# II. EMPLOYEE CONDUCT AFTER IMPOSITION OF DISCHARGE BUT BEFORE THE ARBITRATION HEARING: FACTS IN SEARCH OF A THEORY

MARVIN HILL, JR.*

## Introduction

Marvin Hill and A.V. Sinicropi, in *Evidence in Arbitration*,[1] report that, normally, an employee's post-discharge conduct is not relevant to the question of just cause. Black-letter law in this area is that just cause considerations of an employee's discharge are determined at the time of the discharge and what was known to management at that time.[2] There are, however, recognized exceptions to the rule. "Related" and "connected acts" may be considered to bolster the employer's initial grounds for discharge. Thus, when the employee's conduct bears a close and logical relation to the original misconduct giving rise to the discharge, post-discharge conduct is relevant and considered by arbitrators. Similarly, post-discharge conduct that is of the nature of rehabilitative conduct commenced after the discharge is generally considered as relevant, although not dispositive of, the just cause determination. In this case, evidence that an employee has addressed the underlying causes giving rise to the discharge (e.g., by entering a rehabilitation or an employee assistance program (EAP)) may indeed be relevant to the remedy.

Do the same considerations apply when the post-discharge conduct is prejudicial to the employee? For example, an employee

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[1] 2d ed. (BNA 1987).

[2] *Id.* at 60. See generally, Nicolau, *The Arbitrator's Remedial Powers*, in Arbitration 1990: New Perspectives on Old Issues, Proceedings of the 43rd Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1991), at 73. Arbitrator Nicolau, in an address to the National Academy of Arbitrators, maintained that the first reference to the general rule that a discharge must stand or fall on what the employer knew at the time of the discharge is in a 1946 case, *Forest Hill Foundry*, 1 LA (BNA) 153 (Brown, 1946). Nicolau pointed out that Arbitrator Frank Brown found that the collective bargaining agreement required that the employee be advised of "all reasons" for the discharge at the time it occurred. The grievant was discharged for insubordination. After the discharge, but prior to the arbitration hearing, management discovered that the grievant punched the time clock of two other employees while the rules of the company required each employee to punch his own time card. Arbitrator Brown found that "it would not appear proper to discuss the matter in detail in this decision." *Id.* at 155. "Since then," said Nicolau, "the rule has generally been observed and recited as gospel, no matter what the contract said." *Id.* at 74.

is discharged for insubordination. After his or her discharge but prior to the hearing the employee threatens a witness. Is the evidence relevant even though it is not part of a "continuous" or "related" offense? Does the employer have the option to address the threats in the same hearing dealing with the insubordination charge, or must management initiate new charges and pursue the matter in a separate hearing? When should management wait until the award in the first hearing is issued? Must management notify the grievant and the union that it intends to pursue the matter in a separate hearing? If so, when? Irrespective of any relationship to the merits, is the post-discharge conduct relevant to the remedy or the credibility of the employee? (Case law supports using the information in both situations.) Can the evidence be used to show that the employee is a "bad person" (after he or she places his or her character into evidence)? Are the rules and principles different in the public sector where constitutional issues are often applicable and argued? By definition, the conduct addressed takes place off duty (but, perhaps, not off premises). Thus, in addition to relevance considerations, nexus arguments emerge.[3]

Again, some of these issues have been addressed in our 1987 text. This article examines many of the problems and issues surrounding the use of post-discharge conduct in both situations—where the conduct is positive in nature and where the conduct is detrimental to any order of reinstatement. A theory of the use of post-discharge conduct as part of a just cause determination is proposed. In addition to arbitration decisions, both published and unpublished, case law from the courts and administrative agencies are examined.

## Post-Discharge Conduct and the After-Acquired Evidence Doctrine

Related to the issue of post-discharge conduct is the after-acquired evidence doctrine. Often, an employer dismisses an employee for specified conduct and subsequent to the discharge discovers additional employee conduct that would have warranted discharge had the employer known of it at the time that it occurred. Post-discharge discovery of a falsified employment

[3] *See* Hill & Wright, Employee Lifestyle and Off-Duty Conduct Regulation (BNA Books 1993).

application is a common example.[4] Another common area is evidence of the employee's medical condition, discovered after the discharge, that is offered to mitigate a penalty.[5] Generally, both employers and unions are allowed to investigate and collect evidence *related to the initial discharge*. Sometimes, it will not be clear whether the grievant's post-discharge conduct is related to the original charge.[6] The fact that it is not discovered until after the discharge matters not.[7] However, if the evidence is going to be

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[4]An especially interesting case is *Lenox Hill Hospital*, 102 LA (BNA) 1071 (Simons, 1994), where Arbitrator Simons ruled that he lacked jurisdiction to rule on an employer's motion to dismiss a grievance based on after-acquired evidence, specifically the grievant's false statements on an employment application. Arbitrator Simons concluded that his jurisdiction was limited to "disputes arising out of grievances." Accordingly, he had no jurisdiction to consider conduct that was not part of the original charge against the employee. Arbitrator Simons declared:

> Finally, it is not within the authority of this Arbitrator to require the Union to submit to arbitration a matter, which it can be stated with certainty it never agreed to arbitrate, namely adjudication of a dispute concerning the dismissal of an employee for alleged misconduct, which misconduct was not part of the charge against the employee, not part of the cause for the employee's discharge, and which was not a part of the matter grieved.

*Id*. at 1074.

> The Arbitrator did note that the effect of grievant's alleged misconduct with respect to her employment application on the remedy will be left for later determination.

*Id*.

[5]See Arbitrator Dennis Nolan's discussion of the use of post-discharge evidence in mental disability cases in *Southwestern Bell Telephone Co*., 98 LA (BNA) 137 (Nolan, 1991). In that case Arbitrator Nolan outlined the better rule regarding the use of medical evidence, albeit post-discharge:

> When determining whether there is just cause for firing an employee whose mental illness resulted in unsatisfactory work or attendance or unacceptable conduct, the issue is not fault but rather ability to work. The issue, of course, requires medical evidence. An employer faced with such a problem should therefore treat the employee as sick (perhaps even placing him or her on involuntary leave), gather appropriate medical evidence, and have a qualified person evaluate that evidence. If the evidence shows the employee is unable to work satisfactorily, the employer may give the employee a non-disciplinary termination for medical reasons.

[6]*See, e.g.*, Safeway Stores, 95 LA (BNA) 63, 68 (Levak, 1990) (involving whether the original charge involved "dishonesty.").

[7]Besides the cases discussed in this section, *see* Bi-State Development Agency, 125 LA (BNA) 54 (Daly, 2008) (crediting post-discharge evidence of employment falsification to hide criminal convictions, noting that reason for discharge taken alone would have led to long-term suspension, but after-acquired evidence sufficient to sustain overall termination); Union Tank Car Co., 123 LA (BNA) 1473 (Dilts, 2007) (post-discharge evidence that grievant suffered from sleep apnea credited and used as mitigation of discharge penalty); Hayes-Albion Corp., 117 LA (BNA) 1177, 1181 (Allen, 2002) (stating "It is my opinion post-discharge evidence is admissible, along with all the other evidence, *if the post-discharge evidence is directly related to grounds for the discharge of the Grievant*.") (emphasis added); Pepsi-Cola General Bottlers, 117 LA (BNA) 681 (Goldstein, 2002) (crediting handwriting expert retained by employer after the employee's discharge); Pittsburgh Housing Authority, 116 LA (BNA) 605, 611 (Dissen, 2001) ("While post-discharge conduct is generally not relevant to the question of just cause for the discharge, evidence of conduct which is in the nature of an admission that the offense giving rise to the discharge did in fact occur is admissible notwithstanding that the admission may have been made well after the date of discharge."); Bill Kay Chevrolet, 107 LA (BNA) 302 (Wolff, 1996) (post-discharge evidence that mechanic, terminated for theft of services in claim-

used in the original discharge proceeding, then notice and opportunity to rebut should be accorded the grievant.[8] Failure to do so may result in any number of outcomes, including exclusion and/or having costs assessed against the employer for failure to disclose.[9] As succinctly stated by one arbitrator:

