III. The Decision-Making of Labor Arbitrators in Discipline and Discharge Cases Where a Grievant Offers an Apology: A Policy-Capturing Study

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This study is an examination of the impact of a grievant's offer of apology on labor arbitrators' decisions in discipline and discharge cases. A research methodology called "policy capturing" was used to assess the weight labor arbitrators place on apologies in discipline and discharge cases. This method involves providing arbitrators with a number of different hypothetical scenarios that varied the type of employee misconduct (insubordination versus sexual harassment), the timing of the apology (early versus late), the type of apology (sincere versus insincere), and the seniority of the grievant. We asked arbitrators to render a decision in light of the changes in the scenarios. We assess the importance of apologies and other factors by testing whether the introduction of changes to a scenario alters the probability that the arbitrator reduced the hypothetical grievant's punishment or reversed the discharge entirely. The results of the study demonstrate that the sincerity of the apology and the seniority of the grievant positively and significantly correlate with the arbitrator's decision to reduce the degree of imposed discipline or reverse a discharge.

Background: The Ubiquity of Apologies

When conflict emerges in any realm of public dialogue, government officials may issue public apologies to reduce tension levels and to bring the matter at hand to closure. Examples of public apologies are numerous, and have included important figures from major political, legal, and religious institutions across the world. In American politics, relevant examples include Republican candidate George Allen's apology for the use of an ethnic slur

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("macaca") during his Virginia Senate campaign, Senator Larry Craig's apology to his family for an alleged homosexual rendezvous in a Minneapolis airport men's room, and South Carolina Governor Mark Sanford's apology for lying to his wife and aides that he was walking on the Appalachian Trail when he was actually in Argentina with his lover. There are more significant policy-related apologies, some of them tremendous in scope, such as Pope John Paul's apology for the Holocaust, former British Prime Minister Tony Blair's apology to the Irish people for the potato famine, and former South African State President F.W. de Klerk's botched apology for Apartheid.

In mediation, practitioners will adamantly assert that the apology may be the centerpiece of reaching an agreement.[1] We also know that in an area that is costing the medical profession millions of dollars, the malpractice area, some hospitals, such as the University of Michigan, are instituting new apology programs that have reduced (in Michigan's case) medical malpractice claims from 121 claims in 2001 to 61 claims in 2006. The backlog of claims has been reduced from 262 in 2001 to 83 in 2007, with a reduction in the processing time from 20 months to 8 months.[2]

Apologies are part of reality for those in the public spotlight, but they also play an important role in conflict resolution, mediation, and judicial proceedings. This article seeks to understand the role apologies play in one of the areas of conflict resolution—arbitration—through an empirical study of the effect of apologies on the decision making of labor arbitrators. The arbitrations referenced here are grievance arbitration disputes, not interest arbitration. Grievance arbitration disputes arise in an employment setting where there is a union and an employer, and where the labor organization and management have established a collective bargaining agreement that specifies the redress of a grievance through final and binding arbitration.[3]

The authors surveyed the entire membership of the National Academy of Arbitrators (NAA) (586 arbitrators), randomly assigned each member a different hypothetical scenario, and asked each to indicate how he or she would rule. To test the role apolo-

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[1]Hoffman, *The Use of Apology in Employment Cases*, 2 Employee Rts. Q. (2002), 21–32; Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 Mich. L. Rev. (2003), 460–516.

[2]Goodman, *Saying Sorry Pays Off*, Associated Press (July 20, 2009).

[3]Although there has recently been a trend toward establishment of employment arbitration in non-union settings, and although there is interest arbitration for baseball players and public safety employees in some states, the focus here is grievance arbitration.

gies play in arbitration decisions, the cases varied as to whether the grievant proffered a sincere apology, an insincere apology, or offered no apology. Further, the cases also varied the timing of the apology (early or late), the grievant's seniority (2 years or 25 years), and the issue in the case (sexual harassment, insubordination due to use of profanity, or insubordination due to refusal to work). The work record for all scenarios remained constant: The grievant had an above-average work record. Finally, there was no variation across the scenarios in past violations: All the scenarios depicted a grievant who had received discipline previously for the same infraction. Therefore, the grievant was a repeat offender. Overall, there were 1,773 different cases ruled on by 180 arbitrators in this study.[4]

