sources. The pension board psychologist testified that all kinds of sources should be used in evaluating the patient, but that exclusive reliance on persons who had made hostile allegations, such as the grievant's wife and her divorce attorney, is a mistake because it may introduce a bias and may make it difficult to evaluate the complete picture.

The department's psychologist relied primarily on questioning collateral sources because he believed that the grievant had faked his responses on the one psychological test given—the MMPI. The pension board psychiatrist also stated that collateral sources are unnecessary because a trained psychiatrist can determine whether a person has a personality trait or disorder by performing a mental status examination in taking a patient's history. Psychologists using psychological tests have controls to determine if there is malingering or deceit in the course of the testing.

The arbitrator determined that these collateral sources, relied upon by the department psychologist, alleged conduct that had not been determined to be true and questioned why such allegations should be given greater weight in a psychological evaluation than the report of a psychotherapist. The department's psychologist gave little weight to the one psychological test given even though it showed the grievant to be within normal limits of psychological functioning. Instead, the department's psychologist relied upon these allegations of misconduct relayed to him by the collateral sources.

This approach contrasted sharply with that used by the other doctors who examined the grievant with a full battery of psychological tests performed by two clinical psychologists. The

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[6]*Id.* at 19.

arbitrator gave little deference to the department's psychologist's use of and reliance on collateral sources. The department's psychologist had urged that he was an expert in forensic investigations, and his experience led him to conclude that police officers under psychiatric investigation had a tendency to be deceptive about their alleged mental health problems. Therefore, he defended his reliance on collateral sources as a technique used in forensic investigations. The arbitrator's resolution of this issue is quite significant because the collateral sources had become such a prominent component of the department's case.

In support of its arguments, the department urged that its own psychologist's report should be given great weight due to the psychologist's greater understanding of the duties of police officers. This argument is familiar to members of this Academy. Arbitrator Volz summarized it at the 31st Annual Meeting in 1978:

> As to whether an employee has the physical ability to do the work, the decision is to be made by a good-faith and objective evaluation of the relevant evidence, which includes principally the employee's past work history, any instances of prior or present physical difficulty, his general state of health, and medical opinions and recommendations. Where the only reliable evidence consists of the conflicting opinions of the company's medical advisor and the employee's physician, it is usually held by arbitrators that the company properly may rely upon the findings and recommendations of its own expert, especially where they evidence a thorough understanding of the employee's condition.[7]

Volz cited the decision of Arbitrator Doyle in *Hughes Aircraft*.[8] In *Ideal Cement Company*,[9] Arbitrator Merrill held that the company physician's opinions are entitled to deference if the grievant has been given fair notice and opportunity to overcome the views of the company doctor before reaching a final decision.

While Goldberg recognized this argument, he rejected it because the two clinical psychologists and a psychiatrist testifying on behalf of the grievant understood the central element of police work that was relevant to the case (i.e., the necessity for good judgment and self-control under situations of great stress

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[7]Volz, *Health and Medical Issues in Arbitration, Employee Benefit Plans, and the Doctor's Office: I. Medical and Health Issues in Labor Arbitration*, in Truth, Lie Detectors, and Other Problems in Labor Arbitration, Proceedings of the 31st Annual Meeting, National Academy of Arbitrators, eds. Stern & Dennis (BNA Books, 1979), 156, 176.

[8]49 LA 535 (Doyle, 1967).

[9]20 LA 480, 482 (Merrill, 1952).

and personal danger). The unanimous conclusion of each of these doctors, that the grievant was capable of functioning as a police officer, was entitled to considerable weight. The psychological evaluation procedures used by these doctors were more reliable than those used by the department's psychologist. After all, the department's psychologist used only one psychological test which he rejected and relied in large part on collateral sources. The arbitrator concluded that the grievant's medical evidence was entitled to greater weight than that of the department's psychologist. This decision demonstrates that careful and analytical evaluation of conflicting medical evidence is needed to dispute the employer's medical evidence and that such evidence should not necessarily be entitled to weight greater than competent, conflicting evidence.