> Fundamental notions of fairness—especially in discharge cases—require prompt and full disclosure of the facts or positions of the parties at the earliest steps in the grievance procedure. The aim of the grievance procedure is, and should be, to settle disputes, not arbitrate them. Settlement of disputes will be most likely when the facts and positions of the parties, and the strengths and weakness of their respective cases, are fully disclosed at the earliest possible time. Arbitration, even less than litigation, should not be a guessing game—especially when the stakes are the equivalent of "capital punishment."[10]

In *Mohave Electric Cooperative v. NLRB*,[11] the Court of Appeals for the D.C. Circuit outlined the law regarding the use of after-acquired evidence. In *Mohave*, the National Labor Relations Board (NLRB) had ordered full reinstatement and back pay for an employee who was the object of an unfair labor practice. Disputing the award, the employer submitted evidence that it claimed would have resulted in the employee's termination irrespective of the injunction proceedings. The evidence was discovered one week after he was terminated. The evidence was a statement by a co-worker that, on a single occasion 9 to 10 months before the discharge, the grievant paid the worker a $5 bribe to take part of his meter route. The company's operations manager testified unequivocally that he would have discharged the grievant for this action as soon as he discovered it. According to the D.C. Circuit:

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ing to install condensers on two cars that were not in for repairs, also falsely claimed he installed condenser on third car is admissible, where grounds for dismissal, theft of services, did not change and evidence related to same wrongdoing). *But see* Southwest Airlines, 122 LA (BNA) 856 (Jennings, 2006) (holding that just cause determination must be based on information that management had available to it at time of discharge).

[8] *See, e.g.*, Jackson General Hospital, 113 LA (BNA) 1040, 1046 (Sharpe, 2000) (stating "Even though evidence of pre-discharge misconduct discovered after the discharge may be considered, the existence of the misconduct must have been established in a process that permits the grievant to fairly test it."); U.S. Sugar Corp., 112 LA (BNA) 967, 971 (Chandler, 1999) ("None [arbitrators], however, hold or even suggest that these newly discovered matters can be raised for the first time at the arbitration hearing.").

[9] Bill Kay Chevrolet, 107 LA (BNA) 302, 310 (Wolff, 1996) (employer ordered to pay half of union's costs where employer did not notify union of additional evidence until hearing date; arbitrator reasons that had employer told union of evidence, union might not have proceeded to arbitration).

[10] *Id.* at 310.

[11] 206 F.3d 1183, 163 LRRM 2917 (D.C. Cir. 2000).

> To preclude reinstatement and limit back pay on the basis of after-acquired evidence, the employer has the burden of proving that the evidence reveals misconduct for which it "would have discharged any employee," not simply for which it *could* have done so. Because the Board has "broad discretion" in fashioning remedial orders, we will uphold its decision as long as there is substantial evidence in the record to support it. There is such substantial evidence here.[12]

Thus, to terminate reinstatement or back pay on the basis of after-acquired evidence, the employer must demonstrate that the discovered misconduct is not the sort of conduct that it has tolerated in the past.[13]

To this end, the Seventh Circuit has ruled that when an arbitrator examines only the evidence against the employee known to the employer at the time of the discharge, and does not consider evidence discovered after the discharge, the employer is not forever foreclosed from using the evidence as a basis of a subsequent discharge. As explained by the court, simply because an arbitration award requires reinstatement of a discharged employee does not mean that the employee is granted perpetual job security. Once reinstated, "an employee is 'in the same position as any other employee…and would be subject to any lawful disciplinary action, layoff, or discharge. Any future employment decisions

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[12]163 LRRM at 2923–24.

[13]According to the Sixth Circuit, "the seminal case establishing the after-acquired evidence doctrine in employment discrimination cases is *Summers v. State Farm Mut. Ins. Co.*, 864 F.2d 700, 48 FEP (BNA) Cases 1107 (10th Cir. 1998). The doctrine mandates judgment as a matter of law for an employer charged with discrimination if evidence of the plaintiff employee's misconduct surfaces at some time after the termination of the employee, and if the employer can prove it would have fired the employee on the basis of the misconduct if it had known of it."

*Summers* involved the case where an employee claimed that he was fired for age and race in violation of the Age Discrimination in Employment Act (ADEA) and Title VII. Four years after the discharge, while preparing for trial, the employer discovered that the employee had falsified records in 150 instances. The Tenth Circuit affirmed summary judgment for the employer, reasoning that although the after-acquired evidence could have been the actual cause of the employee's discharge, it was relevant and determinative to the employee's claim of injury, and precluded any relief or remedy.

The Sixth Circuit adopted the *Summers* after-acquired evidence rule in *Johnson v. Honeywell Info. Systems, Inc.*, 955 F.2d 409, 57 FEP (BNA) Cases 1362 (6th Cir. 1992), a case involving post-discharge discovery of resume fraud. There, the court made it clear that even if the employer discharged the plaintiff as retaliation for filing a charge, she would not be entitled to relief because of her resume fraud, at least in the case where the employer established that it would not have hired the employee and would in fact have fired her had it became aware of the fraud during her employment.

Black-letter law in this area is this: After-acquired evidence is a complete bar to any recovery by a former employee where the employer can show that it would have fired the employee on the basis of the evidence. Of course, the issue of whether an employer would actually fire an employee for misconduct could create a genuine issue of material fact. Any alleged nexus between the initial reason for discharge and the after-acquired evidence is irrelevant to the application of the doctrine.

affecting [the employee] would, of course, be evaluated independently of the [original discharge].'"[14]

All evidence of post-discharge conduct is, of course, "after acquired" evidence. When the employee's conduct takes place before his or her discharge and is undiscovered until after his or her discharge, case law regarding the "after-acquired evidence doctrine" is applicable. This means that an employer has the option of awaiting the ruling of an arbitrator and if reinstatement is ordered, using the after-acquired evidence as a basis for a second discharge. As stated by the Seventh Circuit in *Truck Drivers Local 705 v. Schneider Tank Lines*,[15] a company may reinstate an employee and then discharge him again if it has a "fresh reason for doing so." Although parties may be in disagreement regarding the meaning of a "fresh reason," any conduct by the grievant subsequent to the discharge but prior to the hearing would arguably qualify even if the conduct is unrelated to the original dismissal. The conduct would, of course, be subject to a just cause analysis.

## Post-Discharge Conduct That is Favorable to the Terminated Employee

### *Rehabilitative Conduct*

Although decisions can be found to the contrary, generally, an employee's post-discharge treatment is irrelevant to whether just cause existed *on the date of discharge*. Where arbitrators have considered an employee's post-discharge conduct of engaging in rehabilitative efforts, the evidence is generally credited for consideration of the remedy. Thus, an employee's post-discharge medical evidence of rehabilitation or treatment is usually disregarded when offered for determining just cause but arguably relevant for determining the question of the remedy.[16]

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[14]Chicago Newspaper Guild v. Field Enters., Inc., 747 F.2d 1153, 1156, 117 LRRM 2937 (7th Cir. 1984) (as cited in Chrysler Motors v. Allied Ind. Workers, 2 F.3d 760, 62 FEP (BNA) Cases 1030 (7th Cir. 1993)).

[15]958 F.2d 171, 174–74, 139 LRRM 2699 (1992).

[16]Besides the cases discussed in this section, see *Tecumseh Products Co.*, 105 LA (BNA) 626, 630 (Frockt, 1995) (noting grievant's apparent failure at rehabilitation, reasoning "Had M made a good faith, continuous effort at rehabilitation during the six month period between his discharge and the hearing, the undersigned would have considered the usage of an award of reinstatement under very limited and strict terms and conditions."); Southern Union Gas Co., 100 LA (BNA) 964, 968 (Baroni, 1993) ("Grievant's testimony that he successfully completed his rehabilitation program and passed drug tests for subsequent employers is not relevant, since the Company's decision to discharge him must be evaluated on the facts available to management at the time it was reached and not upon any evidence of post-discharge rehabilitation."); Atlantic Southeast Airlines, 101

Case law in this regard is especially instructive.