Because part of our research addresses the impact of sincere versus insincere apologies, the concept of sincerity requires some explanation. Sincerity in apologies is dealt with in great detail in the review of the literature that follows, where it is often alternatively called an "effective" or "complete" apology. The offer of a sincere apology helps restore equilibrium by correcting the imbalance caused by the offense. Complete or sincere apologies involve a statement that acknowledges wrongdoing against a person (not just a statement of regret) as well as an acknowledgment by the wrongdoer that he or she takes responsibility for the action, according to Lazare.[5] We acknowledge that, in large part, sincerity is in the eye of the beholder. In the forum of arbitration it is the labor arbitrator's call as to what constitutes a sincere apology, just as it is the arbitrator's call as to whether a grievant is credible. Often the issue of credibility is inextricably intertwined with the arbitrator's finding regarding the sincerity of the apology. For purposes of this article, the phrase "sincere apology" is interchangeable with the phrase "credible and complete apology."

Industrial Relations Literature

The industrial relations literature includes many piecemeal studies on how characteristics of different arbitrators, different grievants, and different case characteristics can affect the decision in discipline or discharge cases, resulting in higher rates

[4]Wheeler, Klaas, & Mahoney, *Workplace Justice Without Unions* (W.E. Upjohn Institute for Employment Research 2004).

[5]Lazare, *Go Ahead and Say You're Sorry*, 40 Psychol. Today (1995), at 43. Lazare, *On Apology* (Oxford University Press 2005).

of reversal of discharge or of reduction in penalty. Specifically, industrial relations scholars attempt to predict arbitral outcomes by using the arbitrator's demographic characteristics, the type of issue in the case, the grievant's work history, the grievant's past record of violations, and the grievant's seniority. Most of these were necessarily narrow studies, for instance all the discharge cases in a certain industry in a certain range of years, or some or all of the discipline cases in a particular state or region.

Labor arbitrator characteristics thought to be important to their decisions include the arbitrator's age, gender, and/or education. The results on the importance of the arbitrator's age as a predictor of arbitral outcome are inconsistent at best. A 1983 study by Heneman and Sandver found that age made no significant impact on the arbitral award.[6] However, a 1990 study by Bemmels found that the age of the arbitrator tended to be correlated with sustaining the grievance in discharge cases.[7]

Developing parallel to the finding of gender effects in judicial proceedings,[8] industrial relations scholars have studied whether the gender of the arbitrator makes a difference to the outcome. Although Bemmels found a slight bias in finding in favor of female grievants in arbitration cases, most of this research found no correlation between gender and outcomes.[9] Block and Steiber did find a pattern of female arbitrators leaning toward shorter suspensions than their male counterparts.[10] Additionally, Caudill and Oswald found that female arbitrators were less likely to fully reinstate

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[6]Heneman & Sandver, *Arbitrators' Backgrounds and Behavior*, 4 J. Lab. Res. (1983), 115–124.

[7]Bemmels, *Arbitrator Characteristics and Arbitrator Decisions*, 11 J. Lab. Res. (1990), 181–192.

[8]Menkel-Meadow, *Lawyering in a Different Voice 1985* in Cases and Materials on Feminist Jurisprudence: Taking Women Seriously, eds. Becker, Bowman & Morrisson (St. Paul Minnesota: West Publishing Co. 1994), 856–60; Martin, *Women on the Bench: A Different Voice*, Judicature, Vol.77, No.3 (Nov.–Dec. 1993), 126–28; Martin, *Differences in Men and Women Judges: Perspectives on Gender*, J. Pol. Sci., Vol. 17 (1989); Davis, Haire, & Songer, *Voting Behavior and Gender on the U.S. Courts of Appeal*, 77 Judicature (1993), 129–33; Rhode, *Progress for Women in the Law—But no Parity Yet*, Nat'l L.J., Vol. 19 No. 26 (Feb. 24, 1997), A23; Myers, *Bias Against Women Lives on, Hearings and ABA Study Show*, Nat'l L.J., Vol. 18, No. 27, (Mar. 4, 1996), A16.

[9]Bemmels, *Attribution Theory and Discipline Arbitration*, 44 Indus. & Lab. Rel. Rev. (1991), 548–62; Bemmels, *Gender Effects in Grievance Arbitration*, 30 Indus. Rel. (1991), 150–63; Bemmels, *Gender Effects in Discharge Arbitration*, 42 Indus. & Lab. Rel. Rev. (1988), 63–76; Bigoness & DuBose, *Effects of Gender on Arbitrators' Decisions*, 28 Acad. Mgmt. J. (1985), 485–91; Heneman & Sandver, Heneman & Sandver, *Arbitrators' Backgrounds and Behavior*, 4 J. Lab. Res. (1983), 115–124; Scott & Shadoan, *The Effect of Gender on Arbitration Decisions*, 10 J. Lab. Res. (1989), 429–36; Thornton & Zirkel, *The Consistency and Predictability of Grievance Arbitration Awards*, 43 Indus. & Lab. Rel. Rev. (1990), 294–307.

