they are regularly scheduled to work, or otherwise fail to take seriously their responsibilities to employers, who need to "keep the trains running." Employees win when they can prove inconsistency or disparate treatment, or when an arbitrator is convinced that fundamental issues of fairness are involved. This study's most interesting finding is that arbitrators frequently find fault—and merit—with both sides, and issue split decisions that typically impose a penalty on the worker but reduce the level of discipline proposed by management. The high proportion of such cases (nearly half) highlights that the lack of supports for working families in the United States often places everyone—employees, employers, and arbitrators—in situations where they have few good choices.

II. The Evolution of Worklife Disputes in Grievance Arbitration: A Commentary on Professor Joan Williams' Presentation to the National Academy of Arbitrators

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The emergence of worklife conflict as a factor in labor discipline cases is changing traditional notions of just cause. A few arbitrators deem the consideration of family responsibilities in assessing disciplinary action to be an "egalitarian social experiment" that unnecessarily hampers an employer's operations.[1] This is a static and unfair view. As Professor Williams' paper documents, this notion is based on an outdated paradigm that arose when workers were predominately male, and had a wife devoted to family demands. Fairness requires evolution in the concept of just cause so that contemporary legal and social ideas can be incorporated into the standard. Thus, arbitrators must take into account the changed circumstances of modern workers who increasingly lack a familial safety net.

Many arbitrators recognize that the principle of fairness underlying the general doctrine of just cause, by itself, authorizes

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[1] *Town of Stratford*, 97 LA 513, 514 (Stewart 1991).

the treatment of family responsibilities as mitigating factors for discipline. For example, one arbitrator wrote, "It is fundamentally unfair to discharge an employee for leaving work because she was informed that her four-year-old daughter had fallen, was injured, and was being taken to the Emergency Room." That arbitrator said, "Fair-minded people would not disagree that she was compelled to leave work. She had no reasonable choice in the matter."[2] Another arbitrator said, "No person should be forced to choose between his children or his livelihood. Grievant was between the proverbial rock and hard place. This is the classic Hobson's choice."[3] In another case, the arbitrator noted with respect to family emergencies, "the family must come first, as most employers would readily agree."[4]

Arbitrators may find support for consideration of worklife conflict in the explicit language of collective bargaining agreements. A growing number of contracts contain provisions on childcare, eldercare, flexible work schedules, and family leave.[5]

Case law also supports arbitral scrutiny of worklife conflicts. No law, for example, specifically prohibits discrimination because of family responsibilities or gender stereotyping. Nonetheless, courts have relied on a variety of statutes in finding this type of discrimination to be impermissible. Legal support has been found in Title VII disparate impact and constructive discharge doctrines, hostile environment and retaliation law, the Equal Pay Act, the Family Medical Leave Act, the Americans with Disabilities Act, and the constitutional Equal Protection and Due Process guarantees enforceable through Section 1983. The National Labor Relations Board has also recognized the new social reality of worklife conflict. In a case of a union activist assigned to a shift that was incompatible with her childcare arrangements, the Board found that requiring the employee to choose between working and caring for her children was sufficiently burdensome to support a finding of constructive discharge.[6]

This rapidly evolving law of the shop demonstrates that consideration of worklife factors is an idea whose time has come in labor

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[2] *Knauf Fiber Glass*, 81 LA 333, 337 (Abrams 1983).
[3] *Rochester Psychiatric Center*, 87 LA 725, 726 (Babiskin 1986).
[4] *Southern Champion Tray Co.*, 96 LA 633, 637 (Nolan 1991).
[5] Available online at http://www.laborproject.org/bargaining/language.html.
[6] *Yellow Ambulance Service*, 342 NLRB No. 77 (2004); see also *American Licorice* 299 NLRB 145, 148 (1990); *Bennett Packing*, 285 NLRB 602, 603, 607 (1987).

arbitration, and cannot be written off as a grand social experiment. This does not mean that whenever a work/family conflict arises, the employer's interests and needs must be subordinated to the employee's family responsibilities. Employees need to act responsibly and be resourceful in taking care of family duties in a way that is designed not to conflict with work obligations.

Arbitration cases described in recent studies like that of Professor Williams' highlight some of the challenging and unsettled questions still facing arbitrators.[7] Arbitrators will need to determine the type of activities and circumstances that mitigate or excuse a refusal to meet the employee's staffing requirements. Even the definition of what constitutes a "family" has not been fully explored. Although responsibilities relating to the care of minor children, disabled family members, and elderly parents clearly warrant protection, questions remain when the conflict stems from care for an adopted child,[8] a live-in girlfriend[9] or a boyfriend's children and parents.