Arbitrator Elliott Goldstein, in *Keystone Steel & Wire Co.*,[17] considered an employee's failed attempts at rehabilitation in concluding that an employee was not worthy of reinstatement. Significantly, Arbitrator Goldstein pointed out two schools of thought on the question whether post-discharge rehabilitation should be considered by an arbitrator in mitigation of the penalty of discharge, in this case for excessive absenteeism. His analysis is instructive on the relevance issue:

> There are two schools of arbitral thought on this subject. The first, advanced by the Company, is that post-discharge rehabilitative efforts should automatically be viewed as irrelevant. This is especially true in this case since the Grievant had ample opportunity to rehabilitate himself before he was discharged or, at minimum, to inform the Company that he had a problem with alcohol prior to termination. Moreover, the Company contends that there is a negotiated absenteeism policy and the parties have agreed on the definition of excessive absenteeism and the manner in which it should be dealt with. To mitigate the discharge penalty under these circumstances would be adding to or modifying the provisions of the collective bargaining agreement, something which the Arbitrator is precluded from doing. The Company essentially agrees with the position taken by Arbitrator Sergent in *Duquesne Light Co.*, 92 LA 907, 911 (1989), wherein he states that "no subsequent rehabilitation by the grievant can undermine the propriety of the Employer's decision to discharge nor does it vest the arbitrator with authority to second guess the decision."
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> The other school of arbitral thought holds that post-discharge rehabilitation should be considered. The theory is that "the prime purpose of industrial discipline is not to inflict punishment for wrongdoing, but to correct individual faults and behavior and to prevent further infractions." Ashland Petroleum Co., 90 LA 681 (Volz, 1988); *and see* Texaco, Inc., 42 LA 408 (Prasow, 1963). To these arbitrators, treatment and therapy fulfill that function and should be considered. As the union has argued, one of the characteristic features of alcoholism is a psychological inability on the part of the person affected to face up to the rigors of rehabilitation until some drastic consequence

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LA (BNA) 511 (Nolan, 1992) (whether grievant smoked marijuana eight months after she missed drug test may be pertinent to appropriate remedy and may affect outcome of that issue but does not establish that she was not previously credible); Dial Corp., 99 LA (BNA) 176 (Gordon, 1992) (grievant's inability to complete rehabilitation program cited in sustaining company's position); Brunswick City Sch. Dist., 94 LA (BNA) 581 (Talarico, 1990) (citing post-discharge conduct as evidence that employee can lead drug-free life); Aeroquip Corp., 95 LA (BNA) 31, 33 (Stieber, 1990) (crediting grievant's long seniority and post-discharge rehabilitation treatment as exception to general rule that post-discharge evidence is not considered relevant in a just cause determination); Ashland Petroleum Co., 90 LA (BNA) 681 (Volz, 1988) (crediting post-discharge rehabilitation efforts of grievant).

[17] 114 LA (BNA) 1466 (Goldstein, 2000).

such as discharge befalls him. Consideration of that fact, the Union reasons, justifies a careful examination of the Grievant's subsequent efforts to rehabilitate himself.[18]

Arguably taking a "middle approach," Arbitrator Goldstein held that rehabilitative efforts would be considered relevant, but not determinative or conclusive to the just cause issue. He proposed the following test:

> First, was the act done while the Grievant was under the influence of alcohol or drugs or while Grievant was an alcoholic or drug user?
>
> Second, was the Grievant's prior work record relatively clear of disciplinary action or were the prior disciplinary actions of record the result of alcoholism or drug abuse problems?
>
> Third, is Grievant in fact successfully participating in an employee assistance program or similar alcoholic rehabilitation plan or AA which indicates he is likely to be a successful candidate for rehabilitation?
>
> Fourth, was Grievant a long-term employee, with a substantial portion of his work life dedicated to working for the employer?[19]

Arbitrator Goldstein pointed out that reinstatement upon satisfaction of the four factors listed "is a narrow exception to the general rule that an alcoholic or similarly incapacitated employee whose behavior at the worksite violates employer rules may be terminated in accordance with just cause."[20] Finding the employee's post-discharge conduct a "mixed bag," "which suggests that he has not yet attained the sustained level of commitment crucial for successful ongoing rehabilitation," Arbitrator Goldstein denied the grievance.

Arbitrator Fredric Dichter, in *Ocean Spray Cranberries, Inc.*,[21] reports a case where the issue of post-discharge conduct was linked with the issue of the power of an arbitrator to fashion a last-chance remedy for the grievant.

> [T]he authority of arbitrators to order reinstatement under a last-chance agreement and the authority of arbitrators to consider post-discharge rehabilitation is susceptible to differing interpretations. Those arbitrators that consider post-discharge rehabilitation are generally the ones that believe that they have the authority to offer last chance opportunities. Those arbitrators that believe that post-discharge conduct should not be considered, like those arbitrators

[18] *Id.* at 1471.
[19] *Id.*
[20] *Id.* at 1472.
[21] 105 LA (BNA) 148 (Dichter, 1995).

> that believe rehabilitation should not be considered at all, often cite reports from several sociologists that offering another chance to an employee sends the wrong message to that employee. . . . Conversely, those arbitrators that consider post-discharge conduct and order reinstatement subscribe to the view that it takes the discharge to make the employee come to realize the consequences of their conduct. Suspension, they state, does not have that effect.[22]

Stating that each case must be decided on its own set of facts, Arbitrator Dichter rejected the notion that an arbitrator may never consider post-discharge rehabilitation and order last-chance reinstatement.[23]

In *Meijer, Inc.*,[24] the grievant, a grocery store employee, was discharged for grossly unacceptable behavior toward a female customer. Thereafter, the employee was diagnosed as suffering from bi-polar affective disorder. The union maintained that the employee's post-discharge treatment and medication rendered him fit for reinstatement, and also that management should have perceived that the employee was mentally ill. Reinstatement was ordered.

In all of the cases where post-discharge evidence of rehabilitation-type conduct is credited, arbitrators generally first declare that post-discharge conduct is not considered relevant, that the basic issue is whether management's action was justified based on facts known when it took the discharge action. Thereafter, they proceed to consider rehabilitative conduct as evidence of mitigation; in other words, whether the employee is worthy of a second chance.

*Exculpatory Evidence*

An employee is discharged for on-duty theft. Subsequent to termination, the employer learns, either through an independent investigation or from other sources, that the grievant is not guilty as charged. There is no apparent infirmity in crediting exculpatory post-discharge evidence at a hearing. Thus, any exculpatory evidence the grievant can produce, albeit post-discharge, is presumptively admissible.

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[22] *Id.* at 153.
[23] *Id.*
[24] 103 LA (BNA) 834 (Daniel, 1994).

**Post-Discharge Conduct That is Unfavorable to the Employee**

Two recurring categories of adverse conduct during the pendency of the arbitration include criminal convictions and threats to management or co-workers.

*Criminal Convictions*

A common scenario is when an employee is discharged and after his or her termination but prior to the arbitration hearing he or she is convicted in the criminal forum for a similar offense. The Sixth Circuit dealt with such a case in *Morrison v. Warren*,[25] giving its imprimatur to considering post-discharge evidence either to deny a reinstatement remedy or to support a "second discharge." In *Morrison*, a deputy sheriff was dismissed on May 28, 1998, after a court granted his wife an order of protection on May 26 that prohibited Morrison from having anything to do with a weapon. As a result, Morrison was unable to satisfy his primary job requirement, which was to carry a gun on duty. He was accordingly discharged. Morrison challenged his discharge before an arbitrator. Prior to the arbitration a magistrate vacated the order of protection. During the pendency of the arbitration, Morrison was charged with additional acts of domestic violence on July 2, 1998, to which, pursuant to a plea agreement, he pleaded "no contest" to a reduced charge of disorderly conduct on September 10, 1998.

