

CHAPTER 8

WORKPLACE VIOLENCE: WHEN IS A THREAT A THREAT?

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- Union:** W. Daniel Boone, Weinberg, Roger, and Rosenfeld, Alameda, California
- Management:** John S. Schauer, Seyfarth Shaw LLP, Chicago, Illinois

Brogan: Good afternoon. What we are going to try today is our own form of Crossfire on this topic. We are going to be talking about workplace violence. Not the easy kind—not the punching kind—but the verbal kind. In my practice I am finding more and more cases dealing with what are alleged to be *threats* as opposed to *physical* violence.

For those of you who don't know me, I am Margaret Brogan. I am a member of the Academy from outside Philadelphia. To my left is John Schauer. We are pleased to have John here from the Chicago office of Seyfarth Shaw. John is a partner representing management in all areas of labor and employment, with a concentration in labor relations. During his career, he has successfully represented management in National Labor Relations Board (NLRB) matters on many occasions, including representation, decertification, and de-authorization elections in a variety of industries. John has a JD from Northwestern University and a BA from Michigan State.

To my right is a frequent visitor to the National Academy meetings, Dan Boone, from the Oakland firm of Weinberg, Roger, and Rosenfeld. Dan is presently managing shareholder of this union side law firm with offices in Oakland, Sacramento, Pasadena, as well as Honolulu. Nice if you can get it. Dan is responsible for administering the arbitration practice of his firm, which includes opening approximately 1,100 files per year, selecting arbitrators, and reviewing all decisions. Dan is a 1965 graduate of Amherst, majoring in philosophy, and a 1968 graduate of Georgetown Uni-

versity School of Law, and, yes, he is a descendent of Daniel Boone. I never knew that until today.

So after a brief opening, the advocates will respond to each other's arguments. For each round we will change the facts of the scenario, and then we are going to see the effects. One question that we are posing in this session is whether violence really is escalating in the workplace, or is there simply an increased sensitivity brought about by outside forces and events such as 9/11 and Columbine. On one hand, I believe arbitrators struggle with their obligation not to put the parties in a position worse than the one in which they found them, but we also are concerned about the tendency for there to be a knee-jerk response where any form of threatening conduct will put an employee on the street, even where there was no intent nor any consequence to his or her actions.

The threat case presents some very difficult issues. The key question is: When, in the absence of physical violence, do words alone justify significant discipline, even discharge?

In my view, arbitrators do not question the right of employers to maintain workplaces free of violence, but on the other hand, what is a zero tolerance policy with respect to threats? Can it be maintained? Can it be enforced? And how should an arbitrator judge employee conduct? Should we look at an objective standard—what the words are—or do we look at a subjective standard? How did the target feel when he or she heard the words? Was he or she afraid? Were the co-workers next to them fearful, or did they see it just as shop talk? Does that matter in our determinations? Does it matter if the grievant intended to do harm if he or she says “I want to kill you”? Does she really mean “dead,” or did she mean only to scare you, and does that matter?

And what role does the attitude of the grievant at the hearing play? Is he really sorry? He denies he did it. He doesn't get it. Should any of these factors play a part in our decision? Our advocates today are going to step into their union and management shoes to argue the permutations of a single scenario reflecting how a change in facts can require an adjustment in advocacy and perhaps in our arbitral response.

The complete scenario is Addendum 1 to this chapter. To summarize briefly, John Haley is our equipment operator and grievant. He has been in the warehouse for 10 years in that job, and he was discharged on January 6 for an incident that took place three days earlier on January 3. Haley has served as a union steward, but he was recently replaced.

The collective bargaining agreement (CBA) provides that the employer can implement reasonable work rules. There is a just cause provision in the contract. There is also a “rolling off of discipline” clause—discipline older than three years cannot be relied upon. Our grievant has not been disciplined in the last three years. About five years ago the employer unilaterally promulgated a policy with respect to threats: “Threats and acts of violence will not be tolerated. Such conduct may be met with discipline up to and including discharge.” This was disseminated to all employees. The union did not grieve the implementation of that policy, but there has been no specific workplace training.

So here we are with our event. On January 3rd, the grievant Haley has an exchange with a co-worker, Jason Smith, on the shop floor. As the shift starts, the grievant approaches Smith and accuses him in a very loud voice of denting his car the evening before in the company parking lot. Mr. Smith denies the charge. The grievant insists Smith caused the damage, and as the exchange escalates the voices of the two rise and become very heated. At some point, it is alleged that the grievant threatened Smith, stating “I am going to kill you.” There were three co-workers in the vicinity. One of the co-workers advised the supervisor of the incident later the same day. The supervisor approached the grievant and Smith, interviewed them along with the three co-workers. Grievant Haley denied making the threat as alleged. Both grievant and Smith were suspended with pay, pending further investigation. The grievant was discharged for engaging in threatening conduct effective January 6th. Mr. Smith, on the other hand, received no discipline.

So we are going to turn to Mr. Schauer, as he has the burden of proof to give us his opening statement.

Schauer: Thank you, Margie, and good afternoon. Let me first state, on a personal note, that it is an honor for me to be here at the National Academy meeting. Suffice it to say, as far as I am concerned, membership in the National Academy is a prerequisite to acceptability as an arbitrator, and anytime I have a choice in the matter, I try to get that written into my collective bargaining agreements. I hold the institution in that much esteem.

There is no question that Margie has already given you some of the principles involved in discipline, including discharge, for threatening behavior. There is one I would like to dwell on just a little bit more, and that is that employers have an obligation to provide for the safety of their employees, which includes protect-

ing them not only from violence but also providing them with a workplace that is free from fear and intimidation.

In the hypothetical before you, where, in the first fact pattern, the threat is to kill Mr. Smith, there is no question but that discharge is the appropriate remedy for the following reasons: One, the grievant had all night to think about how he would approach the dent in his car. The dent itself is not a particularly serious life episode. The grievant did not choose to report it to the company. He did not choose to make reasonable inquiry, including going to Mr. Smith and inquiring whether or not he was responsible for the dent in his car. In a word, our grievant overreacted. His words were not due to the heat of the moment. This was not a spontaneous utterance or an outburst; it was in the context of having all night to think about how he would approach his co-worker, Mr. Smith. Second, Smith did nothing at the time to provoke a threat. And finally, the grievant did not disengage promptly, after the words were used. He could have said, "I'm sorry. I'm upset. I didn't mean that." He did not disengage from his threatening conduct toward Smith.

So what we have is this: An individual, our grievant, saying to a fellow worker that because of a dent in his car, "I'm going to kill you," pointing his finger in his face, making a specific threat to Smith. He admits he was angry. He was fully aware of what he was doing, and what he was saying. That should end the matter. This isn't shop talk, not when you direct your threat to a specific individual, and pointing your finger in the face of the individual is far different from merely using your hands in conversation. The grievant didn't apologize before he was confronted by the supervisor. He says now that he had no intention of carrying out his threat. Of course, this, again, was after he was confronted by the supervisor.

What was the grievant's intention? I disagree with second guessing and attempting to decipher that intention, but I'm experienced enough to know that the arbitrator's decision will turn on that analysis. But who really knows the grievant's intention at the time of the threat, which is when the employer has to make its decision? Not six months later at an arbitration hearing; but at the time the threat was made, what was the intention of the grievant? The grievant intentionally chose to make a threat.

Why should this or any employer be responsible for guessing into which category the employee will then fit? Will he fulfill the threat, or will he not? Why should an employer have to make that

choice? How can an arbitrator, who certainly doesn't know the grievant as well as the employer, do anything but guess? True, the arbitrator has the advantage of the passage of time. Four, five, or six months has elapsed before the case is actually heard, and nothing had happened in the meantime. But isn't that unfair to the employer at the time or shortly thereafter, after the threat was made? And isn't it also relying on post-discharge evidence, on which, generally speaking, we are not supposed to rely?

Certainly relying on the post-discharge passage of time, absent any violence or misconduct, an arbitrator may reinstate without back pay, but as I say, isn't that relying on post-discharge matters? No one is clairvoyant enough to know with certainty the grievant's intention at the time of the threat. And perhaps we should be thoughtful, therefore, and mindful of a recent decision of the Rhode Island Superior Court—this is a month old—in a case called *Catholic Cemeteries v. Rhode Island Laborers*,¹ overturning an arbitrator's award reinstating an employee who made a threat with the following statement,

This court refuses to endorse this arbitrator's ostrich mentality towards dangerous and abusive workplace behavior, whereby serious threats of violence and intimidation are minimized or ignored rather than dealt with decisively before a tragedy occurs.²

The same court concluded that the arbitrator's analysis ignores the obvious.

Violence in the workplace is an ever-increasing occurrence that creates serious safety and health issues for employers. His analysis also ignores the reality that workplace anger and violence is often ignored by employers who fail to take appropriate steps to diffuse potential violence before it erupts. . . .³

And last, but in my view, the most important conclusion by the court was this:

This court can find no rationality in a decision that seeks to protect a threatening and intimidating employee in the workplace while requiring the recipients of such conduct and others in the workplace to work in fear or under intimidating circumstances. Too often we focus only on the grievant, and we neglect the remainder of the work

¹No. 04-6148 (Apr. 22, 2005).

²*Id.*

³*Id.*

force. And while we can only guess at the grievant's intention at the time of the threat, we know with certainty that a discharge, which is appropriate here, will serve as a deterrent towards others who might be inclined to make threats to their fellow workers and thereby make our workplace more comfortable.⁴

So I would argue that the facts in this case, at least in the first version of the scenario, "I am going to kill you," a specific threat to an individual, is enough objectively, without going into the intention of the grievant or even how the threat was received by others. We have enough to sustain discharge just on that basis.

Boone: Good afternoon. Before presenting the union's opening statement, with your permission, I'd like to start with introductory comments about how union advocates must approach these types of cases. In doing this, I think the presentation that I would make to you as neutrals is much the same as if I were standing before a group of union advocates or representatives.

My view is that the union and the union advocate must accept the legitimacy of the policy considerations that are articulated by the employer representative and reflected in almost all of the reported decisions, whatever the outcome. The employer has an obligation to maintain a safe workplace, including protecting the work force from violence and threats of violence. The union must accept the persuasive force of these arguments. If they are minimized or taken lightly, the chances of winning the case are reduced.

Actually the union, as the representative of all the employees, is equally concerned about the potential for workplace violence. The union has an interest in maintaining the safety of the workplace. The union does not condone an actual threat—a proven threat—against a fellow employee or supervisor. If the union believed there was an actual threat, and the elements of just cause have been established, it would not be in arbitration.