[10]Block & Steiber, *The Impact of Attorneys and Arbitrators on Arbitration Awards*, 40 Indus. & Lab. Rel. Rev. (1987), 545–55.

grievants than their male counterparts.[11] Finally, Crews and Hoyman found that, although there was no direct effect of the arbitrator's gender on the outcome, there was an interaction effect: If the gender of both the arbitrator and the grievant is female, this combination has a significant and positive effect on the probability that an arbitrator will remove the discipline or reduce the penalty over the probability of an arbitral reversal of management's punishment for other gender combinations of arbitrator-grievant such as male-male, female-male, or male-female.[12]

Industrial relations researchers have also examined arbitrator backgrounds to test whether education matters. Bemmels found that Ph.D.s were less likely to reinstate grievants than were arbitrators with Master's or law degrees. These studies also found that both grievant characteristics and the nature of the case will influence arbitral decision making.[13]

In addition, there are strong arguments made that one of the most important factors concerning the grievant is his or her seniority, with greater seniority typically leading to greater chance the grievant will prevail. This is consistent with arbitral case law and the law of the shop.[14] There is also a study by Wheeler, Klaas, and Mahoney that finds that outcomes vary significantly by the institutional role of the decision maker: Arbitrators are most likely to rule in favor of the grievant (55 percent of the time), an employment arbitrator will rule for the grievant 25 percent of the time, an employment arbitrator (for cause) rules in favor of the complainant 33 percent of the time, a peer review rules in favor of an aggrieved person 45 percent of the time, a juror rules in favor of a defendant 38 percent of the time, and a labor court rules in favor of the aggrieved 51 percent of the time.[15]

Scholars also find that work history of the grievant factors into an arbitrator's decisions. For example, Simpson and Martocchio used an experimental protocol that presented different factual

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[11]Caudill & Oswald, *A Sequential Selectivity Model of the Decisions of Arbitrator*, 14 Managerial & Decisional Econ. (1993), 261–67.

[12]Crews & Hoyman, *Arbitration as a Social System: The Importance of Gender and Other Characteristics in Determining Arbitrator Reasoning*, Conference paper presented at the Midwest Political Science Association (Apr. 10–12, 1997).

[13]Bemmels, *Arbitrator Characteristics and Arbitrator Decisions*, 11 J. Lab. Res. (1990), 181–192.

[14]Volz & Goggin eds., Elkouri & Elkouri, How Arbitration Works, 5th ed. (BNA Books 1997), at 929–30.

[15]Wheeler, Klaas, & Mahoney, *Workplace Justice Without Unions* (W.E. Upjohn Institute for Employment Research 2004).

scenarios to labor arbitrators.[16] The scenarios manipulated seniority, absenteeism history, disciplinary record, job performance, and due process. The study found that the following treatment effects were significant: (1) seniority in predicting that the grievant prevailed, (2) poor attendance in predicting discipline or discharge being upheld, (3) a prior disciplinary record, and (4) poor job performance in predicting strictness of the arbitrators' rulings. Overall, these findings suggest that labor arbitrators assess the probability of rehabilitation versus repeat offender behavior partially based on the grievant's work performance.

The findings on arbitral outcomes as predicted by the type of issue, or employee offense, being heard are varied and inconsistent.[17] One study by Block and Steiber found that insubordinates were treated more leniently than those who were discharged for other reasons.[18] Not only have the results of other studies varied, but the issues studied have varied, yielding a pattern that is a patchwork quilt. Gross views an arbitral decision as a value choice.[19] For instance, the value choice for the arbitrator in a safety and health situation, where an employee refused to follow an order due to safety concerns, could be cloaked as safety and health value versus the value of supporting authority figures such as the management hierarchy, by the grievant defying an order. Gross builds a compelling case for this balancing act view of arbitral decision making, however, some arbitrators view their role (naively or not) as solely and objectively finding the facts and objectively reading the collective bargaining agreement, rather than as making a value choice. It is much easier to convince a social psychologist or a judicial scholar of the value choice orientation than it is to convince an arbitrator.

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[16]Simpson & Martocchio, *The Influence of Work History Factors on Arbitration Outcomes*, 50 Indus. & Lab. Rel. Rev. (1997), 252–67.