At a two-day arbitration hearing, on March 17 and 18, 1999, the arbitrator framed the issue as follows: "The question to be resolved is whether the Sheriff violated the collective bargaining agreement when it terminated [Morrison] and, if so, what should the remedy be?"[26] The Sheriff's Office acknowledged that the original order of protection—the basis for the discharge—had been vacated. Nonetheless, it argued that Morrison's discharge was required under the Office's "zero-tolerance policy" for domestic abuse. As evidence, the Sheriff's Office submitted Morrison's subsequent conviction for disorderly conduct. The arbitrator concluded that although post-discharge conduct is not ordinarily admissible or relevant in making a just cause determination, Morrison's post-discharge conduct fell into a narrow exception recognized in arbitration precedent that allows admission of post-discharge conduct that is "part of one connected whole." The

[25]375 F.3d 468, 175 LRRM 2197 (6th Cir. 2004).
[26]175 LRRM at 2198.

arbitrator found that because both instances of conduct by the grievant stemmed from Morrison's wife's allegations of domestic abuse, it would be appropriate to consider evidence of the grievant's post-discharge conduct.

Noteworthy is the arbitrator's resolution of the ultimate just cause issue. The arbitrator sustained in part and denied in part the grievance. The arbitrator first found that because the original protection order had been vacated, the initial discharge was invalid. However, the arbitrator reasoned that the Sheriff's Office was justified in not returning Morrison to employment, stating:

> It would be a serious problem for the Sheriff if [Morrison, upon reinstatement while subject to the conviction] were to violate his probation. . . . And have to be locked up with some of the criminals he arrested. Such a reasonably foreseeable situation is intolerable and supports a finding that just cause exists for . . . termination.[27]

Back pay was ordered from the date of his initial "premature discharge," May 28, 1998, to the date in which the domestic violence charge was filed, July 2, 1998.

What is especially interesting is that on appeal the parties gave differing characterizations of the arbitrator's ruling. The employer argued that the arbitrator considered Morrison's post-discharge conduct "only to construct an appropriate remedy for the invalid discharge." Morrison argued that, rather than constructing a remedy, the arbitrator "found a distinct justification for a second, valid discharge." Although agreeing that Morrison suffered a second discharge, the court found that Morrison never lost a property interest in his job and, thus, "he deserved all the protections that procedural due process requires for the deprivation of a property interest."[28] Morrison, said the court, received all the due process required (notice and an opportunity to view and contest the charges) at the arbitration hearing "which amounted to a post-deprivation hearing on his first discharge and both the pre- and post-deprivation hearings for his second discharge."[29] Finding that Morrison had adequate time during the two-day hearing to know of and rebut the second charge against him, the district court's order of summary judgment in favor of the Sheriff's Office was accordingly affirmed by the Sixth Circuit.

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[27] *Id.* at 2199.
[28] *Id.* at 2201.
[29] *Id.*

Suppose the employee's post-discharge conduct is *unrelated* to the initial reason for discharge? Courts and arbitrators are split on this issue.[30]

In *Sellers v. Mineta*,[31] the Court of Appeals for the Eighth Circuit considered an employee's post-discharge conduct (processing a false loan application) while working as a bank teller. Sellers' initial job was working for the federal government as an Air Traffic Controller at Lambert Field in St. Louis. After her termination she began work at Bank of America. The bank terminated her after she attempted to process an unauthorized loan application in the name of her spouse's former wife. When bank representatives questioned Sellers about the loan application, she admitted to the wrongful conduct, asserting that she had completed the application to obtain her spouse's ex-wife's credit history.

Seller's Title VII action was tried while she was still working at the bank. A jury awarded her $800,000 in non-economic compensatory damages and $345,000 in back pay, which was eventually reduced to $300,000. Later, the Secretary of Transportation moved for a stay of the proceedings with respect to equitable relief based on newly acquired information regarding her conduct while at the bank. A district court held that reinstatement was impractical because of the level of acrimony still present between Sellers and her co-workers, supervisors, and the Federal Aviation Administration (FAA). In lieu of reinstatement, the district court ordered front pay. On appeal, the Eighth Circuit framed the issue this way: "The primary issue presented is whether the post-termination misconduct of a discharged employee that would prevent reinstatement with the defendant/prior employer limits the equitable remedy of front pay."[32] The court asserted that an employee's post-termination conduct can, in some circumstances, limit an employee's remedies for a wrongful discharge, noting that under the National Labor Relations Act, for example, an employee could forfeit the remedy of reinstatement when he threatened his supervisors post-discharge.[33] In the words of the court:

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[30]Besides the cases discussed in this section, see *Hospital Central Services*, 109 LA (BNA) 785, 790 (D'Electto, 1997) (post-discharge evidence of arson and workers' compensation fraud not considered as conduct related to new charges, reasoning "such evidence may not be surprise or have as its purpose the initiation of new charges or a new cause of action to which the grievant must offer a defense").

[31]358 F.3d 1058, 93 FEP Cases 417 (8th Cir. 2004).

[32]93 FEP Cases at 419.

[33]*Id.* at 421 (citing Precision Window Mfg., Inc., 963 F.2d 1105, 1108, 140 LRRM 2321 (8th Cir. 1992)).

> We have also concluded that front pay would be unavailable where the plaintiff's own post-termination conduct prevented reinstatement. It requires no leap of faith to conclude that if an unreasonable rejection of an offer of reinstatement precludes a front pay award, then post-termination misconduct of a type that renders an employee actually unable to be reinstated or ineligible for reinstatement should also be one the "factual permutations" which is relevant in determining whether a front pay award is appropriate.[34]

The appellate court remanded the case to the district court for a determination of whether Sellers' conduct rendered her ineligible for reinstatement under the FAA's regulations, policies, and actual employment practices. The proper inquiry, said the court, is whether the FAA would have reinstated Sellers, not whether it would have terminated her.[35]

Taking the opposite view, the federal district court for the Northern District of Iowa, in *Carr v. Woodbury County Juvenile Detention Center*,[36] excluded a plaintiff's post-discharge conduct of marijuana use. Plaintiff Carr had been discharged from her employment as a youth worker as a result of a racially and sexually hostile work environment. The plaintiff filed a motion to exclude evidence of her post-termination use of marijuana that the employer discovered during trial preparation. Ruling for plaintiff, the court reasoned that the after-acquired evidence rule should not apply because the "marijuana use simply had nothing to do with and did not occur during her employment and caused her former employer absolutely nothing in detriment."[37] The court also reasoned that "the County had not established that the plaintiff's post-termination conduct was so severe that it would have terminated her for it."[38] Also noteworthy, the court found that it would be unfair to hold the employee accountable to the County's employment policies at a time (post-termination) when she was not receiving any of the benefits.

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[34] *Id.* at 422 (citations omitted).

[35] Here the court, in a footnote, declared:

> The FAA does not rely on Sellers' post-termination conduct as justification for her termination, nor could it as the conduct occurred two years after the termination. Rather, the FAA relies on it solely to avoid the equitable remedies of reinstatement or front pay, thereby shifting the inquiry to whether Sellers would have been reinstated.

*Id.* at 422 n.1.

[36] 905 F. Supp. 619, 69 FEP (BNA) Cases 1101 (N.D. Iowa 1995).

[37] 905 F. Supp. at 628.

[38] *Id.* at 629.

In a rare occurrence (but a splendid case on its facts), Arbitrator Samuel Nicholas, Jr., in *Union Oil Co.*,[39] reports a case where an employee was reinstated after being discharged for her off-duty involvement with drugs. In ruling for the grievant, Arbitrator Nicholas reasoned that it was unlikely that she would use drugs or become involved with their sale or delivery in the future, as the terms of her probation prohibited such continued use/delivery. Prior to reinstating the employee the company administered a routine physical examination, together with a drug screen, which denoted that the employee had used marijuana. Accordingly, the company construed the employee's drug use as a violation of the arbitrator's award and refused reinstatement. Both the union and the grievant filed suit to enforce the award. The District Court granted the company's motion for summary judgment, and the Fifth Circuit ruled that the issue whether the grievant's post-award use of drugs rendered enforcement of her reinstatement award against public policy should be resolved by the arbitrator.[40] The case was thus remanded to Arbitrator Nicholas for reconsideration.

