CHAPTER 9

EMPLOYEE'S DUTY OF LOYALTY: AN ARBITRAL-JUDICIAL COMPARISON

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The common law implies a set of obligations owed by employees to their employers, loosely gathered under the head of a "duty of loyalty," a general obligation to further the employer's interests.[1] But employees have their own interests which are at times at variance with those of the employer. For ease of analysis, these can be broken down into three categories: (1) a conflict of interest where the employee's economic activity is inimical to the employer; (2) a conflict of commitment where, because of some personal obligation, the employee is not giving all that is due the employer; and (3) a conflict of conscience where some political, ethical, or religious qualm puts the employee at odds with the employer. The courts have produced an elaborate and well-settled body of law on the first two; they have grappled with the last one, especially more recently as the tort of discharge for a reason violative of "public policy" has taken root as an exception to the at-will rule.

In this paper I will develop how arbitrators have dealt with these conflicts under collective agreements which do not specifically address the precise issue. This exploration is meant to serve two

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[1]The common law of employment on point has been collected and summarized in Specter & Finkin, Individual Employment Law and Litigation (1989), Ch. 9. The theoretical—or philosophical—literature on the idea of loyalty is most recently explored in Fletcher, Loyalty (1993). But he takes "professional loyalties" that derive "solely from contract, from voluntary commitments" to be different from loyalties that derive from "an historical self," which he take to supply "the basis of loyalty." *Id.* at 22–23. He does not explain, however, why loyalty to a new-found friend is more "basic" than the reciprocal obligations of employer and employee close upon a lifetime's service, that is, why employment is not an important component of one's "historical self."

purposes, in addition to what I hope will be a useful exposition of arbitral practice: *first*, to ascertain whether that practice has changed significantly over time, and *second*, to ascertain whether and to what extent arbitration differs from the litigation of these questions. The latter inquiry is of more than academic interest because arbitration may begin to serve as a significant source of dispute resolution in the nonunion environment.[2]

Conflicts of Interest

It breaches the common law duty of loyalty for employees to place themselves in a conflict of economic interest with the employer—by engaging in competing business ventures, self-dealing, or diverting business or property which should be the employer's. Arbitrators have recognized the same implied duty. Employees may not place themselves in a position of trading upon or appearing to trade upon or to compromise their employer's interests, as, for example, for a purchasing agent to borrow money from the employer's customers[3] or for a sports reporter to accept an interest in a racehorse from an owner.[4] So, too, adequate cause to discharge has been found where an employee solicited the employer's customers to a competing venture,[5] where an employee actually went into competition with the employer (albeit on his own time),[6] or an employee otherwise diverted business from the employer.[7] In these cases arbitrators have carefully examined the nature of the employee's involvement, to ascertain whether it truly was competitive,[8] and whether the employee's access to and

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[2]The literature on point is reviewed by Petersen, *The Union and Nonunion Grievance System*, in Research Frontiers in Industrial Relations and Human Resources, eds. Lewin, Mitchell, & Sherer (1992), 131, 151–54.

[3]*Coast Packing Co.*, 31 LA 243 (Prasow, 1958).

[4]*New York Post Corp.*, 62 LA 225 (Friedman, 1973).

[5]*Arroyo Foods*, 67 LA 985 (Darrow, 1976); *Dispatch Servs.*, 67 LA 632 (Matten, 1976).

[6]*Jackson Shipyards, Inc.*, 74 LA 1066 (Taylor, 1980); *Cummins Diesel Sales Corp.*, 34 LA 637 (Gorsuch, 1960).

[7]*Northwest Tank Serv.*, 82-1 ARB. ¶8051 (Jackson, 1981) (breaches duty of loyalty for employee to bid on property in competition with employer); *Patton Sparkle Mkt.*, 75 LA 1092 (Cohen, 1980).

[8]*See generally Armen Berry Casing Co.*, 17 LA 179 (R. Smith, 1950). *See also Sperry Rand Corp.*, 57 LA 68 (Koven, 1971) (reviewing arbitral authority); *Heppenstall Co.*, 55 LA 1044 (Shister, 1970); *Janitorial Serv.*, 33 LA 902 (Whelan, 1959) (janitor employed by cleaning service not engaged in competition by cleaning small tavern on own time). *But in Business Forms*, 77-2 ARB. ¶8400 (Lawrence, 1977), the arbitrator sustained the discharge of a printing employee for soliciting business for his wife's printing venture even though work done there was not of the kind done by the employer. The award is contrary to the weight of arbitral authority.

potential use of the employer's trade secrets or other confidential information played a weighty role.[9]

Arbitrators have also recognized that at other points—not involving competitive activity—employees may act in their own economic self-interest even when doing so is inimical to the employer (or the management): It has been held that an employee may not be dismissed because of a dispute arising out of actions as a stockholder and not as an employee,[10] an employee may not be dismissed for filing a lawsuit against the employer[11] or a customer of the employer.[12] Nor may an employee be dismissed for purchasing a competitor's product.[13]

In general, the arbitral approach to competitive activity has not differed from the judicial approach. But two dissimilarities do emerge from a comparison of the cases. The common law duty of loyalty is an implied obligation and, consequently, requires no express knowledge of it on the employee's part. Arbitrators, however, place considerable emphasis on the employee's knowledge that the conduct is prohibited, often to require that a specific rule must have been promulgated in advance and made known to the employee[14] or that an ultimatum actually must have been given—to cease the activity or be fired—as a precondition of sustaining the discharge.[15]

Moreover, at common law employees under a contract of fixed duration, although forbidden to solicit customers to a future

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[9]*Ravens-Metal Prods.*, 39 LA 404 (Dworkin, 1962) (reviewing arbitral authority).