Another open question concerns whether the nature of the employer's operation changes the analysis. In a few cases, where staffing shortages have significant consequences, the employer's needs have trumped family care responsibilities. For example, an arbitrator found a police officer's inability to make childcare arrangements at the last minute was no excuse because he worked for a paramilitary organization. The arbitrator commented, "the Department must not make accommodations for the Grievant. [Instead, the] Grievant must conform to the Police Department's contractually proper rules, regulations, and command structure."[10] An airline case used a similar analysis. [11] There, the arbitrator upheld the discipline of a flight attendant who refused to extend her trip for an extra leg because of health and childcare issues. In ruling, the arbitrator noted the importance of maintaining the integrity of an airline schedule, and wrote, "Flight crews are required to have flexible personal schedules in order to accommodate their employers' requirements."

How the nature or frequency of the family activities impacts the just cause analysis is another unsettled area. One-time medi-

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[7] See also Malin, Milligan, Still & Williams, *Work/Family Conflict, Union Style: Labor Arbitrations Involving Family Care* (2004).
[8] *City of Columbus*, 102 LA 474 (Kindig 1994).
[9] *City of McAlestar*, 114 LA 1180 (Crow 2000).
[10] *Town of Stratford*, 97 LA 513, 514 (Stewart 1991).
[11] *Piedmont Airlines Inc.*, 103 LA 751, 758 (Feigenbaum 1994).

cal emergencies, where the employee has no alternative but to leave work, mitigate most disciplinary actions. But, little has been written on the treatment of scheduled obligations for medical or psychological care or school events.

Another area where existing cases do not provide clarity involves the appropriate comparison group for determining fair treatment. Arbitrators may be confronted with arguments that employees with worklife conflicts should be compared with employees with other types of emergencies, employees with generic attendance problems, employees with legitimate medical excuses, employees with drug and alcohol problems, employees with long-term health issues, or disabled employees. The choice of comparator can have a substantial impact on the construct the arbitrator applies in balancing the parties' interests.

For example, if the employer provides support for drug and alcohol treatment, psychological counseling, and other types of assistance, arbitrators may find that the employer is also obligated to offer help in a work-family conflict. In one case, an employer argued that the grievant should have used the emergency services of the employee assistance program to find a babysitter. Unfortunately, the arbitrator found emergency babysitting assistance was not actually available through the program.[12] In another case, the arbitrator indicated that the employer should have engaged in an interactive dialogue with an employee who could not come to work because her regular and backup childcare arrangements fell through. The arbitrator noted that the supervisor, "never explored the problem with the Grievant, made any suggestions to her, or indicated that she might be of help." He also wrote that, "…the failure to explore the problem and discuss possible options is as much the fault [of management as the Grievant]."[13]

Finally, arbitrators will need to be creative in crafting remedies for worklife grievances to ensure that they are implementable, prevent future problems, and are fair to everyone in the workplace. Obvious remedies may not be enough. For example, the National Labor Relations Board noted that allowing an employee to trade night shifts for day shifts to address a repeating work/family conflict may be just a "hollow gesture" because of the unwillingness

[12]Boise Cascade, 77 LA 28 (Fogelberg 1981).
[13]Social Security Administration, 93 LA 687, 690 (Feigenbaum 1989).

of day shift employees to give up their assignments on a regular basis.[14]

Some cases offer examples of creative and workable solutions. In one, the arbitrator ordered a last-chance probationary period for the worker to address a childcare problem and improve her attendance.[15] In another case, the arbitrator conditioned the grievant's receipt of lost wages on the submission of a plan proposing how he would work overtime in a manner consistent with his wife's medical condition.[16] In a third case, the arbitrator ordered an employee who was not available for emergency overtime due to a childcare problem to provide three occasions during the next month when she would be available for overtime assignment. The arbitrator based the number of overtime commitments required on the average amount of monthly overtime worked by unit employees.[17]

In the recent past, arbitrators adapted their understanding of just cause to account for changing social norms when deciding sex harassment, drug and alcohol abuse, and disability grievances. As demonstrated by Professor Williams, worklife grievances require a similar rethinking. This is the nature of the evolving concept of just cause. As one treatise noted:

> It should be clear by now that arbitrators did not sit down together in the dim past and agree upon the principles of just cause. Rather, arbitrators build upon what other arbitrators said in their opinions, developing principles of just cause by accretion. Over time, as societal notions of fairness changed, the outer contours of just cause changed while the basic principles became more solidified.[18]

The time is ripe for a similar evolution in the just cause analysis of worklife disciplinary cases.

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[14] *Yellow Ambulance Service*, 342 NLRB No. 77 (2004).
[15] *Knauf Fiber Glass*, 81 LA 333 (Abrams 1983).
[16] *Allied Paper, Inc.*, 80 LA 435, 445 (Mathews 1983).
[17] *Rochester Psychiatric Center*, 87 LA 725, 727 (Babiskin 1986).
[18] Brand ed., Discipline and Discharge in Arbitration (BNA Books 1998), p. 30.