My Opening: The union fully agrees that the charge against the grievant—threatening violence—is very serious. Threats in a work environment are certainly worrisome in our world today, in light of the publicized incidents of workplace violence. The union accepts the legitimacy of policies promulgated by employers in an effort to eliminate violence. The union also acknowledges that proven

⁴*Id.*

threats of workplace violence may be just cause for an employee's summary discharge. However, if the employer carries out a policy of summary discharge, the policy must be administered with fairness and impartiality, consistent with principles of just cause.

One fundamental question is whether or not there was a threat. Here, it is alleged that a certain statement was made with the intent to do bodily harm, to another person, either at the time or in the foreseeable future. The employer, having alleged a threat, has the burden of proving a threat.

The first factual dispute is what was said? What are the words that were allegedly used? The factfinding process in this kind of case can be particularly troubling, and the reported decisions reflect that. These cases usually grow out of emotionally charged situations. Perceptions are clouded. People hear different things. Memories are concretized in polarizing directions as time passes. Your determination of what words were actually said is particularly difficult. Nonetheless, you must hold the employer to carry its burden of proof by clear and convincing evidence, given the nature of the allegations.

In addressing whether the employer has carried its burden of establishing that there was, in fact, an actual threat, the context looking forward and backward in time—the surrounding events, the history between the involved people, the events surrounding the alleged threatening statement—establish the bases to answer the arbitrator's question about what was intended. You must be persuaded that there was an actual *threat* of violence, as opposed to offensive words. After you hear the testimony, I will argue to you at the end of the day, "Yes, these words were foolish, offensive, unacceptable, inappropriate, but they don't justify a discharge because they were not a threat, which I acknowledge is a dischargeable event."

Turn now to some of the factors that will show there was not an actual threat. In this specific case, we have certain circumstances that are relevant. This individual has no history or indication of violent behavior, no indication of being violence prone. We have the fact that he has made gestures with his hands. This is the way John Haley conducts himself. John told me, "I talk with my hands all the time." As I have talked with John, I see the way he functions. (Parenthetically, in another case, when I called the grievant as a witness, I made sure he sat away from a table, that he sat out in the open exposed. It got him talking, and off he went, demonstrating in his conduct the "talking with his hands" trait.)

I acknowledge that without more facts this is a tough fact pattern for the union, and my argument substantially boils down to arguing that the grievant's statement was a spontaneous utterance in the heat of an argument. There isn't anything more indicated by prior history or subsequent events to show that this was an actual threat. There is no menacing conduct and no physical actions, and the statements were not repeated.

If I may, I have one or two additional comments concerning my strategy in this case. In order to get more traction, I want to know more about the details of the argument. Maybe I also want to know who told grievant that Smith had damaged his car. When did Haley find out? On what was the allegation based? Were they both using profanity? Were they both yelling? Did they go back to work? Did things cool off?

If I can persuade the arbitrator that Smith really did damage the grievant's car and that he lied to Haley and he lied when he testified about having damaged the car, I think that gives me a little bit of an angle. Although it doesn't necessarily excuse Haley's statements, it puts more on his side.

In this scenario, I want to know about this apology. Did he apologize at the time of the discipline? What's his state of mind and activities afterward?

In 1998, Elliott Goldstein decided a discharge where the grievant stated to a nurse: "You'd better call someone because they are going to need to take my foot out of your ass." Arbitrator Goldstein noted,

I believe that making threats of physical violence toward other employees, especially supervisory employees, is almost as serious an example of conduct as the actual act of physically attacking another employee or supervisor. If competently established through credible evidence, I have held that threats will support summary removal. However, the real question in this case is whether the company has proved its case for termination of Grievant. In order to prove a case for termination, it must prove that the threat was 'serious,' and reasonably perceived as a threat to do bodily harm, not hypothetical speculation or intemperate words uttered in a context where no one could believe a 'real threat' has been made.⁵

This statement sets the framework for the union advocate to hold the employer to its burden—looking to the context to argue that there was not an actual threat, all the while accepting the underlying policy considerations. To the degree that the union

⁵*South Bend Metal Stamping*, 111 LA 995 (Goldstein 1998).

seeks to condone threats, it will lose the day and frankly it is not in the interest of the union as an institution representing the workers to stand for that proposition. I advise our clients, if the union believes that a threat has been made, and especially if it is toward a co-worker, I say don't take that case to arbitration. That doesn't help build support in the workplace. That doesn't help organize or maintain the organization. If the union really thinks this person is dangerous, then I say, "Tell grievant the lawyer said the case wasn't any good, and let him come complain to me."

Brogan: Well, don't go away, Dan, because I have a question for you, because I thought I heard you say that you thought it was more dangerous if the threat was made to a third person.

Boone: No, no. I didn't mean to say that, no.

Brogan: Okay. Thank you. All right. So you do think if it is said right to the person who he may or may not intend to kill, it has more power.

Boone: Yes. What I was trying to say is that if I am reporting to you, a fellow worker, "I'm pissed off at Supervisor Schauer. He has been riding my ass. This is just terrible. I could kill him." That is a figure of speech. It is unspecific venting. I would argue that is not a real threat. However, if I am in Supervisor Schauer's presence and during an argument I say, "I am going to kill you," the union will have a hard time winning that case.

Brogan: I thought it was interesting how both of you saw a different level of spontaneity. John didn't see anything spontaneous about this remark.

Schauer: He had all night. The dent in his car was put there conceivably the day before.

Brogan: I think I've left that ambivalent.

Schauer: He learned—well, he approached Smith. The dent to his car was the night before. It is not clear when he found out about it. Probably when he left at the end of the shift?

Brogan: You, Dan, on the other hand, find it to be a completely spontaneous eruption?

Boone: Well, again, as pointed out, we don't know when Haley got the report that Smith had been the one to damage his car.

Brogan: So clearly delay would make a difference.

Regarding the apology, let's now assume the grievant states that he had no intention of hurting Mr. Smith; that he was very angry because he was told that Mr. Smith had damaged his new car, and he was willing to apologize to Mr. Smith. Let's assume that that

took place during the investigatory interview process prior to making the disciplinary decision.

Schauer: My concern is that he didn't disengage at the time of the argument with Smith. In other words, if he had said to Smith, "I am going to kill you," and immediately recognized that he went too far, he overreacted and then backed down and apologized, at that point in time, I would look at the case completely differently than until after he is confronted by the supervisor.

He is on suspension with pay, and now he understands, as a former union steward, that his job is in jeopardy, and now he chooses to say, "Well, I really didn't mean when I pointed my finger in his face and said I am going to kill you." And by the way, Dan, I would say it is worse by saying it just once than repeating it. It has a more dramatic intention of threatening conduct than repeating it to the point where perhaps it is meaningless. But he did not disengage, and he became apologetic only when he knew, as a former union steward, that he was in trouble. An employer can't place any credit on that. The employer has to look at what was said at the time the threat was made, what was the context at that time and react accordingly. As time goes by, he knows what he has to do as a former union steward, and by the time Dan Boone gets him ready to testify, we are going to have Wilbur Milktoast on the stand without question.

Brogan: And, John, as the arbitrator at this hearing, are you saying it is unfair for me to take that kind of post-discharge sort of rehabilitative act into account? I am apologizing now as the grievant.

Schauer: It is too late. The arbitrator must put herself in the shoes of the employer at the time the decision was made. You cannot second guess later simply because five months have gone by. You are at an arbitration hearing, nothing has happened, and you know that.

Brogan: Whenever I get that argument, John, that I shouldn't second guess the decision, I always say, "Excuse me, but I am a professional second guesser, and that's what you pay me for."

Schauer: No, no, no. We did not pay you to be a professional second guesser. We paid you to interpret the contract and to render a decision that is consistent with the contract and the context as it occurred at that time. We are not asking you to second guess the decision. That's when we all get in trouble in my view.

Boone: Wait a minute. Compare these facts with another hypothetical. Certainly, if Mr. Haley does not apologize during the interview; does not apologize at the time that he is handed the discharge notice; does not apologize during the first, second, or third steps of the processing of the grievance; and has not apologized up until his cross-examination, argument number one in closing from the employer is, "This man has never apologized. He has not shown a modicum of remorse. Therefore, he doesn't get it. He is a loose cannon. He will do it again because he doesn't recognize what he did was wrong." Absolutely, that argument will be made and is made repeatedly in these kinds of cases.

Whether you do a narrow analysis of whether this a threat, or more broadly, whether you are wondering who this guy is and what are the consequences of a decision to reinstate, there is a lot of information that you as arbitrators want to know. What words were used in the argument? How did the argument end? Did they both go their separate ways and work? Did they continue to work and not have any more words with each other? Did they have lunch together before somebody reported the exchange to the supervisor? How much time passed before an investigation was conducted? Did those who heard the argument immediately report it to security? How soon afterward and under what circumstances did they report the argument to supervision? How did management respond? That entire context contributes to your determination as to whether the people who were present and witnesses thought it was a threat.

Audience Member: Regarding the Rhode Island court case Mr. Schauer mentioned, as Mr. Schauer said, the parties hired the arbitrator to interpret the contract, which is exactly true. They bargained for the arbitrator's interpretation of the contract. He did interpret the contract. He said there was no just cause to discharge the employee. Therefore, the court had no legal basis whatever to overturn the decision of the arbitrator, and it is a great mistake for judges to start overturning decisions on that basis. Thank you.

Brogan: John, when you get to the bench, you remember that. (Laughter.)

Schauer: Well, certainly, if the arbitrator is off on a lark of his or her own, then your only relief is in the court system. It is not one that is used frequently or endorsed by me necessarily, but it is there.

Boone: This Superior Court Judge of the State of Rhode Island, I am quite sure, had never read or heard of the *Steelworker Trilogy*⁶ cases. He said that Workers' Compensation was the exclusive remedy. He said he disagreed with the arbitrator. Therefore, he was going to vacate the award.

If you've read this judge's decision, I know it is the kind of decision that frightens you or outrages you as arbitrators. The judge didn't understand the law, and I can't understand why the union didn't remove the case to federal court, but that's another story.

Schauer: You might disagree with a lot of aspects of it. What you can't disagree with is what the judge said about the employer's responsibility. The employer must protect the workplace for those who are the recipients of the threats and intimidating conduct and not focus solely on the grievant. We fall all over ourselves worrying about the grievant and due process accorded to the grievant. I understand that's important. I am experienced enough to know that, but we neglect many times the rest of the work force. I have a right to come to work and to be in an office or a factory, whatever it happens to be, and not be intimidated and not be put in fear of my physical safety. I have that right. An employer has the right and the obligation to secure that right, and that's what is violated in this case.