[10]*Hopwood Foods*, 74 LA 349 (Mullin, 1979). *Compare Carl Fisher, Inc.*, 24 LA 674 (Rosenfarb, 1955) (not impermissible for employee/customer to threaten the employer/seller with complaint to Better Business Bureau) *with Hagans Chevrolet Co.*, 12 LA 635 (Lindquist, 1959) (impermissible for employee to advise friend to seek legal counsel in dispute with seller/employer). The conflicting law on point is compiled in Specter & Finkin, *supra* note 1, at §10.44.

[11]*Dow Chem. Co.*, 32 LA 71 (Larson, 1958) (where there was no evidence that employee had personal contacts with company's officers or that quality of his work or of relationships were affected by lawsuit). The conflicting law on point is compiled in Specter & Finkin, *supra* note 1, at §10.47.

[12]*Bethlehem Steel Co.*, 32 LA 749 (Stowe, 1959).

[13]*In re Paul Swanson*, 36 LA 305 (Gochnauer, 1961).

[14]*Northern Rebuilders Co.*, 96 LA 1, 3 (Kanner, 1990) ("In my view, grievant's conduct in arguably competing with the Company falls within the purview of the category of rules which must be clearly articulated by the company to employees."). This approach is of long standing: *Skelly Oil Co.*, 19 LA 1290 (Granoff, 1952); *Branch River Wool Combing Co.*, 31 LA 547 (Pigors, 1958) (review authority); *Heppenstall Co.*, *supra* note 8.

[15]*New York Post Corp.*, *supra* note 4 (reinstatement ordered upon divestiture of interest giving rise to conflict of interest); *Moore Business Forms*, 57 LA 1258 (Larson, 1971) (grievant given six weeks to decide whether or not to sell his competing business); *Firestone Retread Shop*, 38 LA 600, 601 (McCoy, 1962) ("If he had been discharged without being given an opportunity first to sell his [competing] business, I would have set the discharge aside.").

competitive venture, may engage in fairly extensive preliminary preparation for such engagement: They may incorporate the prospective competitor, rent space, secure financing, purchase machinery, print stationery, and even announce their intention to depart to the competitive venture in the press while remaining in the current employment.[16] The law also allows employees to use all the knowledge and skill learned or perfected in the prior employment to their subsequent advantage, save only that they may not use the prior employer's trade secrets or confidential business information.

The arbitral approach in this area is considerably less well developed and is less receptive to individual employee interests. Arbitrators have recognized that an employee may not be discharged for attempting to secure another job[17] or for preparing to compete with the employer.[18] But a few cases have held that an employee who possesses trade secrets or other confidential business information may be discharged for engaging in activity preliminary to a competing venture. In *George A. Hormel and Co.*[19] the company discharged an employee, identified by the arbitrator only as "employed in the Dry Sausage Department," after a local newspaper carried an article indicating that he was to be a director and officer of a newly incorporated sausage producer. The arbitrator sustained the discharge with the following observation:

> Once a man is publicly identified as an official of a business that is being formed as a competitor, I think any Company has a right to say to that man either resign from the prospective competitor or we will discharge you. Even if the fear of the transmittal of trade secrets was not involved I think that the Company can be concerned about the public relations impact that results when one of its employees has become the production vice president of a prospective competitor. And in a business where trade secrets are important, as in the production of sausage, I think a Company does not have to prove that a man who is identified as an important official of a prospective competitor has or will actually transfer secrets. The Company can take the position that it fears such might happen and act, as the Company did here, on such fear.[20]

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[16]Specter & Finkin, *supra* note 1, at §9.12. On the latter point see *Fish v. Adams*, 401 So.2d 843 (Fla. App. 1981).

[17]*Perkins Contracting Co.*, 92 LA 408 (Hilgert, 1988).

[18]In *Northwest Tank Serv.*, *supra* note 7, the arbitrator observed that dreams of competitive ventures are rarely fulfilled, and so purchase of equipment necessary for such an endeavor is not "demonstrative of a positive intent to compete with one's employer." *Id.* at 3249. The necessary assumption, however, is that the purchase of such equipment, coupled with a showing of requisite intent, would be grounds for discharge. Such a result would be at variance with the common law.

[19]71-2 ARB ¶8599 (Seitz, 1971).

[20]*Id.* at 5265.