Arbitrator Nicholas concluded that the remand was in the nature of a motion to alter or amend his award in light of newly discovered evidence. He correctly pointed out that "since arbitrators are generally considered *functus officio* once they have rendered their awards, such a request is, to say the least, rarely seen."[41] In the arbitrator's view the company was asking to "consider post-award events not available and not known to him or [the] Company at the time the original decision to terminate Grievant was made, and at the time the Arbitrator entered his finding that termination was not for just cause."[42] The arbitrator refused to engage in such "second guessing" and, accordingly, refused to reconsider his original decision. In his view, "absent a showing of fraud or dishonesty, the Arbitrator is not inclined to re-think his decisions of one of the parties."[43]

What is especially interesting is that the Arbitrator Nicholas passed on the question of whether the company would have just cause to now terminate the employee. The fact that the employee elected to use drugs at a date subsequent to his original award was

[39]92 LA (BNA) 777 (Nicholas, 1989).
[40]Oil, Chemical & Atomic Workers, Int'l Union, Local 4-228 v. Union Oil Co., 818 F.2d 437, 125 LRRM 2630 (5th Cir. 1987).
[41]*Union Oil Co.*, 92 LA (BNA) at 778.
[42]*Id.*
[43]*Id.*

a matter to be addressed by management in the future through discipline and/or discharge. Thus, the arbitrator's original award "was only concerned with Grievant's employability on that date, based on proofs presented to him."[44] No basis existed for changing the original award. The employer was accordingly free to re-terminate the employee, a result not inconsistent with existing case law regarding post-discharge conduct. Here again, a once-successful employee does not hold tenure against future action by management.

*Threats to Management or Co-Workers*

With few exceptions,[45] post-discharge conduct that involves threats made by the grievant to management or co-workers is likely to be considered relevant by an arbitrator, either as a new basis to support a dismissal (if the employer elects to treat the conduct as a new basis for discharge) or, alternatively, or as part of the remedy or mitigation determination. Either way, case law does not favor the grievant's case.

Arbitrator Louis Chang, in *Kapalua Land Co.*,[46] reports a case where the grievant, after his discharge, called a vice-president of the company and made serious threats, including "expect the worse," that he was going to "go off," and that he wanted to hurt a supervisor in the worse way, and that management should prepare for the worse. As a result of the threats, the company obtained a temporary restraining order and injunction preventing the employee from coming to the work site. Although not the grounds relied upon by the company in deciding to terminate the grievant, Arbitrator Chang found that the employee's post-termination conduct "has some pertinence." The arbitrator held that the employee's post-discharge conduct "does not support or warrant mitigation consideration."[47]

Similarly, Arbitrator Calvin William Sharpe, in *Jackson General Hospital*,[48] considered the post-discharge evidence of the grievant

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[44] *Id.*

[45] TNT Logistics N. Am., 116 LA (BNA) 1297 (Brodsky, 2002) (reinstating employee who made post-discharge threats, noting that employer did nothing to amend the employee's discharge to include the comments as additional grounds for termination, and employee expressed remorse for statements); Auto Warehousing Co., 114 LA (BNA) 699 (Brodsky, 2000) (considering employee's post-discharge conduct, threat to management, as relevant to remedy); Tarmac Va., 95 LA (BNA) 813 (Gallagher, 1990) (grievant's post-discharge threat not credited).

[46] 121 LA (BNA) 1269 (Chang, 2005).

[47] *Id.* at 1280.

[48] 113 LA (BNA) 1040 (Sharpe, 2000).

who, after his discharge for insubordination, threatened a witness. Finding the threats credible, Arbitrator Sharpe ordered back pay, but not reinstatement, on the ground that the employee made himself ineligible for employment. Reflecting the better view, the arbitrator had this to say:

> The Grievant's failure to deny these statements permits them to stand as undisputed evidence of the Grievant's conduct. Arbitrators have regarded such aggressive post-discharge behavior as rendering the offending employee unfit for further employment. The Grievant had a continuing obligation to live up to the terms of the Agreement during the processing of the grievance. The threats of assault and battery are in the nature of abusive conduct and disorderly conduct, both major offenses under [the collective bargaining agreement]. Accordingly, the Arbitrator holds the Grievant's threats make inappropriate the Union's claim for reinstatement.[49]

And in *Shaefer's Ambulance Service*,[50] Arbitrator Jack Calhoun, after endorsing black-letter law that "post-discharge conduct is not usually relevant to a just cause issue and arbitrators will not accept evidence of it as affecting the merits of the case resulting from the act that triggered the discipline," found the grievant's post-discharge threats dispositive with respect to the remedy. Concluding that an arbitrator should not order reinstatement if an employee's post-discharge conduct will cause an unacceptable employment relationship, Arbitrator Calhoun found that the employer lacked just cause to discharge the grievant, a paramedic, but denied reinstatement because the employee had threatened the company's president. Back pay was ordered from the date of the suspension to the date of the award, minus interim earnings, and also minus three months where the employee was unable to work because he was on medication that rendered him unable to drive.

Suppose the employee threatens suicide? Some companies have addressed the issue of suicide in their work rules.[51] Where the rules are silent, we see no problem in sustaining a separation of employment when an employee threatens suicide albeit post discharge. One problem for the employer, of course, is determining whether the employee is serious and, if so, determining whether it wants to assume the risk of an in-plant or on-premises suicide that could affect its facilities, workers, or customer base. We can envi-

[49] *Id.* at 1047 (citation omitted).
[50] 104 LA (BNA) 481, 486 (Calhoun, 1995).
[51] *See, e.g.*, the Work Environment Policy of American Airlines, which address suicide and threats of suicide by an employee.

sion a school district or airline taking such threats very seriously, wondering how an employee may take his or her own life.

### Post-Discharge Retaliation by Employers

Of passing (but related) note is the situation where management, after the dismissal, engages in some retaliation against the employee. Evidence that an employer engaged in post-termination discrimination against an employee is admissible as long as the conduct relates to the employment relationship.[52]

### Judicial Review of Arbitrator's Decisions Crediting Post-Discharge Conduct

With few exceptions, courts have been receptive to an arbitrator's decision to credit post-discharge evidence in a just cause context. In addition to the court decisions already discussed,[53] rulings by the Second, Third, Fifth, and Eleventh Circuits are noteworthy.

The Court of Appeals for the Second Circuit, in *St. Mary Home v. SEIU Dist. 1199*,[54] considered an employer's public policy claim that an arbitrator exceeded his authority in reinstating, without back pay or benefits, a nursing-facility employee who was discharged for possession of marijuana with intent to distribute. In finding that the employer lacked just cause, the arbitrator reasoned that the grievant was a long-term employee (14 years) without any major disciplinary problems at the facility. Significantly, the arbitrator pointed out that the grievant was amenable to rehabilitation and the state found him to be a candidate for an accelerated rehabilitation program. While the arbitration was pending the state reduced the charges against the employee to one of simple pos-

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[52] *See, e.g.*, Charlton v. Paramus Bd. of Educ., 25 F.3d 194, 64 FEP Cases 1414 (3d Cir. 1994); Passer v. American Chem. Soc'y, 935 F.2d 322, 56 FEP Cases 88 (D.C. Cir. 1991); Bailey v. USX Corp., 850 F.2d 1506, 47 FEP Cases 729 (11th Cir. 1988); EEOC v. Cosmair, Inc., L'Oreal Hair Care Div., 821 F.2d 1085, 44 FEP Cases 569 (5th Cir. 1987). Generally, an "employee" under fair employment legislation is considered an "employee" for purposes of post-discharge retaliation. *But see* Robinson v. Shell Oil Co., 70 F.3d 325, 69 FEP Cases 522 (4th Cir. 1995) (holding that Title VII's anti-retaliation provision does not protect discharged employee; prima facie case requires conduct occurring during employment).