Brogan: All right. Let's move then to the next version of the scenario because that's the very point. Let's consider how the people around the grievant react. You have two layers of that. First, there is the target of the grievant's remark. Does it matter if that person is frightened by the comment? In this particular case, you will have testimony of Mr. Smith who says he doesn't feel he can work in the same shop as the grievant, and as a reasonable basis for his fear, he points to the fact that our grievant regularly drives a forklift and carries a box cutter. The other level has to do with the co-workers of Smith and the grievant who heard the response. At first they are disturbed, but as John says, as time goes on, sometimes things change. They say at arbitration that they didn't think it was anything much—just harmless shop talk. They know Mr. Haley. He didn't mean it.

⁶*Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 46 LRRM 2414 (1960), *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960), and *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960).

So as arbitrators should we be concerned about the subjective responses of the people around them? What if Mr. Haley is very big and Mr. Smith is very small? Does that matter? So I am going to ask, first, Dan, to speak to the new scenarios.

Boone: I assume that, if either the employer or union call a witness to speak about their state of mind, that the arbitrator is going to let them testify. "I am scared to death," "it is no big deal," and everything in between.

As to of my advocacy of the case, in terms of bargaining unit members or members of the public, I question whether the arbitrator will give credence to the specific statement of that individual, or the combination of individuals, especially if the witness is Haley's friend and has been socializing with Haley for the last five years. I am interested, though, in having more senior respected workers come in and both be present and speak on behalf of the grievant because I think arbitrators are looking to draw a conclusion as to whether Haley is a nut; Haley is a loose cannon; Haley is likely to do it again; or Haley means what he says.

To the degree that I bring people who are not close friends of the grievant, that helps my case because arbitrators are making a judgment about who the grievant is. Seeing that he has the support of his fellow workers will help because, after all, I am arguing to you that I'm here on behalf of everybody, and everybody is not scared of Haley. My goal is to set the scene—to make the whole matter as supportive of grievant, and as benign, as possible.

If a supervisor comes in and says "I'm scared of Haley and I can't work with him," apart from cross-examination to undermine the force of that testimony, my way of dealing with this is to propose remedies intended to allay those concerns.

In addition to the underlying policy concerns, the other piece that I have to assume in a threat case, is that you, as the arbitrator, somewhere in the back of your mind, or maybe in the front of your mind, depending on the circumstances, have a certain worry that could take the form of a headline in the Philadelphia Inquirer, "Worker reinstated by labor arbitrator Brogan, kills seven."

Brogan: That didn't really happen to me. I just want you to know that.

Boone: I prepare both the union client and particularly the grievant for something other than (or in addition to) a make-whole remedy. If I am persuaded that this union member is not really a threat, I am going to ask at the end of the day for an order of reinstatement that may very well make no mention of back pay,

and it will be conditional. I say, "Arbitrator Brogan, you can reinstate Haley, but it can be conditioned upon Haley being sent to a medical professional who has expertise in workplace violence, jointly agreed to by the employer and the union, and that Haley will return to work if, and only if, that workplace professional verifies that he is fit for work and that he does not present an abnormal danger to himself or others." Or I might suggest that you refer him to an employee assistance program (EAP) program. Finally, you can remand the case to the parties to jointly seek a mutually agreeable alternative work location, so that you then enable Haley to be away from Smith if they have a long-standing beef with each other. Frankly, I may want the grievant away from the supervisor who he believes has been harassing him for a period of time.

There are a variety of different remedial mechanisms that I can offer to the arbitrator to try to allay any of his or her concerns about the grievant, whether I think that they are necessary or not.

Schauer: Don't you sometimes, Dan, have difficulty convincing your grievant, who doesn't think that he or she did anything wrong, that he doesn't want to hear his advocate say those kinds of things in his presence in front of the arbitrator, and what do you do with a grievant who says, "No, no, no, I didn't do anything wrong. Don't start talking about anger management training."

Boone: Okay. If Haley denies saying anything, and protests, "We were just arguing, we were cussing, he called me this, and I called him that, but I didn't threaten him," I say, "Well, that's fine, but I am not deciding the case." Ms. Brogan is deciding the case, and she may find, as is frequently the case, that there was some kind of threatening language.

Depending on the circumstances, my counsel as union lawyer is: "Haley, you have to acknowledge that you were out of line; you were venting. With 20-20 hindsight you shouldn't have done it. You wish you hadn't said all you did. If that's the case and if it is important to get your job back, this is a mechanism by which you can assure your employer, your fellow workers, your union, as well as the arbitrator, that you are not a danger. Proposing these remedies is the best way to get back on the job." Although there is sometimes a resistance, that's the effort I make.

Obviously, there are some situations, if the grievant is a hard head, he may not allow me to propose these contingencies. Frankly, that resistance raises questions for the union about taking the case.

Brogan: Thank you.

Schauer: Margie, I have a lot of respect for Dan. We've actually been on opposite sides on a number of occasions, and I marvel at his ability to come up with new and unique ideas to get the arbitrator off the hook and to rule in his favor, and this, of course, is one of them. He didn't tell you about the other one—

Boone: I've always liked to be complemented by John. (Laughter.)

Schauer: This is certainly one of them, and I really admire Dan's thoughts on this, but let me tell you what I think is wrong with it. What Dan is telling you here is that he isn't sure either. He doesn't know what the grievant is going to do either, and isn't Dan asking you to abdicate your responsibility to an industrial psychologist? That's what he is telling you. Send Haley to an industrial psychologist. Let them make the decision as to whether or not the person comes back to work, and I don't think we paid anybody to do that. Isn't it unfair to the employer who had to make the decision at the time the threat was made and do you want to impose upon the employer the responsibility? Should Dan's idea ever gain momentum—and I suspect it won't—but if Dan's idea were ever to gain momentum, are we putting employers in a position where, even when you have a clear threat, as we do in this case, "I'm going to kill you," in angry terms, we now send that person to a psychologist to determine whether or not that person is going to fulfill his prophecy? I think not. He said it. We are done with it, and let's move on to the discharge.

In the second version of the scenario, Smith is saying that he was afraid. Now, under case law, that enhances the employer's decision. Having said that, I question whether the recipient's expressed fear should be a critical factor. Is it any less of a threat when the recipient brushes it off through peer pressure or overactive testosterone or if a 4'10", 90-pound female says the same thing, "I am going to kill you," to a 6', 200 pound worker? Does it make any difference? It still is a threat, and that person still has the opportunity as well as the means, not physically, but by other means, to carry out that threat.

In the third version of the scenario, we talked about the co-workers. Now, the co-workers were disturbed with the threat at the time it was made. Does that not end our inquiry? It should. But again, we have to be careful here. We cannot make these cases into popularity contests. We cannot have a case where five months later, before the arbitrator, we have the union parade in four or

five folks who have been around the workplace for some time, saying, “Hey, you know, the grievant is a great guy. I really don’t think he or she would have done this.” That becomes a popularity contest.

One person in scenario three simply thought it was shop talk. Threatening a fellow worker, specifically threatening a fellow worker in anger, is not shop talk.

Brogan: John, let me ask you this question because I am kind of jumping ahead, but this is something that I think troubles me as an arbitrator in the recent cases I have had. I hear you say—and I think a lot of employers feel the same way—that post-discharge remorse should not necessarily be considered by the arbitrator. Now, you are very realistic in your observation that we listen to it, but you are nevertheless going to argue, “Who cares?”

And similarly, you said, don’t let them bring this parade of other co-workers who really like the grievant. But what about the co-workers who come forward for your client after the grievant has been fired—and this has happened to me—and say, “Boy, I am so glad Haley is gone because he threatened me, too.” And what does an arbitrator do with that kind of post-discharge evidence? I think there are a lot of arbitrators who may say, no, I am not going to look to it, but I think there are also a lot of arbitrators who are concerned that we may put somebody back into the workplace who poses a risk. So I’m interested in your view on that.

Schauer: Well, of course, I think that when witnesses come forward in support of the employer, it is an entirely different matter. (Laughter.)

I would have to say, Margie, that sauce for the goose is sauce for the gander, but I will say this: I think that it depends on the context of how the case is presented to you. I think if the grievant denies the threat and you have an issue of credibility as to whether or not the threat was made, then I think that evidence or testimony from other workers about similar situations could be relevant to determining credibility at the time the incident occurred.

But I am very concerned with moving away and beginning to listen to employees give their opinions, as Dan’s industrial psychologist is going to give his or her opinion, as to whether or not this person is fit to be in the workplace. We have to remember the consequences of guessing wrong are serious. The grievant put himself in this position. Why should any employer have to guess as to whether or not the individual was intent on fulfilling that threat?

Brogan: John, you would argue you could put that evidence in for credibility. Would you also argue that it is for purposes of remedy—that if I did intend to bring him back, that’s a bad idea because, look, you can’t put him back in the workplace because people are frightened. Would you argue that?

Schauer: Oh, yes, I would. (Laughter.)

Audience Member: I know you have your agenda, but I would like to change the facts further. The grievant is an employee for 30 years. He has a perfect record. He admits when he is interviewed that he made the statements, but he says, “I really lost my head. I apologize. I want to apologize.”

Schauer: When did that occur?

Audience Member: At the initial investigatory interview.

Brogan: Do you want to respond, John, or do you want Dan—Dan, of course, I know what you will say.

Boone: Finally, I get the upper hand. (Laughter.) This gives me the chance to climb on the soap box to argue why industrial due process is an absolute prerequisite to just cause, and that the failure to have industrial due process to give the employee the opportunity to admit or deny, and to explain his or her state of mind, is critical. You, as arbitrators, must “educate” employers to confront the grievant as a requirement of just cause by not upholding discharges when this doesn’t occur. I don’t advocate for industrial due process to create a procedural hurdle, or a technical defense. Rather, the union must be involved at the outset to effectively carry out its duty of fair representation, and to better ensure that disciplinary disputes are resolved quickly, without arbitration.

As all arbitrators know, industrial due process “cuts both ways.” The investigatory meeting may be the opportunity for the worker to give an exculpatory explanation. On the other hand, if the worker is confronted and repeats the threat, the cause for discharge is cemented. The union then is in a position to exercise its good-faith judgment, consistent with the duty of fair representation, to make a decision not to take that case to arbitration.

Once the discharge happens, and then all the explanations come in afterwards, unions are in a position where they have to take the case. They might not have taken it if there had been due process.

So it is not only to inform the arbitrator, the ultimate decision maker, and to inform the employer as a decision maker, but to inform the union in the carrying out of its duty. This is why due process is very important in these situations.

