neutral policy of an employer never needs to be modified to "accommodate" the "handicapped" employee unless it "pose[s] . . . [a] *distinctive* obstacle to the disabled."[51]

Therefore, if a workplace features a garden-variety no-fault attendance policy, especially one that is a child of collective bargaining, there would appear to be at least seven solid votes on the Supreme Court for the proposition that such a policy should, in the normal case, triumph over an employee's claim that a disability prevents him or her from meeting the policy's attendance requirements. *Barnett* left the door slightly ajar by indicating that "special circumstances" might warrant an exception to the seniority system. Potentially, an employee who could show that his or her disability was the "sole" reason for his or her failure to meet the employer's attendance expectations might somehow entice the court with a "catch-22" argument. However, such an employee would still be struck with the general trend of the law that, in most cases, it remains an "essential function" of the job to appear for work on a regular basis.

For this reason, it is not outlandish to suggest that in the near future, the employment protections of the ADA may vanish entirely for the employee with attendance problems, even if that employee's absences are occasioned by his or her disability. The disabled worker who has such issues will have to then turn to the Family and Medical Leave Act[52] to attempt to obtain any degree of statutory solace from an adverse employment action.

II. CURRENT ISSUES IN ATTENDANCE

M. DAVID VAUGHN*

The great philosopher Woody Allen once said something to the effect that nine-tenths of life is just showing up. "Showing up," as used in the workplace, is the most basic and universal employee obligation. It is the point from which both pay and work begin. The regularity with which employees show up for work is a reliable measure of productivity and profitability.

---

[51] *Id.*
[52] 29 U.S.C. §2615 (1993).
*Member, National Academy of Arbitrators, Clarksville, Maryland.

By way of illustration, a study conducted between 1975 and 1981 concluded that each percentage point of absenteeism in an organization employing 1,000 individuals and having a paid absence program "represents an annual cost of more than $200,000 for direct wages, loss of productivity and administrative expenses."[1] A study published in 1984 estimated that absenteeism costs the nation approximately $26.4 billion annually. This figure did not include losses from lower productivity, reduced quality because of the use of untrained substitute workers, replacement training, payroll, and record-keeping, and the figures used represented white-collar employees with much greater purchasing power.[2]

An employee's failure to be regular in attendance at work subjects him or her to discipline. Involuntary termination for absenteeism almost invariably fits the contract definition of a discharge—for which just cause is required. Calling the inquiry something other than just cause does not change its nature. Attendance-related issues arise from a mixture of basic and largely timeless principles of management, new management techniques, changing employee attitudes, and the constraints of external law. Attendance cases are a cauldron of different, sometimes overlapping, and often inconsistent principles and black letter law. Changing employer and employee expectations regarding work and leisure, competing economic pressures, and changed legislative requirements complicate the mix.

One thing has not changed: As a paper presented at the 37th Annual Meeting of the Academy in 1984[3] reported, the largest single group of discipline cases reaching arbitration involved absenteeism and tardiness. This paper will focus on the contractual aspects of absenteeism, leaving the impact of external law on attendance to the other members of this panel.

The usual purpose of presentations such as this is to marshal the accumulated wisdom on the subject and to organize and present a clear, cogent analysis of the issues, approaches, and solutions. The examination of attendance issues, however, revealed overlap and

---

[1]Scott & Taylor, *An Analysis of Cases Taken to Arbitration: 1975–1981*, 38(3) Arb. J. 61 (Sept. 1983).

[2]Morgan & Baker, *Do You Need an Absenteeism Control Program?* Supervisory Management, Sept. 1984, at 33.

[3]Cole, *How Representative Are Published Decisions*, in Arbitration 1984: Absenteeism, Recent Law, and Published Decisions, Proceedings of the 37th Annual Meeting, National Academy of Arbitrators, ed. Gershenfeld (BNA Books 1984), 170. *See also* Knight, *Impact of Arbitration on the Administration of Disciplinary Policies*, 27(1) Arb. J. 47 (Mar. 1984).

inconsistency in the principles and concepts used to describe and analyze attendance issues. The slippery vocabulary and elusive concepts used to describe these cases are difficult to apply, and they make attendance cases complicated for parties and arbitrators alike.

The Block and Mittenthal Paper

There is a road map to help us sort out the difficulties inherent in attendance cases. In a paper presented at the 37th Annual Meeting of the Academy,[4] Howard Block and Richard Mittenthal delivered a thorough and comprehensive discussion of the underlying conceptual issues and conflicting interests present in disputes concerning absenteeism. That paper is as current today as it was when delivered.

