Chapter 6

AN EMPIRICAL INVESTIGATION OF FACTORS AFFECTING OUTCOMES OF DISCIPLINE ARBITRATIONS WHERE WORK AND FAMILY RESPONSIBILITIES CONFLICT: PRELIMINARY RESULTS*

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Introduction

The demographic revolution in the workplace has become an accepted fact of life. The 1950s model of a two-parent household in which only one parent worked outside the home has long faded into obscurity. Today a child raised in such a household is in a distinct minority. In March 2002, the most recent date for which data are available, only 23.7 percent of all children in the United States lived with two parents and had only one parent in the labor force.[1]

The predominance of single-parent and dual-worker households has greatly increased the tension that employees feel between responsibilities to their jobs and responsibilities to their families. For example, it has been estimated that one in three working families with children under age six relies on split shifts for childcare, i.e. parents working different shifts so that each can

Authors' Note. After we presented our preliminary results at the Academy's annual meeting, we discovered a significant error in the data file in the condition designation codes. We therefore reanalyzed the data, and this report contains the results of the new, corrected, analyses. Those who attended our oral presentation at the annual meeting will notice that with the reanalysis, the results have changed considerably. We apologize for any confusion this may have caused.

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[1] *See* U.S. Census Bureau, *Children's Living Arrangements and Characteristics: March 2002*, at 9, tbl. 4 (June 2003).

care for the child while the other is at work.[2] Additionally, an increasing number of workers are responsible for caring for elderly parents and in-laws.

The external law has responded to these demographic changes in many ways. Most visible is the Family and Medical Leave Act of 1993 (FMLA).[3] Other legal developments, although not as visible as the FMLA, nevertheless reflect recognition of these societal changes. For example, in *Prickett v. Circuit Science, Inc.*,[4] the Minnesota Supreme Court overruled prior case law and held that a single father discharged for refusing a shift change because he could not find childcare was entitled to unemployment benefits. The court rejected the employer's argument that the claimant was disqualified because he had been terminated for willful misconduct. The court wrote:

> [W]e hold that the employee's failure to report to a new shift assignment because of an inability to obtain adequate care for the employee's dependent child does not constitute misconduct justifying denial of unemployment compensation benefits. To hold otherwise would be to ignore significant facts about the world today. In 1990, almost 60% of children in Minnesota lived in families in which both parents worked outside the home. Another 9.3% lived in families with one working parent. If Prickett had left his child without supervision, he would have been subject to criminal sanctions. He also could have been sanctioned for failure to support Kyle. Under these limited circumstances, Prickett seemed to have no choice but to do as he did and we cannot hold that he engaged in "willful misconduct."[5]

Labor Arbitration and Work/Family Issues

Labor arbitrators most commonly encounter work/family conflict issues in discipline and discharge grievances.[6] In the typical case, the employee has been disciplined or terminated for absenteeism linked to family responsibilities or for refusal to work overtime or call backs because of conflicting family responsibilities. The published awards reveal no consensus, at least on the surface, in approach to these issues.

For example, in *Town of Stratford*,[7] a police officer refused an order that she report for duty at noon instead of her scheduled

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[2] *See* Presser, *Toward a 24-Hour Economy*, 284 Science 1778 (June 11, 1999).
[3] 29 U.S.C. §§ 2601–54 (2000).
[4] 518 N.W.2d 602 (Minn. 1994).
[5] *Id.* at 605 (citations omitted).
[6] Such conflicts also arise when employees grieve shift changes and leave denials.
[7] 97 LA 513 (Stewart 1991).

4:00 p.m. start time because she was unable to get childcare to cover the early start. The town suspended her for five days for insubordination. The arbitrator denied her grievance, finding that the absence of childcare was not analogous to illness, which would have justified refusal of the order.

Similarly, in *Washtenaw County*,[8] the grievant was an attorney with the County Friend of the Court. She sought a leave covering six weeks during the summer when she and her common law husband would have custody of her husband's two young daughters. The Friend of the Court denied the request because he was new and would be carrying out numerous changes and could not afford the absence of an attorney with the grievant's capabilities and experience. She proposed working three days per week or taking files home to work on and reporting for work "whenever I can." The Friend of the Court denied both requests. The grievant did not appear for work on Monday of the first week that she and her husband had the girls. The Friend of the Court allowed her to use her last sick day for that Monday and ordered her to report for work on Tuesday. The grievant did not and she was fired.