Brogan: Well, Dan, what if the employer did “make a mistake” and not ask the grievant his version during an interview and didn’t give him the opportunity to explain, but we get to the hearing and the grievant is not at all remorseful and not at all believable, and he definitely made the threat? Can the due process violation, if one exists, be remedied, and if this guy clearly poses a threat, should an arbitrator put him back because of the due process violation?

Boone: Margie, you are presenting the fact pattern calculated to get the “don’t reinstate” answer. However, I think that due process is so important that, even with your hypothetical, reinstatement is still the correct result, albeit likely without back pay.

By analogy, all arbitrators agree that “disparate treatment” is contrary to just cause. A worker who clearly has engaged in serious misconduct, including threatening behavior, will be reinstated if other comparable fact patterns have not resulted in discharge. The same analysis and conclusion should apply for “due process.”

Finally, as a last resort, I argue for “back pay without reinstatement” as a remedy for the “due process violation.” Without some consequence, employers will not be encouraged to afford due process.

Schauer: May I address the hypothetical from the audience about the long-term employee? This is a difficult question. But let me pose this to you, if you will. Is it less of a threat if I am a probationary employee or a 30-year employee? Is it any less? Is a 30-year employee capable of making a threat that scares the willies out of the recipient? I suggest, indeed, yes. So I don’t think the years of service—and I know how it is going to come out already—the threat could be so serious that the 30 years should not be considered. I recognize it is a difficult case, but should we have a level of threats for probationary, for one year, and then a different level of threats for five to ten years, and these are the questions we have to wrestle with. I’m sorry.

Brogan: That was good, John, very good. Let’s go back to the due process issue that you wanted to bring up.

Audience Member: Realistically, you have to assess how serious you think the threat really is. If you have a question about whether or not it is a “serious threat,” then you address it at the remedial end so that you will not be guessing about what might happen. That is my question about whether focusing on the remedy is really abdicating. Is it the union’s position that the arbitrator is

supposed to have a vast knowledge of the possibilities of mental health professionals?

Schauer: That's right.

Audience Member: Or are you going to bring on a professional as an expert witness who has already examined the grievant and says that such behavior won't happen again?

Schauer: Well, I think Dan's remedy was to have the arbitrator reinstate the grievant subject to a post-hearing evaluation by a medical expert. You are saying that the evidence is presented at the hearing and that is a different matter. If there is evidence to the arbitrator, then that is something that the arbitrator may want to consider, but that's different than saying, "I'll reinstate subject to some unknown person—the psychologist—saying that this person can return to the work force." Certainly, Dan could present a witness, as could we, I suppose, although I, quite frankly, haven't seen it done, to give testimony that the person is either safe or unsafe to be in the workplace.

Audience Member: I had the same concern. It strikes me that the post-hearing remedy is a ticket to long-term grief. First, the parties may be unable to agree on a psychologist. And even if they agree on the professional, they are not going to get a doctor who would say, "I absolutely guarantee you that if you put this man back to work, he wouldn't harm a fly." The professional is going to say, "Well, I believe there is a reasonable probability that unless untold circumstances occur, that there is a good chance . . . etc." The company is going to say that's not good enough, and the union is going to say, oh, sure, that's terrific. And there you are.

Schauer: Right. And then what happens when somebody argues that your jurisdiction is done with the rendering of your award.

Audience Member: I have had a variation on these facts where during the grievance procedure the employer said it was willing to send the grievant to a psychologist, and if the psychologist certifies him, they would take that under consideration. The union concurred. Upon examination, the psychologist reported that the threat was an "out-of-character act"—that the grievant would never do it again, he is fit, and he should be put back to work. However, the employer did not honor that opinion, and so the case came before me under those circumstances.

Brogan: Jim, you keep giving John really tough scenarios. You have to be a little more balanced.

Boone: I had a threat case where a worker said to a third-party, "I could kill Jane," who was his supervisor. It was reported, inves-

tigated, and the employee was discharged. The employer, being the City and County of San Francisco, went to court and got a restraining order saying that he couldn't come within 100 yards of his workplace.

The case was arbitrated. We put aside the restraining order for purposes of the merits, and I successfully argued for the conditional remedies I have described. The parties mutually agreed on a medical evaluation by a professional who actually worked for the City and County of San Francisco—who did workplace violence workups. The grievant was blessed to return to work, put into an alternative workplace, has a different job, and continues as a fine employee. The injunction is still sitting out there waiting to lapse. So I would argue that it can work.

It depends on the relationship. It is a mechanism. And here I will address one of John's powerful arguments. We cannot guess. We cannot know what's going to happen. Well, who does know? We cannot know absolutely that a psychiatrist or psychologist can assess these questions, and how accurately, but they are the people that supposedly know.

Schauer: But, Dan, my argument is at the time the threat was made, that's the point that we have to concentrate on. At the time the threat was made, what was the individual's intention? And how can we second guess that? How are we clairvoyant enough to decipher that?

Boone: John, let's assume that the worker says "I'm going to kill you." The two go back to work. They work the rest of the day. The accused comes to work for the next week without incident. Nobody reports it to management until a week later. As a matter of fact, it turns out the argument is on video tape "You son of a bitch. I am going to kill you," but a week has gone by. At the time of the threat, nobody thought it was a threat. So reinstatement, full back pay, right? (Laughter.)

Brogan: I just want to warn you, one of the cases that Dan gave me was yours, so you better be careful what you say. (Laughter.)

Audience Member: I was going to make an admission about one of the two lawyers in the Robertis case, and because I practice in California, you can guess who it was. This was an employee who worked in an office environment. A male employee who to several female employees made allegedly threatening comments about a female supervisor. "She better watch her back. I am going to get her," and similar statements. They were not made directly to the supervisor. What was interesting about the case is that sev-

eral females, including two women who heard him make these comments, testified that after those comments were made, they changed their conduct at work. They would no longer go down to the garage alone at night; that they wouldn't work alone; that they wanted to be escorted.

This testimony raised two issues for me: One, it gave me a way to assess how threatening the employee's conduct appeared to be at the time. I don't know whether he was going to carry out the threats. I am not clairvoyant, but it gave me a way to assess that. The second issue was the effect on people who credibly testified that they changed their work conduct, regardless of whether I believed that the grievant would ever carry out his threats. So it was really a double-edged thing.

Now, Dan knows what happened to the case, so you shouldn't ask him, but the question is: What do you do when witnesses testify like that, Dan? How do you try to save the employee? And for John, what do you do if I put the person back to work and you have these employees testify they can't work with him? They won't go to the garage alone, etc.

Schauer: The person is reinstated?

Audience Member: Yes, and you can't find that Superior Court judge we have been talking about.

Schauer: Remove the case to Rhode Island, I suspect. (Laughter.)

Well, you know, there are many instances in which employers have to make some form of accommodation in situations where you may have sexual or other forms of harassment. There are cases where you may have an employee who has done something outside of the workplace that the employees frown upon, rightly or wrongly, and tell you that they just simply can't work with that individual. I believe that there are some—I have not had the case—but I believe there are some arbitral decisions that say if the situation is bad enough and you can't move the person sufficiently to remove the threat or harassing conduct, ultimately you can terminate. My guidance to any employer would be to try to find a means of getting this person away from those who are threatened by the conduct as best you can.

Audience Member: Hi. I would like to go back to the credibility question. Assuming we don't have unanimity that a threat was made. The threat is alleged and we have the two employees who testified about it. Neither of you has mentioned one aspect that

I expected to hear. It might be a tougher one for Dan. There are many work settings in which it is “unusual” for unionized brothers and sisters to testify against one another. Assuming that nothing is known about animosity between the people before the incident, what significance, if any, should the arbitrator pay to the fact that it is unusual for fellow employees to testify against one another in evaluating the credibility of the threat?

Schauer: If the people actually testify, if the fellow union members actually testify, I think you are right, that it does impact Dan’s case more. As the employer representative, I am going to be in a better position of being able to prove the threat occurred through the grievant’s words and deeds. But in terms of presenting fellow employees to testify of their concern, it is going to be difficult for an employer to do that. I typically try to avoid the admission of such testimony on the basis that it is essentially irrelevant.

Now, if they do come forward and I can get them on the stand, you know, great, but I really think we have to be concerned about a popularity contest.

Boone: But, I understood you were asking a little bit different question. It was not as to their perceptions—whether they were afraid or not or felt threatened—but rather, what is the impact of their willingness to come forward and testify. It depends on the workplace culture whether workers are willing to testify against each other, and whether the arbitrator knows the industry.

If it is a culture where workers do not typically testify against each other, and a bargaining unit member does give that testimony, and if it is that explicit, that really strikes me as the kind of case that should not go to arbitration. We have been talking about the statement, “I am going to kill you.”

But the hard cases are the ones where there is no explicitly threatening language, such as, “You better take care of yourself.”

Brogan: “Watch your back.”

Boone: Right. There was an arbitration award issued by Arbitrator Charles Feigenbaum. I will read from the opinion and not misstate it. (Laughter.) It is at 110 Labor Arbitration Reports, page 475, “At the end of the meeting, he either told Ms. Melton that she ‘needed to be careful’ or that she ‘needed to be careful this weekend.’” Now, Arbitrator Feigenbaum found that statement was not a threat. He analyzed the whole context, the rest of the conversation, the setting, who the worker was, and what happened after that to find the statement was general, unspecific,

and ambiguous. It promised no action, no timetable or conditions under which harm would come to Ms. Melton. There were no accompanying threatening gestures.

To me, these are the closer cases where thorough development of the evidence is critical. From the union's point of view, a worker who is disfavored or has a bad reputation says, "You need to be careful." Immediately when confronted the worker gives an explanation that is somewhat exculpatory. Nevertheless, this worker was fired. In Arbitrator Feigenbaum's case, this worker was reinstated. These are the challenging cases that you all wrestle with.

Schauer: Even esteemed arbitrators are entitled to one bad decision, Dan. (Laughter.)

Boone: You better watch what you say. (Laughter.)

Brogan: We have some questions pending. We really are actually out of time, but there is no program that follows this, so I'm going to take the three questions that are standing. So go ahead. And Elliott has got one, too. So there are four.

Audience Member: Does the scenario change at all in your mind—and this would be for both of you—if the person who has made the threat such as, "I could kill you," has been harassed on the job, which also is violative of a company or a public policy? For example, it may be something that the company is aware of and that they have addressed only in a minimal way,

Schauer: You are saying there is a provocation?

Audience Member: Extreme provocation over a period of time. And assume there has been no history or pattern related to this employee until that occurrence.