Block and Mittenthal confirm that attendance and absenteeism, seemingly simple concepts, are pregnant with complexities. They describe some of these complexities as follows:

> The difficulty for the arbitrator arises from the fact that absenteeism may or may not be misconduct depending upon the circumstances of the case. A failure to report to work for good reason is often characterized as an excused absence. A failure to report without good reason is characterized as an un-excused absence. The excused absence is generally ignored; the un-excused absence may or may not be ignored depending again on the circumstances. Occasional unexcused absences are usually disregarded. But when such behavior becomes excessive or disruptive, discipline is likely to follow.
>
> These distinctions draw management into a web of uncertainty. It must ask the employee for an explanation of his absence. It may seek proof of his explanation, typically a doctor's note confirming illness or injury. It must then evaluate his explanation (or his proof) to determine whether he was truly unable to work. If it concludes that his absence is unjustified, it must decide whether such behavior has become excessive. . . . And if management believes that the absentee is guilty of misconduct, it must decide what discipline is appropriate. That decision must take into account the discipline imposed on others for absenteeism. . . .
>
> . . .

[4]Block & Mittenthal, *Arbitration and the Absent Employee*, in Arbitration 1984: Absenteeism, Recent Law, and Published Decisions, Proceedings of the 37th Annual Meeting, National Academy of Arbitrators, ed. Gershenfeld (BNA Books 1985), 77.

> It is not only management, which is frustrated by absentee administration. Employees are also unhappy. They complain they are not told of the attendance standards by which they are being judged; . . . they complain of a lack of uniformity in discipline for absenteeism; and so on. They seem to be asking for rules, fixed standards against which to measure their own behavior. But when management attempts to follow such a course and adopts an absentee plan which specifies the point at which any absenteeism will result in discipline and the progression of penalties for such continued absenteeism, employees then protest that the plan is inflexible.[5]

Formal attendance control plans were developed in the 1970s as ways to administer attendance issues more effectively and to provide consistency in notice and expectations. However, the inherent tensions described above remained. By 1984, when Block and Mittenthal presented their paper to the Academy, these tensions were clear and the issues were focused.

Issues concerning absenteeism are arbitrated on a case-by-case basis and involve the application of just cause principles. Even in so-called no-fault attendance control programs, it remains the employer's burden to prove that the program has been violated and the penalty is appropriate. The adjudication of attendance cases involves far more than the application of a set of predetermined formulas. At bottom, as Block and Mittenthal pointed out, the outcomes in absenteeism cases are fact-based, within the confines of the particular rules and practices governing the workplace. Each case is different. Arbitrator Sylvester Garrett gave a flavor of the variety of facts to be adjudicated in these cases. He said:

> The presence or absence of "just cause" is a fact question which properly may be determined only after all relevant factors in a case have been weighed carefully. The length of the employee's service, the type of job involved, the origin and nature of the claimed illness or illnesses, the type and frequency of all of the employee's absences, the nature of the diagnosis, the medical history and prognosis, the type of medical documentation, the possible availability of other possible . . . jobs or a disability pension, the employee's personal characteristics and overall record, the presence or absence of supervisory bias, the treatment of similarly situated employees, and many other factors all may be relevant in any given case.[6]

---

[5] *Id.* at 77–78.

[6] *United States Postal Serv.*, 73 LA 1174 (Garrett 1979) (quoted in Block & Mittenthal, *supra* note 4, at 77).

Regardless of the premise of any attendance control program, whether fault or no-fault, the task in arbitration is to determine whether the rule violated was reasonable, clear, adequately disseminated to the employees, and whether it was enforced consistently and administered fairly. If the employer has previously been lax or inconsistent in the enforcement of attendance rules, it must be determined whether the employer notified the employees of the more stringent enforcement of standards before implementing a policy of strict enforcement. Finally, the penalty must be determined to be proportionate to the infraction.

The difficulties inherent in attendance cases can be illustrated using four concepts that appear simple and familiar, but are difficult in application: distinctions between "fault" and "no-fault" attendance control plans, the definition and measurement of the term "excessive," the application of progressive discipline, and the avoidance of disparate treatment.