The arbitrator denied her grievance. He held that the employer's denial of her leave requests was not arbitrary or capricious, opining that the denial "seems based upon a fair analysis of the work commitment that was expected of the grievant. . . . It would appear that an attorney of the grievant's extraordinary capabilities and admirable work habits would be sorely missed and put the department at a great disadvantage were her leave granted." [9]

Finding the leave of absence denial proper, he also upheld her discharge. In reaching this conclusion, the arbitrator stated:

> What possible response could an employer have in such a situation other than termination of the employee. To permit her to continue at her whim as to which days she would work or not would simply be accepting her terms of employment and, in effect, granting the leave of absence which already had been denied. There was absolutely no assurance from the grievant of an absolute commitment to her employment but rather that it would all depend upon her ability to get a babysitter or make some other arrangements. None of the alternatives were viable in the eyes of the employer and properly so.[10]

The arbitrator further opined:

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[8] 80 LA 513 (Daniel 1982).
[9] *Id.* at 515.
[10] *Id.*

> There is no doubt whatsoever in this case that the grievant was acting out of unselfish and commendable motivation to provide for two young children a stability that they had not experienced before. The grievant at that time was certainly capable and able to weigh in the balance her employment against the urgency of her personal problems. She made her choice at that time and who is to say it was not the wisest. However, having made that decision, she lacks standing to complain about loss of the employment.[11]

In contrast, in *Jones Operation & Maintenance Co.*,[12] the grievant had been starting her shift at 9:00 a.m. to accommodate her childcare needs. She took maternity leave. Upon her return, the employer required that she begin her shift at 7:30 a.m. She was unable to find childcare for that shift and was terminated. The arbitrator sustained her grievance because the employer was unable to justify its denial of the request for schedule accommodation.

In *Rochester Psychiatric Center*,[13] a single parent worked the 3:00–11:20 p.m. shift. Mandatory overtime rotated among all employees. The grievant knew when her name reached the top of the rotation list but did not know when she would be tapped for overtime. Determination of the need for overtime, usually a second eight-hour shift, was made late in the shift and the grievant was unable to obtain childcare on such short notice. The grievant refused to work the overtime and was suspended. She refused a second time and was suspended again. When she refused a third time, the employer fired her.

The arbitrator opined, "No person should be forced to choose between his children or his livelihood."[14] He further stated, "No arbitrator on earth would sustain discharge on the facts of this case."[15] He reduced the discharge to a $1 fine and required the parties to agree on three days per month, arranged 30 days in advance, during which the grievant would be available to work overtime.

A systematic survey of all published arbitration awards found widely divergent approaches to discipline and discharge grievances where the incident giving rise to the adverse employment action arose out of a work-family conflict.[16] Many of the reported awards

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[11] *Id.*
[12] 93 LA 239 (Schwartz 1989).
[13] 87 LA 725 (Babiskin 1986).
[14] *Id.* at 727.
[15] *Id.*
[16] Malin, Still, Mulligan & Williams, *Work-Family Conflict Union Style: Labor Arbitrations Involving Family Care* (American University Center for Worklife Law, June 14, 2004), *available at* www.uchastings.edu/sitefiles/WLL/conflictunionstyle.pdf.

are difficult to reconcile, at least on their face. Some appear to regard family responsibilities as personal to the employee and as matters that the employer has a right to expect not to interfere with job performance. Others seem to regard family responsibilities as a relevant factor that employers must consider in assessing discipline and seem to find implicit in the just cause requirement a requirement that employers attempt to accommodate such responsibilities.

How Arbitrators Decide Cases

Much has been written about how arbitrators decide cases. More than 40 years ago, Sylvester Garrett made the following observations on the role of intuition in arbitral decisionmaking:

> The creative and intuitive nature of this [decisionmaking] function . . . has a counterpart in the conventional judicial process. Judges are not often driven to given results in difficult cases by the inexorible compulsion of concepts, maxims, logic and language. Almost always there is a choice among several potentially applicable sets of principles.

One knowledgeable judge . . . has written that the vital motivating impulse for judicial decision often is a "hunch" or intuition as to what is right or wrong for the particular case. Judge Hutcheson's explanation of the opinion-writing process will seem familiar to many an arbitrator. He went on to write that, having reached a "hunch" decision:

> . . . the astute judge, having so decided, enlists his every faculty and belabors his laggard mind, not only to justify that intutition to himself, but to make it pass muster with his critics.[17]

Twenty-four years later, Mr. Garrett reiterated his recitation of this model of arbitral decisionmaking and observed that since his initial observations, many other arbitrators had expressly concurred with that model.[18]

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[17]Garrett, *The Role of Lawyers in Arbitration*, in Arbitration and Public Policy, Proceedings of the 14th Annual Meeting, National Academy of Arbitrators, ed. Pollard (BNA Books 1961), at 102, 122 (citing Hutcheson, *The Judgment Intuitive: The Function of "Hunch" in Judicial Decisions*, 14 Cornell L.Q. 274, 278 (1929)).

