

CHAPTER 3

WORK AND FAMILY CONFLICT

I. WORK/FAMILY CONFLICT: THE ARBITRATOR'S ROLE

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Introduction

This case presents the unique situation where both the [employer] and the grievant are right. There are compelling equities for both of their representative positions. This case does not really fit into the mold of the typical disciplinary case because it can truly be said that no one is at fault.

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In 1992, a flight attendant began a four-day trip for a small regional airline where she had worked for 13 years.² She was scheduled to arrive at 2:30 p.m., and her husband had made her a 3:00 p.m. dentist appointment because she had a large cavity that had been giving her a lot of pain. Her babysitter had agreed to stay late, but had to leave at 4:00.

The scheduler notified her that she would have to take an extra flight because three flight attendants were out, one of them a man who “was not available because he was babysitting,” to quote Arbitrator Charles Feigenbaum.³ Two other flight attendants, each with less seniority than the grievant,⁴ were available to cover the flight, but the scheduler was unaware of them. The grievant attempted to extend the babysitter’s coverage, but was unsuccessful,

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¹87 LA 725 (Babiskin 1986).

²*Piedmont Airlines, Inc.*, 103 LA 751 (Feigenbaum 1994).

³*Id.* at 752.

⁴One of the other flight attendants was “deadheading” (flying as a passenger) on the grievant’s plane. The grievant said that another flight attendant also had been available.

and her husband would not be home until 6:30 p.m. Faced with the prospect of leaving two children under the age of two unattended, she told her supervisor:

I'm sorry. I have to take the consequences. I can't do this trip. . . . I called my babysitter. She's got another job at, you know, 4:30 and I, I can't leave my kids. . . . There's nothing I can do. . . .⁵

She refused to take the flight, and caused a 48-minute delay.

She was given a 7-day suspension. Arbitrator Feigenbaum held that the company had just cause to discipline, and upheld the 7-day suspension. He refused to reduce the penalty despite the grievant's 10+ years with the company, during which she had no history of discipline.

The grievant is a long-term [flight attendant]. As such, she is aware of the importance the company places on maintaining the integrity of its schedule, as indeed, all airlines do. Flight crews are required to have flexible personal schedules in order to accommodate their employers' requirements in this regard. The grievant's refusal to accept the extension, even though it was a first infraction, is a serious matter and the suspension given her is affirmed.⁶

This decision lands at one extreme of the arbitrations that the Center for WorkLife Law has examined involving work/family conflicts. It stands along with five other decisions discussed later in this chapter that give scant weight to the worker's family responsibilities, as compared with management's interests.⁷ At the opposite extreme is *Knauf Fiber Glass*,⁸ which involved a packer with 9 years at the company who was a good worker (according to her supervisor) but had always had "a serious absenteeism problem," including 27 (!) written warnings. But she always avoided accumulating the extra point or two that would have led to discharge. In part because of the complaints of co-workers who had worked involuntary overtime during her no-shows, she was placed on special probation, which allowed her only one excused and one unexcused absence during a 3-month period. While still on probation, she received a call from her brother-in-law saying that her 4-year-old daughter had fallen, had hurt her head, and was being taken to the emergency room. The grievant left, despite

⁵*Piedmont Airlines, Inc.*, 103 LA at 753.

⁶*Id.* at 758.

⁷See notes 194–202 and related text.

⁸*Knauf Fiber Glass*, 81 LA 333 (Abrams 1983).

being told that her job would be in jeopardy if she did so. She was subsequently fired.

Arbitrator Roger Abrams noted that “absenteeism is a scourge in the industrial workplace,” that a worker’s first responsibility is to be there, on time, that “a company is not a social service agency,” and that an “individual employee may have serious personal problems which produce an abominable attendance record, but management need not carry an employee on the rolls if prior experience proves that reasonable attendance requirements cannot be met.”⁹ Yet, for just cause to exist, “that final ‘point’ must be found to have been warranted in order to justify termination.” In assessing this, “it is important why the grievant left the plant.”¹⁰

It is fundamentally unfair to discharge an employee for leaving work because she was informed that her four-year-old daughter had fallen, was injured, and was being taken to the Emergency Room. Fair-minded people would not disagree that she was compelled to leave work. She had no real choice in the matter. . . . When grievant left work on December 3, she was not continuing her pattern of regular absenteeism. She could not have prevented the occurrence or rescheduled the accident. That event was not the type of absenteeism which indicates that the grievant cannot fulfill reasonable attendance requirements.¹¹

As the arbitrator highlighted, this does not mean that an employer must live forever with a worker who does not show up when scheduled to work. It simply means that an employee should not be discharged for doing what any conscientious parent would do, because that kind of absence is not part of the prior pattern of absenteeism. The arbitrator, appropriately, sent a very clear message that the grievant needed to address her attendance posthaste. Although he reinstated the grievant, she received no back pay, and he put her on special probation for 90 days, with only one unexcused absence.

These cases represent opposite ends of the spectrum in terms of arbitrators’ receptivity to workers’ work/family conflicts. The second case is more characteristic of the general trend. In fact, it illustrates the single most striking finding of this study. Whereas arbitrations typically find either the union or the employer at fault, in cases involving work/family conflict, arbitrators often “split the baby,” typically by reinstating a worker without back pay.

⁹*Id.*

¹⁰*Id.* at 337.

¹¹*Id.*

This paper is a follow-up to WorkLife Law's initial report, on all published arbitrations, *Work/Family Conflict, Union Style*, written by Martin H. Malin, Maureen K. Milligan, Mary C. Still & Joan C. Williams and published on the Web in 2004.¹² Since then, WorkLife Law has studied the arbitrations of three unions that generously made their databases available to us: the Communication Workers of America (CWA), the Amalgamated Transit Union (ATU), and the United Parcel Service (UPS). This paper reflects 78 arbitrations involving family caregiving in all the databases we have examined thus far. Of course, many disputes are settled informally; most arbitrations are never published; and most workplaces are not unionized. We could expect work/family conflicts to be more common in non-unionized workplaces, where workers typically have fewer rights. Thus the arbitrations we found represent the tip of the iceberg: no doubt, many more grievances involving family caregiving never reach the arbitration stage, and many problems arise in non-unionized workplaces.

Of the discipline and discharge arbitrations, most (80 percent) involved child care; 9 percent involved care for a parent; 9 percent involved care for an extended family member; 1 percent involved care for a grandparent; and 11 percent involved care for a spouse. In 26 percent of the cases, the workers were absent without leave (AWOL) or had an unexcused absence. Thirty-eight percent involved excessive absenteeism. Roughly 15 percent involved workers who refused overtime and 18 percent encountered charges of insubordination. Twelve percent involved workers who refused an assignment or callback and 14 percent involved tardiness. In the cases that involved discipline and discharge, management prevailed in 36 percent of the arbitrations; the union prevailed in 17 percent; the remaining 47 percent were split decisions.¹³

This paper is designed to help arbitrators handle these cases, which often involve difficult situations and hard decisions. The first section helps arbitrators understand why these cases arise, providing demographic data that place workers' work/family con-

¹²In an article published shortly after the WorkLife Law's report, two authors also reviewed the published arbitrations involving caregiving. Neither set of authors was aware of the other until their respective pieces were published. Wolkinson & Ormiston, *The Reconciliation of Work/Family Conflicts in Arbitration*, 59 *Dispute Resolution J.* 84 (2004).

¹³Eleven other arbitrations turned on contractual issues. The outcomes did not drastically differ when the contractual arbitrations were included in the calculations: employees prevailed in 18%, management prevailed in 39%, and 43% were split decisions. See also Still, *Work/Family Conflict: An Analysis of Union Arbitration in the United States*, Paper given at the Annual Conference of the Institute for Women's Policy Research (June 2005).

flicts in their cultural context. The second section examines when lack of child care is treated as a legitimate excuse for being absent from work. Employees need to have in place reliable child care, and a back-up plan: if both fall through, most arbitrators work out some compromise or side with the worker. The third section discusses communication problems surrounding work/family conflicts. The fourth section examines the assumption that employers cannot be responsive to workers' family needs without jeopardizing the effectiveness and profitability of their businesses. The fifth section examines overall patterns, highlighting the large percentage of family-caregiving arbitrations that yield split decisions. The final section discusses two issues related to just cause and reasonableness.

Why These Cases Arise: The Demography of America's Working Families

Mr. Ball testified that he again urged the grievant to seek counseling [under the Employee Assistance Program to remedy his absenteeism problem. . . . The grievant] stated at the hearing that he did in fact review his situation with a counselor shortly thereafter but . . . the counselor informed him that the program would be of little assistance to him inasmuch as his problem with attendance was not directly attributable to his own personality as much as it involved the care of his [severely mentally handicapped] child.

*Boise Cascade Corp., Insulite Division*¹⁴

Employers have long had Employee Assistance Programs (EAPs) to help employees whose problems at work stem from alcoholism, substance abuse, or other problems relating to their own personalities. Many are less pro-active in helping workers cope with balancing workplace and family responsibilities. Yet such conflicts are common. As will be discussed further below, in the database of the Communication Workers of America, we found arbitrations involving no less than 19 workers who were fired for monitoring their own phone lines because of worries about ill, suicidal, or troubled children or parents. (Some were reinstated.)¹⁵

Knauf involved a single mother; *Piedmont Airlines* involved a married couple. In both types of families, all adults were in the

¹⁴77 LA 28, 29 (Fogelberg 1981).

¹⁵CWA database: *Ameritech*, case no. 4-99-39 (Bellman 2001); *U.S. West Communications*, case no. 7-92-20 (Abernathy 1993); *U.S. West Communications*, case no. 7-95-93 (Rinaldo 1999) (describing nine workers).

labor force, as are all the adults in 70 percent of working families in the United States.¹⁶ These cases are representative in other ways as well. Both involve overtime in an economy where the 40-hour week is on the endangered species list. Compared with the 1960s, the average American employee works the equivalent of six extra 40-hour weeks each year.¹⁷ And total weekly work hours for dual-earner couples increased from 81 in 1977 to 91 in 2002.¹⁸ Even when measured against working conditions in the mid-1990s, workers presently spend three extra 40-hour weeks on the job.¹⁹ Presently, Americans work longer hours than workers in virtually any other industrialized country—even Japan, where they have a word for death from overwork.²⁰

Not only do workers spend more time on the job, they also have little control over their hours of work. Nearly three-quarters of working adults report having little or no control over their work schedules.²¹ Lower-income workers tend to have the least control over their schedules: A study found that nearly two-thirds of workers with incomes over than \$71,000 a year have access to flexible scheduling, while fewer than one-third of working parents with incomes less than \$28,000 have such access.²²

Workplaces devoid of benefits and flexibility often put workers under intense stress, especially those with responsibility for children. Employers have not yet caught up. For example, as noted above, in *Boise Cascade Corp., Insulite Division*,²³ the employer sent a worker with an attendance problem to counseling to help correct his absenteeism, only to have the counselor send him away: the EAP was designed to deal with individual, not family, issues.²⁴

Employers are geared up to handle problems with the worker him- or herself but not for the caregiving challenges workers increasingly face. About one in three working families with children under age six rely on “tag teaming,” with parents working differ-

¹⁶Kornbluh, *The Parent Trap*, 291 THE ATLANTIC MONTHLY 111–14 (2003).

¹⁷E. Hill et al., *Finding an Extra Day a Week: The Positive Influence of Perceived Job Flexibility on Work and Family Life Balance*, 50 Family Relations 49 (2001).

¹⁸Bond et al., Families and Work Institute, *Highlights of the National Study of the Changing Workforce* 30 (2002, released 2003), available from <http://www.familiesandwork.org> (visited June 1, 2006).

¹⁹Hill, *supra* note 17, at 49.

²⁰Gornick & Meyers, *Families That Work: Policies for Reconciling Parenthood and Employment* 59 (2003).

²¹AFL-CIO, *Work & Family*, Family-Friendly Work Schedules available at <http://www.aflcio.org/workfamily/workschedules.cfm> (visited June 1, 2006).

²²*Id.* (62% and 31% respectively).

²³77 LA 28 (Fogelberg 1981).

²⁴*Id.*

ent shifts so that each can care for the child when the other is at work.²⁵ The evening shift is the most common alternative work schedule, accounting for 40 percent of all nonstandard work shifts among full-time workers and more than half of those among part-time workers.²⁶ When faced with child care emergencies, tag-team families sometimes face difficult choices as to whether the mother or the father will get into trouble at work for taking time off to attend to children. In *U.S. Steel Corp.*,²⁷ for example, the grievant stated that when the regular babysitter was in the hospital, he, rather than his wife, took off work because his wife's employer had a stricter absenteeism policy, a frank (if tactless) approach to a problem demographers suggest is widespread.

Among "tag teamers," fathers often take on significant child care responsibilities, acting as primary caregivers when their wives are at work.²⁸ One arbitration involved a vivid example of this trend. The father of a toddler started his warehouse job at 7:00 a.m. in order to be available to pick up his daughter from preschool at 3:00 p.m.; his wife brought the child to preschool in the mornings. The father won a grievance challenging his employer's attempt to change him entirely to a 9 a.m. to 5 p.m. schedule, on the grounds that the union contract did not allow the company to unilaterally change start times.²⁹ Fathers may find themselves on the front lines of family care not only when they tag team, but also when they divorce. In a number of arbitrations, divorced fathers were disciplined for refusing mandatory overtime that conflicted with the hours they were scheduled to care for their children.³⁰

Among parents of younger children, routine childhood illness is a major concern. Young children get sick on average four to six times a year.³¹ In the 70 percent of families in which all adults are employed, one working parent needs to stay home when a child is

²⁵Presser, *Toward a 24-Hour Economy*, 284 Science 1778 (June 11, 1999).

²⁶Heymann, *The Widening Gap: Why America's Working Families Are in Jeopardy—and What Can Be Done About It* 48 (2000).

²⁷95 LA 610 (Das 1990).

²⁸Presser, *supra* note 25, at 1779.

²⁹*Central Beverage*, 110 LA 104 (Brunner 1998).

³⁰*Interlake Material Handling Div., Interlake Conveyors*, 113 LA 1120 (Lalka 2000). For other tag team families, see *Marion Composites*, 115 LA 94 (Wren 2000); *Sutter Roseville Medical Center*, 116 LA 621 (Staudohar, 2001); *United States Steel Corp., Southern Steel Division*, 95 LA 610 (Das 1990); ATU database: *Chicago Transit Authority*, case no. 99-155 (Patterson 2001).

³¹Heymann, *supra* note 26, at 73. Studies have shown that children stay sick longer when parents are not present, *id.* at 57, and that sick children infect other children and adults if they cannot stay home. See U.S. Census Bureau, *Children's Living Arrangements and Characteristics: March 2002* 9, tbl.4 (June 2003), available at <http://www.census.gov/prod/2003pubs/p20-547.pdf> (visited June 1, 2006).

sick. *Jefferson Smurfit Corp.*³² involved a 3-year old with a high fever who woke up screaming and crying. The grievant's wife had no car she could drive, and asked him to leave work to buy more medicine that would lower the child's fever.³³ *Naval Air Rework Facility* involved a child with chickenpox.³⁴

More common are arbitrations involving families whose children have serious illnesses, including a divorced father with custody of an asthmatic son,³⁵ the father of a severely handicapped son,³⁶ the stepfather of a young man paralyzed as the result of a gunshot wound,³⁷ a male train operator with a diabetic son,³⁸ a male rental car shuttle driver whose son had a "serious heart condition,"³⁹ a child who needed a ventilator in order to breathe,⁴⁰ a child with special needs,⁴¹ a janitor whose son had severe mental and physical disabilities,⁴² and five families whose children threatened or attempted suicide.⁴³

Of course, under the Family and Medical Leave Act (FMLA), workers caring for a family member with a serious health condition are entitled to up to 12 weeks of unpaid leave each year, so long as they have worked for at least one year at an employer with 50 or more employees within a 75-mile radius of their worksite.⁴⁴ Workers can take leave for serious health conditions in an intermittent pattern, which is particularly useful for workers who need to bring family members to doctors' appointments or who have family members with chronic diseases.⁴⁵ Yet many workers are not

³²110 LA 276 (Goldstein 1997).

³³*Id.* at 279. The grievant was disciplined when it was found that he did not in fact go and get more medicine until after his shift would have ended. Either the grievant was faking and wanted to go home for his own reasons, or his wife was mistaken in thinking they needed more medicine immediately, or she just wanted her husband home because she felt unable to handle the child's illness on her own.

³⁴86 LA 1129 (Hewitt 1986).

³⁵*Interlake Conveyors*, 113 LA 1120 (Lalka 2000).

³⁶*Boise Cascade Corp., Insulite Division International*, 77 LA 28 (Fogelberg 1981).

³⁷*State of New York, Department of Correctional Services*, 89 LA 122 (Handsaker 1987).

³⁸ATU database: *Massachusetts Bay Transportation Authority* (Hodlen 2001).

³⁹*Budget Rent-A-Car Systems*, 115 LA 1745 (Suardi 2001).

⁴⁰ATU database: *Chicago Transit Authority*, case no. 99-155 (Patterson 2001).

⁴¹ATU database: *Massachusetts Bay Transportation Authority* (Dunn 2000).

⁴²*Tenneco Packaging, Burlington Container Plant*, 112 LA 761 (Kessler 1999); *Mercer County Association for the Retarded and American Federation of State, County and Municipal Employees AFL-CIO*, 1996 WL 492101 (Hewitt 1996).

⁴³CWA database: *U.S. West Communications, Inc.*, case no. 7-95-93 (Rinaldo 1999) (listing four grievants who were dismissed for monitoring phone calls when they were concerned about suicidal children); ATU database: *Transit Management of Decatur* (Perkovich 1998).

⁴⁴Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified at 29 U.S.C. §§2601-2654 (1994)).

⁴⁵29 U.S.C. §2612(b)(1), 29 C.F.R. §25.203(a).

covered.⁴⁶ Others fail to request FMLA leave⁴⁷ or to obtain the necessary medical documentation;⁴⁸ sometimes it is unclear whether the FMLA was ever considered.⁴⁹

Even if children are not ill, they need adult attention long after they leave preschool. Emotional support and one-on-one interactions with children are crucial during the adolescent years where high parental involvement can significantly help build self-esteem and educational accomplishment.⁵⁰ Active parental involvement and supervision into the high school years can help prevent juvenile crime and other risky behavior: most teenage pregnancies and teen violence occur between 3 p.m. and 6 p.m.⁵¹ Several arbitrations involve adolescents, including several involving suicidal daughters,⁵² a son injured in a gang beating,⁵³ a step-son confined to a wheelchair by a shooting,⁵⁴ a father fired for absences caused by family illnesses and “delinquent children,”⁵⁵ a father fired due to absenteeism caused (among other things) by the drug overdoses of his daughter,⁵⁶ and a mother who had to take her son for a high school placement test.⁵⁷

Workers struggle to meet the needs not only of their children, but of their parents: 1 in 4 families also take care of elderly relatives.⁵⁸ Among people age 50 to 64 needing support for their health and emotional needs, 84 percent rely on informal care giving networks.⁵⁹ A study by the Families and Work Institute found that more than one-third of workers provided elder care in the prior year, with 13 percent taking time off from work to meet elder care responsibilities.⁶⁰ Another study found that one in ten

⁴⁶ATU database: *Miami Valley Regional Transit Authority*, case no. 52-390-484-00 (Campbell 2001).