So, too, in *Pipe Coupling Manufacturers*,[21] the arbitrator sustained a discharge where the company learned that the employee was actively engaged in setting up a competitive enterprise. The arbitrator allowed that mere intent to compete would not be grounds for discharge in an "ordinary sort of business," but in a small and highly competitive industry, potentially involving the disclosure of confidential information, "the Company had the right to lock the stable door before the horse was stolen."[22] And in *Industrial Beads*,[23] an employee who had extensive knowledge of the employer's patented technology had been discharged in part for exploring the possibility of working for a competitor. The arbitrator concluded that the employee's behavior, although "tactless" and potentially harmful, did not give rise to dischargeable conduct but did warrant a disciplinary layoff.

The arbitrators in these admittedly few reported cases pay little attention to factors emphasized by the courts to negate a breach of the duty of loyalty—the use of the employee's ability and knowledge to better advantage and the benefit to society flowing from such competitive effort. The decision in *George A. Hormel*, for example, is inconsistent with the common law. And in *Industrial Beads* the employee was disciplined for exploring the possibility of bettering himself in a small, intensely competitive industry to which his skills and knowledge were accordingly limited.

Relatedly—and again in contrast to the courts—the arbitrators in these cases failed to consider more carefully whether the information in the employee's possession was actually a trade secret or other protectable confidential business information.[24] In an earlier case, *E.B. Sewall Manufacturing Co.*,[25] relied upon in *Pipe Coupling Manufacturers*,[26] Arbitrator Updegraff sustained the discharge of an employee because his sons had launched a competing venture. The business manufactured gears, using technical information developed by extensive research and at some cost. The arbitrator found: "These technical processes once developed and put into effect in the shop are capable of being thoroughly understood and applied

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[21] 46 LA 1009 (McCoy, 1966).

[22] *Id.* at 1011.

[23] 34 LA 458 (Klamon, 1960).

[24] *But see Ravens-Metal Prods., supra* note 9, at 410 (attending to exact nature of information in employee's possession); *cf. Branch River Wool Combing Co., supra* note 14, at 551 (employee had no access to confidential information).

[25] 3 LA 113 (Updegraff, 1946); *cf. Northwest Airlines*, 59 LA 69 (Koven, 1972) (employer could discharge ticket agent for marrying owner of travel agency if rule on conflict of interest had been promulgated in advance of wedding).

[26] *Supra* note 21.

by any of the skilled or semiskilled employees."[27] Therefore, he held that this information constituted trade secrets. Discharge was ordered not because the employee had transmitted trade secrets but because it was possible to do so in the future, even inadvertently. (The arbitrator sustained the discharge as, in a sense, a prophylactic—he ordered the employee reinstated, were his sons to discontinue their business within a year). But the widespread character of the technical knowledge involved in *E.B. Sewall*, and the ease with which it could be (and was) acquired by even the semiskilled, would militate against considering it a trade secret at law.

These differences can be explained by the respective settings in which these disputes arise. At law the employee's breach of the duty of loyalty can be asserted by the employer as a defense to an employee's suit for wrongful termination of a contract of employment, as grounds for recovery by the employer of compensation paid during the period of disloyalty, and as grounds for disgorging the employee's misbegotten gains. And the trade secret cases invariably involve the possible imposition of injunctive relief, forbidding the employee from utilizing that knowledge. The litigation of these issues often involves highly compensated professional, managerial, and sales employees as well as large sums of money, complex issues of intellectual property, and commensurately large legal fees. Compared with litigation, the relative speed and small cost of arbitration, normally involving the discharge of lower paid blue collar workers, can reduce the sharpness of focus. Even so, there is no reason for the economic liberties of the two groups to differ.

Conflicts of Commitment

At common law an employee working full time for an employer under a contract of fixed duration is obligated to devote that time solely to the employer. But time not due the employer may be devoted to other activities, including other (noncompetitive) work for the employee's benefit, so long as the employee's obligation to the primary employer does not suffer. Arbitrators have consistently recognized this distinction, resulting in something of a "blackletter" rule. Moonlighting, unless expressly forbidden by the employer,[28] may be engaged in by an employee unless the second job interferes

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[27]3 LA at 114.

[28]In *Great Atl. & Pac. Co.*, 77-2 ARB ¶8553 (Shister, 1977), the arbitrator held that an employee's "helping out" at his brother's store was competitive work proscribed by the collective agreement even though the grievant had not been paid for it.

in the primary work.[29] This principle has been applied by some arbitrators allowing a full-time worker's privilege to work part time even for a competitor,[30] so long as trade secrets are not involved,[31] and allowing a part-time worker to work for a competitor full time.[32] The sense of these cases is that, unless expressly forbidden by an employer rule, performing relatively routine tasks *for* someone who competes with the primary employer is not the same as going into direct competition *with* the primary employer.[33]

This blackletter rule has been extended to allow a full-time worker even to occupy a second full-time job[34] as well as to permit use of personal leave for that purpose.[35] Even the use of sick leave to moonlight has been allowed where work in the second job was consistent with an inability to perform the primary employer's work.[36] But such engagement must comply with the duty of candor owed by the employee to the employer—to request permission if company policy requires it[37] or truthfully to disclose the use of leave time upon inquiry.[38] Indeed, the requirement that the employee notify the employer of an impending absence is strictly enforced even where the reason for the absence otherwise provided a justifiable excuse.[39]

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[29] *Climate Control*, 89 LA 1062 (Cromwell, 1987); *Memphis Publishing Co.*, 67-1 ARB ¶8233 (Cantor, 1967) (no breach of the duty of loyalty for newspaper circulation managers to own and operate bar despite community prejudice against such establishments where there was no showing of any adverse effect on job performance); *Wood County Tel. Co.*, 46 LA 175 (Lee, 1966); *Kansas City Star Co.*, 12 LA 1202 (Ridge, 1949).

