A better approach would be to inform employees that they are not required to listen to messages they find offensive and to allow employees to communicate their views to those whom they believe might be interested. Employees who are the recipient of an offensive message need only inform the speaker that they do not wish to hear it. If the speaker does not respect this instruction, then he or she can be disciplined.

Although these few principles do not provide answers to the many and varied free speech disputes faced by arbitrators, they may provide a fresh perspective that allows employees a greater degree of freedom at work without compromising the legitimate needs of employers.

IV. UNION PERSPECTIVE

MICHAEL HARREN*

I must confess a sense of disappointment that this Academy continues to see the preservation of First Amendment speech rights in the workplace as an open issue. But, then again, if the U.S. Supreme Court finds itself compelled to periodically address the limits of speech within society as a whole, we must expect that arbitrators will periodically be asked to perform a similar task with respect to disputes arising in the workplace. Furthermore, we should expect that the workplace, like society as a whole, will find it difficult to draw a bright line between acceptable and unacceptable speech.

As Professor Alleyne notes, arbitrators have had little difficulty in rejecting claims that speech is protected absolutely in the workplace. Neither public nor private sector workplaces present suitable forums for open debates.[1] Supervisors and workers are not expected to haggle over assignments as though they are dealing in some industrial bazaar. Rather, debates are to be moved off the floor and resolved through the grievance procedure. The oft-invoked statement of "obey now and grieve later" is shorthand for this limitation on shop-floor debate.[2]

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*Partner, Chamberlain, D'Amanda, Oppenheimer & Greenfield, Rochester, New York. The author wishes to thank Lucinda Lapoff of his office for her assistance in researching the issues discussed in this paper.

[1] *See Ford Motor Co.*, 3 LA 779 (Shulman 1944).

[2] *See generally* Zack, *Just Cause and Progressive Discipline*, Labor and Employment Arbitration, Chapter 19, eds. Bornstein & Gosline (Matthew Bender 1991), 19-1–19-22.

Arbitrators are, at times, called upon to consider cases that involve "pure" speech cases arising out of the employment relationship. Examples of such cases are ones involving discipline imposed for employee or union comments in the media[3] or in notices posted on the union bulletin board.[4] Although some arbitrators analyze these cases under constitutional standards, others often look to whether the parties themselves have adopted the limits of acceptable speech. If the union waives its rights to criticize the employer, arbitrators appear willing to honor such a waiver.[5]

In certain situations, speech is protected to ensure that necessary communications take place. An example could be a grievance over a supervisor's retaliation against an employee who speaks out at a meeting. Would any of us, arbitrators or advocates, support an employer who seeks to discipline an employee who speaks out at a meeting convened by the employer to solicit insights into the shortcomings of the employer's operation? Similarly, once the maxim of "obey now and grieve later" has been followed and the dispute has moved off the shop floor and into the manager's office, the employee and the union representatives are certainly protected in a vigorous debate with management.

The issue facing arbitrators is seldom, however, well-reasoned polemics articulated pursuant to established formalities. Often, the issue involves alleged insults,[6] miscellaneous comments, hat or T-shirt insignias,[7] or drawings in the workplace. Day-to-day exchanges on the shop floor must be evaluated in light of the experience of the parties and the environment of the enterprise.

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[3]*Luke Air Force Base*, 90 LA 1065 (Cohen 1988) (no prior restraint available for union's criticism in local media); *Los Angeles Harbor Dep't*, 84 LA 860 (Weiss 1985) (suspension for violating rule prohibiting public disparagement of employer upheld); *San Diego Gas & Elec. Co.*, 82 LA 1039 (Johnston 1983) (reprimand for article in local newspaper criticizing employer's safety record upheld); *Norfolk Naval Shipyard*, 75 LA 889 (Aronin 1980) (no contract violation by union publicizing disputes with management during negotiations).

[4]*U.S. Army*, 91 LA 1201 (Wolff 1988) (union violated contract provision prohibiting derogatory remarks in union notices); *Copley Press*, 91 LA 1324 (Goldstein 1988) (employer could move union bulletin board containing offensive language to a less public location).