[17]Common reasons for an employee's discipline or discharge include lying, absenteeism, insubordination, sexual harassment, the use of profanity, refusing to work, and so forth.

[18] Block & Steiber, *The Impact of Attorneys and Arbitrators on Arbitration Awards*, 40 Indus. & Lab. Rel. Rev. (1987), 545–55.

[19]Gross, *Value Judgments in the Decisions of Arbitrators*, in Arbitration 1997: Proceedings of the 50th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA 1998), 212–25; Gross, *Value Judgments in the Decisions of Labor Arbitrators*, Indus. & Lab. Rel. Rev., Vol. 21 (1967), 55–72.

Apology Literature

To date, there is no scholarly work assessing whether an aggrieved employee's apology increases the likelihood of getting the penalty for his or her discipline reduced, or getting his or her discharge reversed, by the arbitrator. However, scholars have examined the impact of apologies in other forums such as the courts. These studies have suggested that apologies have a therapeutic, healing, or "evening the score" effect that makes it possible for the injured party to accept the offered settlement and apology by the offending party and move on.

Definition of Apology

Lazare, a psychologist, is one of the major scholars on apologies and how they work.[20] According to Lazare,[21] the core components of an apology include four requirements:

1. It must contain an acknowledgement that a moral norm was violated.
2. It must express acceptance of responsibility for the offending act.[22]
3. It must be specific.
4. It must acknowledge impact and damage.

Smith adds another element necessary for an apology, that is, an explanation or agreement as to the facts of what occurred.[23] Smith calls this a "categorical" apology. Smith does acknowledge that there are multidimensional and contextually driven aspects of apologies, making the definition and meaning of apology both complex and ambiguous. In addition, Tavuchis asserts that more important than an expression of genuine regret and remorse for harm done is that the offender acknowledges that a moral principle was violated.[24]

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[20]Lazare, *Go Ahead and Say You're Sorry*, 40 Psychol. Today (1995), at 43; Lazare, *On Apology* (Oxford University Press 2005).

[21]*Id.*

[22]Experiments by Robbennolt support the importance of taking full responsibility in the apology. Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 Mich. L. Rev. (2003), 460; Robbennolt, *Apologies and Settlement Levers,* Court Review (Forthcoming 2009).

[23]Smith, *The Categorical Apology*, 36 J. Soc. Phil. (2005), 473–96.

[24]Tavuchis, *Mea Culpa: A Sociology of Apology and Reconciliation* (Stanford, CA: Stanford University Press 1991). *See also* Taft, *Apology Subverted: The Commodification of Apology*, 109 Yale L.J. (2000), 1135–60.

The Impact of Ineffective Apologies

What constitutes a bad or ineffective apology as opposed to a good or effective apology? Both Lazare and Davis use Richard Nixon's resignation speech as the consummate example of a failed apology because it contained only regrets, and did not provide acceptance of responsibility and acknowledgement of what he did wrong.[25] This quote from Nixon's resignation speech on August 8, 1974, illustrates the point:

> I regret deeply any injuries that may have been done in the course of events that have led to this decision (to resign). I would say only that if some of my judgments were wrong, and some were wrong, they were made in what I believed at the time to be in the best interest of the nation.[26]

In contrast to the Nixon apology, the literature is full of examples of effective apologies.[27] Fox and Stallworth found that apologies can be effective in resolving employment disputes over bullying, even racial or ethnic bullying, but the acceptance rates varied with the race of the offended party and the status of the offender.[28]

There is empirical evidence that a partial or botched apology may make the situation worse when compared with simply not apologizing. An experiment by Robbennolt involved the hypothetical scenario of a bicyclist and pedestrian accident. The acceptance rate for a partial apology was 35 percent, which was even lower than the acceptance rate of 51 percent for no apology. It is worse to offer a lackluster apology than not to apologize at all. In another study by Robbennolt, which was a controlled experiment regarding the factors associated with the ease of settlement, apologies were found to be critical to promoting settlement by altering the injured parties' perceptions of the situations and the perception of the offender such as to make them more accepting of a settlement discussion. The apology actually brings about a change in the values of injured parties' settlement levers in ways that are likely to increase the chances of settlement.[29]

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[25]Lazare, *Go Ahead and Say You're Sorry*, 40 Psychol. Today (1995), at 43; Lazare, *On Apology* (Oxford University Press 2005); Davis, *On Apologies*, 19 J. Applied Phil. (2002), 169–73.

[26]Lazare, *Go Ahead and Say You're Sorry*, 40 Psychol. Today (1995), at 76.