[30] *Worth Press Co.*, 72-2 ARB ¶8536 (Larson, 1972); *Branch River Wool Combing Co., supra* note 14 (emphasizing critical absence of general rule prohibiting employment with competitor and reviewing arbitral authority to that effect).

[31] *See generally Western Paper Goods*, 77-2 ARB ¶8450 (High, 1977) (reviewing authority).

[32] *Chicago Mastic Co.*, 69-2 ARB ¶8809 (Johnson, 1969).

[33] *See also* the awards cited in *supra* note 8.

[34] *United Eng'g & Foundry Co.*, 37 LA 1095 (Kates, 1962). *Cf. Goodyear Tire & Rubber Co.*, 64 LA 875 (Di Leone, 1975) (holding two full-time jobs expressly forbidden by company policy).

[35] There is a division of authority on whether an employee who takes a personal leave from an employer, which he uses without the employer's knowledge to apply for and occupy another job, is guilty of a dischargeable offense: *compare Cincinnati Tool Co.*, 52 LA 818 (Kates, 1969) (not just cause) *with Crown Zellerbach Corp.*, 73-1 ARB ¶8268 (Nicholas, 1973) (is just cause).

[36] *Rock Hill Printing & Finishing Co.*, 64 LA 856 (Whyte, 1975). *See also Merico, Inc.*, 98 LA 122 (Silver, 1992) (suspension warranted in lieu of discharge because employee lied to employer about moonlighting, but moonlighting itself not shown to be inconsistent with inability to work in primary job); *Alcan Aluminum Corp.*, 88-1 ARB ¶8298 (Volz, 1987) (reviewing arbitral authority).

[37] *Whippany Paperboard Co.*, 68-1 ARB ¶8237 (Buckwalter, 1968) (employee discharged for absenting himself without leave after company denied leave for purpose of engaging in another business).

[38] *Consumer Plastics Corp.*, 83 LA 870 (Talent, 1984); *William Feather Co.*, 77-1 ARB ¶8073 (Shanker, 1977).

[39] *Mission Indus.*, 98 LA 688 (Weiss, 1991) (effective notice was given that employee had been hospitalized out of state); *Southwestern Ohio Steel*, 58 LA 501 (Stouffer, 1972); *National*

A recurring arbitral situation concerns the employee who declines overtime, leaves work without permission, or refuses to report for work when called due to a personal emergency. In a long-standing line of cases in keeping with industrial norms of progressive discipline, arbitrators weigh the employer's need for the services against the reason for the employee's action—such as an employee's need to tend a child[40] or a spouse,[41] or some other personal exigency, including harvesting a crop,[42] a commitment to a second employer,[43] and similar situations[44]—to determine the remedy. For example, the discharge of an employee on probation for absenteeism was held excessive where the offense arose from a family emergency,[45] and taking additional but unauthorized leave in such a case has mitigated the penalty.[46] However, a recurring or persistent refusal to report for work on the basis of otherwise justifiable grounds is nevertheless a valid ground for discharge.[47]

Rose Co., 43 LA 1066 (Autrey, 1964). Where the absent employee was unable to notify the employer because his incarceration disabled him from so doing, the failure of notice was held to be excused. *National Tube Co.*, 12 LA 975 (Seward, 1949).

[40] *Lithonia Lighting Co.*, 83-1 ARB ¶8217 (Williams, 1983) (departure from past practice with respect to leave to take child to doctor requires grievance be sustained); *Palm Desert Greens Ass'n*, 69 LA 191 (Draznin, 1977) (extension past vacation time due to sick child); *Mead Corp.*, 55 LA 1279 (Hon, 1971) (reinstatement without back pay).

[41] *Allied Paper*, 80 LA 435 (Mathews, 1983).

[42] *Niagara Alkali Co.*, 25 LA 541 (Guthrie, 1955); *cf. Bowman Transp.*, 79-1 ARB ¶8059 (Hon, 1978) (need to bale hay qualifies for excused leave under collective agreement). *Per contra Stark Ceramics, Inc.*, 79-2 ARB ¶8546 (Ipavec, 1979) (discharge for refusal of overtime in order for employee to help his father to load "a particularly frisky bull" sustained).

[43] *Budd Co.*, 52 LA 1290 (Keefe, 1969) (suspension warranted for refusal to work overtime due to conflict with second job); *F.L. Jacobs Co.*, 27 LA 339 (R. Smith, 1956); *American Wood Prods. Corp.*, 17 LA 421 (Livengood, 1951).

