III. Of Work, Family, and Arbitration: Comments on Williams, *Work/Family Conflict*

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Professor Joan Williams's paper, *Work/Family Conflict*,[1] builds on her earlier co-authored descriptive study of published arbitration awards involving conflicts between employees' work and family obligations, *Work/Family Conflict, Union Style* (2004). In the newest work, she vastly expands the number of cases examined by dipping profitably into several private union and employer databases. The additional material permits a richer presentation of issues and solutions. Standing on that foundation, Professor Williams is able to apply some of the themes of her highly regarded 1999 book, *Unbending Gender: Why Family and Work Conflict and What to Do About It*.[2]

Work/Family Conflict provides a thorough review of the relevant arbitration cases, a definitive taxonomy for those cases, and much helpful advice for employees, unions, employers, and arbitrators. Naturally, some of the six parts of the paper are stronger than others. In offering my assessments, I will follow the author's outline and discuss each of her sections in turn.

The first section describes "the demography of America's working families." It is likely to be the most informative (and least controversial) portion of the paper for those who are not familiar with changes in the work force over the last half-century. Professor Williams notes that, compared with the 1960s, employees work longer hours and relatively few families have a stay-at-home parent. The combination of those facts creates the tension between work and family obligations that has been the focus of her re-

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[1]The version of Professor Williams's paper that appears here differs markedly from the version presented at the 2005 Annual Meeting. It is more than five times as long, which allows the author to flesh out points that were originally sketchy. It omits some problematic assertions in the original. It addresses most of the concerns that were raised in Chicago, notably about arbitrators' limited authority to apply their own policy preferences to contract-interpretation disputes. Most importantly, it presents a more nuanced view of the respective and often conflicting rights and duties of grievants, employers, and other employees. These comments, therefore, address only the final version of the paper.

[2]While generally well-received, *Unbending Gender* naturally came in for some significant criticism as well. The merits of that debate are beyond the scope of these comments but interested readers should begin with a book review by Baker, *Power, Gender, and Juggling the Work/Family Conflict*, 3 Jurist: Books-on-Law 3 (2000) (book review), at <http://jurist.law.pitt.edu/lawbooks/inmar00.htm> and Professor Williams's reply to Professor Baker, *Are Men Pigs?*, 3 Jurist: Books-on-Law 3 (2000) (reply) at <http://jurist.law.pitt.edu/lawbooks/inmar00.htm>.

search. Much of that tension involves the needs of parents to care for their children, but other cases involve care for grandchildren, parents, spouses, or others. (For convenience I refer, as Professor Williams usually does, to child care issues without intending to exclude other forms of family care.)

Some families tag-team parental duties, with two workers on different shifts passing off the child care baton each day. Many others rely on child care provided by relatives, friends, hired help, or day care from various providers. Even under the best of circumstances, these arrangements will sometimes fall through; when emergencies occur, failures are even more likely. Employees faced with family care needs that interfere with work must use available personal holidays, vacation days, personal or sick leave when allowed under the particular circumstances, or Family and Medical Leave Act of 1993 (FMLA) leave. When none of those options is available, the employee may be disciplined for missing work. The resulting disciplines explain why "work/family issues abound in labor arbitrations."

The second section then addresses the critical question: When is lack of child care a legitimate excuse for being absent from work? This section of the paper describes various arbitral approaches to that question.

Anyone who writes about arbitration decisions (or judicial or administrative decisions, for that matter) soon encounters two big difficulties. The first is that we seldom know anything about the facts of the cases except what the arbitrators tell us in the published award. Our "evidence," in other words, is pure hearsay, often double or triple hearsay. If the arbitrator says that something happened, we have to assume that it did; if the arbitrator omits some information, we have to assume that it does not exist. Moreover, any good arbitrator, like any good judge, will strive to present the "facts" in such a way that the opinion's conclusion seems inevitable. In short, we have to rely on partial and not always reliable reports.