[18]Garrett, *The Interpretive Process: Myths and Reality*, in Arbitration 1985: Law and Practice, Proceedings of the 38th Annual Meeting, National Academy of Arbitrators, ed. Gershenfeld (BNA Books 1986), at 121, 144–46 (citing, *inter alia* Alexander, *Reflections on Decision Making*, in Collective Bargaining and the Arbitrator's Role, Proceedings of the 15th Annual Meeting, National Academy of Arbitrators, ed. Kahn (BNA Books 1962), at 7); Seitz, *How Arbitrators Decide Cases: A Study in Black Magic*, in Collective Bargaining and

The intuitive judgments involved in arbitral decisionmaking are influenced by the values held by individual arbitrators. As James Gross has observed, "We as arbitrators use values to judge the conduct of others in discipline cases and to determine what constitutes just cause for discipline in those cases."[19] These values, and their influence on arbitral intuitive judgments, evolve along with changing mores in society. As Richard Mittenthal, commenting on Gross's paper at the National Academy's Fiftieth Meeting, observed:

> Over the course of time, changes occur in how we view certain misconduct. For instance, in the 1950s, sleeping on the job was often held to justify discharge for a first offense, while sexual harassment may have warranted no more than a brief suspension, perhaps a mere written reprimand. In 1997, the first time an employee is caught sleeping on the job will prompt no more than a brief suspension, while sexual harassment will be held to warrant discharge. How things have changed. Widespread inattention to duty in the workplace seems to have downgraded the seriousness of a first sleeping offense. And widespread revulsion against the abuse of women has transformed harassment into a "capital" offense. Thus, a change in societal or workplace values alters arbitral value judgments, which in turn affect our view of what is a reasonable penalty.[20]

Mutual selection of the arbitrator by the parties legitimizes the role of arbitral intuition and value judgments in the decisionmaking process. The parties typically recognize the arbitrator's wide range of discretion and the major role that the arbitrator's personal perspective on labor relations, as influenced by his or her background, training, and ideological viewpoints, can play in resolution of the grievance. Consequently, the parties often pay attention to these matters when selecting an arbitrator.

Jack Dunsford has observed that once selected to hear a case, an arbitrator's options in handling the matter are practically unlimited. The only meaningful restraints are those tacitly conveyed by the parties as to their expectations. As an arbitrator's reputation and docket grow, a reciprocal conditioning comes into play.

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the Arbitrator's Role, Proceedings of the 15th Annual Meeting, National Academy of Arbitrators, ed. Kahn (BNA Books 1962), at 159. *See also Decisional Thinking of Arbitrators and Judges—Chicago Panel Report*, in Decisional Thinking of Arbitrators and Judges, Proceedings of the 33rd Annual Meeting, National Academy of Arbitrators, eds. Stern & Denis (BNA Books 1980), at 63, 84–87 (1980); *Decisional Thinking of Arbitrators and Judges—West Coast Panel Report*, in *id.* at 119, 124–30.

[19]Gross, *Value Judgments in Arbitration: Their Impact*, Proceedings of the 50th Annual Meeting, National Academy of Arbitrators, ed. Najita (BNA Books 1998), at 212, 213.

[20]Mittenthal, *Comment*, in *id.*at 231, 231–32.

The parties are presumed to be familiar with the arbitrator's conduct, rulings, and decisions and, by their selection, represent the arbitrator's past performance to be their expected standard for the current matter.[21]

Similarly, Edgar Jones has commented on the link between the parties' selection process and the legitimate role of the arbitrator's personal values in resolving a grievance: "[I]n this process of competitive selection, 'his own brand' was analyzed and adopted [by the parties] as their own brand [of justice], whatever may have been their respective expectations. . . ."[22] Indeed, as one of the authors of this paper has commented, grievance arbitration presents a type of adjudication where the legal realist model of decisionmaking applies with unchallenged legitimacy.[23]

The Impact of Gender on Work/Family Grievances

The role of societal values and arbitral intuition in arbitrator decisionmaking begs the question of what factors may explain the divergent results in the published arbitration awards dealing with discipline and discharge resulting from work-family conflicts. Specifically, although consideration of grievances with work/family conflict at their core should not be affected by the *gender* of the grievant, there is reason to suspect that it might. In social psychology, a vast literature on stereotyping has developed, in which the typical finding is that individual members of stereotyped groups are judged consistently with group stereotypes.[24] With regard to gender, this means that individual women tend to be judged as less aggressive, more emotional, more nurturing, less competent in workplace settings, and less capable in leadership roles than comparable men.[25]

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[21] Dunsford, *The Role and Function of the Labor Arbitrator*, 30 St. Louis U. L.J. 109, 112–13 (1985).

[22] Jones, Jr., *A Meditation on Labor Arbitration and "His Own Brand of Industrial Justice,"* in Arbitration 1982: Conduct of the Hearing, Proceedings of the 35th Annual Meeting, National Academy of Arbitrators, eds. Stern & Dennis (BNA Books 1983), at 1, 11.