[44] *Beechwood Lumber & Veneer Co.*, 62 LA 1023 (Rice, 1974) (unauthorized leave to see son in military shortly to be sent overseas merits suspension); *Great Atl. & Pac. Tea Co.*, 62 LA 245 (Burke, 1973) (three family members disobey company's refusal to allow them to attend funeral of relative: two reinstated with back pay, third's dismissal sustained in light of his work record); *Pittsburgh Plate Glass Co.*, 29 LA 286 (Lehoczky, 1957) (two-week suspension excessive for female employee who absented herself, contrary to employer's order, to marry and honeymoon with serviceman husband shortly to be assigned overseas). *Compare Noll Mfg. Co.*, 69 LA 170 (Ward, 1977) (discharge of employee who took additional vacation time to visit allegedly sick brother against employer's direct order sustained) *with Pinto Valley Cooper Corp.*, 83 LA 1300 (Lennard, 1984) (no sufficiently explicit and unequivocal order disallowing employee time off to attend hospitalized daughter).

[45] *Knauf Fiber Glass*, 81 LA 333 (Abrams, 1983) (employee absented herself because her 4-year-old daughter had been taken to hospital emergency room). *See also Western Paper & Mfg. Co.*, 84-2 ARB ¶8427 (Seidman, 1984) (need to attend to newborn with spina bifida).

[46] *Hobart Corp.*, 80-1 ARB ¶8316 (Goetz, 1980) (employee remained at home, contrary to employer's order, to attend very badly burned infant).

[47] *Rohm & Haas*, 91 LA 339 (McDermott, 1988) (child-care needs); *Washtenaw County*, 80 LA 513 (Daniel, 1982) (attorney unwilling to work full time in order to care for children at home); *Avco Corp.*, 64 LA 672 (Marcus, 1975) (family needs); *Rock Hill Printing & Finishing Co.*, 37 LA 254 (Jaffee, 1961) (persistent absences to harvest employee's crops).

Thus, discharge for a refusal to complete necessary work has been sustained where an employee made no attempt to work around a foreseeable child-care need.[48]

At common law cause to discharge an employee under a contract of fixed duration must be substantial; the employee, it has been said, cannot be an insurer of meticulous performance.[49] So, for example, a band leader who had been engaged for a three-month period could not be dismissed for failure to perform for one day due to food poisoning.[50] But in the cases according contractual status to an employer's disciplinary rules applicable to otherwise at-will employees—a situation more analogous to collective agreements—at least some courts have suggested that disobedience alone is cause for discharge.[51] In consequence, arbitration treats blue collar workers more like workers under contracts of employment than do these courts, albeit by applying norms of progressive discipline.

Conflicts of Conscience

A conflict with an employer dictate, deriving from a conscientiously held employee objection, can play out at the workplace in almost infinite variety: a refusal to raise the American flag,[52] to sign a misleading attestation of training in hazardous chemicals handling,[53] to remove a poster of the Mexican revolutionary Emiliano Zapata from the employee's office wall,[54] to remove a button communicating a message of social protest,[55] or to obey an order the employee believes conflicts with professional standards.[56] For the sake of brevity, two areas will be reviewed: (1) disobedience grounded in religious belief, and (2) extramural criticism of the employer raising a question of public concern.

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[48]*Southern Champion Tray Co.*, 96 LA 633, 637 (Nolan, 1991). To similar effect see *U.S. Steel Corp.*, 95 LA 610 (Das, 1990).

[49]Specter & Finkin, Individual Employment Law and Litigation (1989), at §4.13.

[50]*Joshua v. McBride*, 19 Ark. App. 31, 716 S.W.2d 215 (1986).

[51]*Loftis v. G.T. Prods.*, 167 Mich. App. 787, 423 N.W.2d 358 (1988) (failure to report for overtime on two occasions); *Gaudine v. Emerson Elec. Co.*, 284 Ark. 149, 680 S.W.2d 92 (1984) (failure to report on time and failure to notify employer that medication causing dizziness had been taken); *Reynolds Mfg. Co. v. Mendoza*, 644 S.W.2d 536 (Tex. App. 1982) (refusal to work on Saturday).

[52]*Ralston Purina Co.*, 61 LA 14 (Krislov, 1973).

[53]*James B. Beam Distilling Co.*, 90 LA 740 (Ruben, 1988).

[54]*California Processors*, 56 LA 1275 (Koven, 1971).

[55]*Allegheny County Port Auth.*, 58 LA 165 (Duff, 1971).

[56]*Rockford Newspapers*, 63 LA 251 (Kelliher, 1974).