In another psychiatric case involving the same parties, Arbitrator Witney sustained a grievance protesting a psychiatric removal from duty. He emphasized the employer's failure to consider the actual job performance of the grievant in his capacity as a Chicago police officer. The arbitrator held that when a police officer's career "is at stake, every reasonable effort should be made to assure a fitness for duty evaluation is proper."[10] Not only did the employer fail to use a battery of psychological tests (a common means to determine a person's psychological and psychiatric condition), but the evaluation did not consider the grievant's actual job performance. In fact, conversations between the department's psychologist and the grievant's commander did not include job performance issues. Instead, those conversations focused upon the relationship between the grievant and his paramour. The grievant had an impeccable record as a police officer, and no questions were directed to his commanders or supervisors to determine whether the grievant properly fulfilled his job duties. A sergeant gave the psychologist a favorable report in which he stated that the grievant "seems normal to me, no problem, was a quiet person . . . ."[11] His commander testified that some officers thought the grievant was a little odd or different, but could not say who supplied the information. The arbitrator noted:

> Given such hearsay and speculation, the employer obviously has not supplied anything of evidentiary value to show that fellow officers

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[10]*City of Chicago*, Grievance No. 129-84-04, *supra* note 2, at 46.
[11]*Id.* at 6.

> refused, or were reluctant to work with the [grievant]. The [commander] did not investigate the matter in any official or meaningful way. . . .[12]

This emphasis on actual street performance is consistent with a standard recognized by arbitrators in psychological removal cases. In *City of Fenton*[13] Arbitrator Roumell held that the employer did not act arbitrarily when it considered the safety issues of removing a police officer from duty for alleged mental illness.

These arbitral decisions are consistent with the provisions of the Americans with Disabilities Act of 1990 (ADA) requiring that medical examinations of employees be job-related and consistent with business necessity.[14] An employer covered by the Act may inquire as to the ability of an employee to perform job-related functions. Even though the ADA does not take effect until July 26, 1992, some of its basic concepts, including job-related examinations, have been a pertinent part of arbitration literature for a number of years.

Witney's emphasis on an examination of job performance in the context of the ADA's requirement for job-related examination is particularly important, given the police department's determination that the grievant was not fit for duty and should not be placed in street performance. This opinion was based upon an interview with the officer and one psychological test, which was not considered because the department psychologist believed the officer was attempting to show himself in the most favorable light. Instead of relying upon a battery of psychological tests, the department psychologist reviewed a 10-page letter written by the grievant entitled, "Civil Rights Violations by the Chicago Police Department."

The letter had been written to protest the department psychologist's refusal to provide the grievant with an earlier psychological evaluation, which had found the grievant to be fit for duty even though it concluded that he had an adjustment disorder with mixed emotional features. After this letter had been circulated to various department personnel, the grievant was referred again to the department psychologist for an interview. The psychologist also reviewed a memorandum from a police

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[12]*Id.* at 44.
[13]*Supra* note 4, at 355.
[14]42 U.S.C. §12112(3)-(4)(A) (1990).

sergeant, employed in the department's medical section, who wrote about an argument he had with the grievant concerning the prior psychological evaluation. During that argument the grievant became intense and was hostile. Based upon the sergeant's letter and the grievant's letter, the department psychologist concluded that the grievant should be removed from duty. He also noted a clinical impression of schizophreniform disorder as defined in the Diagnostic and Statistical Manual III, 295.40.

This diagnosis was refuted by psychiatric evidence submitted on behalf of the grievant and based in part upon a full battery of psychological testing conducted by the grievant's own psychologist. A psychiatrist who examined the grievant testified that the grievant's 10-page letter did not indicate any symptoms of schizophrenic form.

The arbitrator concluded that sufficient medical evidence submitted by the grievant demonstrated that the department psychologist's diagnosis of schizophrenic disorder was not correct. The psychiatric evidence submitted on behalf of the grievant did not state that he was fit for duty. It was submitted to rebut the department's view that the grievant had a schizophreniform disorder. The arbitrator, concluding that the department's evaluations were flawed because they did not consider job performance and did not provide the grievant with a full battery of psychological tests to establish psychological fitness, ordered that the grievant be returned to full duty with back pay for the entire period of time he was out of work.