⁴⁷ATU database: *Chicago Transit Authority*, case no. 97-0166 (Hayes 1999).

⁴⁸*Budget Rent-A-Car Systems*, 115 LA 1745 (Suardi 2001).

⁴⁹*Boise Cascade Corp., Insulite Division*, 77 LA 28 (Fogelberg 1981).

⁵⁰B. Schneider & D. Stevenson, *The Ambitious Generation: America's Teenagers, Motivated but Directionless* 145 (Yale University Press 1999).

⁵¹Newman et al., *Fight Crime: Invest in Kids, America's After-School Choice: The Prime Time for Juvenile Crime, or Youth Achievement and Enrichment* 2-3 (2000), available at <http://www.fightcrime.org> (visited June 1, 2006).

⁵²ATU database: *Transit Management of Decatur* (Perkevich 1998).

⁵³ATU database: *Chicago Transit Authority*, case no. 00-373 (Gundermann 2001).

⁵⁴*State of New York, Department of Correctional Services*, 89 LA 122 (Handsaker 1987).

⁵⁵*Greater Cleveland Regional Transit Authority*, 106 LA 807 (Duda 1996).

⁵⁶ATU database: *Regional Transit Authority*, (Vernon 1983). The arbitrator reinstated him.

⁵⁷ATU database: *Chicago Transit Authority*, case no. 97-0166 (Hayes 1999).

⁵⁸Heymann, *supra* note 26, at 2.

⁵⁹Gibson, AARP Public Policy Institute, *Beyond 50.03: A Report to the Nation on Independent Living and Disability* 59 (April 2003), available at <http://research.aarp.org/research/housing-mobility/homecare/aresearch-import-752-017817.html> (visited June 1, 2006).

⁶⁰Bond et al., *supra* note 18, at 25.

workers provides 40 or more hours of unpaid assistance to elderly relatives each month.⁶¹ Nearly 3 out of 4 of these unpaid caregivers are working women who make accommodations in their daily schedule to provide elder care.⁶² One arbitration involving an elderly parent is *Sprint/Central Telephone Co. of Texas*,⁶³ which involved a phone customer service representative who did not meet her sales quota because of the stress caused by caring for her mother, who had died by the time of the arbitration.

With pressing child and elder care responsibilities, workers who lack workplace flexibility must devise creative methods of resolving work/family conflicts. Many rely on family members for assistance, with low-income families more likely to rely on relative and family care than more affluent families.⁶⁴ In fact, one-third of low-income families must rely on a relative to care for their children while they are at work.⁶⁵ Heavy reliance on family-delivered care continues in families with older children. Nearly one-fifth of children ages 6 through 12 are cared for by relatives outside of school hours.⁶⁶ Largely because of their reliance on informal arrangements, child care breakdowns are more common in less affluent families.⁶⁷ A study of child care in Massachusetts found that 4 out of 10 low-income parents were forced to miss work because of problems with child care arrangements; nearly three-fourths lost pay due to work/family conflicts.⁶⁸

When a babysitter is sick, it is not only parents whose jobs are at risk. In *Department of Veterans Affairs Medical Center*,⁶⁹ a grandmother was suspended for 14 days from her job as a nursing assistant when she was unable to work her scheduled shift (3:30 p.m.–midnight) because she was unable to find child care. (The arbitrator concluded that “the Agency responded too harshly” and reduced

⁶¹Heymann, *supra* note 26, at 48.

⁶²AFL-CIO, Bargaining Fact Sheet: Elder Care 1 (Spring 2001), available at <http://www.aflcio.org/issues/workfamily/upload/elder.pdf> (visited June 1, 2006).

⁶³117 LA 1321 (Baroni 2002).

⁶⁴Capizzano, Adams & Sonenstein, The Urban Institute, *Child Care Arrangements for Children Under Five* (March 15, 2000), available at <http://urban.org/url.cfm?ID=309438> (visited June 1, 2006).

⁶⁵Boushey, Center for Economic and Policy Research, Data Brief No. 1, *Who Cares? The Child Care Choices of Working Mothers* (May 6, 2003), available at http://www.cepr.net/publications/child_care_2003.htm (visited June 1, 2006).

⁶⁶Capizzano et al., The Urban Institute, *Child Care Patterns of School-Age Children with Employed Mothers* 6, tbl.1 (Sept. 2000), available at <http://www.urban.org/UploadedPDF/occa41.pdf> (visited June 1, 2006).

⁶⁷Albelda & Conzensa, Center for Survey Research, University of Massachusetts Boston, *Choices and Tradeoffs: The Parent Survey on Child Care in Massachusetts* 12–13, (2000).

⁶⁸*Id.*

⁶⁹100 LA 233 (Nicholas 1992).

the suspension to 5 days.) *Mercer County*⁷⁰ also mentions a working grandmother who needed time off to care for her grandchildren. This grandmother had custody, but grandparents frequently provide regular child care: more than one-fifth of preschool-aged children are cared for primarily by grandparents when their parents are at work,⁷¹ and a new study reports that 2.4 million grandparents have *primary* responsibility for the care of their grandchildren.⁷² More than one-fourth had cared for their grandchildren for five or more years.⁷³ One such grandparent was the grandfather in *Tractor Supply Co.*,⁷⁴ who was fired (although reinstated by Arbitrator Fredric Dichter) in a dispute stemming from his need to get home to care for his 18-month-old grandson.

Because the average age at which Americans become grandparents for the first time is now 47, three-fourths of grandmothers and almost 9 out of 10 grandfathers are in the labor force.⁷⁵ Thus, more than one-third of grandmothers who provide care for preschool-aged children are otherwise employed.⁷⁶ Many grandmothers tag team with their daughters.⁷⁷ These older family caregivers are vulnerable to the same work/family conflicts faced by their grown children.

Even when families are able to rely on child care centers, they still must cope with the center's often inflexible hours and policies. Many close before normal business hours, and charge steep fees (often \$1 per minute) if children are picked up late. Even more important, the steep fees signal that child-care teachers get upset when children are picked up late, so that parents who arrive late risk losing their child care arrangement, which often means they lose their jobs. In five of the arbitrations studied, workers lost their jobs after they lost their child care.⁷⁸

⁷⁰*Mercer County Association for Retarded*, 1996 WL 492101 (Hewitt 1996).

⁷¹U.S. Census Bureau, *Who's Minding the Kids?, Child Care Arrangements* 5, tbl.2 (Fall 1995, issued October 2000), available at <http://www.census.gov/prod/2000pubs/p70-70.pdf> (visited June 1, 2006) (21.7%).

⁷²U.S. Census Bureau, *Grandparents Living with Grandchildren: 20003* (Issued Oct. 2003), available at <http://www.census.gov/prod/2003pubs/c2kbr-31.pdf> (visited June 1, 2006).

⁷³*Id.*

⁷⁴2001 WL 1301335 (Dichter 2001).

⁷⁵Heymann, *supra* note 26, at 97.

⁷⁶Presser, *supra* note 25, at 1779.

⁷⁷Presser & Cox, *The Work Schedules of Low-Income American Women and Welfare Reform*, Monthly Lab. Rev. (Apr. 1997), at 26.

⁷⁸*Naval Air Rework Facility*, 86 LA 1129 (Hewitt 1986); *Piedmont Airlines Inc.*, 103 LA 753 (Feigenbaum 1994); *Sutter Roseville Medical Center*, 116 LA 621 (Staudohar 2001); *Town of Stratford*, 97 LA 513 (Stewart 1991).

This demographic and cultural context means that work/family issues abound in labor arbitrations. In fact, the arbitrations provide a much needed correction to the public image of work/family conflict as primarily the domain of highly paid professional women. Roughly 56 percent of the arbitrations involve men: one recent study found that men reported significantly higher levels of work interference with their families than similarly situated women.⁷⁹ Surveys confirm that many unionized workers feel work/family conflict: two-thirds of unionized fathers, and half of unionized mothers, said they were unhappy with the amount of time they dedicated to their children.⁸⁰ In fact, nearly one-third of all unionized employees surveyed said their biggest work-related concern was not having enough time for family and personal life.⁸¹

These data show that arbitrators can be expected to see many workers who face a Hobson's choice between family members' need for income and their need for care. American workers are particularly vulnerable because they lack basic protections available to workers in many other advanced industrialized countries. Alone among such countries, they lack paid maternal leave.⁸² Unlike workers in all European countries, they lack working time regulations such as mandated vacation time, parental leave, and sick leave available both for illness of the worker and close family members.⁸³ Apart from the small Head Start program available to very low income workers, Americans also lack high-quality, subsidized child care. In fact, 60 percent of child care in the United States is of "poor or mediocre" quality, according to a National Institute for Child Health and Human Development study.⁸⁴ The well-documented lack of family supports in the United States leaves workers vulnerable for doing what virtually any parent, spouse, or child would do.

⁷⁹Bond et al., *supra* note 17, at 30.

⁸⁰AFL-CIO, *Bargaining Fact Sheet: Control Over Work Hours and Alternative Schedules 1* (Spring 2001), available at <http://www.aflcio.org/issuespolitics/workfamily/upload/workhours.pdf> (visited June 1, 2006) (66% and 51% respectively).

⁸¹Friedman & Casner-Lotto, Work in America Institute, *Time is of the Essence: New Scheduling Options for Unionized Employees 3* 2003, available at <http://www.laborproject.org/publications/pdf/time.pdf> (2003) (visited June 1, 2006) (29%); Bond et al., *supra* note 18, at 13, fig. 9.

⁸²Organization for Economic Cooperation and Development OECD Employment Outlook, Chapter 1, *Clocking In (and Out): Several Facets of Working Time* (2004).

⁸³*Id.*

⁸⁴Smolensky & Appleton Gootman (eds.), *Working Families and Grown Kids: Caring for Children and Adolescents* (Washington, DC: The National Academies Press, 2003), cited in Boots, New American Foundation Work & Family Program, *The Way We Work: How Children and Their Families Fare in a 21st Century Workplace* 12.

The lack of paid maternity leave, paid parental leave, high-quality, affordable child care, and paid leave to care for sick family members (the subject of recently proposed legislation by Senator Ted Kennedy)⁸⁵ can place working families in impossible situations. Here is particularly poignant testimony from a UPS package delivery driver discharged for “theft of time” when he took off an extra hour and a quarter two different days:

I took a three-week vacation when my second son was born. . . . Prior to this my wife had quit her job due to early contraction and had difficult[y] her last trimester. I [was] working up to 50–60 hrs week. . . . At times, I was to return. . . . [to work] with just 8 hours off in between. Barely enough time to sleep or recuperate. . . . On my vacation time, with my new baby boy and my 2 ½ year old, my wife was laid up. . . . recuperating. . . . I had even less sleep. . . . I was taking care of my two kids while I let my wife rest[.]. . . . Since [then] things haven’t calmed down [but] I returned to work . . . since I can no longer afford to be off for so long. One week later my wife got sick due to an infection in her breast . . . [and] ended up with a temperature of 104. . . . Meanwhile, my first son was coughing and had the flu. As the newborn is still feeding every two hours, I was getting by on 2-3 hours of sleep a day. . . . I didn’t know whether I was coming or going. . . . [I went] home and spen[t] my lunch and breaks there to make sure every one at home was okay. But I lost track of time. . . . My intention was [to be] there for my family but not to steal time, as I was accused of.⁸⁶

He pointed to his 2 years of service, and said “I’ve always given the best of my ability to get the job done. . . . Taking away my job from me has put my family in a financial hardship. I cannot survive with having two babies. And my wife being out of work. I deeply regret for what I’ve done, but I need my job back.” The arbitrator, pointing to an established arbitral history of discharge for “stolen time,” upheld his discharge, faulting him for lying when he claimed overtime rather than admitting he had not been at work for part of the regular workday. Given the arbitral history, this decision is understandable, yet it highlights that work force/workplace mismatch, combined with the failure of public policy to address it, often leaves not only workers and employers, but also arbitrators, with few good choices.

⁸⁵*The Healthy Families Act*, S. 2520, 108th Cong. (2005).

⁸⁶UPS database: *UPS*, case no. 97-222(B) (McKay 1998).

When Is Lack of Child Care a Legitimate Excuse for Being Absent from Work?

Clearly, a major problem confronting working parents in our society is the unavailability of good and reliable childcare. However, it is not the CTA's responsibility to deal with this problem on a long-term basis.

*Chicago Transit Authority*⁸⁷

If the inability to employ a responsible individual to provide full-time babysitting care when neither spouse nor relatives are available for that purpose is not a 'compelling personal reason,' then it is hard to imagine what sort of excuse would be acceptable.

*General Telephone Co. of Indiana*⁸⁸

Arbitrators tend to rule against men who have a string of absences who add child care onto a long list of excuses. An example is *Joy Manufacturing Co., Sullivan Division*,⁸⁹ a 1946 decision in which the grievant was discharged after he was absent from work, without explanation, for 40 nights, 27 of which were Fridays—the night after pay day. A more recent example is the 1989 *General Tire Inc.*,⁹⁰ in which the arbitrator upheld the discharge of a worker whose many absences included a claim of child care that the arbitrator clearly did not believe. In a third case, a tag-team father with a "long history of unrelieved tardiness" falsified a document, thereby "casting doubt on all his testimony." Arbitrator William Weinberg upheld his termination.⁹¹ Some people will "game" any system, and they should not be allowed to hide their unreliability behind claims of childcare concerns.

Arbitrators often penalize workers who make no attempt to arrange child care to cover predictable work obligations. For example, in *Velva Sheen Manufacturing Co., Division of Marketing Industries, Inc.*,⁹² a worker in a clothing imprint plant had absenteeism/tardiness rate of 25 percent to 26 percent over a period of 14 months. After the company instituted a new attendance policy, the performance of three other workers with high rates of absenteeism/tardiness improved. The grievant's performance did not. She reacted "both defensively and uncooperatively" during her counseling session, stating that "my kids come first no matter

⁸⁷ATU database: *Chicago Transit Authority*, case no. 99-155 (Patterson 2001).

⁸⁸CWA database: *General Telephone Co. of Indiana*, case no. 51-30-0742-80 (Walt 1979).

⁸⁹Healy 1946.

⁹⁰93 LA 771 (Groshong 1989).

⁹¹*GAF Corp.*, 77 LA 947 (Weinberg 1981).

⁹²98 LA 741 (Heekin 1992).

what,” and giving no sign that her attendance would improve.⁹³ The personnel director responded that she, too, was a single mother, understood firsthand the struggle of meeting both work and home responsibilities, and that it would hurt the grievant’s children if she were to lose her job. The company offered a leave of absence to address the underlying problem, which the grievant refused; she was warned she would be fired if the situation did not improve. Arbitrator William Heekin upheld her discharge:

Finally, while being sympathetic to the Grievant’s plight in struggling to balance her home life with the meeting of work responsibilities, it cannot be found that the Company acted improperly here in the way it demanded regular work attendance and then acted on that demand. Indeed it can easily be imagined that there were other employees amongst the Fairfax plant work force who face a similar struggle and yet who apparently are able to regularly attend work. Therefore, it is found that the company had just cause to terminate.⁹⁴

A similar case is *Sutter Roseville Medical Center*,⁹⁵ which involved a nuclear medicine technician who worked in a short-staffed department that regularly placed employees on standby for callbacks. The grievant had been exempted from standby as the result of an agreement with his supervisor in 1994, because he lived very far away and cared for his son after school. In 2000, a new supervisor told the grievant that he was no longer exempt, evidently influenced by employees who had complained that the grievant’s immunity meant they had to work standby more often. The grievant steadfastly refused to select standby times and refused to report for the dates assigned him, despite three sessions of counseling, a written warning, and a 3-day suspension. Ultimately he was discharged for insubordination. The employer argued that the grievant’s actions were particularly “egregious” because it ran an acute care hospital for seriously ill patients, and the grievant was placing the health and safety of the patients at risk. Arbitrator Paul Staudohar upheld the discharge, noting that the grievant

⁹³*Id.* at 743.

⁹⁴*Id.* at 747. See also *Penske Truck Leasing*, 115 LA 1386 (Ellmann 2001), which involved a male consumer service representative who, in his 16 months with his employer, had left early 20 times and was “no call, no show” 13 times. The company counseled him, issued a written warning, suspended him, and then offered to reinstate him—but he did not show up for work the day he was due to be reinstated. The worker said his absences were because he was caring for his sick grandmother, an excuse the arbitrator questioned. The grievant had never mentioned his grandmother until the hearing, and his attendance problems persisted even after his grandmother died. Nonetheless, Arbitrator William Ellmann gave worker a “third chance,” noting that he could be summarily discharged if he was late or absent during his 90-day “final warning” period.

⁹⁵116 LA 621 (Staudohar 2001).

never tried to arrange alternative child care or to move closer to work. *Sutter* and *Velva Sheen* signal that most arbitrators consider it unreasonable for individual employees to insist that child care responsibilities should give them permanent immunity from shifts that others workers are required to work. Such individualized immunity would create favoritism that would hurt working parents in the long run.

In two cases, arbitrators intimated that employers should reasonably accommodate child care responsibilities for single parents faced with long and/or unpredictable hours. In *Bryant v. Bell Atlantic Maryland*,⁹⁶ the arbitrator “strongly suggested that Bryant (a single father) be [exempted from the overtime requirement] or, in the alternative, that Bryant be scheduled for overtime in a manner that would allow him to meet his workplace and child care obligations.”⁹⁷ In *Tenneco Packaging Burlington Container Plant*,⁹⁸ a janitor, the divorced mother of a 17-year-old son with the mentality of an 18-month-old-child, was terminated after 27 years for failing to report one Saturday in August when her son’s caregiver could not work because she had a sick child of her own. The grievant had been working 60-hour weeks, including every Saturday except one since May. This schedule led to attendance problems, and she had received 4 verbal warnings, 7 written warnings, and 3 suspensions for absenteeism in the prior 4 years, and was absent 25 times in 1998. None of the discipline was ever grieved. For the Saturday absence for which she was terminated, she called in on the “sick line” and said she would not be in. She called again; no answer. The arbitrator found that the grievant was discharged without a fair investigation, and that the company’s attendance policy could not override the just cause provision in the labor agreement, which “recognizes the need to attend to an ill family member during scheduled working hours,” as did the Wisconsin Family and Medical Leave Act. “The Company attendance policy, which is a unilateral statement of the policy, cannot override either the contract or statutory language.” He continued:

The Company had been scheduling six-day work weeks for an extended period of time. This heavy work schedule was likely to have a substantial impact on any single parent employees, and would have

⁹⁶288 F.3d 124 (4th Cir. 2002).