So that's my first question. And second, I don't find Dan's suggestion to allow a professional evaluation of fitness for duty unusual. I deal with police and fire and corrections where it is used all the time because there is training and fitness for duty requirements to enter the job.

Schauer: Provocation. Well, in our scenario, in my view, there was no provocation. If there is provocation, then you can look at the threat perhaps as something different, particularly if the person apologizes or ties his words to the provocation relatively quickly. Then I think you can take that into consideration. Did I get that right?

Audience Member: You are representing the employer and you realize your client hasn't acted properly in accordance with their own policies against harassment. The union puts forth the evidence and argument saying, "Look, this fellow was driven to this,

the company didn't follow its own process, it had a process to deal with, workplace violence, and they didn't follow it." So I'm asking you, is that a mitigating factor that should have any significance?

Schauer: Well, then the suggestion is that someone can be entrapped, so to speak, into threatening a fellow co-worker. In other words, I am a victim of my workplace. Therefore, I am free to lose my common sense and threaten a fellow worker?

Audience Member: Well, I wouldn't state it in that way. I guess the fact of the matter is, I am saying to you that management had a responsibility as well to provide a secure and safe workplace for the grievant as well as the alleged victim—

Schauer: Right.

Audience Member: So I'm saying, if that's the case, then what effect does that have? You have gone to arbitration, so obviously, you didn't work it out. What effect should there be when you didn't follow your own rule and this fellow is in a position now where he or she has been provoked and has lost his temper, whatever?

Schauer: Certainly, it enhances Dan's case.

Boone: My argument will be that, whatever the words were, this was venting—this was understandable and justified blowing off steam. This comes up typically with discharges for threatening language toward a supervisor. The union is motivated to bring this case because, in the vernacular, that supervisor is an asshole, and he has been an asshole for 15 years. In effect, the worker's upset was justifiable—it is understandable why he would say these things about that supervisor.

Audience Member: My comment goes to Mr. Schauer. With respect to the management bar on this type of case, my sense over the last 10 years is that every single case is being presented in arbitration without even vetting the believability of the person making a claim. I have heard comments from management attorneys saying, "Look, we can't take a risk with respect to the liability."

I had a case where the particular unit was all Italian women. The claimant, who was making the argument that she was being threatened, said that one of the women was giving her the "maloik." "Maloikia," for the non-Italians in the room, it is the evil eye, the Sicilian evil eye, and she couldn't come to work. She was losing sleep. She wanted to be escorted to the subway. I remember going in the hallway and saying, "You must be kidding." First of all, I will disclose I am of Italian American heritage, and I have seen a maloikia work.

Brogan: Oh, we didn't really know that.

Audience Member: Did you notice that, talking with the hands?
(Laughter.)

Brogan: That's great.

Audience Member: But my point is, it may seem as if there is no discrimination in terms of what is being presented, but then we come back and make a decision saying, "Look, this is just incredible." Then we hear some of the arguments today that we shouldn't be second guessing. I think that you are doing your duty to protect the employer from liability, but some of these cases are completely off the wall.

Schauer: On both sides.

Audience Member: Yes, both sides.

Schauer: I am not going to disagree with you. There are some employers who would prefer to take the case before the arbitrator. If the person is coming back to work, I'm not putting him back to work. Let the arbitrator put him back to work, and somewhere along the line if something happens, I will argue I am not responsible. The arbitrator put him back to work.

Audience Member: Which is fine, but I just wanted to understand what you were saying.

Schauer: But in like token, I think you have seen just as many cases presented by unions that have no place in that room, either.

Audience Member: I am not saying I disagree. I just wanted to be sure that you acknowledge that it does cut both ways. So I won't put the maloikia on you as a result. (Laughter.)

Brogan: Jim?

Audience Member: This is an anecdote, which is only remotely apropos, but I had a threat case, and it seemed very obvious to me that it was a genuine threat because the guy was known to have all kinds of weapons and bragged about them and how well he used them. Well, he threatened a supervisor. I heard the case. I upheld the discharge, and then the union representative called me at home from another state and said, "He got your name and where you lived, and he said he is going to kill the supervisor, and then he is going to kill you." It was nice to know I made the right decision. (Laughter.)

Brogan: Elliott, you have our last question.

Audience Member: I must say that context and contents are always important in these cases. Quickly, I had a case where the steward said, "I am going to burn your ass," and they fired him. I concluded that what he said was really related to the grievance

procedure and a threat to litigate. Whereas, if grievant had said, “I am going to put my foot in your ass,” it would be something else. It really is important as to what is said and in what context.

Brogan: Well, thank you for educating us, Elliott. I didn’t appreciate the distinction.

Schauer: Elliott, only you are smart enough to decipher the difference.

Brogan: Allow me to close this marvelous session by giving special thanks to our participants, John Schauer and Dan Boone, who made it so worthwhile. Thank you so much. (Applause.)

Addendum 1 to Chapter 8

The Workplace Violence Scenario

Following is the scenario that was the focus for the discussion in this session on workplace violence.

John Hamley has been employed as an equipment operator in a warehouse for 10 years. He was discharged on January 6, 2005, for threatening conduct. The triggering incident took place on January 3, 2005. Mr. Hamley has served as a union steward for many years, but recently was replaced as steward by a co-worker after an election.

The collective bargaining agreement provides that the employer may implement reasonable work rules, and may discipline consistent with just cause principles. It further states that discipline older than three years “cannot be used for disciplinary reasons.” The grievant has not been disciplined in the last three years.

Approximately five years ago, the employer unilaterally promulgated a handbook that provides for progressive discipline. Work rules are specifically set forth, including the following:

Threats and acts of violence will not be tolerated. Such conduct may be met with discipline up to and including discharge.

The handbook was disseminated to all workers, including the grievant, and the work rule has been prominently displayed on two company bulletin boards. There has been no specific workplace violence training. The union did not grieve the company’s promulgation of the handbook.

On January 3, 2005, the grievant had an exchange with a co-worker, Jason Smith, on the shop floor. As the shift started, the grievant quickly approached Mr. Smith, and accused him, in a very loud voice, of denting his car the evening before in the company parking lot. Mr. Smith denied the charge; the grievant insisted he caused the damage. As the exchange escalated, the voices of the two rose and became more heated. It is alleged that at some point the grievant threatened Mr. Smith. Three co-workers were in the vicinity. One of the co-workers advised a supervisor of the incident, later the same day. The supervisor immediately approached both the grievant and Mr. Smith, and suspended them with pay pending investigation. The grievant, Mr. Smith, and the three co-

worker witnesses were subsequently interviewed by the supervisor. The grievant was charged with engaging in threatening conduct in his interchange with Mr. Smith, and was fired, effective January 6, 2005. Mr. Smith received no discipline.

How do the following facts affect the advocates' arguments to the arbitrator?

1. Mr. Smith states that the grievant yelled, "I am going to kill you." According to Mr. Smith, the grievant said this at close range, with his finger pointed in Mr. Smith's face. The grievant acknowledges that he may have said, "I could kill you," but argues he and others in the shop use this phrase regularly, in the presence of supervisors with no disciplinary consequences. He also explains that he often uses his hands when he is speaking, especially when he is excited. The grievant states that he had no intention of hurting Mr. Smith, that he was very angry because he was told that Mr. Smith had damaged his new car, and he was willing to apologize to Mr. Smith.

2. Assume the facts of (1) above. In addition, when Mr. Smith was interviewed, he told the supervisor that he took the grievant's threat seriously, and could not work in the same shop as the grievant. As a reasonable basis for his fear, Mr. Smith cites that the grievant, as part of his duties, drives a forklift, and carries a box cutter.

3. Assume that the co-workers heard the grievant say, "I am going to kill you," to Mr. Smith. Two of the co-workers said that they were very disturbed by the statement. At arbitration, on cross-examination, they testified that they had known the grievant for years in his role as a union steward, and they did not believe he would actually kill or harm Mr. Smith. One co-worker felt it was nothing but harmless "shop talk."

4. Change the facts as follows. Assume that all the grievant said to Mr. Smith on the shop floor was: "You had better watch your back from now on." Later, the grievant has a conversation with Joe, one of the co-workers, who was a longtime friend. In that conversation, he says, "That guy (Smith) makes me so mad, I could kill him." The grievant is discharged based upon both comments.

5. Change the facts as follows. Instead of immediately holding off the grievant with pay pending investigation, the grievant and

Mr. Smith are sent back to work. The supervisor interviews Smith and the witnesses, prepares a report of the investigation, but does not interview the grievant because he assumes the grievant will deny all allegations. The Supervisor does not show the report to the Human Resources Director until three days later on January 6, because the HR director is out of town. The grievant and Mr. Smith worked during that time, without incident. Upon returning to the facility and reading the supervisor's report and recommendations, the HR Director terminates the grievant that day.

6. The union wishes to present evidence that four years ago, a 20-year employee who threatened a co-worker (by pulling a knife as he backed away during an argument) was suspended, not fired. The union cites a second incident, which occurred in 2004, in which an employee shoved a co-worker while arguing on the shop floor and received a written warning and was sent to anger management training.

7. Assume that the grievant denies making any threatening statements. The company wishes to present three prior incidents of the grievant in which the grievant was disciplined for threatening misconduct. All involved threats to co-workers in the workplace. These incidents took place more than three years ago. The company seeks to introduce the evidence to show notice to the grievant of the work rule, and to establish that the grievant likely engaged in the misconduct alleged.

8. The company seeks to introduce newly discovered evidence. Company counsel states that since the grievant was discharged, four co-workers have come forward, wishing to testify against him. They allegedly have told management that the grievant has repeatedly threatened them in the past and they were too frightened to come forward until he was out of the shop. The company avers that they were not aware of these incidents at the time of the grievant's discharge.

9. Would your arguments change if the written work rule proscribed only "acts of violence"?

10. On the day before the arbitration hearing, company counsel requests a conference call of the parties to discuss a procedural matter. In the call, for the first time, the company indicates that it wishes to have a security guard in the room during the hearing, given the aggressive tendencies of the grievant. How should the union respond?

11. John Hamley is called as a union witness. Union counsel tries to introduce a letter from the grievant to the company president written a month after the discharge acknowledging his “stupid mistake” and seeks to elicit testimony that the grievant was under severe personal stress in January 2005 because of his mother’s serious illness and his recent bitter divorce. He stated that he is willing to seek counseling, and he wants a second chance to show that he can be a productive employee. Employer counsel strenuously objects.