[53] *See* Mohave Elec. Coop. v. NLRB, 206 F.3d 1183, 163 LRRM 2917 (D.C. Cir. 2000); Chicago Newspaper Guild v. Field Enters., Inc., 747 F.2d 1153, 117 LRRM 2937 (7th Cir. 1984); Sellers v. Mineta, 358 F.3d 1058, 93 FEP Cases 417 (8th Cir. 2004); Carr v. Woodbury County Juv. Det. Ctr., 905 F. Supp. 619, 69 FEP Cases 1101 (N.D. Iowa 1995). All are discussed in this chapter.

[54] 116 F.3d 41, 155 LRRM (BNA) 2456 (2d Cir. 1997).

session of marijuana and placed him in an accelerated rehabilitation program. Under that program, successful completion would result in the dismissal of charges and their expungement from one's record. Reflecting the better view, the Second Circuit had this to say regarding the arbitrator's use of post-discharge events:

> Since the arbitrator explained his conclusions in terms that offer a "colorable justification for the outcome reached," . . . our inquiry is at an end. Internal inconsistencies in the opinion are not grounds to vacate the award notwithstanding the Home's plausible argument that the arbitrator's decision was misguided or our own concerns regarding the arbitrator's conclusion. In contracting for arbitration of disputes over whether just cause existed for discharging employees, the parties bargained for a decision by the arbitrator, not necessarily a good one, and that is what they received.
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> We will not disturb the arbitrator's conclusion on the ground, argued by the Home, that the arbitrator exceeded the terms of his reference by considering post-discharge events, specifically [the grievant's] participation in the accelerated rehabilitation program. The arbitrator provided colorable justification for his determination by reference to several pre-discharge factors, a matter which we doubt.[55]

Rejecting the employer's public policy argument, the Second Circuit applied the Supreme Court's rationale in *Misco*[56] and correctly refused to vacate the award.

In *Healy v. N.Y. Life Insurance Co.*,[57] the Third Circuit held that post-termination performance evaluation of an employee *three weeks after he filed charges with the Equal Employment Opportunity Commission* did not provide evidence of "pretext" in an age discrimination case, even though the employee's prior ratings declined,

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[55]155 LRRM (BNA) at 2459 (citations omitted).

[56]United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 126 LRRM (BNA) 3113 (1987). The Second Circuit noted:

> In the context of arbitration contracts, a court's authority to refuse to enforce an arbitration award on public policy grounds is narrowly circumscribed "to situations where the contract is interpreted would violate some explicit public policy that is well defined and dominant . . . ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." *Misco*, 484 U.S. at 43 (internal quotation marks omitted).
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> Thus, as the Supreme Court indicated in *Misco*, courts may refuse to enforce arbitral awards only in those rare cases where enforcement of the award would be directly at odds with a well defined and dominant public policy resting on a clear law and legal precedent. Under current law, a public policy sufficient to vacate an arbitral award must be ascertained "by reference to . . . laws and legal precedents and not from general considerations of supposed public interest." *Misco*, 484 U.S. at 43 (internal quotation marks omitted).

155 LRRM (BNA) at 2460.

[57]860 F.2d 1209, 48 FEP Cases 459 (3d Cir. 1988).

at least in the case where the evaluation was not substantially different from previous evaluations and it cited performance problems that had been apparent in previous reviews. In the court's opinion, the mere fact that an employer relies on a post-discharge evaluation as justification for dismissal, although suspect, does not in itself create a factual dispute about whether the evaluation is pretextual.

In *Gulf Coast Industrial Workers Union v. Exxon Co.*,[58] the Fifth Circuit (notorious for substituting its own opinion for that of arbitrators) considered an arbitrator's award reinstating an employee (Woods) who was discharged for violating the company's alcohol/drug policy on two occasions. Applying its own sense of industrial justice, the Fifth Circuit, citing a public-policy rationale, concluded that the arbitrator exceeded his authority when he considered and relied upon the employee's post-discharge conduct, including drug and alcohol abstinence after one relapse. The court's reasoning is instructive on the issue of judicial inventiveness:

> As an alternative basis for vacating the arbitrator's award, Exxon also contends that the arbitrator below improperly considered "post-discharge good works" as a basis for reinstating Woods. As a result, argues Exxon, the arbitrator exceeded the scope of his authority under the contract. Specifically, the arbitrator considered and relied upon several assertions regarding Wood's post-discharge behavior, including (1) his post-relapse drug and alcohol abstinence, (2) his ability to hold a job, (3) his realization that he must live "one day at a time." In sum, the arbitrator considered these factors in making his just cause determination and in conjunction that Woods represented "a good bet for successful rehabilitation so that discharge is not justified at this point in his treatment." For its part, the Union urges strenuously that an arbitrator may properly condition his just cause determination on numerous factors, even those that arise after termination.[59]

After giving lip service to the Supreme Court's mandate in the *Steelworkers Trilogy* cases ("We are guided by our prior recognition that, to 'draw its essence' from the contract, 'an [arbitrator's] award must have a basis that is at least rationally inferable, if not obviously drawn, from the letter or purpose of the collective bargaining agreement'"), the appellate court went on to impose its view of what the arbitrator should have done regarding post-discharge evidence of rehabilitation:

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[58]991 F.2d 244, 143 LRRM 2375 (5th Cir. 1993).
[59]991 F.2d at 255.

> The inquiry is straightforward: should the arbitrator have relied upon evidence of events that occurred after Woods' discharge? Once again, the Supreme Court's decision in *Misco* provides important guidance. In *Misco*, the arbitrator refused to consider evidence unknown to the company at the time the grievant was fired. The Court noted that the arbitrator's refusal was merely a construction of what the agreement required when deciding discharge cases: "an arbitrator was to look only at the evidence before the employer at the time of the discharge. As the arbitrator noted, this approach was consistent with the practice followed by other arbitrators." 484 U.S. at 39–40, 108 S. Ct. at 371. The Court elaborated in a footnote:
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> Labor arbitrators have stated that the correctness of a discharge "must stand or fall upon the reason given at the time of discharge," and arbitrators often, but not always, confine their considerations to the facts known to the employer at the time of the discharge.

The court considered the parties' stipulation of the issue (i.e. whether the company's discharge of Woods was for just cause and, if not, what shall be the appropriate remedy), and concluded the question was worded in the *past tense*. "It is equivalent to asking, 'Did Exxon possess just cause on June 15, 1990 to terminate Thomas W. Woods?'" Thus, the arbitrator "should have confined his considerations only to the facts as they existed at the time Exxon made its termination decision."[60]

The Fifth Circuit stated that its decision was supported by most of the case law regarding the use of post-discharge evidence.

In *Delta Air Lines, Inc. v. Air Line Pilots Association*,[61] a case discussed by the *Exxon* court, the Eleventh Circuit reversed an arbitrator's decision that reinstated a pilot who flew while intoxicated. One stated basis for the court's reversal was the arbitration board's consideration of the grievant's post-discharge conduct, in this case the pilot's efforts at alcohol rehabilitation (i.e., the pilot was diagnosed as an alcoholic and had pursued a rehabilitation program with effective results). For guidance, the court turned to one of its previous decisions, *Butterkrust Bakeries v. Bakery, Confectionary & Tobacco Workers*.[62]

> *Butterkrust* holds that an arbitrator is bound to decide just cause for discharge, *vel non*, at the time of the discharge. The arbitrator's responsibility is discharged upon his determination of the existence of just cause. If this finding had been made, *the arbitrator is not authorized to employ "his own brand of industrial justice" and decide what post discharge*

[60] 143 LRRM at 2383–84.
[61] 861 F.2d 665, 130 LRRM 2014 (11th Cir. 1988).
[62] 726 F.2d 698, 115 LRRM 3172 (11th Cir. 1984).