[27]Levi, *The Role of Apology in Mediation*, 72 N.Y.U. L. Rev. (1997), 1165–1210.

[28]Fox & Stallworth, *How Effective Is an Apology in Resolving Workplace Bullying Disputes*, 61 Disp. Resol. J. (2006), 54–63.

[29]Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 Mich. L. Rev. (2003), 460. See another Robbennolt study on conditions favorable to settlement talks: Robbenolt, *Apologies and Settlement Levers*, 3 J. Empirical Legal Studies (2006), 333–73.

Hoffman's 2002 study of the use of apology in employment cases indicated that it was extremely difficult for companies to give an apology to an employee whom they had just fired.[30] However, sometimes an apology for the way in which the person had been fired was as important as the monetary settlement on the table, according to Levi.[31] Levi points out many limits to the apology as a solution, highlighting that issuing a sincere apology is rare and may create vulnerability (or potential legal exposure) as a practice. Thus, some scholars, such as Taft, recommend the creation of apology laws, or Safe Harbor laws, or the invocation of Rule 408 of the evidentiary rules, in order to encourage the use of apologies without liability.[32]

How Do Apologies Work?

There are many answers to the question of "What is the mechanism by which apologies work?" Tavuchis and Taft view the offer of an apology as a process of creating a new (and now even) moral ground, as it is this mutual adherence to a moral principle, a law, or a company rule (in the case of labor arbitration) that binds the parties together.[33] An alternative framework is the power frame. The original transgression raises the offender above the victim, whereas the offended may have been the supervisor in the case of insubordination. Thus, the offending party has caused disequilibrium in the authority relationship. Therefore, an apology restores the equilibrium in the power relationship between the actors to the status quo ante. Still, others argue that apologies heal the wounds generated in interpersonal conflict. This is an indirect route to reestablishing trust, and ultimately reconciliation. Note that practitioner-scholars who are mediators think that all disputes on one level are "personal," even if they are over legal matters.

Finally, viewed through the lens of exchange theory, one trades an apology for another thing, like exoneration. Taft refers to this as the "commoditization" of apologies, in which what Taft views as non-reflective mockeries of apologies are traded for lesser penalties like goods. Taft argues that this cheapens the process

[30]Hoffman, *The Use of Apology in Employment Cases*, 2 Employee Rts. Q. (2002), 21–32.
[31]Levi, *The Role of Apology in Mediation*, 72 N.Y.U. L. Rev. (1997), 1165–1210.
[32]Taft, *Apology Subverted: The Commodification of Apology*, 109 Yale L.J. (2000), 1135–60.
[33]Tavuchis, *Mea Culpa: A Sociology of Apology and Reconciliation* (Stanford, CA: Stanford University Press 1991); Taft, *Apology Subverted: The Commodification of Apology*, 109 Yale L.J. (2000), 1135–60.

of apologizing.[34] Lazare frames the apology phenomenon as an exchange of both shame and power.[35]

Apology Usage in the Context of Mediation, Arbitration, and Judicial Proceedings

Arbitration is a more formal and more uniform proceeding than mediation. It is conducted as a quasi-judicial proceeding with a tightly scripted protocol. The rules of evidence such as hearsay are more relaxed than in regular court proceedings, but there is no discovery in arbitration. It is noteworthy that the earlier steps in the grievance procedure are a form of fact finding. A number of contracts provide for exchange of information and in fact the National Labor Relations Act requires it. However, these information-gathering procedures and requirements fall well short of the discovery required by regular court proceedings. Nonetheless, labor arbitration is an adversarial process in discipline and discharge case proceedings, with evidence being entered in the form of testimony after direct and cross-examination. If the grievant is called as a witness (which is not a certainty), then he or she can tender an apology or express remorse at the hearing. This would be what we call a "late apology." How would an arbitrator know of a so-called "early" apology—one that happened before the arbitration hearing? Such an apology might be mentioned by the advocate for the union or the company in opening or closing statements or via direct or cross-examination. In our scenarios these are simply scripted as an early apology or as a late apology.