⁹⁷288 F.3d at 129 (holding that Bryant could not seek judicial enforcement of the arbitration award under the Maryland Uniform Arbitration Act). The author’s characterization of the arbitrator’s opinion is based on the federal circuit court’s opinion.

⁹⁸112 LA 761 (Kessler 1999).

a particularly heavy impact on an employee with a child in need of permanent care and assistance. [The grievant] had legitimate reasons for missing two of the 23 Saturdays when she had been scheduled to work overtime.⁹⁹

The arbitrator strictly construed the employer's no-fault attendance policy, citing Elkouri and Elkouri¹⁰⁰ for the proposition that the arbitrator may require considerable tolerance on the part of management where the equities in favor of the employee are strong:

Here, the equities . . . favor a long term employee, who is also a single parent caring for a mentally and physically disabled child requires reasonable tolerance on the part of management. At least the employee should be given an opportunity to explain the absence. The six day, ten hour daily work week, and the unforeseeable circumstances of a care giver's child['s] illness all support a more flexible application of the excessive absenteeism provision of the Attendance Policy.¹⁰¹

She was ordered reinstated, with full back pay. *Tenneco* shows that some arbitrators, when faced with unending brutal hours, will find them unreasonable, at least for sympathetic single parents.

The grievant in *Tenneco* had tried to arrange child care, once even requesting a leave of absence to enable her to do so. Most other cases won by unions involve grievants who had tried to arrange reliable child care, plus one or more back-up systems so they could attend work if regular child care broke down. For example, in *Princeton City School District Board of Education*,¹⁰² a teacher requested a personal leave day when her normal day care provider became suddenly sick. The grievant's husband was out of town, and her mother-in-law was scheduled to work. School officials denied leave in the absence of proof that she had tried to arrange for back-up through a commercial day care center. She had not tried to do so on the date in question because she had learned, several years earlier, that local centers (like most centers in the United States) did not accept short-notice 1-day clients. Arbitrator Michael Paolucci held that the personal day should have been granted because the grievant *did* have a back-up plan—relying on her husband and mother-in-law—that had worked in the past.

Arbitrator Charles Feigenbaum also found in favor of the grievant in another decision involving back-up child care in *Social*

⁹⁹*Id.* at 765–66.

¹⁰⁰*Elkouri & Elkouri*, ed. Ruben, *How Arbitration Works* (6th ed. 2003).

¹⁰¹*Tenneco* at 768.

¹⁰²101 LA 789 (Paolucci 1993).

*Security Administration, Westminster Teleservice Center.*¹⁰³ The case involved a contact representative who was treated as AWOL when she did not report to work when her regular babysitter had car problems, and her back-up babysitter's husband was hospitalized with a heart attack. The grievant, a single mother with no relatives nearby, made persistent efforts to reach her supervisor, expressing increasing anxiety over the cost of her long distance calls. Her direct supervisor never returned her calls. Instead, her case was handled by another manager, Ms. Granico, who ordered her to find a babysitter, ignoring her statements that she could not find one. Eventually the grievant used foul language to express her frustration, and twice hung up the phone on Ms. Granico. When the grievant returned to work, her direct supervisor backed up Ms. Granico, and denied the grievant's request for emergency leave. The arbitrator concluded that, while "the primary actors were all sincere and well-meaning," the AWOL charge was unjustified. Acknowledging that the grievant "overreacted," he held that the grievant was entitled to emergency annual leave under the contract because she

had met the commonly understood meaning of 'emergency': She had a childcare emergency. It is not disputed that the two people she reasonably and legitimately depended upon for childcare were suddenly and unexpectedly unavailable. . . . Indeed, her circumstances exactly met the situation described in [the contract], that is, there was an unexpected change in her child care arrangements.¹⁰⁴

He ordered the AWOL removed from the grievant's record, concluding that "both sides would have been well advised to make better efforts at communication."

A number of other cases, in addition to the *Piedmont Airlines* case discussed above, raise questions as to whether grievants did enough to secure back-up babysitting. In *Southern Champion Tray Co.*,¹⁰⁵ Arbitrator Dennis Nolan upheld the discharge of a mechanic whom he faulted for failing to make back-up arrangements after two warnings from his supervisor that he needed to do so.¹⁰⁶ Al-

¹⁰³93 LA 687 (Feigenbaum 1990).

¹⁰⁴*Id.*

¹⁰⁵96 LA 633 (Nolan 1991).

¹⁰⁶The arbitrator was clearly influenced by his assessment of the grievant: "The grievant had been something of a thorn in management's side for quite a while. He had run up an extraordinary number of tardies, for example, although just short of the number in any given period needed to impose discipline. He had repeatedly told his supervisor he would not do certain work, even though eventually he did do it. He had filed two grievances on matters other than the matters involved in this case." *Id.* at 634.

though the union argued that “the grievant *did* make alternative plans,” only to have his wife’s car unexpectedly break down, the arbitrator rejected this argument. “With hindsight, of course, it is apparent that something *could* have been worked out,” said the arbitrator. The grievant could “have called the school and asked a teacher to keep an eye on his son for a few minutes. Had he done so, he probably would have learned about the day care program at the school.”¹⁰⁷ There was “no evidence that the grievant knew about those options.”¹⁰⁸

This kind of “hindsight thinking” appears in several cases. If an employer can show that the union or the employee *actually knew* about a particular option, arbitrators certainly can expect the worker to use the alternative. Hindsight solutions are a different issue. They are problematic not only because they are hypothetical (“probably would have learned”) but also because employers may not be an accurate source of information. In one case, for example, an employer sent a worker with child care problems to its Employee Assistance Program (EAP), apparently unaware that its EAP did not handle child care problems.¹⁰⁹ In the *Princeton* case discussed above,¹¹⁰ a supervisor faulted a mother whose child care had broken down for not using a child care center, apparently unaware that centers in his area (like most centers) did not take drop-ins. The time-tried solution is to insist on evidence. In *Chicago Transit Authority*,¹¹¹ an arbitrator did just that. The case involved a part-time bus driver with custody of his four children, ages 6 to 12, whose absences stemmed from a series of family-related causes, including car trouble while attending the funeral of a relative, the fact his mother did not show up on a day when she had promised to mind the children, his need to take his son to the hospital and then monitor his condition after he was injured in a gang beating, a day he overslept, and a day he had to go to court to attend an adoption hearing for one of his kids. His final miss occurred because he was in jail. His ex-wife had appeared at his house, began “striking and punching him and pulling off his clothes,” at which point he pushed her away, she called the police, and he was arrested for domestic violence, all while their four children were stand-

¹⁰⁷Some teachers may have bristled, seeing this as a parent asking for free babysitting from a professional who is not a babysitter; others may well have obliged. The grievant also did not know that the teachers stayed outside until 3:30 p.m.

¹⁰⁸*Southern Champion Tray Co.*, 96 LA at 634.

¹⁰⁹*Boise Cascade Corp., Insulite Division*, 77 LA 28 (Fogelberg 1981).

¹¹⁰*Princeton City School District Board of Education*, 101 LA 789 (Paolucci 1993).

¹¹¹ATU database: *Chicago Transit Authority*, case no. 00-373 (Gundermann 2001).

ing on the porch watching their parents' altercation, obviously "frightened and upset." He reported to work when he was released, but was told that he had been fired because he had had two misses while on probation for absenteeism. Arbitrator Neil Gundermann rejected hindsight thinking unsupported by evidence, noting that employer's arguments consisted mainly of "'what if . . . ' 'could have...,' or 'should have...'"—speculative inquiries which all seem reasonable now with the benefit of hindsight but which would not necessarily have occurred to even the most reasonable person during a time of crisis." He ordered the grievant reinstated without back pay, and taken off probation, because his probation would have ended had he not been terminated.

Hindsight thinking often arises where a father lacks even a basic knowledge of his children's child care options. This lack of knowledge is telling. Studies show that fathers' knowledge about their children's lives typically is limited.¹¹² Even men who believe that they should play an active role in family care often are a poor source of knowledge about their children's lives; they are less involved in their children's daily lives, and typically leave their wives or ex-wives to set up child care, play dates, lessons, and to establish relationships with their children's teachers.¹¹³

Clearly, men need to step up to the plate, yet it is important not to assume that workers have more child care options than they in fact have. Low-income workers are more likely than others to rely on families or relatives rather than paid babysitters. These informal child care arrangements break down more often than do more formal ones,¹¹⁴ as in *Chicago Transit Authority*,¹¹⁵ in which a worker failed to come to work when his mother, who had agreed to watch his four children, did not show up.

In assessing what employers can reasonably expect, arbitrators also need to consider what society provides in terms of leaves and child care. As noted earlier, the United States lags far behind many industrialized countries in providing affordable, high-quality child care and other supports for working families. This lag leaves both

¹¹²Crouter & Head, *Parental Monitoring and Knowledge of Children*, in *Handbook of Parenting* 474 ed. Bornstein (2002); Bumpus & Crouter, *Work Demands of Dual-Earner Couples: Implications of Parents' Knowledge about Children's Daily Lives in Middle Childhood* 465 (1999).

¹¹³Lareau, *My Wife Will Tell Me Who I Know: Methodological and Conceptual Problems in Studying Fathers*, 23 *Qualitative Soc.* 407 (2000).

¹¹⁴Dodson, Manuel & Bravo, *The Radcliffe Public Policy Center, Keeping Jobs and Raising Families in Low-Income America: It Just Doesn't Work* (2002).

¹¹⁵ATU database: *Chicago Transit Authority*, case no. 00-373 (Gundermann 2001).

companies and workers with few attractive choices, and can be expected to affect arbitrators' sense of what reasonable alternatives existed for an individual worker at a particular point in time.

In sum, a few principles emerge. Clearly, if claims about child care problems are a make-weight, they will be given the (lack of) weight they deserve. Second, a few arbitrators have held that employers should take the child-care obligations of single parents, or grandparent-caregivers, into account in setting their work schedules. Third, other workers who make no attempt to arrange permanent child care to cover regular working hours typically cannot expect co-workers and management to be tolerant forever. Fourth, workers—male as well as female—should assume it is their responsibility to arrange not only regular child care but also to have some back-up system. But arbitrators should recognize that, given the lack of available and affordable child care in this country, many workers' back-up system will consist of a spouse or other relative who also has to work. It is illogical for each employer to insist that the spouse it employs will have a work schedule that always trumps that of his or her spouse, as the employer and arbitrator did in *Piedmont Airlines*.¹¹⁶ The simple fact is that both parties' schedules cannot simultaneously have priority.

To be sure, it is not the fault of an individual employer that the United States lacks a suitable system of leaves and child care for working families. But neither is it the fault of an individual worker. In contractual contexts where arbitrators have to decide what is just and reasonable, they need to think very carefully about upholding discipline—particularly the “industrial death penalty” of termination—when a worker's back-up child care breaks down or when he or she is unable on work overtime on short notice due to an inability to find child care.

A related, very practical, issue is what an arbitrator should do if faced with an arbitral history unreceptive to claims related to family care. One important point is that arbitrators already have interpreted much standard contractual language about just cause, reasonableness, etc., in ways that accommodate legitimate needs for family caregiving. Equally obvious is that other arbitrators have

¹¹⁶*Piedmont Airlines, Inc.*, 103 LA 751, 756 (Feigenbaum 1994) (“her husband would have had to leave work early”). See also *U.S. Steel Corp.*, 95 LA 610 (Das, 1990) (grievant noted that he had to leave work because his wife's employer had a stricter absenteeism policy); *Southern Champion Tray*, 96 LA 634 (Nolan 1990) (grievant made no alternate arrangements to pick up his son from school because he believed his wife would not be able to leave work early as she had done previously).

proved stoutly unreceptive. Arbitrators need to balance their concern for following precedent with the need to be sensitive to the demography of the changing workforce. To quote Richard Mittenthal:

Over the course of time, changes occur in how we view certain misconduct. For instance, in the 1950s, sleeping on the job was often held to justify discharge for a first offense, while sexual harassment may have warranted no more than a brief suspension, perhaps a mere written reprimand. In 1997, the first time an employee is caught sleeping on the job will prompt no more than a brief suspension, while sexual harassment will be held to warrant discharge. How things have changed. Widespread inattention to duty in the workplace seems to have downgraded the seriousness of a first sleeping offense. And widespread revulsion against the abuse of women has transformed harassment into a “capital” offense. Thus, a change in societal or workplace values alters arbitral value judgments, which in turn affect our view of what is a reasonable penalty.¹¹⁷

“A change in societal or workplace values,” Mittenthal notes, “will often lead to a change in arbitral practice.” That change appears to be well underway in arbitrations involving family care.

Communication Issues Concerning Work/Family Conflict

Another theme in arbitrations involving work/family conflict is communication between management and working men. While we found no case involving a woman who flatly refused to discuss work/family conflicts, a number involve men who had difficulties communicating their work/family conflicts in an appropriate way.¹¹⁸

The model of how *not* to communicate is *Jefferson Partners*,¹¹⁹ in which a bus driver with a series of accidents and customer complaints was discharged. The grievant was called off the extra board for an assignment over Thanksgiving. He phoned twice to see if he had an assignment, and was told he had none and that “it appeared slow for the next few days.”¹²⁰ Then he left town to pick up his children for the holiday. While he was on the road, the dis-

¹¹⁷Mittenthal. *Comment*, in *Arbitration 1997: The Next Fifty Years: Proceedings of the 50th Annual Meeting*, National Academy of Arbitrators, ed. Najita (BNA Books 1998) 231–32.

¹¹⁸In *Tenneco Packaging*, a woman janitor did not explain to her employer that she could not work because the babysitter had not arrived for her disabled child. Her silence appears to have been differently motivated: the arbitrator states that the grievant simply did not know that management expected an explanation. 112 LA 761 (Kessler 1999).

¹¹⁹109 LA 335 (Bailey 1997).

¹²⁰*Id.* at 336.

patcher called him for extra board call. The grievant said he could not take the run, although he admitted that he had not asked for the day off. When the dispatcher said he would be terminated if he did not take the assignment, he said “Fuck it,” and hung up.¹²¹ Shortly thereafter, he stopped at a pay phone and called the dispatcher, allegedly asking, “Why do we have to kiss ass all the time?” and requesting that someone else take the run. When the dispatcher told him he was too busy to talk, grievant said, “well fuck all of you.”¹²² Arbitrator Robert Bailey held that the company had no just cause for discharge, arguing that the grievant did not refuse a direct order but rather asked to be reassigned, which “was not an act of insubordination.”¹²³ The arbitrator also held that the company had denied the grievant due process because it did not elicit or listen to his side of the story, and imposed a 1-month suspension for the use of vulgar language.

More commonly, men simply refuse to tell management about their work/family conflict. The classic example is *Tractor Supply Co.*,¹²⁴ in which an employer posted notice of two hours’ mandatory overtime the day before it was to be worked. Workers had the option of staying late or reporting two hours early the following day. Subsequently, the employer took down the overtime notice and a supervisor clarified that the next day’s work could be handled by voluntary overtime. The notice was later reposted, but by that time the grievant and some other workers had left. Had the grievant known of the overtime, he would have reported to work two hours early. However, when he learned of the overtime the following day, he refused to stay at work past his regular shift because he had to get home to care for his grandchild.¹²⁵ When his supervisor asked why he would not stay, he replied that it was none of his business. The supervisor said that accommodations could be made for reasonable excuses and then asked again why he could not stay. The worker again said it was none of his busi-

¹²¹ *Id.*

¹²² *Id.* at 337.

¹²³ *Id.* at 338.

¹²⁴ 2001 WL 13013355 (Dichter 2001).

¹²⁵ The boy’s father worked as the only manager on duty during the evening, had joint custody of his 18-month old, and because of the boy’s medical condition, the court required that the child be cared for by a family member.

ness. The supervisor ordered him to stay, and he was fired for insubordination.¹²⁶

What was worth getting fired over? This worker is not the only one who believed that an important principle was at stake. In *Midwest Body, Inc.*,¹²⁷ Arbitrator Valentine Guenther upheld the dismissal of a grievant who failed to report for overtime work on Saturday or for work on Monday. When asked why, “he replied he had family problems and declined to be more specific,”¹²⁸ refusing again at a meeting with two supervisors and a union representative. The union alleged that he was being discharged for union activities: he was President of the union and had notified the Occupational Health and Safety Administration (OSHA) of safety problems at the plant. The arbitrator noted that absenteeism was “something of a habit” with this employee. “Reluctance to give specific information with respect to ‘family problems’ may be understandable,” he continued, “but an employee who is unwilling to give [it] should refrain from using that sort of excuse.”¹²⁹ A similar case is *Ashland Oil*,¹³⁰ in which a carpenter left work after explaining “that he had obligations at home without specifically mentioning child care.” In *Tom Rice Buick, Pontiac & GMC Truck, Inc.*,¹³¹ an National Labor Relations Board (NLRB) decision, an auto parts salesman lost his job when he left work 15 minutes early to pick up his 13-year-old son, who was frightened to be left alone after volleyball practice, in a school where windows has been broken by gunfire the previous week. His father told a manager (and an outraged customer) that he had to leave work for a “personal reason.”

Other male workers simply left. In *Southern Champion Tray Co.*,¹³² the grievant, after having told his supervisor repeatedly that he could not stay because he had to pick up his son, walked off the job. Asked why he did not explain to his supervisor that his back-up plan had fallen through when his wife’s car broke down, he

¹²⁶Arbitrator Fredric Dichter emphasized the worker’s failure to explain why he could not stay, but he found that the discharge was unreasonable in the face of the worker’s need to care for the child, and the confusion concerning notice the day before. He reduced the penalty to a 30-day suspension, without back pay.

¹²⁷73 LA 651 (Guenther 1979).

¹²⁸*Id.* at 652.

¹²⁹*Id.* at 653.

¹³⁰91 LA 1101 (Volz 1988).

¹³¹334 NLRB 785 (2001).

¹³²96 LA 633 (Nolan 1991).

replied, "I thought I did all I could and I was tired of fussing. I didn't feel anything else could be worked out."¹³³ In *City of Columbus*,¹³⁴ an operating engineer said even less when he left to pick up a carpool of his son and another first-grader from school after his crew was told to remain at work due to an impending snow storm. Company policy was that employees were excused from overtime if they advised their supervisors of a reasonable excuse prior to the end of their normal workday.¹³⁵ In fact, another employee had requested, and received, an excuse to leave for a short time to pick up his pregnant wife from work. Noted the arbitrator, "[i]f Benton's situation was considered to be a reasonable excuse, then certainly the grievant's excuse that he had to pick up his first grade son as well as another first grader from school would also be found to have been a reasonable excuse under the contract."¹³⁶ But the grievant did not tell the street maintenance foreman of his difficulty. After asking for two supervisors and being told they were not there, he simply left.¹³⁷

Finally, in a 1998 UPS arbitration involving discharge of a package delivery driver for theft of time, a grievant's failure or refusal to disclose his family care needs clearly played a role in the arbitrator's decision to uphold the termination. "[A supervisor] testified he told the grievant that in light of the grievant's failure to offer an explanation for his excess personal time . . . [he] had no other alternative but to discharge him for theft of time." It was not until several weeks later that the grievant admitted he had gone home to care for his ill wife, newborn, and toddler sick with the flu.¹³⁸ Clearly, unions need to train workers to disclose work/family conflicts. Supervisors can't help solve a problem if they don't know of its existence, and arbitrators typically do not bring up issues that are not argued.