Remedial issues in these cases may require a reservation of jurisdiction by the arbitrator. The nature of the case decided by Arbitrator Goldberg caused him to order ongoing psychological therapy to benefit the police officer. He was persuaded, based upon the evaluations of two psychologists and a psychiatrist, that the grievant was psychologically fit for duty and was to be reinstated without clearance from the department psychologist. The one condition he attached to the order was that the grievant undergo continued therapy.

The arbitrator retained jurisdiction of this matter until one year from the date of the grievant's reinstatement to active duty, in order to resolve any disputes arising as to whether the grievant complied with the therapy condition and whether the employer complied with the back-pay orders. This retention of jurisdiction is appropriate in this kind of case because parties

may encounter problems in accepting the return to work orders of arbitrators.

In the case decided by Arbitrator Goldberg, the police department challenged the decision in court and lost, but delayed for many months the return of the grievant to active duty. In a supplemental award, the arbitrator clarified his decision by requiring the employer to pay for the grievant's therapy sessions in the event they were not covered by the employer's health plan. He also required the grievant to undergo the therapy sessions on his own time. Arbitrator Goldberg was quite prescient in understanding the stresses the grievant would undergo in his attempt to return to duty. Rather than place him on street patrol work, the department assigned him to utility and clean up functions in a precinct garage, where his duties included washing cars and filling gas. As a result, he became the Western world's highest paid gas attendant. However, since his eventual return to full duty he has satisfactorily performed his job responsibilities.

Even though the union was quite successful in its litigation of these psychiatric cases, in the next round of negotiations after these decisions had been issued the union proposed that these issues be resolved by a panel of mental health professionals. The parties agreed to amend the collective bargaining contract and have diverted the resolution of these questions from the grievance-arbitration procedure. The new contract language provides for the creation of a three-person panel, with representatives of each party and a neutral physician to be appointed to resolve any disputes.[15]

The parties have learned that the use of this panel has been an excellent way of reducing their costs of litigating these issues. By not having adversarial hearings, the parties have reduced the scope of attorneys' work, eliminated transcripts and briefs, and limited their costs to expenses charged by the medical professionals required to make the evaluations, including the shared cost of the neutral medical professional. This system has also decreased the amount of time between removal from duty and the ultimate decision concerning the status of the officer, thereby reducing the stresses attendant to the psychiatric removal from duty cases. By diverting these cases from the parties' arbitration docket, the limited time and resources allot-

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[15]Collective Bargaining Agreement, City of Chicago and Fraternal Order of Police, Chicago Lodge No. 7, at 12.

ted by the employer for the litigation of contract and discipline cases have been conserved.[16] In terms of decreasing the time for resolution of these cases, the union estimates that the cases can be and have been resolved within five to six months from the time the grievance was filed protesting the officer's removal from duty. The fees for the union have ranged on the low side from $400 to $600 and on the high side from $800 to $900, depending upon the circumstances of each case.

The most important feature of this system is that the doctors have been able to refer the grievants for additional psychological testing. Generally, the adversarial system does not provide for additional posthearing review to determine the merits of the case, and if it did the delays could be substantial. In several cases the panel of medical professionals has agreed to submit the grievant for additional psychiatric testing. This has proven to be a flexible way to resolve these disputes.

The parties are quite pleased with the results of this system. A vast majority of the panel decisions are unanimous because of the free exchange of information between the medical professionals and the participation of the employees in the process. In some cases the employees have been asked to provide additional information, and they seem more satisfied with the large number of unanimous decisions.

Thus, we have effectively avoided what David Miller has characterized as "handing the coin to someone else to flip."[17] And we have also given Don Sears another reason why there are so few reported psychiatric removal cases. In 1969 at the 22nd Annual Meeting of the Academy, he speculated as to the reasons why there are so few cases. He concluded that two reasons for the relatively low number of cases are (1) that employees are reluctant to raise psychological matters as a defense and (2) that the parties tend to resolve them by granting sick leave and psychiatric treatment. Our Chicago panel offers the new system as a third reason why there are few reported arbitrator decisions.[18]

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[16]Medical grievances involving health issues are subject to a mediation procedure. For the past several years Academy member Martin Cohen has greatly aided the parties in the resolution of a large number of medical cases. Those cases not resolved are submitted to arbitration. Under the parties' procedure the mediator may not also arbitrate these cases.