Religion

Before Title VII was amended in 1972 to impose a duty of reasonable accommodation to religious practice or belief, arbitrators looked to past practice or the reasonableness of the employer's order if it conflicted with a religiously grounded claim.[57] But arbitrators have since come to apply a requirement of reasonable accommodation, sometimes referencing the law and sometimes not. As in the civil setting, it may be contested whether the objection is grounded in an authentic religious tenet and is sincerely held.[58] As in the civil setting, the duty to accommodate is not especially onerous.[59] A female worker may not refuse a work assignment on grounds of personal modesty, because the employer did not supply trousers;[60] but an employee's objection to that form of dress on religious grounds triggers a duty to explore alternative forms of dress even where the employer's dress requirement is necessitated by reasons of health or safety.[61] However, an employee whose religious zeal involves preaching to the employer's customers—to the point of loss of business—may be fired for refusal to desist.[62]

In the most frequent case, of Sabbatarian practice or the like, where an accommodation is not used by the employee[63] or where none satisfactory to the employee is feasible,[64] the persistent refusal

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[57] *Mucon Corp.*, 29 LA 77 (Stark, 1957); *Trailmobile, Inc.*, 18 LA 788 (Cornsweet, 1952) (discharge sustained of employee-minister for preaching on company property before starting time contrary to employer's order); *John Morell & Co.*, 17 LA 280, 282 (Gilden, 1951) ("[W]here this pattern [of accommodation] is not recognized or established, and a conflict arises, the employee must yield his religious scruples in favor of his job duties or resign."); *International Shoe Co.*, 2 LA 201 (Klamon, 1946) (company's acquiescence in pattern of accommodation to Sabbatarian practice of Seventh Day Adventist requires company to continue so to accommodate).

[58] *Building Owners & Managers Ass'n*, 67 LA 1031 (Griffin, 1976) (Roman Catholicism does not forbid Sabbath work). *See also Alameda-Contra Costa Transit Dist.*, 81-1 ARB ¶8002 (Randall, 1980) (employee's pattern of dress is inconsistent with her claim of religious belief governing dress requirements).

[59] *See, e.g., Kohlman Elec.*, 81-2 ARB ¶8372 (Archer, n.d.) (employer's failure to consider offer of reasonable accommodation).

[60] *Milk Prods., S.A.*, 16 LA 939 (Rothenberg, 1951) (disobedience warrants suspension, not discharge).

[61] *Colt Indus.*, 71 LA 22 (Rutherford, 1978); *Hurley Hosp.*, 70 LA 1061 (Roumell, 1978); *A.O. Smith Corp.*, 58 LA 784 (Volz, 1972).

[62] *Charles Todd Uniform Rental Serv. Co.*, 77 LA 144 (Hutcheson, 1981).

[63] *U.S. Steel Corp.*, 70 LA 1131 (Dunsford, 1978) (employer had not reasonably accommodated as required by Title VII of the Civil Rights Act of 1964); *Reynolds & Reynolds Co.*, 63 LA 157 (High, 1974) (employee could have arrived late at church meetings); *Reynolds Metals Co.*, 56 LA 592 (Kahn, 1967) (employee under obligation to avail himself of voluntary substitute provision even where doing so would violate religious belief).

[64] *Owens-Illinois Co.*, 83-2 ARB ¶8586 (Williams, 1983) (accommodation in shift-scheduling ordered); *General Elec. Co.*, 83-2 ARB ¶8397 (Ruben, 1983) (employee to be given opportunity to bid on shifts to accommodate Sabbatarian practice, failing which he is to

to work as scheduled has been held a valid ground for discharge, just as in the cases previously discussed where persistent family need conflicts with the work schedule. As in those cases, a singular episode of absenteeism driven by a religious need will not justify a termination.[65]

Public Criticism: Disloyalty or Protected Speech

The disparagement of the employer or its product has been held a breach of the duty of loyalty.[66] But employee complaint or protest can implicate the larger public interest and can be shielded on that ground. Where to draw that line has proved vexing for arbitrators. On the one hand, Arbitrator McDermott opined that the duty of loyalty means that the employee's

> rights as a citizen must be balanced against his obligations to his employer. This means that he should not engage in actions that will result in the defamation of his employer's reputation. Neither should he provide harmful information or perform acts that can impair the Company's relationship with its customers . . . [or] with the general public . . . [C]onsideration must be given to the confidentiality and accuracy of the information disclosed, the manner in which it is disclosed, and the possibilities of adverse economic impacts as a result of the disclosure.[67]

In that case a utility lineman, in uniform and while on assignment at city hall, protested his employer's rate increase to a city official. The arbitrator sustained a disciplinary suspension because the employee's appearance as an identifiable employee gave his complaint an aura of accuracy that, in fact, it lacked. But the arbitrator stressed in any event that it was not for the employee to complain to the city as a way of changing his employer's policy.[68]

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be placed on layoff with recall rights); *Quality Transparent Bag*, 81-2 ARB ¶8496 (Heinsz, 1981); *Norris Indus.*, 77 ARB ¶8094 (Rehmus, 1977) (company did as much as it could to allow employee time off to attend Wednesday night prayer services which she believed to be required by her denomination).

[65]*Public Serv. Co. of N.M.*, 98 LA 23 (Sartain, 1991) (discharge reduced to suspension where employee's refusal to notify authority of his absence flowed from Navajo tribal/religious belief); *H.K. Porter Co.*, 83-2 ARB ¶8439 (Shanker, 1983) (absence should have been excused); *Alabama By-Products Corp.*, 79 LA 1320 (Clarke, 1982) (grievance sustained where company conceded that employee's absence created no hardship for company); *Armstrong Rubber Co.*, 58 LA 143 (Williams, 1972).

[66]*Oklahoma Fixture Co.*, 98 LA 1178 (Allen, 1992); *Sun Furniture Co.*, 73 LA 335 (Ruben, 1979); *Thompson Bros. Boat Mfg. Co.*, 56 LA 979 (Schurke, 1971).