[23] Malin & Ladenson, *Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the* Steelworkers Trilogy *to* Gilmer, 44 Hastings L.J. 1187, 1220–25 (1993).

[24] *See generally* Brewer, *When Stereotypes Lead to Stereotyping: The Use of Stereotypes in Person Perception*, in Stereotypes and Stereotyping, eds. Macrae, Stangor & Hewstone (Guilford Press 1996), at 254–75; Schneider, The Psychology of Stereotyping (Guilford Press 2004).

[25] *See* Biernat & Kobrynowicz, *Gender- and Race-based Standards of Competence: Lower Minimum Standards but Higher Ability Standards for Devalued Groups*, 72 J. of Personality & Soc. Psychol. 544–57 (1997); Boldry, Wood & Kashy, *Gender Stereotypes and the Evaluation of Men and Women in Military Training*, 57 J. of Soc. Issues, 689-705 (2001); Deaux, *From*

Furthermore, parental status seems to affect judgments about workplace competence as well, such that employed mothers and fathers are perceived as differentially effective in the workplace. A line of research by Etaugh and colleagues has documented that full-time employed mothers are perceived as less nurturing *and* less professionally competent than full-time working fathers.[26] In research examining how parental status influenced actual hiring decisions, Firth mailed letters of application to several accounting firms. Among other variables, the applicant's gender and parental status were manipulated. Firth found that motherhood decreased the likelihood that a female applicant was contacted, but fatherhood had no effect on a male applicant's success.[27] According to Bridges and Etaugh,[28] negative behaviors directed toward employed mothers may stem from the perception that such individuals deviate from gender expectations. Employed fathers, by contrast, conform to the role of provider. This suggests that mothers may be treated more harshly than fathers, i.e., with less sympathy, by arbitrators considering grievances.

On the other hand, it may be the case that the kinds of work/family grievances arbitrators consider lead to harsher treatment of *fathers* than mothers because family interference with work life violates expectations for men. For example, a father who refuses an overtime shift because of childcare problems may be viewed more negatively than a woman who does the same because childcare concerns are not perceived, stereotypically, as a proper male domain.[29]

Of course, it is also possible that gender roles have changed so much with shifts in the demographics of the workplace that gen-

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Individual Differences to Social Categories: Analysis of a Decade's Research on Gender, 39 Am. Psychologist, 105–16 (1984); Eagly & Steffen, *Gender Stereotypes Stem from the Distribution of Women and Men into Social Roles*, 46 J. of Personality & Soc. Psychol., 735–54 (1984); Heilman, *Description and Prescription: How Gender Stereotypes Prevent Women's Ascent Up the Organizational Ladder*, 57 J. of Soc. Issues,657–74 (2001).

[26] *See* Bridges & Etaugh, *College Students' Perceptions of Mothers: Effects of Maternal Employment-Childrearing Pattern and Motive for Employment*, 32 Sex Roles 735–51 (1995); Bridges & Barnes-Farrell, *Trait Judgments of Stay-at-Home and Employed Parents: A Function of Social Role and/or Shifting Standards?*, 26 Psychol. of Women Q. 140–50 (2002); Etaugh & Folger, *Perceptions of Parents Whose Work and Parenting Behaviors Deviate from Role Expectations*, 39 Sex Roles 215–23 (1998); Etaugh, & Moss, *Attitudes of Employed Women Toward Parents Who Choose Full-time or Part-time Employment Following Their Child's Birth*, 44 Sex Roles, 611–19 (2001).

[27] Firth, *Sex Discrimination in Job Opportunities for Women*, 8 Sex Roles, 891–901 (1982).

[28] Bridges & Etaugh, *College Students' Perceptions of Mothers: Effects of Maternal Employment-Childrearing Pattern and Motive for Employment*, 32 Sex Roles 735–51 (1995).

[29] *See* Bettencourt, Dill, et al., *Evaluations of Ingroup and Outgroup Members: The Role of Category-based Expectancy Violation*, 33 J. of Experimental-Soc.-Psychol. 244–75 (1997).

der does not affect arbitrator decisionmaking. Norms of fairness may also prompt a focus on the merits of a case rather than any individual attributes of the grievant. Furthermore, the stereotyping literature in social psychology suggests that factors such as gender play a lesser role in judgment to the extent that large amounts of *individuating information* are available.[30] For example, when all one knows about a worker is his or her gender, gender may guide evaluations in a stereotypical direction. But with much knowledge about the worker's performance, circumstances, etc., the role of gender in evaluations may weaken. Thus, gender stereotypes may lead a female worker to be evaluated more negatively than a male worker, but knowing that a man and woman both have good performance records (or bad performance records) typically results in judgments being driven largely by that specific, individuating information and much less so by gender.