[17]Miller, *supra* note 1, at 142.

[18]Sears, *The Use of Experts in Arbitration: III. Observations on Psychiatric Testimony in Arbitration*, in Arbitration and Social Change, Proceedings of the 22nd Annual Meeting, National Academy of Arbitrators, ed. Somers (BNA Books, 1969), 151.

Psychotherapist—Patient Privilege

No discussion of medical issues in arbitration would be complete without identifying the testimonial privileges that have been recognized by court decisions and legislative action in the area of medical and psychiatric testimony. Early common law decisions did not recognize a physician-patient privilege, but state statutes and some court decisions created the privilege. An example of judicial recognition of the privilege is a recent decision of the Massachusetts Supreme Judicial Court, which held:

> We continue to recognize a patient's valid interest in preserving the confidentiality of medical facts communicated to a physician or discovered by the physician through examination. . . . All physicians owe their patients a duty, for violations of which the law provides a remedy, not to disclose without the patient's consent medical information about the patient, except to meet a serious danger to the patient or to others.[19]

A review of existing court case law indicates that, of the courts that have considered such questions, most have held that a patient can recover damages if the physician violates the duty of confidentiality which plays a vital role in the physician-patient relationship.

An example of legislation creating the doctor-patient privilege is the physician-patient section of the Illinois Code of Civil Procedure.[20]

Exceptions apply for homicide trials, malpractice cases, personal injury cases, actions brought by or against the patient in which the patient's physical or mental condition is an issue, will contests, child neglect cases, and criminal actions involving abortion.

The New York Tripartite Committee of the National Academy of Arbitrators recommended guidelines for the assertion of a physician-patient privilege.[21] Under these guidelines an employee may not claim the privilege ". . . if an employee's employment or continued employment is, by contract, controlling practice, or company rule, conditioned on his physical condition." The privilege may be claimed ". . . if an employee's

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[19]*Alberts v. Devine*, 395 Mass. 59, 479 N.E.2d 113, 118–19 (1985).

[20]Ill. Rev. Stat. ch. 110, ¶8-802 (1991).

[21]*See Problems of Proof in the Arbitration Process: Report of the New York Tripartite Committee*, in Problems of Proof in Arbitration, Proceedings of the 19th Annual Meeting, National Academy of Arbitrators, ed. D. Jones (BNA Books, 1967), 295, 298–99.

employment or continued employment is not exactly or explicitly, by contract, controlling practice or a company rule, conditioned on his physical condition."[22] This formulation of the physician-patient privilege does not cover psychotherapists, including psychologists. It also does not cover the all-important situation involving employee assistance programs which require strict confidentiality.[23]

The psychotherapist-patient privilege has generally been created by statute. However, the elements of the privilege are based upon four criteria recommended by Dean Wigmore:

1. Does the communication originate in a confidence?
2. Is the inviolability of that confidence vital to the achievement of the purposes of the relationship?
3. Is the relation one that should be fostered?
4. Is the expected injury to the relation, through the fear of later discourse, greater than the expected benefit to justice in obtaining the testimony?[24]

Applying these criteria to the psychotherapist-patient relationship, the Wigmore test is met. Patients are normally reluctant to discuss any matters with a psychotherapist unless the consultation is confidential and secret, and the patient is less likely to reveal information if the patient knows that the disclosures might be revealed in some future lawsuit. The relationship should be fostered and probably would not be developed without benefit of the privilege, and the information revealed would produce far fewer benefits to the interests of justice than the subsequent injury to psychotherapy.[25] As a result of these criteria generally being met, several states have enacted statutes providing for the creation of a psychotherapist-patient privilege.[26]

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[22]*Id.*

[23]The code of ethics for physicians providing occupational medical services provides that "employers are entitled to counsel about the medical fitness of an individual in relation to work, but are not entitled to diagnoses or details of a specific nature." The code states: "Physicians should treat as confidential whatever is learned about individuals served, releasing information only when required by law or by overriding public health considerations, or to other physicians at the request of the individual according to traditional, medical ethical practices; and should recognize that employers are entitled to counsel about the medical fitness of individuals in relation to work, but are not entitled to diagnoses or details of a specific nature." American Occupational Medical Association Code of Ethical Conduct, Principle 7 (1976).