[5]*See, e.g.*, decisions of Arbitrators Weiss and Johnston cited *supra* note 3 and Arbitrator Wolff cited *supra* note 4. *But see Holodnak v. Avco Corp.*, 387 F. Supp. 191, 87 LRRM 2337 (D.C. Conn. 1974), *aff'd in relevant part*, 514 F.2d 285, 88 LRRM 2950 (2d Cir. 1975) (raising, in a duty of fair representation claim, the issue of the union's duty to defend the free speech rights of a union dissident at a defense plant).

[6]*United Grocers*, 93 LA 1289 (Snow 1990); *City of Berkeley*, 88 LA 603 (Staudohar 1987); *Montebello Container Corp.*, 85 LA 1011 (Kaufman 1985).

[7]*Armco, Inc.*, 93 LA 561 (Strongin 1989); McKay, *Ma Bell Redshirts Union Protestors*, Pittsburgh Post-Gazette, Nov. 24, 1994, at B-14.

As noted, there is a clear consensus that speech rights in the workplace are not absolute. Just as there is a consensus in society that free speech rights do not protect shouting "Fire!" in a crowded theater, so too, in the workplace, racial and ethnic slurs,[8] blatant insubordination, and pervasive hostile comments of a sexual nature directed at co-workers[9] are recognized as unprotected. Although I, as an advocate, might argue that the alleged statement does not rise to the category of prohibited speech cited in the above categories, it would be unlikely that I would argue that such speech was protected. Management's right to maintain a workplace free of invidious controversy among employees authorizes the prohibition of certain types of speech.

Employers in both the private and public sectors have a right to manage the workplace for their legitimate interests. In both sectors, however, employees are protected by the just cause provision of the collective bargaining agreement. Speech may be regulated by the employer, but such regulation must be consistent with the just cause requirement.

Speech in the workplace falls along a continuum from the clearly protected (e.g., the discussion of a grievance between the union steward and the supervisor in the latter's office) to the clearly prohibited (e.g., a protracted argument with the supervisor on the shop floor). The contractual just cause provision prevents discipline for protected speech but not prohibited speech. In drawing a line along this continuum, arbitrators must require employers to reasonably accommodate arguably protected speech. Once an employee invokes a reasonable claim of protected speech (i.e., outside the prohibited categories discussed above), it becomes incumbent upon the employer to establish a business necessity to limit that speech through discipline.

The approach I set forth is by no means novel. It was articulated in much the same fashion in this forum 20 years ago.[10] In 1976, at the 29th Annual Meeting of this Academy, Professor Julius Getman proposed a standard that should continue to guide us. Recognizing society's acceptance of the fundamental fairness of the constitu-

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[8]*Hannaford Bros. Co.*, 93 LA 721 (Chandler 1989).

[9]*See* EEOC, *Proposed Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age or Disability* (58 Fed. Reg. 51,266 (Oct. 1, 1993).

[10]Getman, *What Price Employment? Arbitration, the Constitution, and Personal Freedom*, in Arbitration—1976, Proceedings of the 29th Annual Meeting, National Academy of Arbitrators, eds. Dennis & Somers (BNA Books 1976), 61–71. *See also* Grodin, *Constitutional Values in the Private Sector Workplace*, 13 Indus. Rel. L.J. 1–37 (1991).

tional protection of free speech, Getman suggested a reasonable accommodation standard: "Arbitrators should recognize that certain issues, such as freedom of speech and religion, are so fundamental to individual liberty that they can be limited and made the basis of disciplinary action only when management can demonstrate an overriding economic need."[11] Professor Getman further commented: "Freedom of expression at work should be limited only when a strong showing can be made that the expression of ideas or the use of words is likely to cause serious disruption."[12]

The position urged here is substantially similar to the protection afforded by statute to another First Amendment right: religion. U.S. civil rights legislation not only prohibits discrimination in employment on the basis of religion,[13] it affirmatively requires reasonable accommodation of religious rights:

> (j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.[14]

It is reasonable to assume that two fundamental principles of our free society, both designated as such in the First Amendment, would be treated identically on the shop floor.