In short, the literature on how stereotypes guide judgments of others provides abundant evidence that gender and other social category memberships (e.g., race, age, socioeconomic status) can bias judgment in stereotypical directions. At the same time, we know that gender stereotypes can operate paradoxically, such that a father may be perceived as a better parent than a mother (presumably because he is being evaluated with respect to lower expectations for his group), that violations of gender roles may harm both men and women, and that some situational factors such as amount of knowledge may mitigate stereotyping effects. However, much of this research has been carried out with samples of undergraduates rather than "real-world" decisionmakers such as arbitrators, the focus of the present research.[31]

The Empirical Study

We conducted an experimental study designed to explore whether demographic characteristics of grievants affect the outcome of the grievance process. The study also explored whether demographic characteristics of the arbitrator affect the outcome of grievances arising from work/family characteristics. Before de-

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[30] *See generally* Kunda & Thagard, *Forming Impressions from Stereotypes, Traits, and Behaviors: A Parallel-Constraint Satisfaction Theory*, 103 Psychological Rev. 284–308 (1996).

[31] *See* Kobrynowicz & Biernat, *Decoding Subjective Evaluations: How Stereotypes Provide Shifting Standards*, 33 J. of Experimental Soc. Psychol., 579–601 (1997); Kunda, Sinclair & Griffin, *Equal Ratings but Separate Meanings: Stereotypes and the Construal of Traits*, 72 J. of Personality & Soc. Psychol. 720–34 (1997)).

tailing the study, a major caveat is in order. In the study, members of the National Academy of Arbitrators were given vignettes of grievances and asked to rule on them as they would any real arbitration. However, due to space constraints, the vignettes did not provide the level of detail that would normally come out in an arbitration hearing. As indicated above, the more detail a decisionmaker is provided, the less likely the decisionmaker will rely on stereotyping in making a decision. In any given real case, peculiar details, such as evidence of disparate treatment and the grievant's length of service and work history, are likely to exert a major influence on the result. Within this limitation, the study provides useful insight into arbitral consideration of these types of grievances.

Sample Description and Methods

Participants were 284 arbitrators (236 male, 48 female) who replied to a request to participate in an online (or paper-and-pencil) study about arbitration decisions. The population from which this sample was drawn included all 634 members of the National Academy of Arbitrators, who each received a solicitation letter by mail. This represents a response rate of 44.8 percent, fairly typical of survey research of this sort.

Each participant was exposed to four case vignettes, each depicting a labor grievance, and was asked to render a judgment on the grievance ("I would sustain the grievance in its entirety," "I would sustain the grievance in part," or "I would not sustain the grievance"). Each of the four cases involved an employee filing a grievance after being fired or suspended; each case also kept the merits of the case constant but varied two important details. First, in each case, the grievant was described as either a man or a woman (manipulation of "grievant sex"), and second, one other aspect of each grievant's background or history was manipulated. The four case vignettes are described below:

> Case 1 described a police officer (male or female) grieving a suspension for insubordination after failing to report for duty 8 hours early because of childcare problems. For half of the respondents, the police officer was depicted as a single parent; for the other half, as a married parent (manipulation of grievant marital status).
>
> Case 2 described an employee grieving his/her firing after three occasions of refusing to work overtime on short notice. For half of the respondents, the employee refused overtime because s/he was a single parent of two children and had been having difficulties finding childcare on short notice; for the other half, because s/he was the primary

caregiver for an elderly parent and had been having difficulties finding eldercare on short notice (manipulation of reason for refusal to work overtime).

Case 3 described a grievant (male or female) who was suspended for insubordination after refusing to extend a work shift. For half of the respondents, the grievant was depicted as wanting to attend his/her child's dance performance; for the other half, a prior commitment to help move an elderly disabled neighbor into a nursing home was the reason for the refusal (manipulation of reason for refusal to work overtime).

In case 4, the grievant (male or female) had been fired after using up FMLA leave and still having difficulty with lateness and missed work. This grievant was explicitly compared with two employees who were coping with alcoholism for whom the employer had made special concessions (and not fired). For half of the respondents, the grievant had used up FMLA-guaranteed leave to care for a chronically sick child; for the other half, the care was for a chronically sick elderly parent (manipulation of type of family care).