Addendum 2 to Chapter 8

Threats of Violence in the Workplace: The Union Perspective

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This paper addresses the challenges unions face when arbitrating a discharge founded on alleged threats of violence in the workplace and recommends some strategies for successful advocacy to gain reinstatement. The focus of this paper is on a particular type of case, that being “threats of violence” justifying summary discharge. The “threat” case is distinguishable from other disciplinary arbitrations involving “horseplay,” use of profanity, racial epithets, obscene or otherwise offensive language, general harassment, and sexual harassment.

Overview

The first prerequisite to the union’s preparation and advocacy is recognizing and understanding the interrelated policy considerations that the employer will stress to the arbitrator. The employer’s arguments typically include all or most of the following statements:

1. Threats of violence violate the most basic tenets of workplace morality and conduct. The employer has a right and obligation to maintain a working environment free of violence and threats of violence. Given the epidemic of workplace violence, employers have a duty and responsibility to protect employees from workplace violence, and no choice but to terminate an employee who engages in threats of violence.¹
2. The victim (and others) are genuinely frightened, and cannot work with the grievant. The grievant’s statements

¹In “threat” cases, almost every award states that the company’s concerns are legitimate, and threats of workplace violence are a serious problem in society today. Employees are entitled to enjoy a safe workplace without threats of violence.

do not constitute “shop talk,” and cannot be excused as a “joke.”

3. The grievant’s excuse that a supervisor or co-worker provoked him or her cannot justify the grievant’s behavior.
4. The grievant’s claim of disparate treatment must be rejected.
5. Reinstatement would condone threats, and in the event of actual violence, would expose the company to very costly civil liability. No one can say just when such a threat will be carried out. The employer simply cannot take the chance. Therefore, the discharge must be upheld.

The union must accept the persuasive force of these points. They cannot be taken lightly. In its presentation, the union must unequivocally state that the union, as the collective voice of the work force, takes threats of violence seriously. It does so from the perspective of protecting the safety of fellow union members. For example, the union’s opening statement may begin as follows:

The Union fully agrees that the charge against the grievant of threatening violence is very serious. Threats in a work environment are certainly worrisome in our world today, in light of the publicized incidents of workplace violence. The Union accepts the legitimacy of policies promulgated by employers in an effort to eliminate violence. The Union also acknowledges that proven threats of workplace violence may be just cause for an employee’s summary discharge. However, if the employer carries out a policy of summary discharge, the policy must be administered with fairness and impartiality, consistent with principles of just cause.

The question that must be squarely and honestly faced is whether the employer can sustain its burden of proving that the grievant made statements that constitute an actual threat of harm. If the answer is “yes,” the union may decide not to arbitrate the grievance protesting the discharge, consistent with its duty of fair representation to grievant and other members of the bargaining unit.²

²Even if the grievant made an actual threat of harm, the union may nonetheless opt to arbitrate the grievance if there is persuasive evidence of disparate treatment, such as employees being sent to an Employee Assistance Program for anger management for a first offense. Based on numerous arbitration awards, this argument is unlikely to prevail unless the other conduct relied upon has reoccurred and is truly comparable, and there are mitigating factors such as long service and a good work record.

Close Attention to the Facts

The second (obvious) key to a successful outcome is penetrating the employer's evidence with the purpose of presenting a fact pattern that is different from, or more complicated than, the employer's characterization. By scrutinizing the employer's evidence, the union may be able to undermine allegations that the grievant made the statement for which he or she was discharged. Sometimes the grievant completely denies having made such statements. More typically, the grievant acknowledges making statements, but different than those alleged.

In "threat" cases, answering the simple question "what words were uttered" can be a complicated and difficult "fact-finding" task for the arbitrator. What exactly was said by the grievant? Heated exchanges in emotionally charged settings often lead to witnesses having widely varied recollections of the events. Hearsay reports and absent witnesses are frequent in this type of case.³

Although reaching a conclusion about what was said can be challenging, the truly difficult questions concern the correct characterization of the statements made. How are the words and conduct related to those words, to be understood? What are the workplace and societal contexts informing those meanings? To highlight this question, I recite statements found to have been made by workers on the job:⁴

The grievant said "he would hurt anyone who crosses him, and specifically, that he was going to obtain revenge against [supervisor] W__, who he felt was unfairly riding him, by running W__ over with a forklift truck and by cutting the gas line on W__'s motorcycle."⁵

"[O]ne of these days I'm just going to kill [supervisor] W__."⁶

The grievant stated he was going to "get even" with and "go after" his supervisor.⁷

³Of particular concern is the attempt by employers to present hearsay witnesses or writings as sufficient evidence to support threat allegations. Arbitrators have rejected these efforts. *Boise Cascade Corp.*, 114 LA 1379, 1384 (Crider 2000); *Philip Morris USA*, 109 LA 299, 301 (Wahl 1997). Reported awards also draw adverse inferences against the employer for failure to call percipient witnesses who are apparently available. *Windsor Door*, 109 LA 761, 766 (Neas, 1997); *Lewis Tree Service, Inc.*, 114 LA 852, 859 (Dissen 2000).

⁴In every one of the recited cases the grievants were reinstated, many with back pay.

⁵*Kuhlman Electric*, 112 LA 691 (Goldberg 1999).

⁶*Milbank Manufacturing Co.*, 112 LA 464 (Crider 1999).

⁷*Samaritan Hospital*, 112 LA 18 (Monat 1999).

“You [supervisor] need to be careful this weekend.”⁸

The grievant threatened to kill his supervisor and also said “[Y]ou’re a lying motherfucker, I’m going to fuck you up.”⁹

“[W]hat do I have to do, go get a gun and blow somebody away?”¹⁰

“[Y]ou better call somebody, because they are going to need to take my foot out of your ass.”¹¹

The grievant told his supervisor “that he had better not see him in church on Sunday or he was going to get him.”¹²

As the grievant walked behind his supervisor he told the supervisor, “C’mon, you and me over the fence right now, on the other side of the fence, right now!”¹³

If a statement is found to have been made by the grievant, such as the examples provided above, the critical inquiry is whether the grievant’s words, evaluated in light of the totality of the circumstances, really constituted a “threat.” Black’s Law Dictionary defines a threat as, “A communicated intent to inflict harm or loss on another or on another’s property, especially one that might diminish a person’s freedom to act voluntarily or with lawful consent.”¹⁴ Referring to the same Dictionary, “intent” is defined as, “The state of mind accompanying an act, especially a forbidden act. . . .”¹⁵ By strict application of these definitions, what is relevant to an evaluation of the grievant’s culpability is his or her intent at the time the statement is made. The burden is on the employer to persuade the arbitrator that the grievant intended to do violence.¹⁶

⁸ *Children’s Hospital*, 110 LA 471 (Feigenbaum 1998).

⁹ *Ryder/ATE*, 111 LA 1038 (Prayzich 1999).

¹⁰ *B.F. Goodrich Aerospace*, 105 LA 1053 (Strasshofer 1995).

¹¹ *South Bend Metal Stamping*, 111 LA 995 (Goldstein 1998).

¹² *Safelite Glass Corp.*, 111 LA 561 (Bain 1998).

¹³ *Van De Kamp’s, Inc.*, 111 LA 180 (DiLauro 1998).

¹⁴ Black’s Law Dictionary (West, 8th ed. 2004).

¹⁵ *Id.*

¹⁶ Employers will often argue for a standard that focuses on the reaction of or impact on the victim(s), or on the content of the statements independent of the grievant’s state of mind. Arbitrators may also apply a more “objective” test. For example, California Code of Civil Procedure authorizes a Court to issue workplace injunctive relief if there is a proven “credible threat of violence,” defined as “a knowing and willful statement . . . that would place a reasonable person in fear for his or her safety, or the safety of his or her immediate family, and that serves no legitimate purpose.” C.C.P. §527.8(a) and (b)(2).

In addition, union advocates must recognize that creating and exploiting fear is endemic in our society, and that an Arbitrator can be affected.

In light of the Post-9-11 climate in the United States, an arbitrator may sustain the discharge of grievant even where the grievant lacked the intent to threaten another person.

Acknowledging that expressions such as “I am going to kill him” or “I could kill him” legitimately raise fears and concerns and are highly disfavored in our violence-prone society, it must also be recognized that such phrases are bandied about with some regularity. To say such words does not automatically mean one literally intends them, or ever intends to act on them. The key to a finding that there was not just cause for discharge is persuading the arbitrator that the statements made were not actual threats, but can be and should be correctly understood, for example, as venting because of justified anger caused by unreasonable or improper provocation by the alleged victim, or that the statements were a spur-of-the-moment reaction to some event, and not premeditated or malicious. This can be accomplished only by meticulously probing the details of the fact pattern, and eliciting testimony that provides evidentiary support for the overall arguments. The core issue is whether there is a real imminent likelihood of a threat being carried out.

Determining the grievant’s intent poses many difficult and interrelated questions:

1. What exactly was said that constituted the alleged threat?
2. What emotion, or perception of emotion, accompanied the words? Was the statement made in a joking manner? Or was it an expression of frustration, anger, rage, hatred, or disdain?¹⁷
3. Were voices raised? Was profanity used? By whom?
4. What, if any, physical actions accompanied the words?
5. Did the grievant intend the words to be understood as an actual threat to harm? What are the possible bases for making this determination?
6. Was the grievant venting animosity, as opposed to making an actual threat or statement of intent to do harm?

The “victim” or witnesses’ stated belief that an imminent likelihood that a threat would be carried out may provide the arbitrator a sufficient basis for sustaining a discharge. The Union advocate must be prepared to argue that 1) the grievant lacked the intent to threaten violence; or alternately, 2) that the “victim” and witnesses did not interpret the statement to be a threat at the time it was made. Therefore, the statement made by the grievant was not a threat.

¹⁷The “I was only kidding” or “it was just a joke” defense is generally not persuasive. *Southwest Airlines*, 114 LA 1797 (Jennings 2000); (A threat to “go postal” is not a joke or laughing matter, especially at an airport.).

7. Was the grievant justified in his anger? What were the circumstances that grievant believed prompted his statements?
8. Was the statement made in the presence of the alleged victim? Were the statements directed to the intended victim or were they generalized?
9. What is the relationship and history between the grievant and the “victim”?
10. Was the “victim” a fellow employee or supervisor?
11. What other interactions did the principal participants have with each other before and after the “threat” event?
12. What did witnesses see and hear?
13. Did those present react as if they believed there was a real danger? For example, did they intervene, immediately contact a supervisor, or call the police?
14. Did the grievant and the “victim” return to work and continue working for the remainder of the shift?
15. Were the statements repeated? Did the argument/exchange continue after the allegedly threatening statements?
16. Did the grievant acknowledge making a mistake? If so, when and under what circumstances?¹⁸
17. What type of workplace was the setting of the dispute? A school? An airport?
18. Are there differences between contemporaneous oral or written reports and later testimony?