The second difficulty is assessing the context of the awards we discuss. Some parts of the context are provided in the award. Other parts, though, have to be inferred. One key aid in making those inferences is chronology. Professor Williams correctly notes that arbitrators' decisions will reflect their times and that the way we treat issues will thus change with the times.

Having stated that point, however, she sometimes fails to apply it. That leads *Work/Family Conflict* into the historian's sin of anach-

ronism. More than once, the paper judges old decisions by 21st century standards. That is most apparent in the treatment of decisions rendered before the FMLA. Fortunately the more recent decisions, particularly those from the private databases, provide a good window into contemporary arbitral thinking. A few of those opinions, at least as described in Professor Williams's paper, still seem to reflect older attitudes.

Finally, another key part of the context is the controlling contractual language. If the parties have reached an agreement about an allocation of rights and responsibilities, an arbitrator must respect their wishes. Quite possibly their compromise will not protect employees with family care responsibilities as much as some worker advocates might wish, but in analyzing the decisions of employers and arbitrators, the writer must keep the terms of the bargain in mind. At several points *Work/Family Conflict* fails to do so. When that happens, the result is an error that is analogous to anachronism: judging actors by the standards the author wishes were in place rather than by the rules that really existed.

Nevertheless, the case descriptions in this section are, for the most part, complete and perceptive. Her readings of the cases are always plausible if not always compelling. She finds, perhaps unsurprisingly, that arbitrators rule against employees who fail to arrange for child care or who attempt to justify generally poor attendance records by adding child care to a long list of other excuses. Other cases reflect arbitrators' efforts to balance the parties' interests—for example, by suggesting that employers should try to accommodate the needs of single parents faced with long or unpredictable hours. Understandably, arbitrators often sustain grievances of disciplined employees where it is clear the employees missed work only after primary and back-up care systems failed.

Professor Williams' analyses of these cases are generally accurate, with one important qualification. She faults some arbitrators for what she terms "hindsight thinking"—that is, denying grievances at least partially because the arbitrator discerns options the employee failed to explore. The quoted term may not be quite accurate. "Hindsight" usually suggests a later ability to see things one could not have seen earlier; thus the common quip that "hindsight is always 20-20." An arbitrator who faults an employee for not having had a crystal ball would surely be guilty of "hindsight thinking."

The problem with using that term is that the crucial issue in most of these cases is whether the employee acted reasonably in

the circumstances. The only way to answer that question is to determine what a reasonable person would have done in the same situation. If our hypothetical reasonable person would have explored various obvious possibilities but the particular grievant did not, the arbitrator has to conclude that the employee erred. In explaining the judgment, the arbitrator will naturally state what the employee should have done. Dismissing those statements as "hindsight thinking" fails to appreciate the precise question before the arbitrator and the limited ways in which the arbitrator can answer it. The relevant inquiry is not whether the grievant *could have* done something different but whether he or she *should have* done so.[3]

The second section concludes with an unexceptionable suggestion: arbitrators should recognize that limited child care options mean that many employees' back-up system may consist of a spouse or other relative who also has work responsibilities.

The third section addresses "communication issues." The main communication problem is that some employees (mainly men, according to *Work/Family Conflict*) do not inform their employers of the family-care reasons for their absences. Instead, they either offer no explanation or present a false or incomplete reason. Either way, employers are not likely to excuse the resulting absences. Professor Williams suggests that unions should train employees to disclose these conflicts and that good communication by a worker may lead an arbitrator to hold that the employer waived the right to discipline the employee.

Less convincingly, Professor Williams suggests that "it does not make sense for an employer to refuse to accept a worker's claim that he needs time off for family responsibilities because the worker initially gave a different reason" in the belief that the first reason would be less controversial. In other words, if an employee dissembles about an absence, the employer should nevertheless excuse the absence once the employee comes up with a better explanation.