Each participant was exposed to one version of each "case." Four sequences of cases were used in the manner depicted below, and participants were randomly assigned to a sequence:

	Case 1	Case 2	Case 3	Case 4
Sequence 1.	M—married	F—child	M—neighbor	F—child
Sequence 2.	F—married	M—parent	F—child	M—parent
Sequence 3.	M—single	F—parent	M—child	F—parent
Sequence 4.	F—single	M—child	F—neighbor	M—child

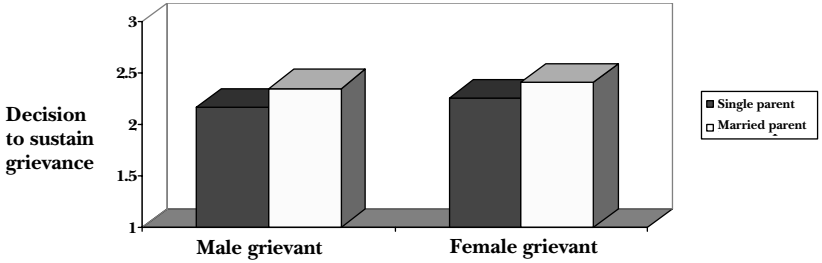
After rendering a decision on each case, participants were also asked to judge the blameworthiness of the grievant as well as sympathy for the grievant's case. Because these judgments generally followed the same pattern as the decisions, they will not be discussed here. At the end of the questionnaire, participants also answered a number of demographic questions. The mean age of the sample was 65 (range from 39–93); years of experience in arbitration $M = 28.5$ years (range from 5–58); politics $M = 3.10$ (on a scale ranging from 1 = liberal to 7 = conservative). Roughly 64 percent of the sample practiced arbitration full-time; the most common industries represented were manufacturing (55%), public sector (44%), education (38%), and transit (33%).

Results

For each case, decisions were converted into a scale ranging from 1–3, where 1 = a decision *not* to sustain a grievance, 2 = sustenance in part, and 3 = sustenance of the grievance in its entirety. We then computed 2 (sex of grievant) X 2 (other manipulated factor) Analyses of Variance (ANOVAs) on this decision variable for each case. ANOVA is a statistical procedure that tests for mean differences among conditions. Specifically, it indicates the effects of each manipulated variable as an independent "main effect" (e.g., a main effect of grievant sex would indicate that the mean decision differed for men and women, regardless of the other manipulated factor), as well as the "interaction" between the manipulated variables (e.g., an interaction between grievant sex and the other factor—say, marital status—would indicate that the mean decision differed somewhere among the four "cells" of the sex X marital status design. For example, the effect of gender might differ when parents are presented as single v. married, or the effect of marital status might differ for men v. women.). Whenever a significant interaction was found in the analyses reported below, follow-up tests were used to pinpoint the source of the effect; which cell (or cells) in the design were "driving" the interaction. Results for each case will be discussed in turn.

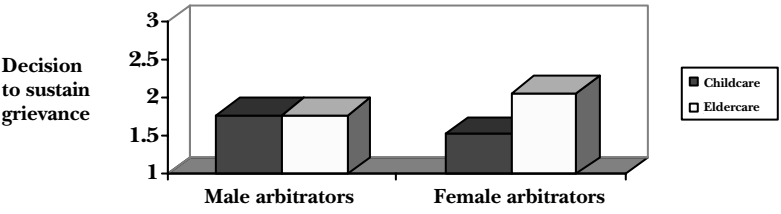
Case 1: The married/single male/female police officer. Decisions on this case were submitted to a Grievant Sex X Marital Status ANOVA. Only the main effect of Marital Status was significant, albeit at what is considered a "marginal level," $F(1,269) = 3.05$, $p < .08$. Overall, arbitrators were more favorable toward (more likely to sustain the grievance of) a *married parent* grievant ($M = 2.38$, $SD = .75$) than a *single parent* grievant ($M = 2.21$, $SD = .79$). Although the interaction with parent sex was not significant, the relevant means are graphically presented in Figure 1, where the y-axis depicts the mean decision on the 1 (do not sustain grievance) to 3 (sustain in its entirety) scale described above. As can be seen, the tendency for more negative decisions for single relative to married parents held both when the parent was male and female. To put this in more concrete terms, arbitrators sustained the grievance in its entirety 54 percent of the time when the grievant was married, compared with 44 percent of the time when the grievant was a single parent.

Figure 1: Grievance Decisions in Case 1, by Grievant Sex and Marital Status



Case 2*: *The male/female employee who could not work overtime because of child care/eldercare responsibilities. We computed a Grievant Sex X Reason for Refusal (child care/elder care) ANOVA on grievance decisions in this case. No effects were significant (all *F*s < 1). But when the sex of the *arbitrator* was also included in this analysis, a reliable two-way interaction emerged between the sex of the arbitrator and the reason for the refusal to work overtime, $F(1,269) = 4.82$, $p < .05$. As depicted in Figure 2, among male arbitrators, there was no evidence of differential decision-making based on grievant features. However, among female arbitrators, there was a reliable tendency to render less favorable judgments for grievants with childcare difficulties than for grievants with eldercare difficulties, $F(1,269) = 5.65$, $p < .02$. More specifically, female arbitrators decided entirely in favor of grievants with eldercare concerns 40.7 percent of the time, compared with a rate of 14.3 percent in the case of childcare concerns.