[67]*Appalachian Power Co.*, 73-2 ARB ¶8496, 4841 (McDermott, 1973).

[68]Complaint by a group of employees acting for the union (or, if nonunionized, acting for themselves) would present a separate question. *See Ohio Power Co.*, 35 LA 226 (Folkerth, n.d.).

On the other hand, where an employee was discharged for complaining to the authorities of criminal wrongdoing by his employer, Arbitrator Edgar Jones sustained the grievance, observing in part:

> There is evidenced in this case a tension between an employee's private loyalty to an employer and his public loyalty to his community. Each citizen has a duty of citizenship imposed and enforced by law to disclose criminal conduct of which he becomes aware. That duty never ceases so long as he has the knowledge and it remains undisclosed. The fact that his disclosure would be of "incalculable damage" to his employer can hardly be thought to reduce that duty of disclosure.[69]

To the extent that a generalization from the few reported cases is possible, arbitrators tend to give great weight to the employer's reputational interests. In relatively uncontroversial cases arbitrators have held that it is a breach of the duty of loyalty for an employee to report a safety violation to authorities without first notifying his employer,[70] or to make a malicious and unfounded complaint to public authority,[71] without first raising the issue with management.[72] (Interestingly, the fact that a complaint was made intramurally and *not* to public authority has been held by some courts to deprive the act of public policy protection.[73])

Other decisions, however, are more problematic. When a group of black employees wrote publicly to protest to the local school board (a major customer of the employer) the board's giving an award to their employer, on the ground that the employer was guilty of bigotry and racism, the arbitrator held the conduct sanctionable, although their discharge was reduced to a suspension. Their allegations were inaccurate; they "went directly to the public arena" without using internal channels to ensure accuracy or to seek relief; and the letter—concededly neither malicious nor inflammatory—was "internally disruptive."[74] So, too, an employee's appearance before a public body, in his express capacity as a taxpayer only, to protest a policy beneficial to his employer has been held to be "disloyal"—and to justify discharge—where the employee was identified as such by the press and his criticism was thought by the arbitrator altogether too strident.[75] And more

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[69] *Yellow Cab of Cal.*, 65-1 ARB ¶8256, 3928 (Jones, 1965).
[70] *Springfield Sugar & Prods. Co.*, 62-3 ARB ¶8846 (Donnelly, 1962).
[71] *Factory Servs.*, 70 LA 1088 (Fitch, 1978).
[72] *Davenport Good Samaritan Center*, 78-2 ARB ¶8441 (Ross, 1978).
[73] Specter & Fink, Individual Employment Law and Litigation (1989), at §10.35, and the authorities collected in the 1991 Cum. Supp. at 165 n.149.1.
[74] *Zellerbach Paper Co.*, 75 LA 868 (Gentile, 1980).
[75] *R.P. Richards, Inc.*, 63 LA 412 (Gentile, 1974).

recently an arbitrator sustained the reprimand of an employee of a public utility for writing an article critical of a nuclear power facility in which her employer had a financial interest.[76] "Any reputable company," the arbitrator opined, "must ever be on the alert in order to maintain a favorable image in the eyes of its customers." Although the employee acted neither with malice nor intent to be disloyal, "the fact remains that the publication probably did have some psychological effect upon its readers—the extent of which is not known at this time."[77]

I do not mean to suggest that arbitrators are monolithic in balancing the employer's reputational interests against employee free speech. In *Northern Indiana Public Service Co.*,[78] for example, involving the discharge of an employee who had sent to both the chairman of the company's board of directors and to his congressman an extraordinarily vitriolic letter critical of the company and his supervisor, the arbitrator sustained the grievance, relying upon the federal policy of "robust" debate in labor disputes. Nor should we ignore that the balance of interests can be more complicated in some occupations than in others, such as in news reporting.[79] But I do suggest that, in deciding these cases, some arbitrators fail to come to grips with the larger values that are necessarily implicated,[80] and thus their awards are less than satisfying.

Conclusion

The arbitral approach toward conflicts of interest and conflicts of commitment has been well settled for decades. At points, however, this body of practice could both borrow from and inform the law. Arbitrators should be more sensitive to employee interests in preliminary competitive activity and attend more closely to what is protected business information. The courts ought to develop a greater appreciation for industrial norms of progressive discipline in applying the rules in employer manuals and handbooks.

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[76] *San Diego Gas & Elec. Co.*, 82 LA 1039 (Johnston, 1983).

[77] *Id.* at 1041.

[78] 69 LA 201 (Sembower, 1977).

[79] *See, e.g., United Press Int'l*, 94 LA 841 (Ables, 1990) (discharge of reporter for writing book about employer sustained); *Forest City Publishing Co.*, 58 LA 773 (McCoy, 1972) (discharge of reporter who wrote article in magazine in part critical of his employer sustained); *Union Tribune Publishing Co.*, 51 LA 421 (E. Jones, 1968) (setting aside discharge of reporter who wrote letter in another newspaper that could be taken as critical of his employer's policies); *Los Angeles Herald Examiner*, 49 LA 453 (E. Jones, 1967) (discharge of reporter who served as source for article critical of his newspaper sustained).