In some cases that might be true. For example, if an employee offers (true but incomplete) Excuse A and then supplements it with (true) family-care Excuse B, a reasonable employer should consider the two together and not simply ignore Excuse B. In most

[3]Full disclosure: this section of the paper cites my award in Southern Champion Tray Co., 96 LA 633 (1991) as an example of such hindsight thinking. Rather than debating that decision here, I invite the interested reader to read the opinion and then compare it to the description in Part 2 of *Work/Family Conflict*.

other cases, the employee's statements are more problematic. Offering *false* Excuse A, for example, casts doubt on the employee's credibility, reliability, and trustworthiness regardless of the merit of Excuse B. Trying to explain the lie by saying "I thought you'd accept Excuse A without determining whether it was true" would only compound the problem. In that more common scenario, it most definitely would "make sense" for an employer to refuse to accept the belated Excuse B. Even in the latter situation, however, some unusual circumstance might excuse the original misstatement.

The point is not that arbitrators should always believe or disbelieve a grievant who changes explanations, but rather that the credibility resolution will always depend on the totality of the evidence. It would thus be safer for Professor Williams to say that "it may not *always* make sense" for an employer to reject the employee's second reason.[4]

The fourth section poses a near-rhetorical question: Will family-responsiveness jeopardize an employer's effectiveness and profitability? The reader will not be surprised to learn that Professor Williams's answer to this question is a resounding "No!" She goes on to present what she terms the "business case"—that is, the argument that adapting work demands to the needs of the work force actually enhances productivity and profitability.

To be sure, there is good evidence that the economic benefits from some family-friendly work policies outweigh the costs. Offering reliable professionals flex-time or telecommuting options, for example, may help employers retain valuable employees who might otherwise quit. Because attrition is expensive, those policies can work well for both parties.

At that level of generality there is no debate. But the proposition is subject to serious debate when one starts asking about the details. *Which* family-friendly policies, for example, should be offered to *which* employees, with what restrictions and monitoring, and at what cost? *Work/Family Conflict* does not explore those questions, which are for the most part outside the realm of arbitral concern. (Professor Williams did address some of them in *Unbending Gender*, but many of her answers provoked a good deal of skepticism.)

One part of her argument on this point, however, is of arbitral concern. She uses this topic to introduce her least persuasive

[4]I thank Marty Malin for helping me to clarify this point.

concept, that of the "Ideal Worker." The version of that concept presented here is somewhat shrunken from the version first introduced in *Unbending Gender* but it is still formidable. Professor Williams criticizes employers for holding employees to the Ideal Worker standard, which she describes here as "an employee without competing family responsibilities." That ideal arose, she tells us, in an era when each worker was supported by a stay-at-home wife, so it has no application today.

The problem with that argument is that the Ideal Worker, so defined, is a straw man. No employer uses that model, certainly not the employers in the cases cited in *Work/Family Conflict*. To the contrary, those cases typically involve employees who either have continuing attendance problems and or who fail to do what Professor Williams recommends—make child care arrangements ahead of time, with at least one back-up plan, and explain any glitches to the employer as soon as they arise. Many of the cases show employers working with the grievants again and again to help them balance their responsibilities: excusing absences, granting leaves, counseling employees, then applying progressive discipline when all else fails. In other words, the employers expressly recognized that employees *did* have "competing family responsibilities." What employers ultimately demand is not Professor Williams's "Ideal Worker" but a "Reasonably Reliable Worker Who Sincerely Tries to Meet Work Obligations." That's not quite as snappy as "Ideal Worker," but it is far more accurate.

Using a straw man as a rhetorical tool can lead the advocate into indefensible positions. That is the situation here. The main case Professor Williams uses to criticize employers for unrealistically insisting that workers be "Ideal" is *Washtenaw County, Friend of the Court Unit*.[5] The grievant had sought personal leave for asserted family care needs; the employer denied the leave; the employee nevertheless refused to report for work as directed, and the employer terminated her. Was the termination because the grievant was not "an employee without competing family responsibilities?" Consider the facts, then judge for yourself.

The employee in *Washtenaw County* was an attorney in the Friend of the Court Unit. She was an excellent worker and her boss depended on her. The Unit was apparently a small department that had no one to cover for her. Just as the grievant's request for leave was pending, her old boss left and a new one took over. The new

[5]80 LA 513 (Daniel 1982).