Arbitrator James Hill summarized this principle with respect to the protection of speech as follows:

> The heart of the difficulty lies in the areas of overlap and conflict between the business needs of the enterprise and the safeguarding of the rights of the employee, both of which may be ingredients of *just cause*. Where business needs counterbalance fundamental guarantees of individual liberties, however, one may require the convincing evidence beyond speculation to support the former.[15]

Balancing the free speech rights of the employee and the business needs of the employer can be best demonstrated by looking at awards involving off-duty speech. Assuming that off-duty speech is constitutionally protected, the employer properly bears a heavy burden in seeking to impose discipline for such speech. The employer must show not only that the off-duty conduct affects

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[11]Getman, *supra* note 10, at 64.
[12]*Id.* at 65.
[13]Civil Rights Act of 1964, as amended, § 703, 42 U.S.C. §2000e-2.
[14]Civil Rights Act of 1964, as amended, § 701(j), 42 U.S.C. §2000e(j).
[15]*Westinghouse Electric Corp.*, 35 LA 316, 322 (Hill 1960).

the employment relationship,[16] but also that the proposed discipline is required to protect the enterprise.

This issue of off-duty conduct continues to be viable within the labor arbitration field for the same reason that free speech concerns challenge democratic society as a whole: Each generation not only seeks to determine the limitations it will place upon social discourse, but also insists on identifying its own demons. I submit that the task of arbitrators is particularly difficult because they are called upon to evaluate not just a shop rule, but the legitimacy of the prejudices of not only the employer and the employees, but also of society in general.

I am sure anthropologists could tell us what in our tribal background causes us, as a society, to invoke the specter of evil spirits. We regularly identify demons. To members of the militia movement, the government is the demon. To many others, the militia movement is the demon. Twenty years ago, we could ignore newspaper articles of armed veterans living in cabins in Idaho waiting for Armageddon. Today, we can envision an arbitration arising out of a scenario where an individual who is the head of a self-styled state militia is facing discharge because his co-workers at the Post Office refuse to work with him.

As society adopts new demons, arbitrators are called upon to redraw the line of acceptable conduct and speech. In 1956, an arbitrator was asked to decide whether a former member of the Communist Party was qualified to serve as a foreign desk editor of the *New York Times.*[17] The *Times* argued the individual would undermine its credibility if he, in that capacity, could exercise final say on which of the foreign stories filed overnight would make it into the next day's edition. The arbitrator held that former membership in the Party was sufficient to disqualify the editor. Forty years later, we read in the *New York Times* the story of a graphics editor of the children's page of a Fort Worth, Texas, newspaper who was reassigned to a position of feature writer after the American Family Association complained that the editor, who in his spare time writes a cartoon for a local gay rights newspaper, was not qualified to be assigned to a family page.[18]

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[16]Such a threshold showing would be required in any case in which the employer seeks to discipline for off-duty conduct. *See generally* Hill & Dawson, *Discharge for Off-Duty Misconduct in the Private and Public Sectors,* 40 Arb. J. 2, 24–37 (1985); and Marmo, *Public Employees: On-the-Job Discipline of Off-the-Job Behavior,* 40 Arb. J. 2, 3–23 (1985).

[17]*New York Times,* 26 LA 609 (Corsi 1956).

[18]Meyerson, *A Texas Paper in Dispute Over Gay Editor,* N.Y. Times, Jan. 29, 1996, at D1.