> *good works would entitle the properly discharged employee to rehire.* While the arbitrator . . . may be an actual or potentially excellent personnel expert, his opinion as to what employment opportunities one ought to have if he or she, after discharge, constructively addresses the problems that lead to discharge is not pertinent to the arbitration duties. The arbitrator's effort to impose his views on that subject upon the parties to the arbitration amounts to his basing his decision upon "his own brand of industrial justice," which is forbidden.[63]

## A Theoretical Construct for Considering Post-Discharge Conduct: A Modest Proposal

While arbitrators continue to give lip service to the principle that a discharge must stand or fall based on what the employer knew at the time of the dismissal, like the rule against hearsay,[64] numerous exceptions exist. The rule is not technically "dead,"[65] but one can find support for the proposition that the exceptions have actually swallowed the rule and what is left is complete discretion by the trier of fact unencumbered by evidentiary constraints. Still, numerous "rules" or "principles" can be ascertained from reported decisions and the literature.

Without question, arbitrators continue to admit and credit evidence of the grievant's conduct, *both good and bad*, after the discharge. One arbitrator outlined a common-sense approach this way:

> In my view, post-discharge evidence garnered by either party can be admitted at [an] arbitral hearing. An extreme example serves to make the point. In the event a post discharge witness confesses to a theft charged against the grievant, or a witness recants a prior statement given to the employer thereby denoting the grievant's innocence, it flies in the face of fairness and justice to simply ignore such evidence. Conversely, where, for example, the grievant was discharged for be-

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[63] *Delta Airlines*, 861 F.2d at 699 (emphasis in original).

[64] Rule 802 of the Federal Rules of Evidence reads: "Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress." Rule 803 outlines 24 exceptions where the availability of the declarant is immaterial and Rule 804 5 exceptions where the declarant is unavailable. In addition, Rule 801(d) outlines with specificity statements that are not hearsay. Arguably, one can spend a lifetime familiarizing oneself with the hearsay rules and never get a workable handle on the rule and its application. See, generally, Hill & Westhoff, *The Use of Hearsay Evidence by Labor Arbitrators: A Primer and Modest Proposal*, V. 1998, No. 1 J. Dispute Resol. Univ. Mo. L. Rev. (1998), 1–35.

[65] A recent article in the *New Yorker* addresses the task of fact-checkers of articles accepted for publication. Apparently, the worst checking error is calling people dead who are not dead. "In the words of Josh Hersh, 'It really annoys them.'" See John McPhee, *Checkpoints*, New Yorker (Feb. 9 & 16, 2009), at 56. I submit that the doctrine that a discharge must stand or fall on what management knew at the time of dismissal, if ever the rule, is all but dead in the sense that the exceptions have effectively swallowed the rule.

ing under the influence of alcohol on the job and subsequent to discharge the employer discovered empty liquor bottles in his locker; or an employee is discharged for theft of an item valued at $5.00 and subsequent to discharge it is discovered that he stole items valued at $500, again such evidence should be admitted at arbitral hearing.

In my opinion it is not subsequently-discovered evidence but rather subsequently-discovered grounds for discharge that is precluded at the arbitral hearing. An employer is limited to the grounds set forth at the time of discharge. But neither the employer nor the union is precluded from offering at arbitration evidence which has been discovered post discharge.[66]

In some cases, a grievant's post-discharge conduct will completely disqualify him from a reinstatement remedy altogether or reinstatement to his former job.[67] Post-discharge threats against a witness or management, especially in the protective services or airlines or railroads, are usually sufficient to end an employee's expectation of reinstatement. In others, post-discharge conduct, not credited in a just cause or remedy determination, may be considered for credibility purposes.[68]

An employee dismissed for making threats or dishonesty should not engage in post-discharge conduct relating to threats and dishonesty. He or she should also refrain from introducing evidence of his or her "good character," for once he or she places character at issue (e.g., by introducing evidence of the good character), it is fair game for the other side to introduce instances of bad character, both pre- and post-discharge. There is, of course, an issue of relevance and overall probative value regarding accepting character evidence. The better rule may be to limit character evidence to the trait of truthfulness or untruthfulness and only in those cases where the employee takes the lead by making character an issue.

In those select cases where the grievant's post-discharge conduct is discovered *after* the hearing but *before the award is issued*, upon a showing of good cause management may be able to reopen the hearing. To this end Arbitrator Dennis Nolan, in *Atlantic Southeast*

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[66]AT&T, 102 LA (BNA) 931 (Kanner, 1994).

[67]Davidson Transit Mgmt., 99 LA (BNA) 924 (Hart, 1992) (crediting employee's post-discharge conduct and ordering reinstatement, but to different position).

[68]*See, e.g.*, Pepsi-Cola Bottling Co., 107 LA (BNA) 257, 261 (Ross, 1996) (noting that arbitrators have considered post-discharge evidence to corroborate other testimony supporting the discharge, in support of claims of lack of credibility, to prove motive, and to help determine the appropriate remedy); Shaefer's Ambulance Service, 104 LA (BNA) 481, 486 (Calhoun, 1995) ("evidence may be accepted in considering the remedy and the credibility of the grievant").

*Airlines*,[69] formulated the following test in electing to re-open an arbitration hearing in order to consider a flight attendant's failed drug test:

1. The request to reopen the hearing must precede the arbitrator's final award.
2. The proffered evidence must not have been available with due diligence at the time of the hearing.
3. The proffered evidence must be pertinent.
4. The proffered evidence must be likely to affect the outcome.
5. Admission of the new evidence must not improperly prejudice the other party.

Noteworthy in *Atlantic Southeast Airlines* is that Arbitrator Nolan had issued a draft award (distributed to Board Members only) reinstating the grievant with back pay. The employee's failed drug test occurred just prior to issuing the award. In granting the company's motion to re-open, Arbitrator Nolan ruled "that the proffered new evidence is pertinent to the appropriate remedy but not to the merits of the original decision."[70] He also noted that the company could have used the results of the new drug test to fire her again. Either way, Arbitrator Nolan's decision reflects case law in the area.

Clearly, the prevalent use of post-discharge conduct involves the employee's resort to rehabilitative efforts. The rationale most often expressed is that alcoholism and drug addiction cases are considered among the exceptions due to the recognition that addicted employees are often unable to face up to their problem until reaching a low, generally considered the loss of employment. Next in line are those cases where the employee, post-discharge, threatens individuals. Rare is the case where an arbitrator will not consider post-discharge evidence of threats, at least as part of the remedy determination.[71] Arbitrators have discretion to be

[69] 101 LA (BNA) 511, 512 (Nolan, 1992).

[70] *Id.* at 514.

[71] Threats of violence by an employee, either actual or implied, are serious business for an employer. Negligent hiring and retention of employees is still an active tort and would accord a cause of action for any co-worker injured as a result of management's negligence in retaining an employee with violent tendencies. Threats made *after* discharge but before an arbitration or administrative proceeding are relevant in a discharge case. There

wrong but not goofy. To not admit evidence of the grievant's post-discharge threats, especially as evidence that the threats make him or her ineligible for reinstatement, is arguably unsupportable.

Employees and/or unions that urge the arbitrator to consider evidence of an employee's post-discharge rehabilitation will be required to show, *first*, that the employee in fact suffered from a medical infirmity. Saying that the employee suffers from alcoholism or drug addiction will not make it so. Here, the introduction of competent medical evidence is critical. The use of an expert is, with few exceptions, obligatory to establish a medical infirmity. *Second*, there has to be some showing that the medical infirmity was in fact a cause of the conduct that resulted in the employee's termination. *Finally*, evidence must be proffered that the employee no longer suffers the effect of the infirmity. In other words, there must be a showing that the antecedent conditions causing infirmities in job performance no longer exist and affect the grievant.[72]

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is no protected status for an employee threatening violence. In this respect the Court of Appeals for the Eighth Circuit, in *Precision Window Mfg. v. NLRB*, 963 F.2d 1105 (8th Cir. 1992), ruled that an employee, discharged in violation of the Labor Management Relations Act for engaging in protected activity, forfeited his right to reinstatement when he made a threat to management and by making false statements under oath about his union activity, specifically threatening to kill a supervisor. In so holding the court had this to say regarding threats in the workplace:

> An employee is not free to engage in wanton conduct following an unlawful discharge and then hide behind the Act's protections. The Act's remedies are "not a sword with which one may threaten or curse supervisors."
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> Courts universally reject reinstatement when employees threaten to kill or harm supervisors after a firing, no matter how wrongful the discharge may have been and no matter how understandable the "animal exuberance" displayed.