The framework of the above interrogation of the evidence is well summarized by Charles J. Crider in *Milbank Manufacturing Co.*,¹⁹

An arbitrator determines if any such threat genuinely reflects an intent to seriously harm or kill by focusing on exactly what were the threatening words and on the context in which they were spoken. Culpability for making a threat can be determined only after considering all the surrounding circumstances.

¹⁸Arbitrators are frequently more willing to reinstate a worker who is contrite, however, an apology by the worker may cut several ways as it may serve as an admission of wrongdoing. Certainly, a belated apology carries less weight than an apology made shortly after the incident.

¹⁹*Milbank Manufacturing Co.*, 112 LA at 465.

Arguing the Evidence

The third key to effective advocacy is to persuade the arbitrator that the statements made were not actual threats, i.e., an expression of intent to hurt or injure.

This section discusses specific areas of inquiry, reciting reported awards supporting possible arguments. The persuasive force of each argument, individually or in combination, will of course depend on the quality of the advocacy and the choice of arbitrator.

Evidence that challenges the nature of the statement itself

1. The grievant engaged in no physically threatening, menacing, intimidating, or violent conduct before, during or after the offending statements.²⁰
2. The evidence does not establish that the speaker was likely to or capable of acting on the threat at the time the statement was made.²¹
3. The statement was made in the “heat of the moment.” The “threat” was not specific. The grievant was generally “venting his/her spleen.”²²
4. The “threat” was not made directly to, or in the presence of, the victim. The evidence, including the ambiguity of the statement, is therefore insufficient to conclude that the grievant intended to carry out any of his threatening remarks.²³

²⁰*Kawneer Co.*, 115 LA 1668 (West 2001) (Employer improperly discharged employee who said, when accused of clocking in for a co-worker, that the supervisor “will have to prove something,” while leaning toward the supervisor. The arbitrator reasoned that “such a statement, without being coupled with a physical gesture does not constitute a threat.”).

²¹*Windsor Door*, 109 LA at 767 (“Moreover, H___’s age, size, weight and temperament doesn’t at all suggest that she would be afraid of R___, if R___ attempted to ‘whip her ass.’ The reverse is probably closer to the truth. If R___ had been serious about attacking H___, why would she immediately turn and walk away . . .”).

²²*B.F. Goodrich Aerospace*, 105 LA at 1056; *South Bend Metal Stamping*, 111 LA at 998. (“Statement made in frustration and anger” not a “legitimate threat.” The “threat” was not specific.); *Safelite Glass Corp.*, 111 LA 561.

²³*Kulman Electric Corp.*, 112 LA at 696 (The arbitrator found that the grievant was trying to impress a young woman with his bravado, and the grievant did not actually intend to carry out his statements.); *Children’s Hospital*, 110 LA at 475 (“The remark was generally, unspecific and ambiguous. It promised no action by the Grievant, no timetable or conditions under which harm would come to Ms. Melton, and there were no accompanying threatening gestures.”); *Van De Kamp’s, Inc.*, 111 LA at 184 (The grievant was behind the supervisor when the alleged threat was made so the supervisor could not see the grievant make the statement, nor could he perceive if the grievant was making any gestures of a threatening or non-threatening nature. The grievant did not acknowledge that he was threatening the supervisor when the supervisor immediately confronted the grievant thereafter.); *EWI, Inc.*, 108 LA 50, 58 (Brookins 1997) (The grievant’s alleged statement,

5. The grievant was justifiably angry because of some provocation or legitimate grievance, and his or her statement was a spontaneous outburst.²⁴

Evidence that provides context with respect to the grievant's character and personality

6. There is no history of violence or threats of violence by grievant prior to the offending statements, i.e., no propensity toward violence.²⁵
7. The grievant has been examined by a medical professional, and was found unlikely to engage in violence.²⁶
8. The grievant was experiencing extreme emotional stress due to a divorce, a custody dispute, death or illness in the family, financial strain, etc.²⁷

"I'm gonna get you one of these days outside the plant" is too ambiguous to justify firing grievant.); *Auto Warehousing Co.*, 114 LA 699 (Brodsky 2000) (The arbitrator found that although the grievant's remark that the supervisor was "lucky that someone doesn't come up [here] and split your head open" has some threatening aspects to it, it is different than "I am going to split your head open." The former remark is ambiguous and less egregious than a more direct imminent threat.).

²⁴*Children's Hospital*, 110 LA at 475; *Sterling Engineered Products*, 92 LA 340 (Kaufman 1989) (It was apparent that grievant was extremely offended when his supervisor called him a "cabron" [a general term of insult in Spanish meaning bitch, bastard, etc.]. The arbitrator found that supervisor's provocation of the grievant justified mitigation of the penalty from discharge to suspension.).

²⁵*Samaritan Hospital*, 112 LA at 20 ("She testified that the grievant was very upset about not having been selected for the courier position, a fact he learned moments before in a brief encounter with his supervisor, A____. Cammack described the grievant as 'enraged, off the wall, and upset about everything.' He was going to 'sue her ass' and 'get even with her . . . go after her.'" "The potential to violent behavior is a process and there are always warning signs. There is an 'increase in inappropriate behavior' in terms of frequency, intensity and level of threat. There is no evidence on the record before the arbitrator that the grievant had any history of behavior which was threatening or violent. Even though the grievant was angry because of two (2) incidents in three (3) days, he never threatened to do more than work within the rules to 'get even.' His profile does not reflect the long history of behavior that normally precedes workplace violence."); *South Bend Metal Stamping*, 111 LA at 999.

²⁶*Philip Morris USA*, 109 LA at 301 ("The professionals who evaluated L____, including the Company's own doctor, agreed that L____ had 'thoughts' brought on by stress, without any 'intention' to carry them out, that he was 'stable,' 'in control' and offered no 'threat' to anyone. The fact that he sought help voluntarily, they believed, showed he had no wish to carry out the thoughts which came to his mind. He was cleared from a mental health standpoint to return to work.").

²⁷*United Industries, Inc.*, 88 LA 547, 548 (Baron 1986) (The grievant had severe marital problems and had left his wife the morning before the incident. When provoked by a co-worker, the grievant explained to the co-worker that the grievant had personal problems and that he would take a hammer to him if he did not stop his behavior. The grievant then asked a supervisor to accompany him to his workstation. While accompanied by the supervisor, the grievant said to the co-worker, "If you fuck with me one more time, I'm going to split your head open with a hammer." The arbitrator found that "under the circumstances of the case (which included provocation and other mitigating factors), the discipline of discharge was not reasonably related to the seriousness of the offense. . .").

9. The grievant has prior military history, or martial arts experience. Therefore, the grievant is self-disciplined and not likely to be violent.²⁸
10. There was some form of communication soon after the event acknowledging the mistake, communicating lack of intent to act, or stating some form of apology or regret.²⁹

Evidence regarding the relationship between the grievant and the victim

11. There was a relationship between the grievant and other person(s) that included expressing anger, “blowing off steam,” without a chance of action.³⁰
12. There was a relationship between the grievant and the person to whom the threat was voiced of seeking input or advice or sympathy, rather than sharing an intention to harm another. For example, the listener was a friend, confidant, or an Employee Assistance Program (EAP) counselor.³¹

²⁸This factor may be argued both ways. An employer may assert that a preoccupation with things militaristic serves as evidence of a predilection of violence. More specifically, an accusation that the grievant’s conduct constitutes a “terroristic threat” or a threat of mass violence will be taken very seriously, especially in a post 9-11 era. However, see *Ellis Park Raceway, Co.*, 95 LA 895 (Goggin 1990) (The grievant was reinstated despite saying to co-workers that he wished to put a supervisor on his “berserk list” and also wished that the workplace would burn down and that the owner would go broke. The grievant was known to store a gun in the glove compartment of his car and to carry a pocketknife on his person. The arbitrator concluded that despite the seriousness of the accusation of “terroristic threatening,” the grievant should be reinstated because the employer did not present sufficient evidence to support discharge.).

²⁹*Children’s Hospital*, 110 LA at 475. (“I think it important that, as soon as confronted, the grievant backed away (literally and figurative) from an interpretation of his words that could be construed as a threat, and tried to give them an entirely innocuous meaning. He realized, as Ms. Melton surmised, that he had made a mistake and then attempted to repair the damage that had been done.”); *Swanson Industries, Inc.*, 115 LA 1527 (Grupp 2001) (The morning after the incident, the grievant visited the Director of Operations in his office and asked for his job back, stating that he would accept whatever was necessary in order to be rehired. “Grievant’s subsequent action in trying to get his job back does indicate that he is not unaware of the reaction that hasty conduct and strong words may bring forth from others.”); *Wayne State University*, 111 LA 987 (Brodsky 1998) (The grievant immediately admitted that what he said was inappropriate and apologized for his actions. He later sent a letter to the supervisor to apologize formally. Throughout the arbitration process, the grievant consistently and forthrightly took responsibility for his actions.).

³⁰*Everfresh, Inc.*, 99 LA 1038, 1041. (The grievant, “K_,” made a comment, “Isn’t this how the thing at the Post Office started,” making reference to a recent shooting of a postal supervisor by an employee. Both supervisors who heard the comment testified that they did not take the remark as a serious threat and dismissed it with the comment, “That’s just K_.”)

³¹In response to the California Supreme Court decision, *Tarasoff v. Regents of University of California*, 131 Cal. Rptr. 14 (1976), the California legislature passed Cal. Civ. Code §43.92 (West, 1985) limiting a psychotherapist’s obligation to report threats of violence made by patients. A psychotherapist is only obligated to predict, warn of, and protect potential victims from a patient’s violent behavior “where the patient has communicated to the psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims.”