Thirty-six years ago and some 120 kilometers from here in Buffalo, New York, Arbitrator James Hill was called upon to determine whether three men alleged to have been members of the Communist Party, who had refused to testify before a House Un-American Activities Committee hearing held in Buffalo, could be terminated by Westinghouse Electric for that refusal.[19] Westinghouse argued that because of its large number of defense contracts, its public image would be damaged if it were required to continue in its employ individuals publicly identified as being Communists. Arbitrator Hill sustained the men's grievances. With the collapse of the Communist Bloc 36 years later, that issue looks much easier because that demon went away. But there is an arbitrator today facing the issue of whether or not a tenured high school physics teacher in a public school in New York City can be terminated solely because he was identified in the popular press as a leader of the North American Man-Boy Love Association.[20]

As an example of a situation in which the employer demonstrated a clear business necessity for the imposition of discipline, I would point to the decision of Arbitrator Claire Duff in *Baltimore Transit Co.*[21] In that case, Arbitrator Duff upheld the discharge of a bus driver after it had been publicly announced that the driver was the Acting Grand Dragon of the Maryland Branch of the Ku Klux Klan. The Transit Company, noting that 50 percent of its riders were blacks, argued that continued employment of the driver presented clear and present danger, not only of a boycott by bus riders but of a wildcat strike threatened by other drivers and threatened violence toward buses operated by the grievant. In that case, the employer clearly demonstrated that it could not reasonably accommodate the employee's free speech rights and still maintain the level of operation necessary to meet its entrepreneurial needs.

Because I argue that the principles of free speech are incorporated within the concept of just cause, there is no need to draw a distinction between the public and private sector.[22] As arbitrators

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[19]*Supra* note 15.

[20]Henneberger, *How Free Can Teachers' Speech Be?* N.Y. Times, Oct. 3, 1993, at IV6; *Weighing a Teacher's Rights*, N.Y. Times, Nov. 9, 1993, at 22.

[21]47 LA 62 (Duff 1966).

[22]*See Waters v. Churchill*, 114 S. Ct. 1878, 9 IER Cases 801 (1994); *Jeffries v. Harleston*, 10 IER Cases 806 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 173 (1995); Rubin, *When the Governed Criticize Their Governors: Parameters of Public Employees' Free Speech Rights*, 10 Employee Rel. L.J. 1, 106–119 (1984); *Shahar v. Bowers*, 70 F.3d 1218, 69 FEP Cases 837 (11th Cir. 1995), *vacated and en banc hearing ordered*, 78 F.3d 499, 70 FEP Cases 480 (11th Cir. 1996) (original decision of panel that planned religious marriage ceremony between job applicant and

consider the limits of protected speech, they will inevitably make reference to awards and judicial decisions concerning public sector free speech in the workplace. It is likely that arbitrators would pay greater attention to these workplace cases than to public speech situations. For example, it is generally held that the possibility of adverse, or violently adverse, reaction to protected speech would not justify the courts from banning that speech. A speaker cannot be arrested for inciting a riot where the only conduct is to give a speech in a park, the result of which is the speaker being assaulted by the crowd. It seems more likely, however, that the reaction of a co-worker to the speech of the grievant would be relevant in arbitration. The reaction of co-workers would likely be a factor in evaluating the employer's obligation to reasonably accommodate the speech.

Two of the cases cited dealt with the reaction of co-workers. In *Westinghouse Electric*, the arbitrator noted that the membership of the local had voted to pursue the grievance. The arbitrator inferred that there was not widespread opposition to working with those who had refused to testify before the House Committee. Conversely, in *Baltimore Transit*, Arbitrator Duff noted the potential of a wildcat strike by the other drivers as one reason to conclude that the employer's duty to reasonably accommodate the speech rights of the bus driver had been met.

I would offer one note of caution. Free speech can never be protected if it must first secure majority support. Speech does not lose its protected status merely because it is expressed by a minority. In light of the union's duty to fairly represent all of its members, the union may not refuse to pursue a grievance over discipline merely because the speech is unpopular, although protected.[23]

Applying the foregoing to the situations posited by Professor Alleyne, I would suggest as follows.