Friend of the Court needed to make many changes, as the grievant recognized. He denied her leave request, he explained, because he did not believe the remaining staff was adequate to carry on the department's work during the requested absences. She suggested several possible alternatives such as working part time, but he found none of them satisfactory.

So far the case at least appears debatable. Now, the rest of the story. The man with whom the grievant had a "permanent relationship" had responsibility for his two young daughters during the summer. The grievant had become an important "parental model" for the girls and the couple decided "that the children deserve something better than shunting off with babysitters for the course of the entire summer." So the grievant requested personal leave. Not just a little leave, but—in a small unit in the midst of serious changes initiated by a new supervisor—a *lot* of leave. She sought three leave segments during the summer of 1981, one for 2 weeks, the next for 10 days, the third for 2 more weeks. In total, she wanted to be off work for almost 6 weeks in a 2-month period. Moreover, the collective bargaining agreement placed those leave requests in the "discretion of the Employer." Disagree with her boss's decision to deny her leave if you will, but it hardly seems that he expected her to be the mythical Ideal Worker. In sum, the case does not support the concept she draws from it.

Moreover, the paper's discussion of *Washtenaw County* illustrates the two errors I mentioned earlier. First, it evaluates the decision using anachronistic standards. Perhaps today a plausible argument could be made for the grievant's "family care" responsibilities, but the landscape was far different in 1981 when the employee sought the leave. Remember that the grievant was not the mother, or the adoptive mother, or the stepmother. She was simply a "parental model" for her boyfriend's children. That relationship would probably not entitle her to FMLA leave today. In 1981, no employer would be likely to grant leave in these circumstances—not because of any flawed notion of the Ideal Worker, but simply because the grievant's request would have seemed so unreasonable.

Second, the paper's discussion of that case evaluates the decision without considering the controlling contractual language. The parties had expressly agreed that personal leaves were to be granted only in the "discretion of the Employer." Discretion means discretion: personal leaves are a gratuity, not a right. An employer presumably could not deal with leave requests discriminatorily or arbitrarily, but there was no evidence whatever of discrimination

and the work circumstances refute any suggestion of arbitrariness. Where then was the arbitrator's error?[6]

This portion of Professor Williams's paper marks a significant and highly questionable expansion of her thesis. Virtually all of the other cases cited in the paper involved conflicting *obligations*, usually involving emergencies of some sort. The grievants in those cases are intuitively appealing because we perceive them as struggling with a dilemma. *Washtenaw County*, in contrast, involves a conflict between an employee's work obligation and her personal *preference*. There was no emergency. Nor was there an actual obligation, at least not so far as the opinion indicates. The grievant merely wanted to take off 6 weeks that summer to spend time with her lover's kids. Fair enough. No doubt lots of employees would like to take summers off to be with their families. That is one reason why many people choose to become teachers. But why should we expect any employer on a 12-month schedule to allow that? And why should we sympathize with an employee fired for refusing to work for 6 weeks?

Professor Williams obviously thinks the Friend of the Court was unreasonable in expecting one of his key employees to report for work that summer. Implicitly, then, the paper suggests that employees should be free to choose when they want to work and when they want to stay home with their (or someone else's) children. In short, not only should child care *needs* trump an employer's otherwise reasonable work requirements, so should the employee's child care *wishes*. The source of that trump card is unstated. It is not a statutory right, of course. The FMLA says nothing of the sort. Nor is it a contractual right. The union did not give up something else in return for 6 weeks of personal leave at the employee's demand. Just the opposite, in fact: the collective bargaining agree-