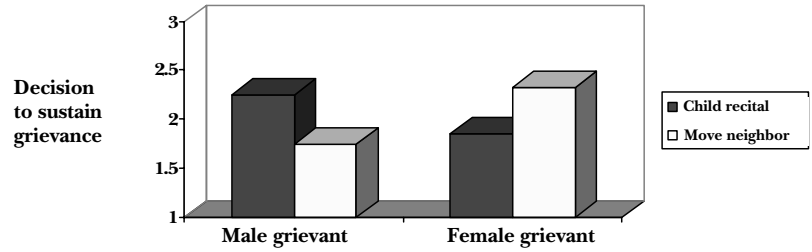
Figure 2: Grievance Decisions in Case 2, by Arbitrator Sex and Child/Eldercare



Case 3: The employee who refuses to work overtime to go to a child's dance recital vs. help move a disabled elderly neighbor. A Grievant Sex X Reason for Refusal ANOVA indicated a main effect of reason for refusal, $F(1,269) = 4.46$, $p < .05$. Arbitrators were more sympathetic to a grievant who refused overtime to help a neighbor ($M = 2.01$, $SD = .81$) than to one who refused overtime to attend a child's dance recital ($M = 1.79$, $SD = .84$). An additional analysis that also included the sex of the arbitrator revealed a reliable three-way interaction $F(1,272) = 4.04$, $p < .05$.

Among male arbitrators, the tendency to favor grievants helping neighbors relative to those attending a dance recital remained significant, $F(1,272) = 5.65$, $p < .05$, but the sex of the grievant had no effect on judgments. Male arbitrators ruled entirely in the grievant's favor 34.3 percent of the time when the refusal reason was moving a neighbor, compared with 24.8 percent of the time when the reason was a dance recital. Among female arbitrators, however, the interaction between grievant sex and reason for refusal was significant, $F(1,272) = 3.98$, $p < .05$. This interaction is depicted in Figure 3, where it is clear that male grievants were *favored* when they refused overtime to attend a dance recital compared with when they helped a neighbor, but *female* grievants were favored when they moved the neighbor relative to when they attended a dance recital. Simple effects analyses indicated that these individual trends were not statistically reliable (presumably because of the small sample of female arbitrators). Nonetheless, female arbitrators sustained the grievance in its entirety 50 percent of the time when the male grievant attended a dance recital

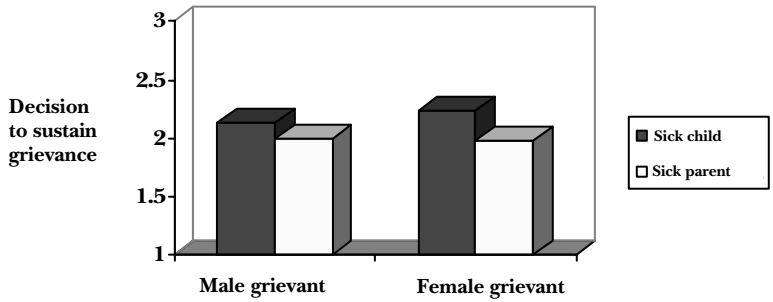
Figure 3: Grievance Decisions in Case 3, by Grievant Sex and Reason for Overtime Refusal, Female Arbirators Only



(but only 16.7 percent of the time when he helped a neighbor move), and 44.4 percent of the time when the female grievant moved a neighbor (but only 28.5 percent of the time when she attended a dance recital). Again, among male arbitrators, those who refused overtime to help an elderly neighbor were favored over dance-recital attendees, regardless of grievant sex.

Case 4: The employee fired for continued absenteeism after using up FMLA leave for caring for sick child/sick parent. This case differed from the others in that it provided an explicit comparison case—two employees who were *not* discharged from the company after accumulating excessive absences and tardies because of alcoholism. We analyzed decisions on the target's grievance using a Grievant Sex X Type of Care (elder, child) ANOVA. A main effect of type of care emerged, $F(1,269) = 4.86$, $p < .05$. Arbitrators were more likely to find in favor of the grievant when he or she was caring for a chronically sick child ($M = 2.18$, $SD = .73$) than when he or she was caring for a chronically sick parent ($M = 1.98$, $D = .73$). Figure 4 depicts the means separately for female and male grievants, but it is clear that the sex of the grievant made no difference in these decisions. Overall, arbitrators found in favor of the childcare provider 37 percent of the time, and the eldercare provider 25.5 percent of the time. An additional analysis that also included sex of the *arbitrator* also revealed a tendency for female arbitrators to rule in favor of the grievant more often than male

Figure 4: Grievance Decisions in Case 4, by Grievant Sex and Type of Care Being Provided



arbitrators (regardless of grievant attributes), $F(1,268) = 4.93$, $p < .05$, Ms = 2.27 and 2.03, respectively. That is, across all versions of this case, female arbitrators sustained the grievance in its entirety 41.7 percent of the time, while male arbitrators did so 28.5 percent of the time.