Mediation is an interest-based process and is more variable than arbitration. Mediation is also usually a confidential process in which settlement offers are, as a rule, not admissible in any subsequent arbitral proceeding or in any subsequent administrative/judicial proceedings. What occurs in the mediation process will be influenced greatly by the relationship between the two parties, by the philosophy of the mediator, by the presence or absence of attorneys in the room, and by the parties' experience with mediation.[36] Finally, mediation can be affected by concerns over whether an apology would constitute an admission of guilt in employment

[34]Taft, *Apology Subverted: The Commodification of Apology*, 109 Yale L.J. (2000), 1135–60.
[35]Lazare, *Go Ahead and Say You're Sorry*, 40 Psychol. Today (1995), at 43; Lazare, *On Apology* (Oxford University Press 2005).
[36]Brown, *The Role of Apology in Negotiation*, 87 Marq. L. Rev. (2004), 665–73; Levi, *The Role of Apology in Mediation*, 72 N.Y.U. L. Rev. (1997), 1165–1210.

cases as well as civil and criminal liability cases.[37] Thus, the more formal and judicial the nature of a proceeding is, the less likely a grievant is to apologize, as lawyers for the alleged wrongdoers often advise against an apology.

Methodology

The empirical studies of arbitral outcomes rely on two alternative methodologies: coding published cases from a source such as the Bureau of National Affairs' *Labor Arbitration Reports* or surveying arbitrators for their decisions on hypothetical scenarios. Both methods have strengths and weaknesses. The problem with coding published cases is that only a very small number of nonrandom selected cases are published annually and the bias in the selection of cases is not measurable. The full population of arbitration cases is not a known quantity as arbitration is a private proceeding and public records do not track private grievances. So, we decided to use the surveys of arbitrators approach for our research design.

This study is of NAA members to test our propositions regarding the impact of grievants' offers of apologies in discipline and discharge cases. In this survey we use hypothetical scenarios to assess what arbitrators will actually do when a grievant offers an apology. Rather than asking respondents if they believe apologies matter in their decision-making process, this approach allows us to "capture" whether or not sincere apologies are affecting their decision making.

The arbitrators were randomly assigned to one of six discipline and discharge scenarios: (1) discipline or (2) discharge for a sexual harassment case; (3) discipline or (4) discharge based on insubordination (because of use of profanity); or (5) discipline or (6) discharge for insubordination (a refusal to work). Each arbitrator was asked to complete a survey containing a series of hypothetical scenarios that varied apology type and the grievant's seniority.

The five different apology types were: (1) no apology; (2) an early sincere apology; (3) a late sincere apology; (4) an early insincere apology; and (5) a late insincere apology. An early apology is an apology rendered when the grievant's action is first brought to

[37]Hoffman, *The Use of Apology in Employment Cases*, 2 Employee Rts. Q. (2002), 21–32; Levi, *The Role of Apology in Mediation*, 72 N.Y.U. L. Rev. (1997), 1165–1210; Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 Mich. L. Rev. (2003), 460; Robbennolt, *Apologies and Settlement Levers,* Court Review (Forthcoming 2009).

the attention of a first line supervisor, or else at the lower steps in the grievance procedure. A late apology occurs at the arbitration hearing and is rendered to the multiple audiences of the arbitrator, the company whose rules were violated, and possibly to the wronged individual (who may or may not be in the room). Each of the five apology scenarios was then varied by seniority (2 or 25 years) within the survey. This gave each arbitrator 10 hypothetical cases (five apology scenarios with two seniority conditions) to decide. Other basic facts in the case do not vary. The work record and past performance remain constant: the work record of all the grievants is good. However, the past disciplinary records in all scenarios include infractions for the same offense, so past disciplinary record is uniformly bad. Hypothetical cases were constructed in this way in order to isolate the effect of the apology.

The 586 NAA members were each randomly assigned to one of the six issue scenarios, and received the scenario and the survey in the mail. Within the assigned issue, each arbitrator was provided 10 cases and was asked how he or she would decide each hypothetical scenario. Five cases involved different apologies given by an individual with 2 years of seniority, while the other five cases involved an individual with 25 years of seniority. The number of arbitrators responding was 180, but the total number of hypothetical scenarios completed was 1,773. The unit of analysis of this study is the case. The 31percent response rate of the survey is roughly comparable with other studies, whose response rates vary from 11 percent to 32 percent.[38]

The group for the survey was compiled from the NAA members list. The NAA represents a select group of labor arbitrators, with the experience and age level being higher on average than labor arbitrators on the Federal Mediation and Conciliation Service (FMCS) list or on the American Arbitration Association (AAA) list.[39]

We checked for whether our respondents differed from our non-respondents on two characteristics: gender and issue. We found that respondents were representative of the total pool NAA members along these two criteria. We found that 84 percent of the returned surveys were from males and that 83 percent of the NAA members are male. We also checked for response bias by

[38]Judge & Martocchio, *Dispositional Influences on Attributions Concerning Absenteeism*, 22 J. Mgmt. (1996), 837–61.