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[6]The same problems arise in her discussion of the other case she condemns for supposedly applying the Ideal Worker standard, *Town of Stratford*, 97 LA 513 (Stewart 1991). A police officer was suspended for 5 days for not complying with an order to report four hours early because she could not arrange child care on short notice. First, the incident occurred in 1989; it is hardly fair to judge the arbitrator's decision by post-FMLA standards. Second and more significantly, the parties had negotiated detailed rules for handling the unexpected emergency calls that all members of the Town's police force faced. The employer followed those rules to the letter. One can complain that the union should have negotiated a different contract, but one cannot fairly fault the employer for following the terms of the bargain or the arbitrator for failing to rewrite it. (One can criticize the arbitrator's choice of words, which sounds a bit archaic by 2005 standards, but that gets us back into the sin of anachronism.) In addition, *Work/Family Conflict* does not consider the consequences of the grievant's failure to report. Either the small Stratford police department would have to cancel one patrol that night or some other employee, perhaps with family responsibilities of her own, would have to report with even less notice than the grievant had.

ment expressly gave the employer discretion over requests for personal leaves. Even readers who are most sympathetic to employees caught on the horns of the work/family dilemma must wonder at this elaboration.

The fifth part is more successful. *Work/Family Conflict* categorizes the arbitration awards into a very helpful taxonomy. It begins with a group of cases in which arbitrators gave "little or no weight to workers' family responsibilities." Other observers might disagree with Professor Williams's interpretation or evaluation of those cases, which include *Washtenaw County* and the *Town of Stratford* decision discussed in footnote 6, but the category itself seems a reasonable one in her listing.

Then the paper poses two important questions. The first is When do grievants lose outright? Her answer is that grievants lose most frequently (a) when they made little or no attempt to meet their employers' business needs and (b) when "patient employers [are] faced with a never-ending series of absences or tardiness." The former group includes employees who "adamantly refuse to put in place adequate child care," employees who are "so overwhelmed by misfortune that they did not take the steps necessary to protect their jobs," and employees who lied about their absences. In the latter group, arbitrators usually allowed employers "to draw a line in the sand" at some point and then discipline the employees who cross it.

The second question is the counterpart: When do grievants win outright? The answer to this question is simpler. Employees win when employers fail to apply their rules consistently, particularly when the different application of the rules suggests some bias.

The most interesting grouping in Professor Williams's taxonomy consists of split decisions, typically those that reduce discipline or impose some new restrictions on employees. The employee's need to provide care to others is often used as a mitigating factor, for instance, which can make discharge too severe a penalty. In other cases, arbitrators sometimes invent innovative remedies such as designing a new probation system for a particular grievant, requiring the employer to give special notice of overtime assignments, or directing the parties to negotiate a way for the employee to perform some overtime work.

The sixth section turns to the issue that lies at the heart of the arbitrator's job in these cases: What is just and reasonable? As all arbitrators soon discover, "just cause" is an amorphous concept. It is hardly surprising then that arbitrators provide different and not

always consistent answers to her question. Consider allegations that refusal to work because of family needs is "insubordination." Some arbitrators accept that designation. Others reject it. The distinction, Professor Williams suggests, should be between those employees whose refusals are "defiant and designed to undercut the authority of management" and those who are simply torn by competing responsibilities. She recommends that arbitrators be cautious about treating work/family conflict cases as instances of insubordination.

The sixth section concludes with a concise discussion of the effect of the FMLA on consideration of past, ungrieved discipline. The usual rule in arbitration is that failure to grieve a discipline waives the employee's right to challenge it in a later arbitration. There are many good policy reasons behind that rule but, Professor Williams suggests, the FMLA may trump it. The FMLA flatly prohibits use of FMLA-protected absences in making later disciplinary decisions. Arbitrators have adopted several techniques for addressing disciplines that rest on earlier disciplines that were arguably due to family care needs. (Unfortunately, the paper's description of these cases does not indicate whether the arbitrators were applying the FMLA.) Some follow the traditional rule. Those who feel the need to consider the reasons for earlier absences may describe management's failure to investigate the reasons as a due process violation, or they may consider the extenuating circumstances as a mitigating factor, or they may simply negate the traditional rule.

Conclusion

As this extensive review demonstrates, there is much useful information in *Work/Family Conflict*. Any arbitrator facing a case of this sort should read the paper and consider both the arbitral precedents praised and criticized as well as the advice Professor Williams offers us. As always, of course, arbitrators should then exercise their own critical judgment when applying the specific contractual language to the peculiar facts of the case.