A related communication issue concerns what inferences to draw when a worker gives a reason other than child care for leaving or refusing work, in a context where it seems clear that child care was the real reason. This situation is not uncommon.

¹³³*Id.* at 637.

¹³⁴96 LA 32 (Mancini 1990).

¹³⁵The grievant claimed at the hearing that he had so informed his supervisor, but this claim was inconsistent with a prior statement, and the arbitrator did not believe it.

¹³⁶*City of Columbus*, 96 LA at 34.

¹³⁷The arbitrator notes that the grievant had "two recent reprimands for committing similar offenses." *Id.* at 37. It is unclear from the decision whether that means that the grievant had gotten into trouble for leaving for child care reasons before. If so, that may explain why he did not discuss his child care issues when they arose again.

¹³⁸UPS database: UPS, case no. 97-222(B) (McKay 1998).

In the disciplinary hearings we examined, unions commonly argued that workers failed to work because they were sick, or for some other reason unrelated to family care, on the assumption that this was the best strategy for protecting the worker. For example, in *Jefferson Smurfit*,¹³⁹ the grievant whose wife wanted him to come home to bring more fever medication failed to persuade two other qualified machine operators to take the overtime; so he claimed he felt sick, but then backed off when his supervisor insisted he go through with a fitness exam. Similarly, in *Piedmont Airlines*,¹⁴⁰ the union argued medical emergency, focusing on the flight attendant's toothache, because of their sense that child care "just wasn't on the radar screen."¹⁴¹

In this context, it does not make sense for an employer to refuse to accept a worker's claim that he or she needs time off for family responsibilities because the worker initially gave a different reason because he or she thought that excuse would be less controversial, as did the employer in *Allied Paper*.¹⁴² In that case, the worker's first reaction to a Saturday call-in was that he was on vacation—in other words, that he had a *right* not to come to work—rather than saying that his wife was seriously ill—in other words, that he had a reasonable *excuse* for refusing overtime. This was not how management saw it. A supervisor acknowledged that the grievant did have a reason for refusing overtime, but he refused to excuse the grievant because he initially said he was on vacation instead of mentioning his sick wife.

A related communication issue is that, in many workplaces, the only way for a worker to stay home with a sick child or to take a child to the doctor's office is to call in sick. Not only is this economically inefficient, as discussed below; it also places workers in a situation where they have to lie in order to keep their jobs. A particularly poignant example, mentioned earlier, involved a UPS package delivery driver who was discharged for theft of time when he spent three hours in the middle of the day helping his wife, who had a breast infection, and a newborn and toddler with the flu.¹⁴³ It is better both for workers and for management to eliminate situations in which workers have to lie.

¹³⁹110 LA 276 (Goldstein 1997).

¹⁴⁰103 LA 751 (Feigenbaum 1994).

¹⁴¹Oral communication, Richard Wrede, May 2005, 58th Annual Meeting of the National Academy of Arbitrators, Chicago, Illinois. In that case, the transcripts made it obvious that child care was the real crisis.

¹⁴²80 LA 435 (Mathews 1983).

¹⁴³UPS database: *UPS*, case no. 97-222(B) (McKay 1998), at 8.

In contrast, good communication by workers may lead an arbitrator to hold that management has waived the right to discipline. In *City of Titusville*,¹⁴⁴ for example, a police dispatcher won a grievance in response to an allegation that she had abused her sick leave to care for her ill son, in part, because “the uncontested facts are that every single absence during this period was known to her supervisors, approved by them, and paid for.” The officer won her grievance because the arbitrator held that management had waived its right to discipline.

Will Family-Responsiveness Jeopardize an Employer’s Effectiveness and Profitability?

On the morning of February 16 there was an employee problem (lack of a babysitter) and a management problem (need for the grievant’s services). Ms. Granico’s [refusal to grant emergency annual leave when the grievant’s regular babysitter had car trouble and her backup sitter’s husband had a heart attack] did not resolve either problem. Instead, they resulted in an angry employee and a vacant space at the [agency].

*Social Security Administration, Westminster Teleservice Center*¹⁴⁵

In many contexts, workplace inflexibility is bad management. This is referred to in the work/family literature as the “business case”: the argument that business should adapt the workplace to the work force not just as a gesture of good will, but to increase businesses’ effectiveness and improve their bottom line. The “business case” literature is important not because arbitrators are management consultants hired to tell employers how to better run their businesses. Clearly they are not. Yet arbitrators need to know that the common assumption that ending workplace/work force mismatch is infeasible runs against a substantial business literature.

Given that most work/family literature focuses on professional and managerial jobs, we know the most about the business case for family-friendly policies for workers in those jobs. In professional or other high-human capital jobs, the key elements of the business case are attrition and recruitment. According to human resource professionals, it costs between 75 percent and 150 percent of a worker’s annual salary to replace a worker who leaves. Because workplace inflexibility fuels high attrition, it makes economic sense in the long run to allow workers the flexibility to

¹⁴⁴101 LA 828 (Hoffman 1993).

¹⁴⁵93 LA 687 (Feigenbaum 1990).

handle family care issues, even if doing so is inconvenient in the short run. In addition, given the “war for talent” in professional and managerial jobs, it does not make economic sense for an employer to be so inflexible that it loses talented women, one after another, once they have children.

The business case for workplace flexibility for professionals emerges clearly in *Washtenaw County, Friend of the Court Unit*,¹⁴⁶ in which Arbitrator William Daniel upheld the dismissal of a lawyer. To quote the arbitrator, “There is no dispute that [the grievant’s] performance as enforcement attorney was most competent and outstanding.”¹⁴⁷ She requested leave without pay for three 10- to 12-day periods one summer, to care for the children of her partner, and had summertime custody of his 5- and 7-year-old daughters. She had become an “important (if not dominant) parental model for the girls,” and the couple decided that they deserved something “better than shunting off with babysitters for the course of the entire summer.”¹⁴⁸ In her application for a flexible schedule, the grievant indicated a willingness to work some hours during any weeks that she was on leave of absence, taking home reports to work on. She “further noted her belief that things could be worked out with the rest of the staff so that it would not cause an undue burden,”¹⁴⁹ to quote the arbitrator.

As happens fairly frequently in arbitrations involving family caregiving, problems arose when a new supervisor appeared on the scene.¹⁵⁰ The new supervisor denied the grievant’s request for

¹⁴⁶80 LA 513 (Daniel 1982).

¹⁴⁷*Id.*

¹⁴⁸*Id.*

¹⁴⁹*Id.*

¹⁵⁰A number of cases were triggered by new supervisors, including *Los Angeles County, Sutter* (Fishgold 1988); *Internal Revenue Service*, 89 LA 59 (Gallagher 1987); *Menasha Corp.*, 90 LA 427 (Clark 1987). The receptivity of one’s supervisor is a key element in whether a worker feels a job is family friendly. See Behson, *The Relative Contribution of Formal and Informal Organizational Work-Family Support*, 66 J. of Vocational Behavior 486 (2005); Moen & Yu, *Effective Work/Life Strategies: Working Couples, Work Conditions, Gender, and Life Quality*, 47 Soc. Prob. 291 (2000). Of course, it is the lack of rights in this arena that make workers dependent on the good will of individual supervisors. In *Menasha Corp.*, *supra*, Arbitrator Charles Clark overturned the discharge of a single mother with 10 years of service and the worst absenteeism record in her factory, which occurred when a new supervisor instituted a stricter attendance policy. “Grievant’s attendance record may not have been good, but mitigating circumstances bar finding just cause for discharge. Personal problems, including divorce, child custody and financial difficulties, plagued her but now appear resolved, as shown by her attendance during months next preceding her discharge. Even before that . . . she often worked despite illness. . . . To permit a discharge under these circumstances would open the door to subversion of the measure of security afforded employees by ‘just cause’ contract provisions through the simple expedient of appointment of a succession of managers espousing different views.” *Menasha Corp.*, 90 LA at 430.

leave on the grounds that child care leave was limited to parents by birth or adoption. The grievant, at the hearing, maintained that she had requested personal, not child care, leave, and that its denial was at odds with past practice in the unit. The supervisor maintained that “he did not believe he could afford the absence of an attorney with the capabilities and experience of the grievant”¹⁵¹ and chose not to exercise his discretion in the grievant’s favor. Ironically, she was fired because she was indispensable—a powerful example of the kind of “regretted losses” that stem from workplace inflexibility.¹⁵²

The arbitrator upheld the termination on the grounds that the leave of absence was at the discretion of the employer:

Although the grievant offered a number of alternatives to the employer, the employer was under no obligation to accept and, in fact, its rejection seems based upon a fair analysis of the work [commitment] that was expected of the grievant. Working part days or taking files home, in the opinion of [the supervisor], would not suffice and this arbitrator finds no evidence to overturn that exercise of judgment. In fact, it would appear that an attorney of grievant’s extraordinary capabilities and work habits would be sorely missed and put the department at a great disadvantage were her leave granted. . . . To permit her to continue at her whim as to which day she would work or not would simply be accepting her terms of employment. . . . None of the alternatives were viable in the eyes of the employer and properly so.¹⁵³

The image underlying the employer’s decision—and embraced by the arbitrator (“properly so”)—is the image of what I have elsewhere termed the “Ideal Worker”: an employee without competing family responsibilities. This way of defining the Ideal Worker developed in an era when, at least in theory, each worker was supported by a stay-at-home wife who was responsible for household work and family care.¹⁵⁴ This model created workplace vulnerability for women.¹⁵⁵ Today, it does the same for many working-class men, given that only a small fraction (16%) have stay-at-home

¹⁵¹ *Washtenaw County, Friend of the Court Unit*, 80 LA at 514.

¹⁵² “Regretted losses” are departures of valued staff that the employer would have liked to have kept. See Project for Attorney Retention, *Balanced Hours: Effective Part-Time Policies for Washington Law Firms*, available at <http://www.pardc.org/Publications/BalancedHours.shtml> (visited June 1, 2006).

¹⁵³ *Washtenaw County, Friend of the Court Unit*, 80 LA at 515.

¹⁵⁴ Williams, *Unbending Gender: Why Family and Work Conflict and What to Do About It* (2000), at 20–30. Other scholars have also developed a similar analysis. See P. Moen & Y. Yu, *Effective Work/Life Strategies*, supra note 150, at 296. (“Jobs and career paths come prepackaged in ways that presume workers are without family responsibilities.”)

¹⁵⁵ Williams, *Our Economy of Mothers and Others: Women and Economics Revisited*, 5 J. Gender Race & Just. 411 (2002).

wives.¹⁵⁶ Current demographic trends preclude most workers from having “flexible personal schedules to accommodate their employer’s requirements,”¹⁵⁷ for doing so requires either having no children or having the responsibility for one’s children rest with a stay-at-home spouse.

Continuing to embrace this old-fashioned image of the Ideal Worker creates workplace/work force mismatch that leads to high rates of attrition, as it did in *Washtenaw County*.¹⁵⁸ Such mismatch also makes it difficult to recruit the most qualified candidates, as employers choose and promote not the most talented workers, but those who can work the schedule traditionally worked by men.¹⁵⁹ Phyllis Moen and her co-author have documented that women’s job histories, unlike men’s, do not typically stretch without interruption for the 40 years between the ages of 25 and 65.¹⁶⁰

Given the limited nature of the arbitrator’s role, the implications of this analysis will vary. At the very least, arbitrators should pause before enforcing the traditionalist—and outdated—image of the ideal worker. An example from the blue-collar workplace is *Town of Stratford*,¹⁶¹ in which Arbitrator James Stewart upheld a 5-day suspension of a police officer when she failed to report for an “orderback.” Although she had arranged babysitting for her three children for the regular shift starting at 4 p.m., she could not, with no notice, find babysitting to cover the noon to 4 p.m. orderback period. To quote the arbitrator:

It is Town’s position that a Police Officer’s personal/family needs are separate matters from their responsibility to the job of police work. A refusal to report as a result of “orderback” is insubordination whether the reason is personal or not. The Police Department is a para-military organization, an “orderback” is a firm requirement of the necessary discipline that surrounds police work. Grievant is expected to have her family life secured in a manner that does not conflict with her professional responsibilities.¹⁶²

¹⁵⁶Lamont, *The Dignity of Working Men* (2000), at 34.

¹⁵⁷*Piedmont Airlines, Inc.*, 103 LA 751, 758 (Feigenbaum 1994).

¹⁵⁸*Washtenaw County, Friend of the Court Unit*, 80 LA 513 (Daniel 1982).

¹⁵⁹See Williams, *UnBending Gender*: *supra* note 154, at 88–91, and sources cited therein. For a more complete bibliography on the business case, see Williams & Calvert, *WorkLife Law’s Guide to Caregiver Discrimination: Using the Law to Protect Working Families*, Appendix I, *Bibliography on the Business Case for Family Friendly Policies* (forthcoming 2006), available at <http://www.worklifelaw.org>.

¹⁶⁰Han & Moen, *Work and Family Over Time, A Life Course Approach*, 562 *Annals of the American Academy of Political and Social Science* 98 (1999) at tbl. 1 p. 104.

¹⁶¹97 LA 513 (Stewart 1991).

¹⁶²*Id.* at 513–14.

Note that the test here is not whether the grievant made concerted and conscientious efforts to find a babysitter so that she would not have to leave her children home alone. Instead, the message is that one is not a suitable police officer unless one has a “family life secured” so as never to conflict with work responsibilities. This is impossible, particularly where unscheduled overtime work is demanded at short notice, unless one has no children—a relatively unusual situation in working class couples¹⁶³—or a spouse (typically a wife) who is available to care for his children without regard to her own job, presumably because she does not have one, or much of one.¹⁶⁴ One might argue that the police are different—that it is so important to have police on duty that police officers should not expect family concerns to be taken into account in any way. Yet, in the other case involving a police officer with family care responsibilities, the arbitrator upheld an officer’s right to use her bargained-for sick leave for child care with no sense that this would jeopardize effective police work any more than do sick leave, personal days, vacations, or leaves to address substance abuse problems.¹⁶⁵ The issue is not whether the police need coverage; like other employers, they clearly do. The issue is whether such coverage is best achieved by being inflexible when officers cannot report due to legitimate child or other family care issues they have taken all realistic steps to avoid.

A similar issue arose in the context of medical workers. In *Sutter Roseville Medical Center*,¹⁶⁶ the arbitrator was understandably vexed with a worker who flatly refused to face the fact that he could no longer count on an immunity to overtime that his co-workers did not enjoy. In ruling for the employer, the arbitrator pointed out the need for dependable staffing in the context of medical facilities involving seriously ill patients. In contrast, in *Department of Veterans Affairs Medical Center*,¹⁶⁷ the arbitrator, in finding for a more sympathetic worker, did not mention particular problems of reliability presented by medical facilities.¹⁶⁸ Perhaps this is because

¹⁶³Fertility studies of working class women are scarce, but from HEWLETT, *Creating a Life: Professional Woman and the Quest for Children* (2002), at 33 (stating that 33% of high-earning career women ages 40–55 are childless and the rate of childlessness among high-achieving women is about twice that of the population at large), we can infer that working-class women are less likely to be childless.

¹⁶⁴Moен & Yu, *Effective Work/Life Strategies*, *supra* note 150, at 295, 311, 314.

¹⁶⁵*City of Titusville*, 101 LA 828, 835–36 (Hoffman 1993).

¹⁶⁶116 LA 621 (Staudohar 2001).

¹⁶⁷100 LA 233 (Nicholas 1992).

¹⁶⁸It may be that the argument was made in *Sutter* but not in *Department of Veterans Affairs Medical Center*.

of the difference in the two types of medical facilities. Perhaps not. After all, the real issue is not whether police, medical, and other 24-hour/day workplaces need reliable staffing. It is whether the only way to reliably provide such staffing is to discipline or fire workers who cannot report due to family care responsibilities—or whether a more effective approach is to train workers that they need child care, plus a back-up plan, and to provide reliable coverage for workers experiencing child care emergencies. Providing such back-up may be *easier* in medical workplaces, because they already have an elaborate system of back-up arrangements, including “floaters,” on-call staff, registry, and other back-up arrangements, due to the exigencies of the field. Arbitrators should not unquestioningly accept an employer’s assertion that a particular type of workplace needs to assume that its employees will never have competing family responsibilities.

Attempting to enforce an outdated model of the ideal worker is unrealistic in today’s workplace. Enforcing it will only serve to make workers vulnerable, for it clashes with another cherished social ideal, namely that family must come first.¹⁶⁹ Arbitrator Dennis Nolan has best articulated this norm: “If all attempts fail [to satisfy parental obligations without interfering with the employer’s business], the family must come first, as most employers would readily agree.”¹⁷⁰

The family-comes-first norm is widely shared, but it is particularly important in the working-class context. To quote Michèle Lamont’s important analysis, one way working men distinguish themselves from higher-status professionals and managers is their emphasis on family. One of the moral flaws working-class men attribute to higher-status groups is what they see as the “poor quality of their interpersonal relationships.”¹⁷¹ In fact, studies report that blue-collar workers put family above work.¹⁷² Lamont quotes a factory foreman: “Money isn’t a big thing in my life. I don’t have to be a rich man. I have riches. As long as you have the love and a tight family and that my kids grow up good, I don’t need a lot of money. . . . I have the respect of people who know me. . . . I have

¹⁶⁹This norm is closely related to the norm I have elsewhere called the norm of parental care. Williams, *supra* note 154, at 48–54.

¹⁷⁰*Southern Champion Tray*, 96 LA 633, 637 (Nolan 1991), also quoted in *Tractor Supply*, 2001 WL 1301335 (Dichter 2001). Note that the arbitrator nonetheless found for the employer in that case.

¹⁷¹Lamont, *supra* note 156, at 112.

¹⁷²*Id.* at 30 (citing studies).

those kinds of things, so I have a sense of self-worth.”¹⁷³ Asked why he likes his best friend, he says, “He’s a family man. His family comes first to him as well.”¹⁷⁴ It is in this cultural context that workers choose family over work even when they risk severe work consequences for doing so. As the carpenter in *Ashland Oil* told his unhappy supervisor (“my ass is on the line”) as he left work to pick up his children, “I must do what I have to do.”¹⁷⁵

The family-first principle is easy to embrace in the abstract. Concrete cases, of course, are harder. At a minimum, the message for arbitrators is that it is unreasonable to insist on a “family life secured,” although it is eminently reasonable to insist that workers have in place adequate child care, and a back-up plan.