[39]The NAA was the only population list of arbitrators available to the researchers; the others (FMCS and AAA) were not available.

type of issue, finding that the distribution of cases by issue in the returned surveys looked much like the distribution of issues that were mailed to the survey respondents—which was one third for each type of issue. Thirty-one percent of returned surveys involved profanity-based insubordination cases. Thirty-four percent of the cases were sexual harassment cases. The remaining 35 percent of cases involved insubordination based on refusal to obey a work order.

Findings

First, we examine the simple association between the main treatment variables: seniority and apology with the dependent variable—whether or not the arbitrator reversed or reduced the penalty. Specifically, cases in which the arbitrator reversed or reduced a penalty were coded one. Cases where the arbitrator affirmed the penalty were coded zero. By aggregating up individual survey responses to the different scenarios and calculating the arbitrator reverse or reduce rate, we can see how apology and seniority influence arbitrator decisions. The arbitrator reverse or reduce rate is the number of cases either partially or completely overturned over the total number of cases of decided. We expressed these in percentage terms. This effectively allows us to estimate the probability that the arbitrator will reverse or reduce management's punishment under different a set of conditions (e.g., whether or not the grievant makes a sincere apology). The arbitrator reverse or reduce rate is the dependent variable. If our theory is correct, then the reverse or reduce rate should be higher for the sincere apology scenario and for scenarios involving a more senior grievant than for no apology/insincere apology scenarios and scenarios involving a junior grievant.

The overall arbitrator reverse or reduce rate for all scenarios, both levels of seniority, and all apology variables, is 21.4 percent. So if one knows nothing about the characteristics of the apology (i.e., timing, sincerity, the type of issue, or discipline severity), then we would expect labor arbitrators to decide in favor of grievants about one out of five times. In examining the difference between discharge and disciplinary cases, we found that arbitrators overturn discharges 26 percent of the time as opposed to reducing discipline (suspension) 17 percent of the time.

Next, recall that our main proposition was that both the timing (early versus late) and the sincerity of an apology would have an

independent effect on the arbitrator's decision. As can be seen from Table 1, the arbitrator's reverse or reduce rate for all types of cases where an apology was given are: 15 percent in no apology cases, 34 percent in early sincere cases, 31 percent in late sincere cases, 15 percent in early insincere cases, and 13 percent in late insincere apology cases. These findings suggest that the timing of a grievant's apology is not as important as the sincerity of the apology in helping the grievant succeed in the dispute. Using the 15 percent arbitral reverse or reduce rate in no apology cases as a baseline, we see that the arbitrator's reverse rate for a sincere apology is double the baseline rate: 34 percent and 31 percent for early and late sincere apologies in all types of cases. In contrast, the arbitral reverse or reduce rate for early (15 percent) and late insincere (13 percent) apologies are virtually indistinguishable from the no apology arbitral reverse or reduce rate. These results support the hypothesis that sincere apologies increase the arbitral reverse or reduce rate. Note that the arbitral reverse or reduce rate is also greater in discharge cases than in discipline cases.

TABLE 1: The Impact of Grievants' Offers of Apology by Timing and Sincerity in Discipline and Discharge Cases, Both Conditions of Seniority

All Scenarios	All Case Types	Discipline Cases	Discharge Cases
No Apology	15.30%	12.10%	18.00%
Early Sincere	34.10%	25.90%	41.30%
Late Sincere	30.80%	26.80%	34.40%
Early Insincere	15.20%	11.40%	8.60%
Late Insincere	13.40%	10.20%	16.10%
N = 1,773			

In fact, sincere apologies increase the arbitral reverse or reduce rate in each issue. As can be seen in Table 2, relative to no apology, a sincere apology more than doubles the arbitral reverse or reduce rate for sexual harassment (20 percent to 42 percent) and profanity cases (13 percent to 24 percent), and approximately triples the reverse rate in refusal to work cases (13 percent to 31 percent).