Fault and No-Fault Distinctions

Employers frequently issue rules making excessive absenteeism a form of misconduct subject to discipline. Discipline is subject to just cause requirements. Treating absenteeism as misconduct subject to discipline requires determination of the *cause* of an employee's absence and assessing whether the employee was at fault for the particular absences leading to the discipline. Such an analysis presents problems of proof. Where excessive absenteeism is defined in numerical terms, the administration of discipline becomes an exercise in calculation. Moreover, by conducting the analysis on the basis of the employee's "fault," it is easy to lose sight of the underlying basis for requiring regular attendance: to enable the employer to obtain the benefit of the employee's productivity and to manage its plant and operations. Regular attendance is the first principle of the exchanged commitments between employers and employees.

So-called "no-fault" attendance control plans focus more directly on the expectations inherent in the employment relationship—that the employee will be available to perform work regularly—and the right of the employer to terminate the relationship when an employee is unable to meet that need,[7] *regardless of the*

[7]Nolan & Abrams, *Toward a Theory of "Just Cause" in Employee Discipline Cases,* 85(3/4) Duke L.J. 594–623.

reason. In workplaces beset by disputes as to the sufficiency of doctors' slips and "the dog ate my homework" excuses, simple, quantifiable plans assessing discipline, without regard to fault, have great appeal. There are, of course, pressures to create exemptions and loopholes in the strict application of no fault and some exemptions are mandatory. Moreover, no-fault plans, with their emphasis on specific numbers of occurrences and time periods, present their own difficulties of recordkeeping, administration, and enforcement.

Part of the difficulty in analyzing absenteeism issues is that the premises and the operation of fault-based and no-fault attendance controls appear conceptually different. It is almost inevitable, however, that the concepts overlap and blur in their application. For example, even in no-fault programs it is almost impossible to remove from analysis the fact that some reasons for absence are simply more excusable—more forgiveable—than others. This reality presents problems for both managers and for arbitrators. While participants at all stages of the administrative and review processes may understand the obligation to apply terms agreed to by the parties, it must be recognized that a literal application of a no-fault, number-driven system will sometimes produce unjust or impractical results. Indeed, attendance control plans that base management's responses on the employee's reaching particular numerical milestones, regardless of fault, will almost inevitably result in retaining some employees who might deserve to be discharged while others, who reach the required numbers in ways meriting forgiveness or at least mitigation, become subject to discharge.

Defining "Excessive Absenteeism"

Excessive absenteeism is itself an elusive term. There is no universal definition of the term, so the definition must be found in each workplace. How, in any event, would such a definition be derived? How would a definition reasonably balance the needs of the employer with the realities of employee health and the extenuating circumstances? How many absences constitute "excessive" absenteeism? Over what period of time? How did the employer arrive at its numbers? Do different scheduling and attendance needs warrant different definitions? In light of the different combinations, it is suggested that no single set of numbers can serve all workplaces.

It is tempting to take a Potter Stewart-esque approach and define excessive absenteeism in any workplace as "knowing it when we see it."[8] Such an approach, however, not only suffers from the problems inherent in post facto definitions, but it also runs afoul of the general principle that employees are entitled to know the conduct that is expected of them and the level of deviation that will subject them to discipline. Can a rule that simply prohibits employees from being "excessively absent" meet that test?

Use of Progressive Discipline

It is a basic principle of industrial relations that the purpose of discipline must be corrective rather than punitive. Absenteeism takes place one occurrence at a time and would appear to be correctable—through good attendance—one day at a time. Most plans, and most employers that do not have formal plans, use progressive discipline. Indeed, warnings and progressive discipline may be used as ways to ameliorate problems of notice and expectation created by the use of general language such as "excessive absenteeism."

There are, however, difficulties in utilizing a succession of warnings and suspensions on an employee who is absenting him- or herself from work. The disciplinary process has been uncreative in finding effective alternative corrective measures. The customary management response of punishing absent employees through the use of additional forced absences is illogical and mutually unproductive. Moreover, even if discipline is appropriate to correct misconduct, how can discipline correct a situation that is really beyond the employee's control? At most, the use of discipline in response to legitimate absenteeism underscores the seriousness with which management views the problem and separates those employees who can but do not attend from those who really cannot attend. For those employees genuinely unable to get to work, discipline will not correct the problem.

As indicated above, many employers adopt rules that inform employees of the standards to be applied when evaluating absences. These range from a general statement that excessive

---

[8]See the discussion on the subject in Block & Mittenthal, *supra* note 4, at 84, and Bornstein, Gosline, & Greenbaum, eds., Labor and Employment Arbitration (Matthew Bender 2001), ch. 17.

absenteeism will be subject to discipline to a comprehensive set of rules that defines what constitutes absenteeism and establishes disciplinary procedures, including a schedule of penalties. Reasonable, comprehensive, and well-disseminated rules more often than not result in fair, progressive, and corrective measures that are uniformly and universally applied. Simple—or simplistic—generalized rules invite dispute as to meaning and may end in arbitration.