[24]8 Wigmore Evidence, §2285, 3d ed. (1940).

[25]*Confidential Communications to a Psychotherapist: A New Testimonial Privilege*, 47 N. U. L. Rev. 384, 386–87 (1952).

[26]*See generally* Mental Health and Disabilities Confidentiality Act, Ill. Rev. Stat. ch. 91-½ ¶801 *et seq.* (1991); Cal. Evid. Code §1010 (1965).

The same policy reasons applicable to the creation of a physician-patient privilege apply to psychotherapist-patient privilege. Arbitrators should be aware that free and open communication between an employee and a psychotherapist might be stifled if the employee is not given the expectation that statements made to the psychotherapist will not be disclosed to the employer.

However, the privilege is not absolute. At least one court has recognized that this privilege should not apply where disclosure is essential to avert danger to others. Essentially, "the protected privilege ends where the public peril begins."[27] Under the Illinois statute the protected communications include any made by a "recipient or other person to a therapist or to or in the presence of other persons during or in connection with providing mental health for developmental disabilities services to a recipient."[28] Information that may be disclosed without consent of the patient or recipient of services includes the identity of the recipient and therapist and a description of the nature, purpose, quantity, and date of the services provided.

The Illinois exceptions are significant in the context of labor arbitration proceedings. Communications may be disclosed where the recipient introduces a mental condition as an element, claim, or defense. Don Sears's theory that the cases are not brought in order to avoid disclosure of certain information concerning mental health may be correct because placing a mental condition in issue as a claim or defense waives the privilege.[29] Thus, in cases where an employee alleges mental illness as a defense to an employer's termination action, the privilege would not apply because the employee has placed a mental condition into issue.[30] Even though an employee places a mental condition in issue, the court or administrative agency must make an in-camera examination of the testimony and determine that it is "relevant, probative, not unduly prejudicial or inflammatory and otherwise clearly admissible and that other satisfactory evidence is demonstrably unsatisfactory as evidence of the facts

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[27]*Tarasoff v. Regents of Cal.*, 17 Cal.3d 425, 556 P.2d 334 (1976).

[28]Ill. Rev. Stat. ch. 91-½ ¶801(1) (1991).

[29]*See* Sears, *supra* note 18.

[30]*See, e.g., Babcock & Wilcox Co.*, 72 LA 1073 (Mullin, 1979) (employee must submit to examination by psychiatrist, and result of examination can serve as basis for final disposition of matter); *Foster-Wheeler Corp.*, 57 LA 1170 (McConnell, 1971) (employer not justified in discharge of employee whose horseplay resulted in injury and created safety hazard, where employee had mental and nervous disability that required medical treatment and leave of absence given by employer was not long enough).

sought to be established by such evidence. . . ."[31] Employers should not be able to circumvent this privilege by ordering employees to undergo psychological examinations. In these cases there should not be a waiver of the employee's statutory rights to nondisclosure.[32]

The integrity of employee assistance programs is jeopardized if employee communications to counselors and therapists are not privileged from disclosure to employers or labor arbitrators hearing discipline or nondiscipline cases. The essence of an employee assistance program is the element of confidentiality. Employers have developed successful employee assistance programs on the basis of confidentiality.