Scenarios 1 and 2. Neither the private sector employer, ABC Corporation, nor the City of Metropolis should be able to discipline an employee for a quiet pro-abortion rights speech to a small group of other employees during a lunch break on the employer's premises. The employer's rule providing that "all discussions of abortion on company property are prohibited and punishable" is, on its face, unenforceable as overly broad. It is difficult to envision

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her same-sex partner could not be the basis of state attorney general's withdrawal of job offer has been vacated pending en banc review).

[23] *See Holodnak v. Avco Corp.*, 387 F. Supp. 191, 87 LRRM 2337 (D.C. Conn. 1974), *aff'd in relevant part*, 514 F.2d 285, 88 LRRM 2950 (2d Cir. 1975).

an enforceable prohibition of speech premised solely upon the subject of that speech. Not every reference to sexual activity would constitute a violation of generally accepted standards of obscenity or sexual harassment. The legitimate business concerns of the employer must be premised upon the objective circumstances of the challenged speech and not merely its subject.

For example, if the grievant sought to support his position with enlarged photographs that were so repulsive as to affront those seeking to quietly eat their lunch, the employer could take action because of the photographs, not because of the subject of the photographs. I also would expect that the employer might have difficulty explaining, on cross-examination from union's counsel, how its rule prohibiting any discussion of abortion is applied with respect to a group meeting discussing the company's health care plan. Such plan would either cover or not cover abortion. Would the company discipline anyone who asked if this procedure is covered by the health plan? Efforts to control speech premised solely on the subject of that speech cannot be the basis of discipline because the employer could not show, in every case, that its interests were vitally affected.

Scenarios 3 and 4. If the case of the grievant who marks up his own copy of a company in-house magazine with sexual and racial slurs is presented as a free speech case, the arbitrator must overrule the discipline. The employer's obligation to reasonably accommodate speech would clearly prohibit the employer from taking action against speech that is publicized to a select group of apparently nonobjecting listeners. If there were no reaction from this select group, the employer could show no injury to its interests. As far as I am aware, employers are not yet justified in disciplining employees for impure thoughts. Likewise, employers cannot discipline employees for unspoken words or unseen pictures.

I am less sure of my position if the supervisor had found the magazine as part of his investigation of a complaint by one of the three individuals who were shown the magazine. Assuming that the sexual references or racial slurs were sufficiently outrageous as to constitute unprotected speech, the employer could demonstrate a business necessity to prohibit such speech in the face of an objection by a co-employee. Although I disagree that the individual should face suspension on the facts provided, I could foresee a scenario where an employee who had previously been warned against such conduct is suspended for continuing that conduct.

Scenarios 5 and 6. Neither the City of Metropolis Department of Power and/or Nucleonics, Inc. should be allowed to impose discipline for off-duty speech made in good faith even if mistaken. The grievant's letter to the editor is a perfect example of the type of good-faith discussion of public issues that the First Amendment is intended to preserve. Where one is dealing with such a clear example of pure speech, the employer would face an almost insurmountable burden to demonstrate sufficient need for retribution. The employer is fully capable of responding to the issues by sending its own letter to the newspaper. If the grievant's claims are wrong, let the employer explain the error in its response. There is no suggestion that the grievant claimed to be quoting secret reports prepared by the employer. The grievant was expressing merely an opinion in a protected forum. The arbitrator must require the employer to meet the same high level of proof as is required of a public official suing a newspaper for libel.

I take this position mindful of the line of cases holding that activity under section 7 of the National Labor Relations Act loses that protection if the employees engage in disparagement of the employer.[24] The instant case, however, is not a disparagement case. Although the employer may suffer some embarrassment, public comment on the safety of nuclear power is to be expected by the employer. The norms of society not only protect such speech, the statutes specifically protect whistle-blowers. Any employee with a good-faith belief that his or her employer is engaging in conduct that puts the public health and safety at risk is not only protected in disclosing that risk, but we, as a society, must insist that disclosure is mandated and fully protected.

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[24]Although I must note that my position is directly contrary to the holding of Arbitrator Robert Johnston in a case involving similar facets. *See San Diego Gas & Elec. Co.*, 82 LA 1039 (Johnston 1983).