[80] To similar effect, see Jones, *Power and Prudence in the Arbitration of Labor Disputes: A Venture in Some Hypotheses*, 11 UCLA L. Rev. 675, 744–47 (1964). *Cf. Town of Plainville*, 77 LA 161 (Sacks, 1981) (discharge of whistleblower in public employment).

The arbitration of claims of conscience may present more difficult problems because, lacking any precise guide in the collective agreement, the arbitrator is called upon to weigh not only managerial and individual interests but competing social values. Unlike the case of religious accommodation, where the standard is well defined and substantially no more burdensome to employers than the accommodation of other personal needs, some of these cases—"free speech" is one—are precisely about standards and confront deep-seated assumptions of inherent management rights; they test whether the employer's prerogative to project (or protect) its corporate image trumps the employee's claim of individual liberty and society's interest in the robust debate of political, economic, and social issues. And in the presentation of these cases, sight of the latter—or even of the corporation's interest as distinct from that of those who manage it—may be lost.

Nor is this kind of engagement novel in the arbitral experience. In the 1950s, the issue was joined in the claimed prerogative of employers to dismiss employees who asserted their Fifth Amendment privilege in congressional investigations of communism.[81] And in the late 1960s, the issue was joined over the claim of employee autonomy in the matter of dress and grooming.[82] To be sure, those cases had an added salience because, failing before an arbitrator, there was no additional recourse. What is different today is the increasing receptivity of the courts to afford relief to otherwise at-will employees, where their underlying conduct is sufficiently implicated with a larger public interest. But because it is unlikely that blue collar workers will pursue legal redress with any frequency,[83] the failure of arbitrators to articulate the larger community values necessarily implicated in these cases may result in a widening gap between the rights of unionized, lower paid, blue collar workers and nonunionized, higher paid, white collar work-

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[81] Putting aside the special status of newspaper reportorial and editorial staff—see *New York Times*, 26 LA 609 (Corsi, 1956); *United Press Ass'n*, 22 LA 679 (Spiegelberg, 1954); *Los Angeles Daily News*, 19 LA 39 (Dodd, 1952)—prevailing view was that invocation of privilege was not alone cause to dismiss. *J.H. Day Co.*, 22 LA 751 (Taft, 1954); *Pratt & Whitney Co.*, 28 LA 668 (Dunlop, 1957); *Republic Steel Corp.*, 28 LA 810 (Platt, 1957); *RCA Communications*, 29 LA 567 (Harris, 1957); *Westinghouse Elec. Corp.*, 35 LA 315 (Hill, 1960). *But see Burt Mfg. Co.*, 21 LA 532 (Morrison, 1953).

[82] *See Changing Life Styles and Problems of Authority in the Plant*, in Labor Arbitration at the Quarter-Century Mark, Proceedings of the 25th Annual Meeting, National Academy of Arbitrators, eds. Dennis & Somers (BNA Books, 1973), 235. On the larger societal implications of such employer controls, see Finkin, *Privacy and Personality in the Employment Relationship*, The Benjamin Aaron Lecture Series (UCLA Inst. of Indus. Rel. 1992).

[83] *See generally* Summers, *Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals*, 141 U. Pa. L. Rev. 457 (1992).

ers, whereby the unionized receive a lesser degree of protection for claims of conscience than the nonunionized.[84] This "collar gap" could widen if developing federal preemption policy precludes the unionized from pursuing state claims.

MANAGEMENT PERSPECTIVE

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Two main contrasts emerge between the American employee's duty of loyalty treated in Matthew Finkin's paper and that of Canadian employees. The first is that Canadian law, drawing its inspiration from English common law and French civil law, pitches the employee's duty of loyalty and fidelity higher than in the United States. The second is that this duty of employee loyalty and fidelity has been imposed initially by the courts and followed, sometimes reluctantly, by arbitrators under collective agreements.

What is the "Duty of Loyalty"?

It is useful, before discussing the case law, first to define the duty of loyalty as it is known in Canada. Basically, Canadian tribunals recognize the obligation of the employee to work in the employer's interest and not to act so as to harm the employer's business. The duty of loyalty is often referred to as the duty of "fidelity" or of "faithfulness and honesty." It includes, but is not limited to, an avoidance of conflict of interest. However defined, it is based on the simple premise that, if employees accept wages, they must work wholly in the employer's interest, because it is readily understood that an employer would not pay the wages otherwise.

Arbitrator Ross Kennedy summarized the common law duty:

> It is an established principle of the common law governing an employer/employee relationship that "an employee is under a duty to serve his employer with good faith and fidelity and not deliberately do something which may harm his employer's business." This has been held to be an implied term of any collective agreement unless it is explicitly excluded (citation omitted).

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[84] *Compare Bishop v. Federal Intermediate Credit Bank of Wichita*, 908 F.2d 658 (10th Cir. 1990) (bank president cannot be discharged because of content of testimony before committee of U.S. Senate, applying Oklahoma law) *with R.P. Richards, Inc.*, *supra* note 75.

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