That hallmark of these programs was recognized as a basis for a physician-patient relationship involving an employee, IBM, and a psychiatrist hired by IBM to work in the employee assistance program. In *Bratt v. IBM*[33] the First Circuit recognized the sensitive nature of the relationship between a patient and physician, even though the physician was hired by the employer. In *Bratt* the employee filed a lawsuit against IBM and its contract psychiatrist because the psychiatrist had examined the employee and called the employee's supervisors to tell them that the employee was paranoid. The employee had seen the psychiatrist pursuant to the IBM policy and employee assistance program, which stated that medically confidential information would not be provided to managers or personnel officers without the prior consent of the employee. The employee had not given consent.

The First Circuit noted the expectation of confidentiality had not been contradicted by the psychiatrist, and the employee had not been asked to waive or otherwise consent to disclosure. The court noted with approval a recent decision of the Massachusetts Judicial Court, *Alberts v. Devine*[34] in which the court recognized a physician-patient privilege and the right of a patient to file a breach of confidentiality lawsuit against a psychiatrist.

Arbitrators unwilling to recognize the existence of such a privilege in the context of employee assistance program disclosures could cause great damage to an employer's program of

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[31]Ill. Rev. Stat. ch. 91-½ ¶810(a)(1) (1991).

[32]Rothstein, *Employee Selection Based Upon Susceptibility to Occupational Illness*, 81 Mich. L. Rev. 1379, 1473 (1983).

[33]785 F.2d 352 (1st Cir. 1986).

[34]395 Mass. 59, 479 N.E.2d 113 (1985).

aiding impaired employees.[35] Obviously, a privilege barring such disclosure, as indicated by the New York Tripartite Committee, could lead an arbitrator to draw separate conclusions about the facts of the case. For instance, an arbitrator might be tempted to draw an adverse inference based upon an employee's assertion of such a privilege. In cases where the employer, rather than the employee, has placed the employee's psychiatric condition in issue, a serious question arises as to whether an employee should be removed from duty. An employee's job should not be jeopardized by asserting the privilege because the employer's burden in such cases must be based upon the demonstration of some job-performance problem and not on psychological speculation. As Witney noted, the psychological evidence presented by the City of Chicago was wholly inadequate because no attempt had been made to determine whether the employee had successfully performed the job of police officer. Under the job-performance analysis it would be quite inappropriate for an arbitrator to sustain an employee's removal based solely upon the assertion of a psychotherapist-patient privilege and a related adverse inference.

Conclusion

The Chicago cases discussed above are excellent examples of an employer's attempt to bypass the normal discipline procedure by not bringing charges against employees for inappropriate conduct. Instead of using the normal disciplinary mechanism, the employer relied upon a mandatory leave of absence for nondisciplinary reasons (i.e., psychiatric reasons). Because job performance is such a critical portion of any

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[35]The statutory and judicially created privileges establish a clearly defined public policy of exclusion of such evidence in administrative judicial and maybe even arbitration proceedings. There is a serious possibility of litigation in those cases in which prohibited testimony is allowed. This could lead to a court challenge to vacate an arbitration award. *See Flight Attendants* v. *US Air, Inc.*, 139 LRRM 2967 (3d Cir. 1992) (the court declined prearbitration challenge to statutorily excluded evidence concerning employee's guilty plea to one count of unlawful possession of cocaine); *In re Arbitration*, 737 F. Supp. 1030, 134 LRRM 3116 (N.D. Ill. 1990) (court denied enforcement of arbitration subpoenas seeking presence of counselor at arbitration hearing and records of employee assistance program and dealing with employee's counsel or on substance abuse case); *Sabree v. Carpenters*, 126 F.R.D. 422 (D. Mass. 1989) (state psychotherapist-patient privilege would be applied to preclude disclosure of records); *Jennings v. D.H.L. Airlines*, 101 F.R.D. 549, 34 FEP Cases 1423 (N.D. Ill. 1984) (psychologist's records of former employee, whose former employer sought to prove through psychologist's records that her complaints were caused by her emotional problems and not actual sexual harassment, were privileged).

removal case, an employer should not be able to take disciplinary action in situations where an employee asserts such a privilege. What these cases represent is an employer's attempt to remove employees in the absence of adequate performance evidence. Had an arbitrator drawn adverse inferences against employees in those cases based upon assertions of privilege, great injustices would have been done.