Several other arbitrations hint at the concrete costs employers incur when they refuse to honor workers’ family care responsibilities. In *Internal Revenue Service*,¹⁷⁶ Arbitrator Thomas F. Gallagher conditionally reinstated a typist with a record of persistent tardiness in the face of evidence that her problems began 7 years after she was hired, when she separated from her husband following the birth of her third child. He noted that she was one of the best typists in the work unit, and that her work had not been affected by the personal challenges that led to her tardiness. Her excellent work record clearly played a role in her conditional reinstatement. The arbitrator assumed that it was in the employer’s best long-term interest to keep this highly efficient worker despite the fact that she had experienced a period of family problems.

Another aspect of the business case is illustrated by *Dial Corp., Bristol Pa.*,¹⁷⁷ in which a company refused to grant leave to a quality control technician whose wife had had a miscarriage. The grievant was required to report for work despite the fact that the hospital had instructed him that his wife not be alone for the first 24 hours. The grievant, who was 56 and had 15 years of seniority, became rattled when he called home and his wife did not answer the phone. He was terminated after he failed to properly inspect carton seals but signed inspection forms saying that he had done so. Arbitrator James Robinson reduced the discipline to a suspen-

¹⁷³*Id.* at 112.

¹⁷⁴*Id.* at 31.

¹⁷⁵91 LA 1101 (Volz 1988).

¹⁷⁶89 LA 59 (Gallagher 1987).

¹⁷⁷107 LA 879 (Robinson 1997).

sion.¹⁷⁸ This fact pattern suggests that a family-hostile workplace may jeopardize quality control. Similarly, *Piedmont Airlines*¹⁷⁹ suggests that public safety may be jeopardized by employers who refuse to acknowledge workers' family responsibilities. The flight attendant in that case acknowledged that she did not think to tell Crew Scheduling that there was another flight attendant on board because she was so "preoccupied" by her child care crisis.¹⁸⁰ How would she have reacted in an in-flight emergency?

Another decision illustrating this point involved a worker who became so upset by a work/family conflict that she felt ill. In *Los Angeles County Department of Public Social Services*,¹⁸¹ an employer refused to allow an eligibility worker time off to take her adoptive mother, who was visiting her from Mexico and spoke no English, to the airport. The grievant did so anyway, saying that she had no choice because her adoptive mother would consider it an insult if she just dropped her and her grandchildren off at the airport. "The Grievant testified that she knew it was wrong not to come into work that day. But she said that she felt compelled to honor her commitment to her adoptive mother."¹⁸² She felt that she had no other choice.¹⁸³ Although the grievant's shift did not end until 4:30 p.m., she did not attempt to report to work after the plane departed at 1 p.m. because, she said, she became "anxious and sick" from worrying about her work/family conflict.¹⁸⁴

Arbitrators should not assume that some minimum level of sensitivity to workers' family obligations is bad for business. Indeed, as these cases and a large work/family literature suggest, it may be self-defeating for an employer to insist that an employee come to work in a context where the worker reasonably believes that his or her duty lies in caring for a family member. Family-friendly policies have been found to decrease absenteeism, "a scourge in the industrial workplace."¹⁸⁵ One national survey found absenteeism

¹⁷⁸The grievant was denied leave because he had not given 30 days' notice. The arbitrator found it "very significant" that others had been granted leave without giving such notice.

¹⁷⁹103 LA 751 (Feigenbaum 1994).

¹⁸⁰*Id.* at 755.

¹⁸¹93 LA 1079 (Knowlton 1989).

¹⁸²*Id.* at 1081.

¹⁸³*Id.* at 1082.

¹⁸⁴*Id.* at 1081.

¹⁸⁵*Knauf Fiber Glass*, 81 LA at 336.

and tardiness dramatically reduced by flextime.¹⁸⁶ Another found that flexibility cut absenteeism by 50 percent.¹⁸⁷ The Pella Corporation found that job sharing not only decreased absenteeism by 81 percent, but it also increased performance reviews.¹⁸⁸

Employers who allow workers to be open about family care sometimes find that, instead of calling in sick for the whole day, employees instead miss only part of the day, because they do not have to pretend they were sick. If employees were allowed to be forthcoming about family care crises or children's and elders' medical appointments, employers might well find that workers make up time missed due to family care, instead of lying. In addition, the growing literature on low-wage work documents that much of the attrition that plagues employers of minimum-wage workers stems from breakdowns in child care.¹⁸⁹ A family-responsive workplace also has been linked to increased productivity.¹⁹⁰

The extensive literature on the business case cannot be fully reviewed here,¹⁹¹ but an understanding of the business case can inform arbitrators in several ways. Arbitrators need an informed perspective so that they do not accept as unassailable truth employers' claims that it will cost a fortune to allow workers flexibility to meet their family obligations. The simple fact is that *refusing* to acknowledge workers' family ties may be costing a fortune in high absenteeism and attrition costs, decreased quality control, and overall productivity. Workplace/work force mismatch is not any better for business than it is for workers.

Arbitrations Balancing Work and Family: The Overall Patterns

Employees obviously must *try* to satisfy their parental and family obligations without interfering with the Employer's business. If there is a crisis or emergency, certainly the responsibilities of family come first.

¹⁸⁶Galinsky et al., Families and Work Institute, *The Changing Workforce: Highlights of the National Study of the Changing Workforce* (1993), at 88.

¹⁸⁷*See* Work & Family Connection, Inc., *Work & Family: A Retrospective* (1996) at 130, 123 (Survey by AMA).

¹⁸⁸*Id.* at 126.

¹⁸⁹Dodson, Manuel & Bravo, *supra* note 114.

¹⁹⁰*Id.* at 16–19 (documenting that flexibility can enable employers to stay open longer hours with the same number of employees, improve staffing during weekends and vacations, increase worker loyalty and job commitment, and provide a fresh worker instead of overworking a tired one). This claim is more controversial, chiefly because productivity is so hard to measure in professional and managerial jobs. Productivity gains are more measurable in blue-collar jobs. *See also* Williams & Segal, *Beyond the Maternal Wall*, 26 HARV. WOMEN'S L. J. 77, 89 (2003) (discussing hotel housekeepers).

¹⁹¹*See* Williams & Calvert, *supra* note 159.

But employees may not refuse overtime and stand behind the shield of family as a defense in the absence of real need.

*Jefferson Smurfit Corp.*¹⁹²

Only 14 percent of the arbitrations involving work/family conflict involve contract interpretation.¹⁹³ Most (86 percent) involve discipline and discharge. This section first critiques the four discipline and discharge cases in which arbitrators gave little or no weight to workers' family responsibilities. This critique does not imply that workers claiming family responsibilities should always win. In fact, this section then discusses the 24 cases in which management won outright. In all of these cases, management deserved to win, typically because the workers did not make reasonable attempts to respond to their employers' business needs, or because workers stood "behind the shield of family responsibilities in the absence of real need." This section also discusses the 11 discipline and discharge cases in which the grievants won outright. Finally, this section discusses this study's most striking finding: 31 of the family-care arbitrations involving discipline and discharge, 47 percent of the total, produced split decisions in which the arbitrator found some fault with each party.

¹⁹²110 LA 274 (Goldstein 1997).

¹⁹³See, e.g., *Board of Education of Margareta*, 114 LA 1057 (Frankiewicz 2000)(reducing to 10 days the 20-day suspension of a School Isolation Monitor who left to care for her pregnant daughter and grandchild when her daughter encountered medical problems during her pregnancy; grievant's supervisor told her he would have to take her request for leave to the Board, but she left before he could do so, and stated that she would have left even if forbidden to go; contract lacked just cause provision, so arbitrator decided based on contract language); *Central Beverage*, 110 LA 104 (Brunner 1998)(unilateral change of grievant's working hours violated the contract); *City of Columbus*, 102 LA 477 (Kundig 1994)(contract limits leave to biological, as opposed to adoptive, mothers); *City of McAlester*, 114 LA 1180 (Crow 2000)(sick leave to care for relatives does not cover live-in girlfriend who was the mother of worker's child); *Cooper Industries*, 94 LA 830 (Yarowsky 1990)(no-fault absenteeism policy satisfies contractual reasonableness requirement); CWA database: *General Telephone Company of California*, case no. 11-82-24 (Zigman 1982)(employer violated the contract when it scheduled grievant to cross-train on a schedule inconsistent with her child care, contrary to her shift preference); CWA database: *General Telephone Comp. of Indiana*, case no. 5-80-934 (Walt 1981); *Naval Air Rework Facility*, 86 LA 1129 (Hewitt 1986)(grievant denied sick leave to care for a child with chicken pox due to lack of certification by public health authorities, as contractually required); *Princeton City School District Board of Education*, 101 LA 789 (Paolucci 1993)(school district violated contract when it denied teacher personal leave to care for her children when her babysitter and back-up child care fell through); *Southern Indiana Gas & Electric Co.*, 86 LA 342 (Schedler 1985)(company did not violate contract by refusing to pay grievant-father childbirth pay when the baby was not born during scheduled hours of work); *Witte Hardware Corp.*, 94 LA 1161 (Hilgert 1990)(employee discharged for failing to report following expiration of personal leave granted so that she could care for her injured son; contract gives employer right to determine whether and to what extent personal leave is given, and employer went to considerable lengths to accommodate grievant's needs).

Cases in Which Arbitrators Gave Little or No Weight To Workers' Family Responsibilities

Of these four cases, three have already been discussed. In *Piedmont Airlines*,¹⁹⁴ the arbitrator upheld a 7-day suspension of a flight attendant who refused an extra flight because she could not arrange child care on short notice, in an opinion that discusses only the needs of the airline, and argues that employees should organize their personal lives so as to be available for work at any time without substantial notice. In *Washtenaw County*,¹⁹⁵ the arbitrator upheld the termination of an exemplary lawyer because of her need for a flexible summer schedule, with the claim that anything less than allowing management to insist on a rigid Ideal-Worker model would subject employers to the “whim” of their employees.¹⁹⁶ In *Town of Stratford*,¹⁹⁷ the union argued on behalf of a police officer who could not come in for an “orderback” because she could not arrange babysitting at such short notice. “[H]er situation should be treated like an officer who fails to report to work because of being sick,” argued the union. “She could not leave her children alone.”¹⁹⁸ The arbitrator rejected the analogy, with the comment that an ill worker could bring a doctor’s note “if not contractually impermissible. . . . Conversely, can the Department require the potential babysitters to write notes as to why they could not fulfill their requirements to a Police Officer?” No, he answered: “Grievant cannot legitimately claim one more lessening of the traditional standards inherent in police work, to attempt to make egalitarian social experiments.”¹⁹⁹ Note the sarcasm, and the negative characterization of eliminating discrimination as an “egalitarian social experiment[].”

In fact, the analogy between the illness of a worker and the worker’s family care responsibilities is an important one, for it highlights that management *already* is required to take account of the fact that workers are real people, flesh and blood, and susceptible to illness. Similarly, given the demography of today’s work force, management should respect the fact that most workers have families to care for. *Where the worker has behaved responsibly*, employers

¹⁹⁴ 103 LA 753 (Feigenbaum 1994).

¹⁹⁵ 80 LA 513 (Daniel 1982).

¹⁹⁶ *Id.* at 515.

¹⁹⁷ 97 LA 513 (Stewart 1991).

¹⁹⁸ *Id.* at 514.

¹⁹⁹ *Id.*

need to take family care responsibilities as a fact of contemporary business life. To quote one arbitrator,

Nowadays, employers must give some consideration to the personal problems of their employees. In today's world, working families are often under a high degree of stress, and it may not be possible for an employee to leave his or her problems 'at the gate.' Modern industry must cope with such problems as substance abuse, alcoholism, and the like. Human resource departments often attempt to meet these and other needs where employees need help.²⁰⁰

The fourth case that gave little or no weight to workers' family responsibilities is *Transit Management of Decatur*,²⁰¹ in which Arbitrator Robert Perkovich upheld a 5-day suspension of a bus operator who had worked for the company for 8 years. She missed a day of work after her 17-year-old daughter, who was using drugs and had threatened suicide, was discovered in the bathtub in a fetal position and refused to speak. The daughter was taken by ambulance to the hospital, where a psychologist arranged to meet with the grievant the following day. The grievant phoned to say that she would not report for work because her daughter was in the hospital. When she returned the following day, she explained the situation to the dispatcher on duty, and requested a personal day the following week because she had been scheduled to speak again to her daughter's psychologist. She offered to make up the time on one of her days off. The dispatcher told her to submit her request in writing, which she did, stating that she needed the time due to "Drs appointments and out of town." When a supervisor denied the personal day because, in his view, she lacked a "real good reason," she took the time off anyway, calling in to report she would not be at work. The arbitrator held that the issue was not arbitrable because it involved the Family and Medical Leave Act (FMLA), and arbitrators cannot decide questions of "external law" not incorporated into the contract.

This seems a red herring. In fact, the question was whether the denial of leave was reasonable and the answer was that it was not. If meeting with the treating doctor of a teenager hospitalized in these circumstances is not a "real good reason" for personal leave, it is hard to know what is.

When these cases are gathered together, *Washtenaw County* stands out as particularly troubling because it alone involved ter-

²⁰⁰ *Id.*

²⁰¹ ATU database (Perkovich 1998).

mination. In the others the stakes were much lower, involving only relatively short 3- or 5-day suspensions.²⁰²

When Do Grievants Lose Outright?

In 24 cases involving discipline and discharge (36 percent), arbitrators balanced management and workers' concerns and found that employers' concerns trumped those of the workers. These cases typically involve either patient employers faced with a never-ending series of absences or tardiness, or employees who do not make an effort.

In some cases, arbitrators allowed employers to draw a line in the sand after a long period of tardiness, absenteeism, or leave, in situations where the employers had gone to extra lengths to try and help the employees, who often had compelling personal circumstances. In *Chicago Transit Authority*,²⁰³ Arbitrator Elliott Goldstein upheld the discharge of a single mother whose tardiness stemmed primarily from her need to unhook her son, who had Crohn's disease, from his IV, bandage him, administer medication, get him off to school, take two buses to take her toddler to his babysitter, and then take a third bus to work. When she was late, she often worked through her lunch hour to make up the time. Although the Transit Authority tried to adapt to the grievant's situation by allowing her to push back her start time for 30 minutes, she still was persistently late. The union argued that the grievant's older son could better care for himself, that she had found child care close by for her younger son, and that there should be an exception for post-discharge developments, analogizing to workers who enter drug or alcohol treatment. But the arbitrator pointed out that "[t]his is not a case where the employer has been unresponsive to the grievant's predicament. The [employer] gave the grievant many opportunities to correct her tardiness. It allowed her to go on flex-time. It stayed its hand in imposing progressive discipline

²⁰²In the UPS context, family responsibilities often translate into "theft of time," a dischargeable offense according to UPS arbitral practice. One case already has been described: that of the driver discharged for stealing time when he went home to care for a wife with an infant, a toddler, and a breast infection. UPS database: *UPS*, case no. 97-222(B) (McKay 1998). Another involved a 14-year driver who was discharged for a lie in which "to buy himself another day off," he lied, saying his wife was in the hospital when she was not. That case stands for the well-established principle that workers who lie, lose. UPS database: *UPS*, case no. 13 300 02899 03 (Wittenberg 2003). The final case involved the driver who left work without calling so that a replacement driver could be found, used foul language, and rejected the three-day suspension his union rep had negotiated. *UPS*, 53 LA 128 (Murphy 1969).

²⁰³ATU database, case no. 96-080 (Goldstein 1997).

and gave the grievant not one but two probationary periods.” Still, she was persistently tardy at a rate that far exceeded that of other employees. “At bottom, most arbitrators would agree that employees should be given a ‘fair shake.’ However, the [employer] did all that and more in the matter before me.”²⁰⁴

Similarly, Arbitrator Herbert Fishgold upheld the discharge of a publicist for *Good Morning America* whose consistent tardiness over a period of well over a year created a morale problem in her office. Much of her tardiness stemmed from her care for her ailing mother. Yet, she was late again even after she had resolved problems related to her mother’s care.²⁰⁵

Finally, in *Witte Hardware Corp.*,²⁰⁶ Arbitrator Raymond Hilgert upheld the discharge of a warehouse worker whose son had suffered such serious brain injuries that he barely survived. She failed to report for work at the end of the 50 working days of personal leave the employer allowed, saying that she could not give a date when she would be able to resume work. The arbitrator found that the company “went to considerable lengths to accommodate her”²⁰⁷ and was entitled to enforce its policy of refusing additional leave in view of a contractual provision that allowed it to terminate employees who exceeded leaves of absence “without reasonable cause acceptable to the Company.” These cases show that an employer’s patience need not be never-ending, where it has tried to be supportive of an employee in a difficult family situation.²⁰⁸

The other arbitrations in which grievants lost outright involve workers who made little or no attempt to respond to manage-

²⁰⁴*Id.*

²⁰⁵CWA database: *Good Morning America*, case no. AN 88-D___-001/013 (Fishgold 1988).

²⁰⁶94 LA 1161 (Hilgert 1990).

²⁰⁷The employer also offered to reinstate the grievant when she was able to work.

²⁰⁸See also *GAF Corp.*, 77 LA 947 (Weinberg 1981) (discharge upheld in the face of “a never ending tardiness” over a period of years despite warnings and discipline). In *Massachusetts Bay Transportation Authority*, the arbitrator upheld a 3-day suspension of a motor person on the Boston Red Line whose persistent tardiness stemmed largely from the fact that either he or his wife had to be up at night to care for their young daughter with special needs “so sleep deprivation was a fact of life.” He often overslept, which had led his supervisor to advise two alarm clocks, one electric and one wind-up. The grievant, who had requested his early starting time so he could relieve his wife at the end of the day, did not buy a wind-up clock. He again overslept one day when electric power went off in his neighborhood and his electric alarm did not go off. The arbitrator found for management, faulting the grievant for failing to obtain a wind-up alarm clock. ATU database: *Massachusetts Bay Transportation Authority* (Dunn 2000). In this context, the grievant’s failure to take an inexpensive step makes the arbitrator’s decision understandable, although the grievant’s predicament—trying to wake up early to relieve an exhausted wife—highlights the need for public policy to help families with children who are permanently disabled.

ment's legitimate business requirements. Two we have discussed above: *Sutter*²⁰⁹ and *Velva Sheen*²¹⁰ both involved workers who adamantly refused to put in place adequate child care so that they could consistently fulfill their workplace responsibilities. In other cases, grievants were simply irresponsible, throwing family responsibilities onto a never-ending series of excuses for inadequate performance.²¹¹ The arbitrator in *Sprint/Central Telephone Co. of Texas*²¹² upheld the termination of a customer service representative who had cared for a dying mother because of evidence that she simply did not have the skills and temperament to do her job well.

In several other cases, workers were discharged when they were so overwhelmed by misfortune that they did not take the steps necessary to protect their jobs, as when the bus driver in *Budget-Rent-A-Car*²¹³ did not file for FMLA leave, and the brake mechanic in *Greater Cleveland Regional Transit Authority*²¹⁴ did not request family and medical leave despite being notified that he could do so, did not use the resources of the EAP although he was repeatedly urged to do so, and failed to provide proper documentation for an illness even when given an extra two weeks to accomplish this.