Table 2: Factors That Impact Arbitral Reverse or Reduce Rate by Type of Misconduct in Discipline and Discharge Cases

Issue Areas (Combined Seniority)	All Types of Cases	Discipline Cases	Discharge Cases
Sexual Harassment			
No Apology	20.20%	9.80%	27.90%
Sincere Apology	41.90%	31.40%	50.00%
N = 598			
Refused to Work			
No Apology	12.70%	7.10%	17.10%
Sincere Apology	30.60%	17.00%	41.40%
N = 629			
Used Profanity			
No Apology	12.80%	19.00%	5.90%
Sincere Apology	24.20%	30.80%	16.70%
N = 546			

Additionally, recall from the apology literature section that Robbennolt had found that insincere apologies had a negative effect as compared with no apology.[40] Our findings are a bit different than Robbennolt's findings. The arbitrator reverse or reduce rate for insincere apologies in all cases (15.2 percent and 13.4 percent for early and late respectively), are approximately equivalent to the 15.3 percent arbitrator reverse or reduce rate when no apology is given. This suggests that late insincere apologies might be worse than no apologies in terms of arbitral outcomes, although it is not a statistically significant dip in effectiveness.[41]

As presented in Table 3, the data also suggest that seniority has a substantial impact. When a grievant has 25 years of seniority

[40]Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 Mich. L. Rev. (2003), 460.

[41]Robbennolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 Mich. L. Rev. (2003), at 486.

instead of 2 years of seniority, it raises the probability of prevailing substantially. In fact, if we look at all case types we see that an employee with 25 years on the job who provides a late insincere apology is more likely to prevail (21.7 percent) than an employee with 2 years who gave an early sincere apology (18.6 percent).

Interestingly, discharge cases exhibit a higher reverse or reduce rate than discipline cases. However, the arbitral reverse or reduce rate in discharge cases is far higher than the discipline case reverse rate for senior employees. Thus it seems that senior employees who give sincere apologies are more likely than not to get their jobs back.

TABLE 3: The Impact of Grievants' Seniority and Arbitrator's Reverse or Reduce Rate in Discipline and Discharge Cases

Seniority	All Types of Cases	Discipline Cases	Discharge Cases
Employees With 2 Years' Seniority			
Early Sincere	18.60%	15.90%	21.10%
Late Sincere	15.10%	16.70%	13.70%
Early Insincere	5.60%	4.80%	6.30%
Late Insincere	5.10%	4.80%	5.30%
No Apology	5.10%	6.10%	4.20%
N = 889			
Employees With 25 Years' Seniority			
Early Sincere	49.40%	35.70%	61.70%
Late Sincere	46.60%	36.90%	55.30%
Early Insincere	25.00%	18.10%	31.20%
Late Insincere	21.70%	15.70%	27.20%
No Apology	25.40%	18.10%	31.90%
N = 884			

Overall, the data suggest that the most influential factor in arbitral reverse or reduce rate appears to be seniority, followed by the sincerity of the apology. Seniority raises the probability of an arbitrator reversing or reducing punishment by almost 20 percentage points. The sincerity of the apology also has a powerful effect on

the probability of the reversal or reduction. Also, there is no effect of the timing of the apology.

Finally, there appears to be a decidedly greater probability of the grievant succeeding in discharge cases, probably because of what arbitrators refer to as the "discharge to capital punishment" metaphor. In essence, because discharge carries huge ramifications and is the worst outcome for an employee, it should not be upheld lightly.

Conclusions

This study began with a simple question: Do apologies matter to arbitral outcomes? The answer is yes. The psychiatrist Lazare made a strong case for the importance of a complete or a sincere apology over that of an insincere apology.[42] This empirical study lends some considerable support to the notion that the type of apology makes a major difference to the decision of the arbitrator. This study finds that apology is a powerful and a statistically significant predictor of an arbitrator's decisions. Specifically, one of the major findings of this study is that a grievant's sincere apology is more likely to lead to more favorable arbitral outcome from the grievant and union's point of view (i.e., a reduction in the amount of discipline or a reversal of discharge) than no apology.

Our study is the first comprehensive empirical test of timing of apologies in the dispute resolution field involving arbitration. Our results refute earlier theoretical speculation from the apology literature that timing had to be early to be effective. Apologies are far from all that matters. The industrial relations field had strong but varied evidence that arbitrator and grievant characteristics and sometimes the issue mattered to the outcome. There is some support for conventional explanatory variables from the industrial relations literature. Specifically, a grievant's seniority helped determine whether the arbitrator reversed or reduced the punishment, with more senior employees benefiting from disciplinary and discharge reversals at greater rates. Also the type of issue seemed to matter, with those grievants accused of sexual harassment more likely to prevail than those who used profanity.

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[42]Lazare, *Go Ahead and Say You're Sorry*, 40 Psychol. Today (1995), at 43; Lazare, *On Apology* (Oxford University Press 2005).

Many of the other arbitrator characteristics, such as gender, age, background, and status as a lawyer, did not predict well at all. The hypothesis that an apology must be complete and sincere to be effective was supported. According to our data, the timing of an apology does not affect the arbitral outcome.