Table 4. Employer Contributions to Fringe Benefits

Compensation Component	*Private Industry*	*White Collar*	*Blue Collar*	*Service*
Insurance	10.00%	9.22%	12.62%	7.41%
Retirement and Savings	4.03%	3.98%	5.09%	1.70%
Federal Unemployment	0.25%	0.21%	0.27%	0.46%
State Unemployment	0.92%	0.77%	1.27%	1.39%
Workers' Compensation	3.28%	1.61%	6.36%	4.48%
Other Benefits	0.34%	0.28%	0.64%	
Employer contribution as percent of wage or salary:	18.8%	16.1%	26.2%	15.4%

Source: Employment Cost Indexes and Levels, 1975–1993, U.S. Bureau of Lab. Statistics Bull. No. 2434 (1993), at 92.

benefits such as vacations, holidays, and supplemental pay are usually considered with the lost earnings. However, if there are major differences in these benefits between the pre- and post-termination employment, then a separate calculation will be necessary. Once fringe benefits are established as a percent of income, that percent can be applied to the present value of the lost earnings to determine the present value of the lost fringe benefits.

III. UNION PERSPECTIVE

ANDREW H. BAKER*

My role as the union advocate is to address what is actually happening with the union members who are affected by what Professor Snow and Dr. McCausland have been discussing. From the union perspective, the expanded remedies available in the nonunion setting have been having a major impact on the unions' ability to adequately represent their members and to satisfy their members' expectations. Union grievants often have expectations of what they should get through their arbitration cases based not on their understanding of 50 years of collective bargaining arbitra-

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tion, but rather on what they read in the newspapers and hear from their friends—astronomical awards to individuals in wrongful discharge suits and employment discrimination suits. Those expectations are making it more difficult for union and management to settle grievances.

When I first meet with a grievant and talk about what we can win if we persuade the arbitrator to give us everything we can possibly get in arbitration, the grievant is often shocked and says: "But the company violated the contract. The company is the wrongdoer. What about all these damages that I've suffered? When I go back to work who knows how it's going to work out there?"

With respect to statutory remedies I have very little to add to what Professor Snow has already said, except to emphasize his latter remarks: do not be too cautious about going ahead and considering the nontraditional remedies in a statutory claim. Where the parties vest the arbitrator with the authority to consider specifically the statutory claim, that authority also carries with it the authority to award all of the statutory remedies. The more difficult problem is where the parties do not expressly vest the arbitrator with such authority and the contract is silent. As long as *Alexander v. Gardner-Denver Co.*[1] remains the law of the land, there is a theoretical objection to the arbitrator reaching out and resolving the statutory claim; for regardless of what the arbitrator does, if the case is lost or if the damages are not adequate through labor arbitration, the grievant may take a second bite at the apple through statutory litigation.

In reality, however, that rarely happens. If the grievant has a colorable discrimination claim, the union will make every effort to put the labor arbitration in abeyance and encourage the grievant to pursue the statutory claims first, thus avoiding any adverse impact the labor arbitration might have on the statutory claim. This is largely because labor arbitrators traditionally have not considered the full panoply of statutory remedies in the labor arbitration context. The union cannot with any confidence tell the grievant, "Let's go into labor arbitration on your statutory claim. We can probably get you everything through arbitration that you can get in your statutory claim through the Equal Employment Opportunity Commission or through court litigation." This tension acts to erode the union member's confidence in collective bargaining as an instrument of industrial justice. It undercuts the

[1]415 U.S. 36, 7 FEP Cases 81 (1974).

very purpose of the union in the workshop. On the other hand, I have to acknowledge that I am not a plaintiff's employment discrimination attorney. Most union attorneys I know do not have expertise in this area. There are real problems for the union and I suppose for many labor arbitrators in beginning to litigate statutory claims. Nonetheless, the problems caused by inexperience will have to be remedied through an adjustment period that I acknowledge may be very difficult.

With respect to traditional make-whole remedies, the comments we have heard today raise some very interesting points suggesting strong reasons for expanding the traditional make-whole remedy, particularly with respect to compensatory damages and front pay.

The problem from the union perspective in limiting damages to back pay is the failure to give any acknowledgment to the other damages that union members traditionally suffer as a result of being discharged. Garden variety discharge cases are taking longer and longer in recent years. The days of the half-day arbitration following very quickly on the heels of a discharge and the decision coming down shortly thereafter seem to be long gone. Arbitrations are not set up for months and months after the discharge. The arbitration hearing often stretches over days, and the award commonly is not granted until a year or more after the discharge. During that period of time, the grievant has suffered not only a loss of pay, but other consequences that are also clearly foreseeable; consequences such as a loss of housing, refinancing costs, taking out loans just to meet ordinary living expenses, medical expenses incurred by the grievant and the grievant's family members that would otherwise be covered by the company's health and welfare plan. All of these should meet the foreseeability test that arbitrators apply in determining what is an adequate remedy. Traditionally, however, some or all of these damages are not awarded. To require that these types of damages be awarded in the past to allow them to be awarded in the future is an unnecessary "Catch 22." At some point, we have to break through that quagmire and acknowledge that employees discharged under union contracts have to be made whole in a genuine and real sense.

Front pay should be utilized in labor arbitration as an effective remedy in certain, rare circumstances, but not as a universal alternative to reinstatement. Front pay should be an appropriate alternative when requested by a union.[2] There will be unique

[2]The Ninth Circuit has approved the concept of front pay in a 1990 case, *Van Waters & Rogers Inc. v. Teamsters Local 70*, 913 F.2d 736, 135 LRRM 2471 (9th Cir. 1990).

circumstances where front pay is appropriate in lieu of reinstatement. I am extremely troubled by the front-pay concept, on the other hand, if an arbitrator without the authority of the parties or a request from the grieving party orders front pay in lieu of reinstatement. That threatens to remove control from the parties and place it with the arbitrator where it is not appropriate to do so. The union should not have to communicate to a grievant, "You win the case, but you're going to get some money instead of the job you wanted to return to." Absent an express request from the grievant, front pay in lieu of reinstatement is something that should be left to the employer, the union, and the grievant to work out among themselves.

IV. MANAGEMENT PERSPECTIVE

MORTON H. ORENSTEIN*
SHARON S. ZEZIMA**

Until recently, required arbitration of employment matters was restricted to claims that arose in the context of a labor union contract. It is an accepted premise of labor-management relations that a collective bargaining agreement between an employer and the representative of its employees will contain a grievance and arbitration clause. The last step in the grievance procedure is always "final and binding" arbitration by a neutral third-party arbitrator.

Commonly, claims under a labor agreement arise because an employee challenges a discharge as not based on "cause" or "just cause." Termination, or other disciplinary action taken by an employer pursuant to a labor agreement, must, under almost all labor contracts, be justified by a cause standard. It is accepted practice that the employer bears the burden of establishing cause for the disciplinary action. Should a labor arbitrator conclude that the discipline imposed was not for good cause, the traditional remedy is contractual and injunctive relief. The arbitrator directs that the employee be reinstated (affirmative injunctive relief) and reimbursed for contract damages suffered, that is, loss in wages.

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