In the remaining cases, management won because the grievants lied. The grievant in *GAF Corporation*²¹⁵ had a long history of absenteeism and falsified a document. *Muskegon Public Schools*²¹⁶ again involved a grievant who lied.²¹⁷ *General Tire, Inc.*²¹⁸ involved a 14-year employee whose excuses for his excessive absenteeism (some of which involved child care) struck Arbitrator Ross Groshong as "weak and questionable."

In short, cases in which management won outright generally involve sympathetic grievants whose employers had already gone the extra mile to try and help them, or unsympathetic grievants who lied, refused to seek child care that would enable them to work consistently, failed to take the steps necessary to help get their lives on track, left work without saying why, or were unsuited

²⁰⁹116 LA 621 (Staudohar 2001).

²¹⁰98 LA 741 (Heekin 1992).

²¹¹*Joy Manufacturing Co., Sullivan Division* (Healy 1946).

²¹²117 LA 1321 (Baroni 2002).

²¹³115 LA 1745 (Suardi 2001).

²¹⁴106 LA 807 (Duda 1996).

²¹⁵77 LA 947 (Weinberg 1981).

²¹⁶94 LA 1316 (Grinstead 1990).

²¹⁷See also *Greater Cleveland Regional Transit Authority*, 106 LA 807 (Duda 1996).

²¹⁸93 LA 771 (Groshong 1989).

to their jobs.²¹⁹ Only two cases are less clearcut. *Southern Champion Tray*²²⁰ is discussed below. The other, *Miami Valley Regional Transit Authority*,²²¹ involved a bus driver whose absences were caused by child care problems, transportation problems, and problems with her extended family. She was proactive in trying to alleviate her problems, but found out that she worked for her employer for too short a period to be eligible for family leave, and was never told of the availability of a Compassionate Leave program until after she was fired. The arbitrator clearly felt torn.

During the hearing . . . I found her to be a very caring person, a people-oriented person. There is no doubt she set a good example by her demeanor on the job and in her attitude toward her passengers. She had a good driving record with no recorded complaints. Unfortunately, because of her [low] seniority position she was assigned to shifts that were difficult for her to properly service because of her family situation.

This is a poignant plea in a context where lack of public supports for workers with family care responsibilities leaves arbitrators, as well as workers and employers, with few good options.

When Do Grievants Win Outright?

Grievants won outright 11 arbitrations involving discipline and discharge (17 percent).²²² Most involve issues of employer consistency, with arbitrators typically referring to disparate treatment

²¹⁹This discussion does not include the UPS cases on “stealing time,” which stem from a particular arbitral tradition that has consistently upheld discharge for employees who take unauthorized time off. See UPS database: *UPS*, case no. 97-222(B) (McKay 1998); UPS database: *UPS*, case no. 13 300 02899 03 (Wittenberg 2003); and *UPS*, 53 LA 128 (Murphy 1969). For discussion of a case where management won because the arbitrator held that the issue was not arbitrable, see *supra* text at note 201, ATU database: *Transit Management of Decatur* (Perkovich 1998).

²²⁰96 LA 633 (Nolan 1991).

²²¹ATU database: *Miami Valley Regional Transit Authority*, case no. 52-390-00484-00 (Campbell 2001).

²²²Two arbitrations that grievants won outright have been discussed above: *Social Security Administration, Westminster Teleservice Center*, 93 LA 687 (Feigenbaum 1989) and *Allied Paper*, 80 LA 435 (Mathews 1983). Others include: *Board of Directors Little Rock School District*, 110 LA 1114 (Bankston 1998); *Bryant v. Bell Atlantic Maryland, Inc.*, 288 F.3d 124 (4th Cir. 2002); *City of Titusville*, 101 LA 828 (Hoffman 1993); *Cutler-Hammer Eaton Corp.*, 113 LA 409 (Hoh 1999); CWA database: *General Telephone Company of Indiana*, case no. 5-80-934 (Walt 1981); CWA database: *GTE California*, case no. 11-91-86 (Miller 1992); *Interlake Conveyors*, 113 LA 1120 (Lalka 2000); *Mehasha Corp.*, 90 LA 427 (Clark 1987); *Tenneco Packaging*, 112 LA 761 (Kessler 1999); UPS database: *UPS*, case no. 14 300 00895 02RVB (Kasher 2002). This includes only arbitrations involving discipline and discharge, not those that are limited to contract interpretation.

or to an employer's failure to follow or apply its own rules consistently.²²³

*Interlake Conveyors*²²⁴ involved a material handler whose discharge was overturned by Arbitrator Colman Lalka. Another worker who had accumulated enough points to be discharged had been allowed to produce documentation that he had furnace problems. The grievant was not allowed to produce documentation that, as the divorced father of an asthmatic son, he needed to stay with his son because he was ill: "How are employees, the Arbitrator is left wondering, to know when they will or will not be terminated pursuant to the Attendance Policy?"²²⁵ Rejecting the employer's argument that the grievant had not taken his son to the emergency room, the arbitrator said it seemed "reasonable for the grievant, a divorced parent with physical custody, to stay with an asthmatic son even if an immediate doctor's appointment was not needed. In the event that the son's condition deteriorated to the point of requiring immediately treatment, the grievant was there to take his son to the emergency room."

Arbitrator Richard Kashner, in *United Parcel Service*, reinstated a part-time car washer who, it appears, got caught up in a crack-down precipitated when drivers complained that their trucks were not being cleaned properly.²²⁶ He sometimes left before his 2 a.m. quitting time so he could get home to "get some rest and get his kids to school." The employer discharged him for dishonesty, despite testimony that he had turned into his supervisor a bag he found in a truck containing \$9,000, and despite considerable evidence that management had tolerated a widespread practice of workers leaving early if they had finished their assigned workload (although an official policy required them to seek out additional work). The grievant's supervisor had filled out his own and grievant's time cards, reporting more hours than the grievant (and the supervisor) actually worked.

*City of Titusville, Florida*²²⁷ involved a police department, as in *Town of Stratford*,²²⁸ with a very chilly climate for women. Arbitrator

²²³For a split decision that involved disparate treatment, see *Tractor Supply*, 2001 WL 1301335 (Dichter 2001) (grandfather was reinstated with no back pay for leaving when he was supposed to work overtime; no one else had been terminated for refusing to work overtime).

²²⁴*Interlake Material Handling Div., Interlake Conveyors Inc.*, 113 LA 1120 (Lalka 2000).

²²⁵*Id.* at 1125–26.

²²⁶UPS database: *United Parcel Service*, case no. 14 300 00895 02RVB (Kasher 2002).

²²⁷101 LA 828 (Hoffman 1993).

²²⁸97 LA 513 (Stewart 1991).

Robert Hoffman overturned the written reprimand of a single-mother police dispatcher whose child had severe ear, nose and throat problems. On at least one occasion, the department refused to grant leave to the boy's future stepfather (who lived with the grievant), yet it faulted the grievant when she stayed home to care for the sick child. After she called in with a bad headache, the Captain counseled her "like a Sergeant, father and grandfather. This girl simply doesn't want to be a police officer. I really can't depend on her because she is a sickly person."²²⁹ This is "attribution bias": a man who calls in sick is sick, but a woman who calls in sick is unfit for police work.²³⁰ It also appears that the department was counting the grievant's maternity leave against her, as part of her pattern of "abusing sick leave."²³¹ Moreover, when the grievant was disciplined, she pointed to a male officer who had used sick leave to care for a child with chicken pox. The arbitrator did not stress the disparate treatment. Instead, he emphasized that supervisors had approved all of grievant's absences, and ordered the city to withdraw the written reprimand from her record because she had done no more than use her sick leave—a bargained-for benefit—as she accumulated it.

In *Menasha Corp., Lewisystems Division*,²³² the discharge of a grievant with 10 years' service was held to be without just cause. She had experienced a second divorce, her ex-husband's failure to pay child support, indebtedness, and her son's choice to live with his father, all leading to stress-induced illness. Although she had been absent more than any other employee, the union representative could recall only one other discharge for poor attendance; the company's record praised her "dedication and hard work"; union witnesses testified that she had sometimes come to work despite being sick; and she had improved her absenteeism record, having no absences for two months. Arbitrator Charles Clark held that the new interim manager could not "clean house" by discharging her, and reinstated her with uninterrupted seniority, full benefits, and back pay, including payment for the overtime hours she would have worked.

²²⁹ *City of Titusville, Florida*, 101 LA at 829.

²³⁰ Linda Hamilton Krieger, *The Content of Our Categories*, 47 Stan. L. Rev. 1161 (1995).

²³¹ *City of Titusville, Florida*, 101 LA at 836. This could well qualify as interference with a worker's ability to take FMLA leave. See 29 C.F.R. §825.220(c). See also *Cooper Industries*, 94 LA 830 (Yarowsky 1990) (discussing a decision by Arbitrator Edgar Jones, Jr., that overturned as sex discrimination the discharge of a pregnant woman unable to come to work because of dizziness and nausea).

²³² 90 LA 427 (Clark 1987).

In *General Telephone Co. of Indiana*,²³³ the grievant was a service clerk who had just had a baby. The day she returned from child care leave she was ordered, with less than a week's notice, to attend a 2-week out-of-town training course. She was unable to get babysitting at such short notice, and her husband, also a company employee, was assigned out of town. She asked that the class be scheduled when she had sufficient time to arrange babysitting. The supervisor suggested that she start the class several months later, and the grievant agreed. A few days later, however, she was informed that attending the training program was a requirement of her job, and that she would be terminated if she did not attend. She said she would again try to arrange babysitting, but was advised the next day that they had found someone else who could go "without any problem." A few days later, after an escalating series of meetings, she was told to take an operator job or be fired. She refused to take the operator job because she believed that this would mean losing her seniority for job bidding purposes. Arbitrator Alan Walt overturned her discharge and reinstated her with full back pay, benefits, and seniority. He found that "no effort whatever was made to accommodate grievant's very real child care needs," despite the fact that two other employees had been excused from dispatcher training for compelling personal reasons. If the inability to find a suitable babysitter when neither spouse nor relatives are available "is not a 'compelling personal reason,'" said the arbitrator, "it is hard to imagine what sort of excuse would be acceptable."

The Fourth Circuit case of *Bryant v. Bell Atlantic Maryland*²³⁴ discusses an arbitration that held that an employer had no just cause to discipline Bryant, an African-American construction lineman who was the single father of two minor children, for refusing overtime. According to the court, the arbitrator held that the employer had no just cause to terminate, and "strongly suggested that Bryant be placed in a position that [did not require overtime] or, in the alternative, that Bryant be scheduled for overtime in a manner that would allow him to meet his workplace and child care obligations."²³⁵ The court noted Bryant's claim that whites' child care difficulties had been accommodated, but his had not.

²³³CWA database: *General Telephone Co. of Indiana*, case no. 5-80-934 (Walt 1981).

²³⁴288 F.3d 124 (4th Cir. 2002).

²³⁵*Id.* at 129.

The remaining case can be disposed of briefly. *Board of Directors Little Rock School District*²³⁶ involved a custodian discharged for abandoning her job after she left, informing her supervisor, to attend the funeral and wind up the affairs of her father. She did not phone the principal, judging it to be too late at night, and her supervisor (despite promising to do so) did not inform him either. The grievant was reinstated by the arbitrator, who held that she had not “gotten a fair shake.”

Close To Half of All Arbitrations Involving Caregivers Yield Split Decisions

The argument is very close.

*Boise Cascade Corp., Insulite Division*²³⁷

[S]ince the undersigned did not rule wholly for or against either party herein, it is the Arbitrator’s decision that his costs should be shared equally. . . .

*Darling Store Fixtures*²³⁸

The most dramatic finding is the high proportion of discipline and discharge arbitrations involving caregiving that are split decisions: 31 decisions, or 47 percent of the total. This finding confirms that—due to the lack of effective public policy—workers and employers are often placed in awkward positions because “both are right.”²³⁹ As a result, arbitrators routinely second guess the discipline imposed by management, imposing less severe discipline in an attempt to balance the equities because both workers and employers lack the choices they need. To state this differently, in arbitrations involving family caregiving, grievants’ family care responsibilities are often found to be a mitigating factor.²⁴⁰ Moreover, in many of these cases, arbitrators include comments in their awards demonstrating respect for the grievants’ choice to fulfill family care responsibilities or indicating that their decision is based solely on the difficult facts presented and should not be considered precedential. There are simply too many split deci-

²³⁶ 110 LA 1114 (Bankston 1998).

²³⁷ 77 LA 28 (Fogelberg 1981).

²³⁸ 108 LA 183 (Allen 1997).

²³⁹ *Rochester Psychiatric*, 87 LA 725 (Babiskin 1986).

²⁴⁰ See Brand ed., *Discipline and Discharge in Arbitration* 105–106 (1998) (discussing when a family emergency is a mitigating factor in attendance contexts). See also Abrams & Nolan, *A Theory of Just Cause*, 1985 Duke L.J. 594.

sions to describe them all. I will describe 13 of these arbitrations to show their flavor.²⁴¹

²⁴¹In addition to the decisions discussed in the text, *see also* CWA database: *Ameritech*, case no. 4-99-39 (Bellman 2001) (Arbitrator Bellman reinstated a 25-year employee, without back pay, discharged for monitoring her phone to check up on her young children, one who was asthmatic); *Ashland Oil, Inc.*, 91 LA 1101 (Volz 1988) (Arbitrator Volz reduced a 3-day to 1-day suspension for carpenter who left job early to pick up his child from day care); *Board of Education of the Margareta Local School District*, 114 LA 1057 (Frankiewicz 2000) (Arbitrator Frankiewicz reduced a 20-day suspension to 10 days for employee who took more leave than authorized to care for pregnant daughter and granddaughter); *Boise Cascade Corp., Insulate Division*, 77 LA 28 (Fogelberg 1981) (Arbitrator Fogelberg reinstated, on probation and without back pay, the father of a handicapped son who was fired after 10 years of employment whose absenteeism stemmed from his need to take his son to specialists' appointments and to an on-the-job injury); ATU database: *Chicago Transit Authority*, case no. 97-0166 (Hayes 1998) (see text at footnote 301); ATU database: *Chicago Transit Authority*, case no. 99-155 (Patterson 2001) (bus driver with a disabled child discharged for absenteeism after his daughter was born; Arbitrator Patterson held that grievant had been denied due process because the CTA failed to conduct a full investigation into two of the father's misses and should not have been placed on probation); ATU database: *Chicago Transit Authority*, case no. 00-373 (Gundermann 2001) (see text at footnotes 111, 115; *infra* text at note 302, 303. *Darling Store Fixtures*, 108 LA 183 (Allen 1997) (Arbitrator Allen reinstated at "last chance" level, without back pay, an absentee employee; "it is not difficult to sympathize with management's concern regarding [the grievant's] absenteeism" but arbitrator was troubled by the fact that some of the absences, involving grievant's own health and her need to take her son to the dentist when he broke a tooth, arguably fell into the "extreme circumstances" exception); *Department of Veteran Affairs Medical Center*, 100 LA 233 (Nicholas 1992) (see text at note 69; *infra* text at note 244); *Dial Corp.*, 107 LA 879 (Robinson 1997) (see *supra* text at note 177); *Electrolux Home Products*, 117 LA 46 (Befort 2002) (Arbitrator Befort reinstated a factory inspector without back pay, who could not claim FMLA leave and was discharged for repeated absences stemming from whiplash in a car crash, a family emergency, and pregnancy complications; the company had not adhered to the procedural standards of its no-fault attendance policy); *Fawn Engineering Corp.*, 118 LA 1 (Thornell 2003) (Arbitrator Thornell reinstated, with back pay halved, a 30-year factory employee who was discharged for a 3-day absence during which time the grievant attended a family funeral); CWA database: *General Telephone Co. of California*, case no. 11-82-24 (Zigman 1982) (see *infra* note 280); *Internal Revenue Service*, 89 LA 59 (Gallagher 1987) (Arbitrator Gallagher conditionally reinstated worker, without back pay, who was discharged for excessive tardiness due to child care difficulties); *Jefferson Partners*, 109 LA 335 (Bailey 1997) (see *supra* text at note 119; *infra* text at note 276); Arbitrator Bailey reduced father's discharge to a 1-month suspension for refusing to take an assignment because he had to pick up his daughter); *Marion City Board of Education*, 114 LA 1491 (Goldberg 2000) (Arbitrator Goldberg denied a teacher's request for paid professional leave for a school trip because grievant did not establish that the Board violated the collective bargaining agreement with respect to her application, but found that a failure of the School Board to grant paid leave gives rise to a justifiable grievance); *Marion Composites*, 115 LA 94 (Wren 2000) (Arbitrator Wren finds no violation of insubordination and reduced a 3-day suspension and granted back pay to a written warning for an employee who left the plant early for child care reasons); *Mercer County Association for the Retarded*, 1996 WL 492101 (Hewitt 1996) (see *supra* text at note 70; *infra* text at note 249; Arbitrator Hewitt removed warning from employee's file who refused mandatory overtime because she had no one to care for her retarded son); *Penske Truck Leasing*, 115 LA 1386 (Ellmann 2001) (see *supra* note 94); ATU database: *Regional Transit Authority* (Vernon 1983) (reinstated, without back pay, a father whose excessive absenteeism stemmed from family problems when his wife left him and his children, including several drug overdoses by his daughter); *State of New York, Department of Correctional Services*, 89 LA 122 (Handsaker 1987) (Arbitrator Handsaker overturned the discharge of a correctional officer with a poor absenteeism record, instead imposing a \$500 fine; many absences related to his wheelchair-bound step-son); *Supermarket Acquisitions Corp.*, 101 LA 792 (Braufman 1993) (Arbitrator Braufman converted the discharge of a grocery store worker to a suspension and final

In *NBC*,²⁴² a technical director who had been with NBC for 17 years was suspended indefinitely when he refused an assignment that required travel. The grievant's wife had left him, and his constant travel was an important factor in the break-up. His then-supervisor acknowledged that it was difficult for him to travel once he was left with his three children, aged 9, 11, and 12. Then a new supervisor took over, and she assigned him to cover an important story despite the fact that she was unable to reach him to let him know of her decision. For a period of 30 hours she made no contingency plans in the event that he could not take the assignment because she wanted continuity of personnel. When the grievant arrived at his office, with one of his sons (his wife had gone to her mother's), he said "he just couldn't go." He talked to his supervisor in the Control Room, where a number of others were present, and did not specify why he could not go, nor did his supervisor ask although she was the wife of his former supervisor, so presumably she knew about the grievant's situation.²⁴³ Instead, she told him his son should leave the building, and that she was issuing a direct order that he should go. The company argued that the grievant should have "obeyed now, grieved later," but Arbitrator George Nicolau reduced his suspension to 2 weeks without back pay, stating "In the unlikely event there are some who think the reduction of penalty in this case is a signal that a refusal to carry out work assignments will be judged differently than in the past, they should think once more."