Disparate Treatment

Finally, principles of just cause reject disparate treatment—different degrees of punishment visited on similarly situated employees.[9] Indeed, most employers acknowledge the unacceptability of disparate treatment in the administration of discipline.

Attendance control plans attempt to solve the subjectivity of management responses to absenteeism primarily by setting numerical milestones correlated to stages of discipline, up to and including discharge. Common sense, however, suggests that not all numerically similar employees deserve the same treatment. As a simple example, should a long-term employee with a previously good attendance record and a short-time employee, each with the same number of incidents under an attendance control plan, be treated the same? Perhaps not. Similarly, the history and timing of point accumulations may also make a difference. Attendance control plans, standing alone, do not usually capture variables that most observers would consider important in determining the treatment of employees. Numerical uniformity of treatment in attendance cases will almost inevitably work injustice.

In the end, any search for uniform analysis and consistency based on a predetermined formula intended to eliminate disparate treatment may be futile. Forced uniformity will almost certainly fail to serve the interests of fairness and justice in all cases. Instead, in the arbitration of absenteeism disputes, it is the task of the parties and advocates to prepare and present the facts of each case for fair and objective examination by the arbitrator and determine whether the employer reasonably exercised its discretion. Block and Mittenthal concluded, in this respect, that what is important is consistency of purpose rather than consistency of penalties.

---

[9] *See, e.g.*, Koven & Smith, Just Cause: The Seven Tests (BNA Books 1992), at 303 et seq.

Sorting Out the Elements of Just Cause

As has been shown, the arbitration of absenteeism disciplinary cases defies easy formulation. Such cases put a premium on our sense of fairness and our ability to juggle a seemingly endless variety of facts and circumstances. Varied and unpredictable as these cases are, the checklist devised by Barbara Zausner and Ann Gosline helps determine just cause in attendance cases. They list a series of questions to be considered when arbitrating disciplinary cases involving absenteeism and tardiness:

1. How frequently was the employee absent or tardy?
2. Of what duration were the absences?
3. Over what period of time?
4. What are the reasons for absence or tardiness?
5. Did the employee provide timely notice and required documentation?
6. Has progressive discipline or other progressive action been taken?
7. Has the employee been put on notice of attendance requirements?
8. How does the employee's record compare to other employees' records?
9. Have similarly situated employees been treated the same way?
10. Are there mitigating factors?[10]

These questions must, of course, be measured against the requirements in the collective bargaining agreement and the reasonable and properly promulgated rules governing each workplace. To the extent the parties have not defined excessive absenteeism and its consequences, the use of this checklist will help to shape the decisional process in such cases to get beyond the "I know it when I see it" rationale.[11]

External Statutory Constraints

The system of expectations and rules concerning absenteeism that has been described above are created within the four corners

---

[10]Bornstein, Gosline, & Greenbaum, *supra* note 8, §17.01[1], at 17-5.

[11]See the discussion on the subject in Block & Mittenthal, *supra* note 4, at 84, and in Bornstein, Gosline, & Greenbaum, *supra* note 8, at ch. 17.

of the employment relationship. Those rules and expectations have evolved over time and have been informed by arbitral decisions and the experience of the parties.

The workplace is dynamic. Absenteeism is costly. Reduced staffing and cost-cutting that have taken place over time have pushed employer rules and expectations to reduce absenteeism, while collective bargaining and other initiatives to create more flexibility, time off, and family-friendly policies in the workplace have pushed in the other direction. In recent years, those internal rules and expectations have been altered significantly by the Americans with Disabilities Act (ADA) and the Family and Medical Leave Act (FMLA), which have created new rights for employees and new obligations for employers.

The rules and expectations of the workplace are always evolving and interacting to reflect economic and social realities, to accommodate external constraints, and to incorporate the lessons learned from arbitration awards and case law. Public policy also has an impact on the workplace. Many predicted that the FMLA and ADA would alter employee attendance in unworkable ways, but their concepts have been incorporated into the rules and expectations of the workplace and in the analysis employed by arbitrators in assessing absenteeism cases. Open questions include the following: Have the FMLA and ADA achieved their objectives? Have employers and employees tightened other rules in response to the FMLA and ADA to offset the additional absences they allow? Is it appropriate that such offsets take place? And what, in the end, will and should be the relationship between attendance requirements and the statutory exceptions to those requirements?