Preliminary Conclusions

If asked whether the sex of the grievant makes a difference in the outcome of the grievance, all arbitrators probably will say *no*. However, the vast social psychology literature on stereotyping suggested that the grievant's gender might play a nonconscious role in the outcome of the grievance. All four cases tested for any effects of the grievant's gender on the outcome of the grievance and all four cases found no such effects. The changing demographics of the workplace, coupled with well-established arbitral norms of fairness, likely account for this outcome.[32]

If asked whether the marital status of the grievant makes a difference in the outcome of the grievance, most (perhaps all) arbitrators would say *no*. The responses to the vignettes, however, indicate otherwise. In case 1, arbitrators were significantly less likely to sustain the grievance of single parents with childcare problems than of similarly situated married parents. The bias against single parents is also evident among female arbitrators in case 2. Case 2 posited a single parent with childcare difficulties against a grievant whose marital status was not specified with eldercare difficulties. Female arbitrators were significantly harder on the single parent than on the grievant unable to find eldercare.

Cases 1 and 2 both involved employers who were likely to have frequent emergency needs for employees to work overtime on short notice (case 1 involving a police department and case 2 involving a hospital). One arbitrator expressly opined that single parents should not be occupying jobs with such employers: "Single parents should not expect to hold jobs that require them to

[32]There was one exception to our finding. Arbitrators who rated themselves as politically conservative favored male grievants in certain instances. In case 2, more conservatism on the part of the arbitrator favored the male grievant (r = .28) over the female grievant (r = –14). Similarly, in case 4, more conservatism favored the male grievant (r = .16) over the female grievant (r = –19).

work in emergencies." Perhaps other arbitrators nonconsciously harbored the same view.[33]

In case 3, reasonable minds may differ over whether the reasons for missing the overtime, attending a child's dance recital versus keeping a commitment to assist an elderly neighbor's move to a nursing home, should make a difference in the outcome of the grievance. It may reasonably be argued that the commitment to the elderly neighbor was more compelling under the facts given. The facts given in the vignette indicated that it was a one-time event that had been arranged considerably in advance and that could not be rescheduled easily. On the other hand, arguably, there would be more dance recitals to come that the grievant could attend. Thus, it is not surprising that arbitrators as a whole favored the grievant with the commitment to the neighbor over the grievant attending the daughter's dance recital.

What is startling is the response of female arbitrators who markedly favored men who attended the dance recital over men who helped the neighbor move. The result may reflect greater receptivity among female arbitrators to men acting outside of traditional gender roles.

Case 4 interjected a potential issue of disparate treatment. Arguably, the employer should not have treated the grievant differently from the way it treated the two employees who had problems with alcohol abuse. Arbitrators who viewed the grievance as a case of disparate treatment would likely sustain the grievance *in part* and we would not expect the reason for the grievant's tardiness (sick child versus sick parent) to matter. In fact, among this group of arbitrators, the difference between having a sick child and a sick parent did not matter with regard to the decision to sustain in part: Arbitrators sustained the grievance in part 44.1 percent of the time with the sick child and 46.9 percent of the time with the sick parent. However, arbitrators were more likely to sustain the grievance *completely* when the sick child was involved (37 percent sick child versus 25.5 percent sick parent). This finding calls for discussion among the arbitral community over the normative question of whether the distinction between childcare and eldercare is relevant.

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[33]We do note one potentially significant difference between case 1 and case 2. Case 1 involved a one-time inability of the grievant to respond while case 2 involved a recurring employer need and a recurring inability by the grievant to meet that need. Probably because of this difference, arbitrators as a whole were far more likely to deny the grievance in case 2 (44.8%) than in case 1 (19.4%).

As discussed above, the results must be interpreted with a considerable degree of caution. The instances where the gender of the arbitrator made a difference in the outcome of the case should not be given too much weight because of the relatively small number of female arbitrators in the sample. Additionally, there is reason to believe that the marital status of the grievant and whether the issue involves childcare or eldercare will have less of an effect in real cases than is demonstrated in this study because in real cases the arbitrator will have many more facts and the possession of greater factual details leads to less reliance on stereotypes. When decisionmakers are consciously aware of the potential for stereotypes infecting their decisions, they are less likely to make decisions in a biased manner. The cognitive biases reflected in this study should further such awareness and lead to less biased decisionmaking in actual arbitrations.