We have no doubt that one of the court's declarations in *Precision Window* is applicable in arbitration cases: "By its very nature, a threat to kill is a threat that is more serious than any other." To this end the court observed:

> Absent actual physical assault, there is no conduct more serious than a threat of physical violence. Threats of physical violence lie outside the scope of the Act's protections, even if they are provoked by an unfair labor practice. (Citations omitted).

*See, e.g.*, Kappalua Land Co., 121 LA (BNA) 1269 (Chang, 2005) (holding discharge of employee proper for violating workplace violence policy, even though words contained no threats of physical harm and challenge to fight, and conduct caused no physical damage or injury, where conduct demonstrated loss of control and willingness to become physically violent and to engage in potentially damaging, violent conduct). *See also* Chrysler Motors v. Allied Ind. Workers, 2 F.3d 760 (7th Cir. 1993) (holding that when an arbitrator evaluating a discharge examines only the evidence against the employee known to the employer at the time of the discharge, and does not consider evidence against the employee discovered after the discharge, employer not precluded from discharging the employee again based on a "fresh reason for doing so.").

[72] *See* Hill & Westhoff, *"No Song Unsung, No Wine Untasted"—Employee Addictions, Dependencies, and Post-Discharge Rehabilitation: Another Look at the Victim Defense in Labor Arbitration,* 47 Drake L. Rev. 399–465 (1999) (lead article).

Hill and Westhoff, in their study of employee addictions and post-discharge rehabilitation, argue that under certain conditions an "addicted" employee, now "cured," may be deserving of a second chance:

> Perhaps the trend is this: Where an employee can show that his or her conduct (for example, absenteeism, fighting, aberrant behavior, insubordination) is a result of antecedent conditions that no longer exist (alcoholism, drug use, domestic problems), the employee is presumptively deserving of a second chance, especially if that employee's behavior has not passed the "envelope" of conduct expected of all employees in that specific industry. Thus, an employee who shows that the reason he was repeatedly late for work was because his alcoholic father kept him awake at night by calls for rides home from taverns, may have a good case when he produces a death certificate showing his father, the cause of his problem, passed away. Similarly, an employee who can show that his divorce "cured" him of job-related misconduct may have a better case than an employee who cannot demonstrate any "cure." For many arbitrators it is insufficient to simply allege the employee has a dependency or addiction problem. The determination whether the employee's misconduct was caused by his "disability" or "mental infirmity" is an element of the victim defense. Accordingly, as part of its burden in alleging mitigating conditions, the union will have to demonstrate a cause-and-effect connection between the misconduct and the antecedent disabling condition.[73]

It is a rare case where an advocate does not assert a hearsay objection at a hearing (nothing new here). One decision rule is to admit evidence of anything the grievant ever said or did, notwithstanding a hearsay challenge. The evidence may not be relevant, but it will survive a hearsay objection. Given a stated objective by the proffer of the evidence (albeit hearsay), the arbitrator can then go on to rule on its relevance. The same result is arguably applicable in cases involving the grievant's post-discharge conduct. "Related" and "connected" conduct, discovered after the discharge but before the hearing, carries the greatest probability of being admitted and credited by an arbitrator as part of a just cause determination. Similarly, conduct that is rehabilitative in nature

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For an application of these tests see *General Telephone Co. of Ind.*, 90 LA (BNA) 689 (Goldstein, 1988) (rejecting claim of post-discharge therapy as insufficient basis for reinstating utility-company employee who engaged in acts of voyeurism at customers' residences, despite suggestion that employee could be transferred to position without customer contact).

[73] *Id.* at 454.

(e.g., attendance in drug or alcohol rehabilitation programs) will generally be considered as evidence of mitigation. But not always. There are arbitrators, although in the minority, who shy away from giving the grievant one last chance after he or she has been discharged because of drug or alcohol rehabilitation. These arbitrators generally reason that neutrals have no authority to require the employer to treat its employees with any greater compassion than is mandated by the collective bargaining agreement.[74] Other arbitrators believe that if an employee's actions after a discharge could be used to reverse a discharge decision, management would be placed in an impossible position (i.e., whenever employees are discharged for intoxication, they need only seek some sort of rehabilitation program to bolster their cases).[75] Although an arbitrator may declare that post-discharge evidence is being limited to remedy issues only (in those cases where post-discharge rehabilitative conduct is considered), often this is an illusory distinction.[76] If the facts are germane to the alleged offense, then they are likely to be considered under an "objective" view of just cause, certainly within the arbitrator's range of authority.

Where conduct is adverse to the employee's case and unrelated to the original charge (threats against a witness or a management official), the employer probably has the option of introducing the conduct in the initial arbitration proceeding or waiting for the award and asserting it as a new basis for discipline. What is clear is that any "newly discovered" evidence that is going to be used in an arbitration proceeding should be disclosed prior to the hearing, especially when the evidence is unrelated to the original charge. Where one side has the evidence in its possession and does not disclose it to the other until the day of the hearing, it may well

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[74] *See, e.g.*, Duquesne Light Co., 92 LA (BNA) 907 (Sergent, 1989).

[75] *See, e.g.*, Pittsburgh & Midway Coal Mining Co., 91 LA (BNA) 431 (Cohen, 1988).

[76] One arbitrator, in *ITT Continental Baking Co.*, 79 LA (BNA) 166, 170 (Modjeska, 1982) (quoting C. Summers), observed: "There is an inherent unfairness in discharging employees first, and then determining whether they deserve it. The action once taken loads the scales with a desire to justify, and short of arbitration the burden is put on the employee and the Union to persuade the company that the employee is entitled to his job back." Arguably the scales are evened out when germane facts, whether discovered pre- or post-discharge, are considered as part of an objective view of just cause. At minimum, the employee is accorded a full and fair opportunity to be heard when the facts are appropriately considered. *Id.* at 169.

be excluded as "surprise" evidence.[77] Constitutional due-process rights are not applicable in an arbitration hearing, but due-process considerations carry considerable weight under a just cause standard. Accordingly, an employer is urged to err on the side of disclosure prior to the hearing, although the rules regarding surprise evidence are applicable to both unions and employers.

In summary, the better rule regarding the use of post-discharge evidence is that the after-discovered evidence may be used to sustain a discharge decision, even though the evidence was not considered in management's initial decision to terminate, especially when (1) the conduct arose during the course of the grievant's tenure, (2) it is the same kind of misconduct for which the employee was dismissed, and (3) the conduct is consistent with the employer's theory of its case. To ensure its admissibility and consideration by the arbitrator, it helps that all three are satisfied. However, case law supports arbitral consideration of post-discharge conduct where only one of the above facts is present. Again, the evidence should be divulged to the union as soon as it is discovered, preferably during the grievance process, and notification proffered that management intends to use the evidence at the hearing.[78] Such procedure arguably satisfies any due process rights the employee would other otherwise possess under a contractual or constitutional standard.

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[77]Group W Cable of Chicago, 93 LA (BNA) 789, 797 (Fischbach, 1989) (crediting post-discharge evidence absolving employee from rule violation where evidence closely intertwined with employee's contractual due process rights and management's duty to fully investigate alleged offense that led to his discharge).

[78]UMW District 6, 110 LA (BNA) 84 (Ruben, 1997) (crediting post-termination evidence of bookkeeper's mistakes, noting that after-acquired evidence had not been deliberately withheld from union and most, if not all, of additional episodes were divulged to union during grievance process).