In *Department of Veterans Affairs Medical Center*²⁴⁴ Arbitrator Samuel Nicholas, Jr., overturned the 14-day suspension of a nursing assistant who had custody of her granddaughter. The grievant had taken a longer vacation than she was entitled to, and then she had 2 months of child care problems when she returned, making it impossible for her to work the 3:30 p.m.—midnight shift. She

warning, without back pay, due to his tardiness, which he claimed was due to him having two families in different parts of the city); *Tractor Supply Co.*, 2001 WL 1301335 (Dichter 2001) (see *supra* text at notes 124–26); *United States Steel Corp.*, 95 LA 610 (Das 1990) (see *supra* text at notes 27, 116); CWA database: *U.S. West Communications*, case no. 7-92-20 (Abernathy 1993) (see *infra* note 271); ATU database: *Washington Metropolitan Transit Authority* (Valtin 2000) (automatic fare collection mechanic with 18 years of experience presented a doctor's excuse that was late, "factually confusing," and allegedly dishonest; she also had health-related absences, and was on leave due to them when her employer (having hired a private investigator) discovered that she was working at a variety store while on sick leave).

²⁴²CWA database: *NBC*, case no. NN 81-201-001/017 (Nicolau 1981).

²⁴³This situation appears different from the cases discussed earlier in this section, in that disclosing his situation would have involved a discussion of his continuing marital problems, not simply that he needed to provide child care.

²⁴⁴100 LA 233 (Nicholas 1992).

requested a leave without pay until she could make other child care arrangements, which she had been granted twice before and which should have been granted under the relevant employer manual. The employer denied her request, and disciplined her for failing to work the 3:30 p.m.—midnight shift. Said the arbitrator, “[w]hile grievant was not entitled to an indefinite excuse from working [that shift], I am of the opinion that Agency should have granted grievant some latitude in seeking to deal with this problem before placing her on AWOL status.” The arbitrator reduced the suspension to 5 days, but stated clearly that the sanction imposed was due solely to the unauthorized vacation, not child care problems.

*Chicago Transit Authority*²⁴⁵ involved a bus driver with joint custody of his 6-year-old daughter and full custody of his 16-month-old son, who was already on a Last Chance Agreement because of his inability to find reliable child care. He incurred an additional absence, which he attributed, inconsistently, to his daughter playing with his alarm clock and a burglar in his apartment. Arbitrator Elliott Goldstein held that the miss in question had a legitimate basis, but that that the employer “should not have to bear the financial onus of back pay” because the grievant had not come forward with the requisite police report in a timely fashion, so he was reinstated but without back pay. In another *CTA* arbitration²⁴⁶ heard by Arbitrator Goldstein, a 14-year employee on probation for absenteeism was reinstated without back pay when he failed to report to work because his pregnant wife, who subsequently died of a brain hemorrhage, broke the phone in a fit of rage, and he decided he could not leave his children alone with her.

*Los Angeles County Department of Public Social Services*²⁴⁷ involved the bilingual eligibility worker who took time off to take her adoptive mother to the airport. The arbitrator noted that “grievant was not defiant,” that she “acted honorably and with integrity,” and that no client had been turned away from the social service agency for which she worked. Arbitrator Anita Christine Knowlton decreased her suspension from 5 to 3 days.²⁴⁸

Particularly intriguing is *Mercer County Association for Retarded*,²⁴⁹ in which an arbitrator upheld a 3-day suspension of a residential

²⁴⁵ATU database: *Chicago Transit Authority*, case no. 98-026 (Goldstein 1998).

²⁴⁶ATU database: *Chicago Transit Authority*, case no. 98-080 (Goldstein 1997).

²⁴⁷93 LA 1079 (Knowlton 1989).

²⁴⁸*Id.* at 1082.

²⁴⁹1996 WL 492101 (Hewitt 1996).

worker in a home for the mentally handicapped who refused to work overtime because her husband was not at home and she could not leave her own mentally handicapped son alone. Said Arbitrator Thomas Hewitt in 1996,

It is not uncommon for employees to have disabled parents or other relatives living with them that require constant care. To permit these employees to be excused because of their personal problems puts an added work burden on other employees and makes that unavailable employee much less useful, if not an undesirable, employee.²⁵⁰

This approach is inconsistent with the Americans with Disabilities Act's²⁵¹ prohibition of discrimination against individuals caring for a family member with a disability. Ultimately, the arbitrator reduced the grievant's suspension to a written warning.

Regional Transit District,²⁵² decided by Arbitrator Gil Vernon, found that an employer did not have just cause to dismiss a father whose frequent absences were almost all due to various family problems, including drug overdoses by his daughter and his wife's abandonment of their children. The arbitrator held that the employer "failed to give adequate consideration to the [father's] personal problems," and ordered the worker reinstated with no loss of seniority or benefits, but no back pay.

*Suprenant Cable Corporation*²⁵³ involved a 22-year employee, most recently an extruder operator in vinyl extrusion, whose stay-at-home wife left him in June 1995, leaving him to care for their 4-year-old son. He was notified that social services was investigating him for child neglect. They found none, and subsequently tried to help him find day care for his son, but all he could find during the summer were high school babysitters who were inconsistent and unreliable. At the end of August he finally found an approved day care provider, but not until he had been fired for excessive absenteeism under the employer's no fault policy. Arbitrator Tim Bornstein wrote:

Such policies are not best suited to dealing with long-term employees who, like [the grievant], have overall good records and who run into an unusual period of bad luck and hard times. Anyone can—most of us will—experience at least one period of adversity in a lifetime. Otherwise good, long term employees are entitled to understanding and sympathy during those rare periods. Their seniority does not exempt

²⁵⁰ *Id.*

²⁵¹ 42 U.S.C. §12111.

²⁵² ATU database: *Regional Transit Authority* (Vernon 1983).

²⁵³ CWA database: *Suprenant Cable Corp.*, case no. 1-95-85 (Bornstein 1995).

them from the expectations of the workplace but may require that they be applied more flexible and sensitively.

Warning that “[h]is fate is in his own hands, for, if he does not improve his attendance record, he must appreciate that the consequences will be severe,” the arbitrator ordered him reinstated without back pay.

One CWA arbitration involved the discharge of more than 40 workers. The discharge of 7 workers was upheld because, while the arbitrator found their actions motivated by “sincere concern for the well-being of loved ones,” they were not facing an “immediate, overwhelming threat to safety.” The discharge of 19 workers was upheld because “there was no justification for the monitoring,” and the discharge of 4 workers was upheld because the “grievants offered explanations that did not comport with the record.” The arbitrator overturned the dismissal of the other 8 cases that met the threat-to-safety test.²⁵⁴ One grievant had a mentally unstable son who had threatened to kill her, her family, and himself. Three grievants were faced with children who threatened and/or attempted suicide. Another had a step-daughter who was physically threatening her daughter. Another became worried and called her house 52 times in a single day; when she broke in to monitor the line, she heard her son acknowledging taking drugs. Two other workers monitored the phones of parents, one of whom was “suffering from confusion,” while the other was ill and had other tenants in her building threatening to harm her. In each case, the arbitrator held that the company did not have just cause to discharge, and their terminations were converted into final warnings. Lastly, the arbitrator overturned one discharge because the grievant had checked a malfunctioning phone number but did not listen to conversations.

In *Jefferson Smurfit Corp.*,²⁵⁵ the arbitrator implied a reasonableness standard with respect to overtime, despite the lack of explicit contract language. As noted above, the case involved the father who left work because his child needed fever medication.

The vast majority of reported awards support the position that overtime is compulsory. . . . [T]he essence of most decisions is that where the agreement is silent on the subject management has the right to make reasonable demands for overtime work . . . provided that it is of ‘reasonable duration commensurate with employee health, safety

²⁵⁴CWA database: *U.S. West Communications*, case no. 7-95-93 (Rinaldo 1999).

²⁵⁵110 LA 276 (Goldstein 1997).

and endurance, and the direction is issued under reasonable circumstances. . . .²⁵⁶

The arbitrator found that this “rule of reason” with respect to overtime work applies even in “no fault” systems: management’s “obligation [is] to observe fairness and reasonableness in demanding overtime [and not] to overlook legitimate reasons for refusing the overtime assignment.” The result, as noted above, was that the grievant’s 3-day suspension was decreased to a written warning.²⁵⁷ Not surprisingly, no-fault attendance systems play a role in many of the arbitrations. The relationship between such systems and just cause is complex.²⁵⁸

In the most intriguing and potentially controversial group of split decisions, arbitrators developed innovative remedies designed to help avoid work/family conflicts in the future. Already discussed is *Knauf Fiber Glass*,²⁵⁹ in which Arbitrator Roger Abrams reinstated the grievant, and in effect designed a new probation system during which she was to be allowed only one unexcused absence during a 90-day period, with an exhortation that she needed to improve her attendance so she could keep her job for the good of her children.

Arbitrator William Babiskin also took a pro-active role in *State of New York, Rochester Psychiatric Center*,²⁶⁰ in which the employer sought to discharge a grievant who had worked as a MHTA²⁶¹ for 9 years. She had a history of attendance problems, almost all of which stemmed from her status as a single parent.²⁶² Due to understaffing and the need for round-the-clock care,²⁶³ MHTAs were expected to work mandatory overtime on a regular basis.²⁶⁴ If an employee refused overtime, she remained at the top of the list until she took it, which is why, after the grievant refused to work overtime on October 3, she was ordered 5 days later to work an additional 8-hour tour after her regular shift ended at 11:20 p.m.

²⁵⁶*Id.* 110 LA at 280.

²⁵⁷*Id.* at 282. The arbitrator relied significantly on the fact that the employer has sowed seeds of confusion by posting that overtime on the day in question was voluntary, and then changing that policy after the grievant had left the plant for the day.

²⁵⁸One aspect of this is discussed below in the section on the FMLA and ungrieved discipline.

²⁵⁹81 LA 333 (Abrams 1983).

²⁶⁰87 LA 725 (Babiskin 1986).

²⁶¹Based on information from the Rochester Psychiatric Center Web site, *available at* <http://www.omh.state.ny.us/omhweb/facilities/ropc/facility.htm> (visited June 1, 2006), MHTA is either “Mental Hygiene Therapy Assistant” or “Mental Health Therapy Aide.”

²⁶²87 LA at 726.

²⁶³*Id.*

²⁶⁴*Id.*

Her sitter could not stay because she had a day job.²⁶⁵ The grievant even asked her supervisor if she knew anyone who could watch her children at such short notice. When the supervisor, while sympathetic, replied that she did not, the grievant then said she could stay if she could bring her children in so they could sleep at the center, but that she could not leave her children alone: "If I have to stay, my kids have to stay here."²⁶⁶

The arbitrator held that the grievant was "technically guilty of insubordination" but that the proposed penalty (discharge)

is out of the question. No arbitrator on earth would sustain a discharge on the facts of this case. Such a result would be "so disproportionate to the offence, in light of all the circumstances, as to be shocking to one's sense of fairness." . . . [The grievant] may not be a woman of means, but she is a woman of substance. . . . She does not hold a high-paying job. She would probably be better off financially if she chose to stay home, watch her kids, and go on the dole. However, instead of becoming a public charge, she has chosen to make a public contribution. . . . Her recent performance evaluation indicates "she can function well on any ward she is assigned." As the parties are aware, I take a very dim view of time and attendance infractions and insubordination. . . . However, grievant deserves every conceivable "break". . . . Her children were well-groomed, neatly dressed, and well-behaved. It is her efforts to be a good parent that have created her problems at work.²⁶⁷

The arbitrator directed the grievant to give center officials 30 days' advance notice of 3 days a month (employees typically worked overtime two to three times a month), when she could work overtime.

A third decision involving an innovative remedy, *Allied Paper, Inc.*,²⁶⁸ once again involved overtime. In *Allied Paper*, the grievant refused a Saturday callback because his wife had cancer, and "he would have left a severely sick woman without water, in case of a fire." He furnished water to his whole rural community, and his pump broke. He felt that, without water, the risk of fire was substantial, and there was no fire department in the vicinity. The grievant's wife's cancer was in remission, but she was so anxious and depressed that he did not like to leave her alone, and in fact had frozen in his pay grade, sacrificing thousands of dollars, to avoid overtime that would have left her home alone. "His wife had stood by him in sickness and tragedy, and he was trying to

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 727.

²⁶⁸ 80 LA 435 (Mathews 1983).

return it. He owed it to her.” Arbitrator Ferrin Y. Mathews held that the company should have investigated further to see whether an emergency existed. Responding to evidence that the grievant had been called 91 times for overtime and had always said no,²⁶⁹ the arbitrator ordered the parties “to arrive at some understanding with the Company so that, consistent with the condition of his wife, he can work some overtime.”²⁷⁰ While noting that “arbitrators are reluctant to reduce discipline where an offense has been proven,” the arbitrator reduced the 3-day suspension to a written warning.²⁷¹

These cases are outside the comfort level of many arbitrators, who see their role as one of enforcing the contract with traditional remedies, rather than forging new ones. Whether or not these arbitrators exceeded their authority is beyond the scope of this article. Yet these decisions highlight once again the ways arbitrators are straining to find solutions in a public policy environment unsupportive of working families.

What Is Just and Reasonable?

Here, the grievant is determined not to have gotten a fair shake, hence, there is the absence of just and sufficient cause. . . .

*Board of Directors of Little Rock School District*²⁷²

Just cause is essentially a standard of reasonableness and fairness.

*Ashland Oil, Inc.*²⁷³

Many of the arbitrations studied involve issues of just cause or reasonableness.²⁷⁴ I will confine my discussion to two key issues that often arise in the family-care context: when a worker’s decision to leave to attend to family matters constitutes insubordina-

²⁶⁹*Id.* at 440.

²⁷⁰*Id.* at 448.

²⁷¹Another case involving an innovative remedy, involved a 23-year employee who encountered such financial troubles that his own phone line was disconnected; he hooked up a line to his house at the start of his shift because he was afraid that his wife, who was diabetic, would go into insulin shock or experience some other medical emergency and not be able to reach him; one day he forgot to unhook the line, and a co-worker reported him. The arbitrator overturned his discharge, returning him from a night job (which he had taken to earn more money) back to a day job, where he would receive greater supervision, without back pay. CWA database: *U.S. West Communications*, case no. 7-92-20 (Abernathy 1993).

²⁷²110 LA 114 (Bankston 1998) (overturning discharge of a school custodian deemed to have abandoned her job when she left town for two weeks to attend her father’s funeral and wind up his affairs).

²⁷³91 LA 1101 (Volz 1987).

²⁷⁴*Id.*

tion, and the interaction between past, ungrieved discipline and the FMLA.

Insubordination

Whenever the employer required the workers to work overtime, the group of women had their babysitters drop their children off at their workplace. When the security guards saw the children, they were dumbfounded, and when the women were confronted by their managers, they said, "I would be put in prison and my children would be taken away from me if I leave them home alone—I cannot do that. You told me to stay, so they're going to come here."²⁷⁵

The general rule is that an employee has to "obey now, and grieve later," or risk discipline for insubordination. A crucial issue in family caregiving cases is whether it is insubordination—an offense typically punishable by discharge—when an employee leaves or refuses to come to work due to lack of child care or other family responsibilities. Alternatively, the worker's refusal can be classified under various other contract provisions, such as refusal to work reasonable overtime, which typically entail less severe remedies.

Obviously, *some* refusals to work constitute insubordination, if they are defiant and designed to undercut the authority of management. However, only two cases involving family caregiving clearly involved this kind of refusal—that of the foul-mouthed driver in *Jefferson Partners*,²⁷⁶ and a 1969 case involving a UPS driver who left work to take over caring for his children from his mother-in-law without making the necessary call to ensure his runs were covered, who rejected his union representative's negotiated deal of a 3-day suspension, insisting instead of being paid for the 3 days, called his supervisor by "the 'phallus' epithet," and then unrepentantly remarked "Well, it's the best part of a man."²⁷⁷ Ironically, the first grievant was held not to have been insubordinate, and the second was discharged, but not for insubordination.

The opposite pole is *Southern Champion Tray*.²⁷⁸ That case involved the mechanic who silently left work to pick up his young son at school after being ordered to stay and complete a machine repair. The grievant had received notice the day before that he might have to stay late, but did not attempt to make alternative ar-

²⁷⁵Gerstel & Clawson, *Union's Responses to Family Concerns*, 48 *Social Problems* 284–85 (2001).

²⁷⁶109 LA 335 (Bailey 1997).

²⁷⁷UPS, 53 LA 128 (Murphy 1969).

²⁷⁸96 LA 633 (Nolan 1991).

rangements until shortly before he needed to leave to pick up his son, only to discover that his wife's car had broken down. (He assumed he could finish the repair on time but was prevented from doing so because a vital part arrived late.) Clearly the worker mishandled the situation, and both the worker and the union agreed that discipline was warranted. The case turned on what level of discipline should be imposed: a warning for failure to report for overtime without good reason; 3 days off for leaving the plant during one's shift without permission; or discharge for insubordination. Arbitrator Dennis Nolan upheld the discharge. Clearly he found the grievant unsympathetic, noting that he "had been something of a thorn in management's side for quite a while . . . [,] had run up an extraordinary number of tardies," "repeatedly told his supervisor he would not do certain work, even though he eventually did do it," and been told three times to stay until the machine was fixed. Rejecting the union's arguments that the grievant was being punished for union activism, and that the grievant should get only a warning for failing to report for overtime without good reason, the arbitrator upheld the discharge, "If an employee gambles on which rule the employer will use, and guesses wrong, he has no one to blame but himself."²⁷⁹

In sharp contrast, other arbitrators have focused on whether the grievant was "defiant" or merely torn by "competing important responsibilities," to quote *Los Angeles County*.²⁸⁰ In *Rochester Psychiatric Center*,²⁸¹ the arbitrator fined the grievant \$1 because she was "technically guilty of insubordination," but overturned her discharge. A similar result emerged in *Marion Composites*,²⁸² which involved a grievant suspended 3 days for insubordination when he left after 8 hours of a 12-hour overtime shift. "It's a bit of a stretch to say that the grievant was guilty of insubordination," said Arbitrator Harold Wren. Although he may have been "technically guilty" when he failed to get the foreman's permission to leave, "he did not deliberately countermand a direct order," nor damage the completion of the work that needed to get done.²⁸³

²⁷⁹*Id.*, 96 LA at 639. The union argued that the grievant had been discharged because of his union activities, specifically for filing two previous grievances.

²⁸⁰93 LA 1079, 1082 (Knowlton 1989). See also CWA database: *General Telephone Company of California*, case no. 11-82-24 (Zigman 1982) (grievant not insubordinate because she did not deliberately attempt to undermine the authority of her supervisor; she had "reached the limits of her ability to handle her frustration and because in her eyes a great emergency was at hand" (the need to pickup her child)).

²⁸¹87 LA 725 (Babiskin 1986).

²⁸²115 LA 95 (Wren 2001).

²⁸³*Id.* at 96.