Evidence related to conduct of the employer or witnesses after the statement was made

13. Those who heard the statements did not believe that the grievant was seriously threatening to kill or harm, based on their reaction and subsequent conduct. For example, there was no immediate report to supervision, security, or police, no actions suggesting belief of imminent danger. Those who witnessed the grievant's statements delayed before reporting to management or security, and did not take actions consistent with a claimed concern for safety.³²
14. The grievant was not restrained, was not escorted off the premises, and/or continued doing his or her job after the alleged threat, demonstrating that the threats were not taken literally at the time.³³

Evidence related to disparate treatment, denials of industrial due process and additional charges after determination³⁴

15. There is a workplace culture of profanity, strong language, with no workplace training beyond issuance of "no threats of violence" rules.³⁵

³²*Samaritan Hospital*, 112 LA at 20; *Children's Hospital*, 110 LA at 474; *Ryder/ATE*, 111 LA at 1042; *B.F. Goodrich Aerospace*, 105 LA at 1056 (The nurse apparently decided after the fact that the verbal threat was "an expression of intention to inflict evil, injury or damage." "If the reactions of the nurse were as strong and vigorous as later reported in the statement, the statement would have been reported promptly."); *Wayne State University*, 11 LA at 992 (A supervisor told the grievant not to sleep on the job. The grievant responded, "If I bring my 44-Magnum, can I go to sleep then?" The grievant also referred to "hollow-point bullets." The supervisor did not react to the grievant's comment as though he faced imminent danger. He did not immediately call public safety and he even participated in later effort to locate the grievant. After the incident, the grievant and supervisor shook hands and the grievant apologized to the supervisor.); *Everfresh, Inc.*, 99 LA 1039, 1041 (Allen 1992) (There was no evidence that the grievant's remark to the supervisor that he was "going to take [supervisor] out" was directed toward the supervisor or that the supervisor ever heard such a statement. There was no need to physically restrain the grievant, and physical contact was non-existent. After the statement was made, the grievant went to the drinking fountain and several minutes later took his regular lunch break.)

³³*Alumax Aluminum Corp.*, 92 LA 28 (Allen, Jr. 1988) (After the alleged threat of violence, the grievant did as ordered by the supervisor, went back to his workstation, and commenced his regular duties. Even the supervisor conceded that he did not order the grievant's removal from the plant because he did not consider the grievant to be a threat.)

³⁴*Grief Bros. Cooperage Corp.*, 42 LA 555 (Daugherty 1964) (Arbitrator Daugherty provides a summary of the principles of a disciplinary system and a set of standards to be applied in determining whether an employer had just cause for disciplining an employee.)

³⁵*Swanson Industries, Inc.*, 115 LA at 1531 ("In my experience language in industrial work places can seldom be compared to the language in church or at a tea party."); *Olin Corp.*, 103 LA 981 (Fowler 1994) ("Even placing the testimony favoring the Company's position in the most favorable light, if every employee who had told a fellow employee

16. There were prior instances of angry outbursts that were not followed by physical assaults, and the grievant was not disciplined for that prior conduct.³⁶
17. Other employees have not been discharged for threats or physical contact in the past. Therefore discharge of the grievant constitutes disparate treatment.³⁷
18. The employer did not conduct a full and fair investigation, did not confront the grievant with specific allegations and give the grievant the opportunity to respond before the discharge decision, to deny, clarify, or explain the statements.³⁸
19. The employer has added on reasons for discharge to reinforce its case after the termination notice.³⁹

Last, the union should keep in mind that an arbitrator hearing a “threat” case seeks a degree of assurance that when the grievant returns to the workplace, he or she will not renew conflict with the individuals at issue, and most importantly, will not engage in any future threats or violence. The union should prepare the grievant to express in testimony recognition that threatening language is unacceptable. Ideally, the grievant will genuinely apologize to the victim and assure the arbitrator that reinstatement will not lead to violence in the workplace. The grievant’s regret and recogni-

that he felt like shooting a supervisor or fellow employee who was upsetting him was discharged, I suspect the number of discharge cases in most industries would be significant. It certainly takes something more to elevate such shop talk to a level of threatening a supervisor or threatening work place.”)

³⁶*Champion Spark Plug, Co.*, 93 LA 1277 (Dobry 1989) (The testimony of a supervisor and a retired foreman suggested that the grievant’s behavior on this occasion was not particularly different from that which had gone unpunished on numerous previous occasions. The arbitrator concluded that grievant’s penalty should be mitigated due to the employer’s lax enforcement of the rules in the past.)

³⁷*Philip Morris USA*, 109 LA at 299, 301; *South Bend Metal Stamping*, 111 LA at 998–99; *Solar Turbines, Inc.*, 85 LA 525, 528 (Kaufman 1985) (It appeared even from the company’s testimony that confrontations between employees on the shop floor occurred on an almost daily basis with no resulting disciplinary action.)

³⁸*Milbank Manufacturing*, 112 LA at 468; *Boise Cascade Corp.*, 114 LA at 1384; *Handschy Industries*, 109 LA 1019, 1021 (Cerone 1998); *Shaefer’s Ambulance Service*, 104 LA 481, 486 (Calhoun 1995).

³⁹These efforts by employers are rejected because “it is axiomatic that in a discharge case the employer’s defense must stand or fall on the reasons given to the employee at the time the action is taken.” *Windsor Door*, 109 LA at 765; *Auto Warehousing Co.*, 114 LA at 703 (The grievant was initially discharged for leaving work without permission on January 5. In the course of arbitration, the employer stated that but for the grievant’s threats of violence on January 6, it would have reversed its initial discharge decision. The arbitrator was suspicious that the employer “almost purposefully never mentioned the January 6 incident in any of the written answers to the subject grievance.” The arbitrator also found that but for the employer’s hasty decision to terminate the grievant on January 5, the events on January 6 would not have occurred.)

tion of wrongdoing will be more persuasive if supported by earlier apologies.⁴⁰ If the grievant has expressed genuine regret about his or her behavior, the union should emphasize this in closing argument.

Closing Argument On the Merits

In closing argument, the union should again acknowledge the legitimacy of the employer's policy considerations. The union ought to also communicate his or her appreciation for the arbitrator's concerns. To state it plainly, the union must understand that the arbitrator carries the nightmare picture in the back of his or her mind: a headline on the morning newspaper, "Worker Reinstated By Labor Arbitrator _____ Kills 7."

If there is a likelihood the arbitrator will conclude that the grievant made a statement, the union should argue that what was said by the grievant was not actually a threat that constitutes a dischargeable offense, but rather a statement made in the heat of argument. Although the statement may well have been foolish, it was not intended as a threat, nor was it understood by the victim or witnesses to be a threat.

This framework of analysis is well summarized by Elliott H. Goldstein in *South Bend Metal Stamping*:

As I have noted in many other decisions, I believe that making threats of physical violence toward other employees, especially supervisory employees, is almost as serious an example of misconduct as the actual act of physically attacking another employee or supervisor. If competently established through credible evidence, I have held that threats will support summary removal. However, the real question in this case is whether the Company has proved its case for termination of Grievant. In order to prove a case for termination, it must prove that the threat was "serious," and reasonably perceived as a threat to do bodily harm, not hypothetical speculation or intemperate words uttered in a context where no one reasonably could believe a "real threat" has been made.⁴¹

If the employer presents convincing evidence that a statement was made by the grievant and that what was said constituted a threat, the union should turn the arbitrator's attention once again

⁴⁰A grievant found to be evasive, contradictory (not credible), combative, argumentative or self-serving will probably lose. Plainly stated, if the arbitrator concludes that the grievant "doesn't get it," the discharge will likely be upheld.

⁴¹*South Bend Metal Stamping*, 111 LA at 999.

to facts evidencing disparate treatment or other violations of just cause principles.

Requests for Appropriate Remedies to Address Concerns about Future Violence

In closing argument, the union should request reinstatement without loss of seniority. Depending on the seriousness of the statements made, the union should request special remedial orders accompanying or preceding reinstatement. For example, the union can urge that reinstatement be subject to, or conditioned upon, participation in counseling and/or anger management, under the guidance of an EAP program, if it exists. Reinstatement could be coupled with a “last chance” admonition that any future threatening language, regardless of its intent, will constitute just cause for discharge. Also appropriate might be a more generalized remedial order that the employer conduct plantwide “workplace violence” workshops.

In a recent case, Arbitrator David Nevins reinstated an employee of the City and County of San Francisco who told a manager that he was “going to kill” his supervisor with whom he had recently argued. Arbitrator Nevins concluded that the grievant’s words “did not constitute the kind of threat and summarily dischargeable event as viewed by the employer,” although “they were seriously inappropriate and offensive in a work environment and sufficient to warrant a significant disciplinary suspension.” Arbitrator Nevins issued detailed remedial orders, all of which had been requested by union counsel, with the knowledge and authorization of the grievant.

The grievant may be reinstated to a different but equivalent position if he, the Union, and the employer agree to such a reinstatement. In addition, a further, two-pronged reinstatement condition seems appropriate. First, to better alleviate any potential discomfort on the employer’s part regarding and preceding the grievant’s return to work the employer and Union are directed, *if the employer so desires*, to mutually select a qualified medical or psychological professional to evaluate the grievant to ensure he poses no violent risk upon his return to work. If that professional determines the grievant unfit for reinstatement, the employer will have no obligation to reinstate the grievant and the financial reimbursement described below will then cease to continue. Second, if the medical professional so advises, or if the employer so desires in lieu of opting for a medical or psychology professional’s evaluation, the grievant shall as part of his reinstatement successfully attend, participate, and complete a recognized and acceptable anger-management program.

Arbitrator Nevins ruled that the grievant was entitled to back pay up to the date of reinstatement, if the medical examination found him fit for duty. The grievant was examined, found fit for duty, and voluntarily participated in counseling. After considerable effort, a mutually agreeable alternative job was found.

In my experience, the ability to offer creative recommendations for “consequences” that are less severe than discharge or suspension serve several functions. First, the union’s and grievant’s agreement to remedial orders demonstrates that the union’s statements about the legitimacy of concerns about violence in the workplace are not just empty words. The grievant’s willingness to participate in anger management counseling or in an EAP referral⁴² will serve as a further assurance that threats of violence will not reoccur.

Are grievants willing to authorize union advocates to argue for these remedial alternatives?⁴³ Although some will not agree, this subject is not an insurmountable obstacle. How the union advocate/representative wins over the trust and confidence of a discharged worker is the subject of an entirely different paper. Briefly stated, if the grievant really understands the union’s “theories of the case,” and the “remedy discussion” with the grievant takes place toward the end of the arbitration, there will be agreement. The grievant’s understanding and consent maximizes the chances of a successful return to work and future satisfactory employment.

Conclusion

Unions *can* win “threats of violence” cases. The union must approach the arbitration with a degree of sensitivity. Reported awards suggest that if the union approaches a “threat of violence” termination in the thoughtful, fact-specific manner described in this paper, the arbitrator may be willing to reinstate the grievant, sometimes with back pay and benefits.

⁴²See *Olin Corp.*, 103 LA at 986 (The arbitrator suggested that the grievant seek assistance through EAP program upon reinstatement.).

⁴³The union could exercise its good-faith judgment to make these arguments even over the objections of the grievant, consistent with its duty of fair representation. However, these arguments are much more persuasive if made in the presence of and with the agreement of the grievant. Furthermore, if the grievant is resistant, it is much less likely that counseling will serve its purpose.