The arbitrator viewed the worker as “an excellent employee who consistently worked overtime when asked to do so. . . . He was never absent. He accepted overtime whenever the Company needed him. Indeed, his dedication to his work placed him in a situation that may have jeopardized his family responsibilities.”²⁸⁴ When first asked to work overtime, he said he could not because he was “tired and worn out”—his wife had recently left him, and he had been so upset he had been feeling ill. Later that afternoon, he said he would help out the company, but that he could stay for only 8 hours because he had to get home to care for his two children. He stayed after the 8 hours were up, but became “distracted” after receiving a call from his wife, and left after 8 hours and 20 minutes. The arbitrator reduced his 3-day suspension to a written warning, and awarded him back pay.

Other arbitrators have held that workers who leave to pick up children contrary to express orders are insubordinate, but that the family care concerns were a mitigating factor. For example, in *Ashland Oil*,²⁸⁵ discussed earlier, Arbitrator Marlin M. Volz held that an employer’s order to work overtime was not justified because employers have to accept reasonable excuses for refusing to work overtime; the grievant’s family care concerns were treated as a mitigating factor.

A closely related issue is whether family care problems present an exception to the “obey now, grieve later” mandate.²⁸⁶ Obviously, this rule presents difficulties in contexts involving family care: clearly, a worker cannot “obey now and grieve later” if obeying involves leaving a young child, or a severely ill family member, without care. This is implicit in Arbitrator Volz’s *Ashland Oil* decision, in which he said, “[t]he ‘work now, grieve later’ rule has no application. [The grievant] could not both continue working and pick up his children.”²⁸⁷

Other decisions explicitly propose a family care exception to the “obey now, grieve later” rule. In *GTE California Inc.*,²⁸⁸ a case that involved a single-parent telephone installer who was caught up in a new telephone company policy that workers could not leave until every customer who had called before 3 p.m. had been

²⁸⁴ *Id.*

²⁸⁵ 91 LA 1101 (Volz 1988).

²⁸⁶ The classic rule is quoted in *Allied Paper*, 80 LA 435, 447 (Mathews 1983) (“a well established rule that an employee, if the employee considers an order improper, must obey now and grieve later”).

²⁸⁷ 91 LA 1101 (Volz 1988).

²⁸⁸ CWA database: *GTE California, Inc.*, case no. 11-91-86 (Miller 1992).

served. This policy, particularly when combined with the supervisor's method for allocating overtime, the arbitrator ruled, was unreasonable, and consequently the grievant was not insubordinate when she left work after being ordered not to do so.²⁸⁹ As for the company's claim that the grievant should have "worked now, and grieved later" even if the system was unreasonable, the arbitrator held that the grievant was covered by an exception to that well-known rule concerning safety:

When the parent is unreasonably asked to work and when there is no one to care for an infant, the parent can be excused for not waiting to file a grievance. By way of clarification, I am not saying that the employee does not bear the burden of meeting the demands of child care or that a parent can walk off the job any time that child care needs are unmet. . . .

I do not know what would have happened to the child if the grievant had not arrived to pick her up. Chances are that the child would have been cared for. However, it was clear that the grievant also did not know what would happen to the child, although she did know that she was running the risk of losing day care service. In these circumstances, the grievant did what I believe any unintimidated parent would have done. She ran the risk of discipline.²⁹⁰

A second decision involving an explicit family care exception to the "obey now, grieve later" rule, *Allied Paper*,²⁹¹ again involved overtime. This was the case in which a worker refused a Saturday callback because he had a sick wife and his home was without water. Like the arbitrator in *GTE California*, the arbitrator held that the grievant need not comply with the "obey now, grieve later" rule by expanding the traditional exception that allowed workers to refuse to work if health and safety is at risk:

The analogy can be drawn with respect to the action of an employee endangering the life of a fellow employee. If the employee can refuse an order because of the employee's own health or safety, then it would logically follow that the employee could refuse such an order if they employee's compliance with the order would jeopardize or endanger the health or safety of another, employee or otherwise. The latter instance is but an extension of the former, and the same compelling reasons are present in each instance.²⁹²

²⁸⁹If more than one person wanted to avoid overtime work on a given day, the rule was that they had to agree which of them would not work overtime. If they could not agree, then both had to work overtime.

²⁹⁰CWA database: *GTE California, Inc.*, case no. 11-91-86 (Miller 1992).

²⁹¹80 LA 435 (Mathews 1983).

²⁹²*Id.* at 447.

The “obey now, grieve later” rule did not apply because “[i]t is conceivable that some action could have occurred, if the grievant’s wife had been left alone, which would have jeopardized and endangered her health.” The arbitrator held that the grievant “honestly believed” that his wife’s health would be jeopardized if he had come to work because of her chronic anxiety and depression: “In essence, the grievant refused . . . overtime work he believed would endanger the health of his wife.”²⁹³ The arbitrator also noted that the lack of water, while not immediately endangering her health, “could have increased her discomfort, thereby affecting her health.”²⁹⁴

In *State of New York, Rochester Psychiatric Center*,²⁹⁵ also discussed earlier, the arbitrator pointed out that a standard exception to the rule of “obey now, grieve later” is when an employee is ordered to commit an illegal or immoral act.²⁹⁶ Although he did not decide the case on that basis, the arbitrator dropped a footnote:

The [employer’s] actions come perilously close to requiring the performance of an immoral act, even though no such thing was intended. If the grievant had stayed, and something terrible had happened to her kids, another arm of the State (Social Services) would have swooped down, accused her of child neglect, and tried to take her children away from her. That is the cold reality and it is nonsense to pretend otherwise.²⁹⁷

Arbitrators need to be mindful of the consequences of allowing employers to characterize as insubordination any instance where a worker leaves or refuses to come to work because of work/family conflict, especially where a contractual provision allows workers to refuse overtime for reasonable excuses. In the absence of defiant behavior, allowing management full discretion to proceed under an insubordination theory may effectively erase that bargained-for provision allowing workers to refuse overtime.

²⁹³ *Id.*

²⁹⁴ *Id.* at 448.

²⁹⁵ 87 LA 725, 726 (Babiskin 1986)

²⁹⁶ *Id.* See *Brand ed.*, *supra* note 240, at 165.

²⁹⁷ *Rochester Psychiatric Center*, 87 LA at 727, n.2. Compare *Sutter*, 116 LA 621 (Staudohar 2001):

Nor is his need to pick up his son after school a valid exception, admirable though it may be. The grievant’s wife was stuck in her office and was unable to help out. But there is no evidence that the grievant tried to make other arrangements for transportation of his son from school to home, in the event that there was an emergency call-in at the hospital. As important as a youngster’s care may be, this situation is not the sort that provides an exception, i.e., no imminent danger to life and limb.

*Past, Ungrieved Discipline and the FMLA*²⁹⁸

The tension between no-fault attendance policies and just cause has often been noted.

[E]ach attendance plan challenge must be evaluated on the contract and the facts and circumstances peculiar to the particular case. . . . [I]n making that evaluation, it must be realized that no plan is guaranteed to produce perfect results. The application of an attendance plan is not a substitute for the contractual requirement of just cause. . . . Thus, whenever discipline is to be imposed for accumulation of a specified number of points, the Company is contractually obligated to review the particular circumstances of the employee involved to ensure that the discipline is supported by just cause.²⁹⁹

In this context, what if a grievant racks up points under a progressive discipline system due to chronic attendance and/or tardiness problems related to family caregiving needs, but the union does not grieve the discipline until the worker is faced with discharge? The general rule, of course, is that the union has waived the right to challenge the prior, ungrieved discipline, and some arbitrators simply apply the rule.

The arbitrations studied reveal four different approaches arbitrators have used in cases involving family care when they feel the need to take into account prior ungrieved discipline. First, in *Chicago Transit Authority*,³⁰⁰ Arbitrator Gerald Patterson reinstated, without back pay, a bus operator whose daughter needed a ventilator to breathe. His absences were due to child care problems that arose when his daughter's mother had to work and attend school, his daughter was ill, his daughter's mother needed emergency surgery, and when confusion arose about an extra board assignment and an alarm clock did not go off. Despite acknowledging the existence of precedent holding that ungrieved discipline is waived and cannot be raised in later hearings, the arbitrator held that the

²⁹⁸An arbitration that has not been discussed that involves FMLA issues unrelated to past ungrieved discipline is *Chicago Tribune Co.*, 119 LA 1007 (Nathan 2003). It involved the discharge of an employee for tardiness and absenteeism. The grievant, who was the primary caregiver for her mother (who had a serious health condition), was with her mom until midnight monitoring her blood pressure, which was out of control, when she returned home to find that her child was having trouble sleeping. She then fell asleep while rocking her child in a rocking chair, and awoke late. She called in and arrived 20 minutes late. The arbitrator held that her oversleeping was an FMLA-qualified event because it resulted from exhaustion from her responsibilities as primary caregiver for her mother.

²⁹⁹*Archer Daniels Midland Co.*, FMCS No. 01-13896 (Malin 2002) (unpublished opinion quoted in Vonhof & Malin, *What A Mess! The FMLA, Collective Bargaining and Attendance Control*, 21 Ill. Pub. Employee Relations 1 (2004).

³⁰⁰ATU database: *Chicago Transit Authority*, case no. 99-155 (Patterson 2001).

grievant was denied due process for lack of a full and complete investigation of two misses that triggered probation, which were not grieved because the union's policy was not to grieve probation. This due process argument proved to be a way around the classic rule that ungrieved discipline cannot be raised in future hearings. The arbitrator concluded that the grievant "did not enjoy an acceptable record of attendance, particularly since he had a miss some two weeks after he had been placed on probation." Yet he allowed him to return to work. "Hopefully the change in his conditions at home—available permanent child care and a healthier daughter—will be positives."

Second, *Chicago Transit Authority*³⁰¹ concerned a female bus driver with a severely asthmatic son who did not grieve points garnered for absences due to a flat tire, a family funeral, misunderstandings about a vacation day and extra board duty, a suspended driver's license, and time lost spent taking her son to a high school placement test. The grievant was fired when a cab got her to work three minutes late one day on which her son had an asthma attack. While acknowledging that "from a technical standpoint, the Arbitrator cannot resurrect the earlier misses that were not grieved previously," Arbitrator Fred Hayes considered those with FMLA implications "but only for mitigation purposes." He concluded that "this attendance case does not square up [n]or is it in the league with other more serious attendance cases where grievants were afforded a greater opportunity to improve, but failed to do so." He warned that the case does not have "any strong precedential value to circumvent or subvert the CTA's attendance program. If the grievant returns thinking she beat the system, her working career at CTA in all probability will be short-lived. Hopefully the Arbitrator by this decision will have salvaged an individual whom he felt deserved another break." He reinstated the grievant with no loss of seniority, but put her on 6-month probation, and gave her only partial back pay, arguing that she should "share some of the responsibility for her attendance problem."

A third decision states that arbitrators need to take extenuating circumstances into account even when these include prior discipline that has not been grieved. In a 2001 CTA arbitration, Arbitrator Neil Gundermann agreed with the grievant's argument that "in determining whether a discharge for excessive absenteeism is for just cause, the arbitrator should take into account extenuat-

³⁰¹ATU database: *Chicago Transit Authority*, case no. 97-0166 (Hayes 1999).

ing facts and circumstances surrounding prior charged absences, even if such discipline was not grieved [citing five decisions].”³⁰² The arbitrator held that the CTA did not have just cause to fire the grievant, a part-time bus driver, when he was charged, while on probation, with a miss that occurred because he was in jail after his ex-wife charged him with domestic abuse. She came to his house and began “striking him in the face with her fist and pulled his shirt off.” The CTA faulted him for not simply leaving the scene, but the arbitrator pointed out that the couple’s “four children were standing on the porch during watching their parents’ altercation, obviously frightened and upset. Under such circumstances, it would have been cruel and irresponsible for a parent in the grievant’s situation to just ‘walk away.’”³⁰³

Finally, the rule that past ungrieved discipline is waived may be subject to an exception when the past discipline was for a leave protected under the FMLA,³⁰⁴ which gives covered employees³⁰⁵ up to 12 weeks of unpaid leave per year for the birth or adoption of a child or to care for a seriously ill child, parent, or spouse. The question that has arisen is, if an employee did not grieve discipline that violated the FLMA, whether the employee—or the arbitrator—can nonetheless raise the issue in a subsequent grievance. This issue, among others, is discussed in an article by Jeanne M. Vonhoff and Martin H. Malin.³⁰⁶ They quote Department of Labor (DOL) regulations that provide: “[E]mployers cannot use the taking of FMLA leave as a negative factor in employment actions. . . nor can FMLA leave be counted under ‘no fault’ attendance policies.”³⁰⁷ In addition, the Seventh Circuit in *Butler Manufacturing Co. v. United Steelworkers of America*³⁰⁸ held that arbitrators may read the FMLA into contracts in which the parties agree to offer “equal opportunity for employment . . . in accordance with the provisions

³⁰²ATU database: *Chicago Transit Authority*, case no. 00-373 (Gundermann 2001). This decision cites another decision by Arbitrator Steven Briggs, involving a mother who monitored her own phone line out of concern for her daughter’s safety. The arbitrator held that the employer lacked just cause to terminate, but imposed a 6-month suspension.

³⁰³*Id.*

³⁰⁴Pub. L. No. 103-3, 107 Stat. 6 (1993) (codified at 28, U.S.C. §§ 2601–54 (2000)).

³⁰⁵FMLA applies to employers who employ at least 50 workers in each of 20 or more weeks in the current or preceding year, 29 U.S.C. §2611 (4), and facilities at which at least 50 employees work, or that have at least 50 employees working within a 75-mile radius, 29 U.S.C. §2611 (2)(B). Employees are covered only when they have worked for their employer for a year or more and are full time (defined as having worked at least 1,250 hours in the preceding year), 29 U.S.C. §2611 (2)(A).

³⁰⁶Vonhoff & Malin, *supra* note 298.

³⁰⁷29 C.F.R. §825.220(c).

³⁰⁸336 F.3d 629 (7th Cir. 2003).

of law,” or similar boilerplate language included in most collective bargaining agreements. The *Butler* court upheld an arbitrator’s decision to reinstate a discharged employee because three of his absences were FMLA-protected. The DOL regulation, along with *Butler Manufacturing*, has the potential to destabilize the traditional rule that an arbitrator cannot revisit past ungrieved discipline, where the past discipline in question was sparked by FMLA-protected absences.³⁰⁹

Vonhof and Malin raise a final FMLA issue that, like that similarly has the potential to change establish arbitral practice. The authors point out that the DOL regulations place on employers an affirmative duty to inquire when they have reason to believe that an absence may be covered by the FMLA.³¹⁰ Does this mean, when a union fails to argue that a grievant’s absence is covered by the FMLA, that the arbitrator should raise the issue? If so, this duty contravenes established arbitral practice, which restrains the arbitrator from raising issues not presented by the parties, on the grounds that arbitration is a process designed and controlled by the parties.³¹¹

Conclusions

The paper is part of an ongoing series of studies designed to make readily accessible arbitrations in which workers are dis-

³⁰⁹The situation is further complicated, according Vonhof and Malin, because of “conflicting signals from the courts.” Vonhof & Malin, *supra* note 298. In *Morgan v. Hilti, Inc.*, 180 F.3d 1319 (10th Cir. 1997), a plaintiff covered by the FMLA developed attendance problems, which continued despite counseling. Eventually she took a FMLA leave for well over a month. Upon her return, the employer notified her that her attendance would be closely monitored and that absence beyond her paid sick days would result in termination; eventually she was discharged. The Tenth Circuit held that the letter established *prima facie* retaliation for taking FMLA-protected leave, but that her employer’s overall concern about her attendance constituted a legitimate nonprotected reason for her termination, and affirmed the lower court’s grant of summary judgment. A sharp contrast is *Bachelder v. America West Airlines, Inc.*, 259 F.3d 1112 (9th Cir. 2001), which involved a plaintiff with medical problems who took FMLA leave in each of the prior two years. The employer, in a corrective action discussion, cited both FMLA-protected leave and leave not protected by the FMLA as evidence of attendance problems. She was discharged shortly after an absence when she called in sick for 1 day to care for her child. The Ninth Circuit held that the employer had interfered with her FMLA leave, stating that a plaintiff need only prove that the taking of protected leave was “a negative factor” in the decision to fire her. Clearly, it will be easier for employees to win in absenteeism cases if they need prove only that their FMLA-protected leave was “a negative factor” in the employment decision than if employers have a defense whenever they can prove that they were actually concerned about attendance (even if FMLA-protected leave played a role in their ultimate decision).

³¹⁰29 C.F.R. §825.302(c).

³¹¹Vonhoff & Malin, *supra* note 298, at 6.

ciplined for issues relating to family care. Until the Center for WorkLife Law's initial report, no published work had analyzed these arbitrations as a distinctive body of precedent.³¹² It is simplistic to assert that employers need workers to work, and workers need to show up. Employers assuredly *do* need employees who will come to work, but both employers and arbitrators already make allowances for the fact that employees have bodies, and will be sick from time to time. Given the realities of today's work force, which includes many single parents and two-job families, and only 16 percent of working-class families with wives at home full time,³¹³ employers need to recognize that today's employees have not only bodies but families for whom they have care responsibilities. The demography discussed shows that it is not realistic to assume that employees are ideal worker with immunity from family care. The literature on the business case shows that—because it is more realistic—it is often better for the bottom line to end work force/workplace mismatch by starting with a realistic image of today's working families. Arbitrators should follow suit, and acknowledge (absent some very specific contract provision) that no just cause exists for discipline where a responsible worker has arranged both regular child (or family) care and back-up care, only to have both break down.

Of course, employees have a duty to behave responsibly, which includes (but is not limited to) their responsibility to arrange for child or other family care, as well as back-up care, so they can fulfill their workplace obligations.³¹⁴ Yet, as these arbitrations show, even the best-paid plans sometimes break down: families have to deal with all kinds of crises, including cancer, suicide attempts, funerals, babysitters who do not show up, and carefully laid back-up plans that fail.

The awards discussed here are not entirely consistent, to say the least. Yet some patterns emerge. Management wins when workers lie, or make no attempt to arrange child care to cover the hours

³¹²That said, the person who first suggested this stream of research was Professor Martin Malin of Chicago-Kent School of Law and Director of the Institute for Law and the Workplace. Malin had written several papers discussing arbitrations relating to family care prior to WorkLife Law's report. (He was also a co-author of Worklife Law's initial report.) An article published in a labor journal analyzing arbitrations involving child care was published shortly after Worklife Law's report was published on the Web. See *supra* note 12.

³¹³Lamont, *supra* note 156, at 34.

³¹⁴Some cases suggest that an upper limit exists on the number of hours an employer can reasonably expect, at least from a single parent. See *supra* notes 96–101 and related text.

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

II. THE EVOLUTION OF WORKLIFE DISPUTES IN GRIEVANCE ARBITRATION: A COMMENTARY ON PROFESSOR JOAN WILLIAMS’ PRESENTATION TO THE NATIONAL ACADEMY OF ARBITRATORS

ANITA CHRISTINE KNOWLTON*

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

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

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