

2008

Do Cognitive Biases Affect Adjudication?: A Study of Labor Arbitrators (with Monica Biernat)

Martin H Malin, *Chicago-Kent College of Law*
Monica Biernat

DO COGNITIVE BIASES INFECT ADJUDICATION? A STUDY OF LABOR ARBITRATORS*

Martin H. Malin** & Monica Biernat***

I. INTRODUCTION

Parties adjudicate their differences before numerous bodies, including judges, juries, administrative agencies, and arbitrators. One of the most fundamental requirements of due process is that the adjudicators be free from bias.¹

Much bias, however, is not overt. Rather, it results from the way in which our brains operate. Every object is unique in a variety of ways. Yet human beings cannot process an infinite variety of diverse characteristics. Consequently, we classify objects into categories which enable us to

* © 2008 Martin H. Malin & Monica Biernat. The authors gratefully acknowledge a grant from the National Academy of Arbitrators Research & Education Foundation, and invaluable administrative and technical support from Larry Adamiec, Jullian Mulla, and Sharon Wyatt-Jordan at Chicago-Kent College of Law. This article has benefited greatly from feedback received from presentations of the study to the American Bar Association Section on Labor and Employment Law, AFL-CIO Lawyers Coordinating Committee, Chicago-Kent College of Law faculty workshop, DePaul University College of Law faculty workshop, and Wisconsin Labor and Employment Relations Association. Professor Malin also acknowledges financial support from the Marshall-Ewell Research Fund at Chicago-Kent.

** Professor of Law and Director, Institute for Law and the Workplace, Chicago-Kent College of Law, Illinois Institute of Technology.

*** Professor of Psychology and Director of the Ph.D. Program in Social Psychology, University of Kansas.

1. See, e.g., *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821-25 (1986) (holding that a justice of the Alabama Supreme Court violated an insurance company's due process rights when he sat on a case which established precedent very favorable to the justice's two pending lawsuits against other insurance companies); *Ward v. Vill. of Monroeville*, 409 U.S. 57 (1972) (holding that trial of an alleged traffic offender before the mayor of the municipality in which the alleged offense occurred violated the defendant's due process rights where the mayor was responsible for municipal finances and traffic fines provided a substantial portion of municipal revenues).

process and interpret data.² We then perceive members of the same category as being similar to each other and members of different categories as being different from each other.³

We categorize people for similar reasons and in similar manners as we categorize objects, often stereotyping results. "[T]o cope in a complex and demanding environment, people are 'cognitive misers' who economize by . . . categorization, ingroup preferences, stereotyping, and attribution bias. These processes, sometimes characterized as 'cognitive short-cuts,' occur regardless of people's feelings toward other groups or their desires to protect or improve their own status."⁴ Thus, "stereotypes are unconscious habits of thought that link personal attributes to group membership. Stereotyping is an inevitable concomitant of categorization . . ."⁵

People may be unaware of, and generally do not focus on, the fact that they engage in stereotyping: ascribing group-level expectations to individual members of those groups.⁶ Indeed, stereotyping occurs among people whose beliefs are relatively free of bias or prejudice.⁷ Stereotypes, however, "bias[] in predictable ways the perception, interpretation, encoding, retention, and recall of information about other people."⁸

Researchers have identified two types of stereotypes: (1) descriptive stereotypes and (2) prescriptive stereotypes. Descriptive stereotypes attribute characteristics to members of a particular category or classification. They can distort perception by leading the observer to

2. See Jerome S. Bruner, *On Perceptual Readiness*, 64 PSYCHOL. REV. 123, 123 (1957) (discussing the use of certain attributes to differentiate inputs and place them into categories).

3. See Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1175-77, 1188-89 (1995); Henri Tajfel & A. L. Wilkes, *Classification and Quantitative Judgement*, 54 BRIT. J. PSYCHOL. 101, 101-14 (1963).

4. Barbara F. Reskin, *The Proximate Causes of Employment Discrimination*, 29 CONTEMP. SOC. 319, 321 (2000) (citation omitted) (footnote omitted).

5. *Id.* at 322.

6. See Marilynn B. Brewer, *When Stereotypes Lead to Stereotyping: The Use of Stereotypes in Person Perception*, in STEREOTYPES AND STEREOTYPING 254, 254 (C. Neil Macrae et al., eds., 1996) (defining stereotyping).
254, 254 (C. Neil Macrae et al., eds., 1996) (defining stereotyping).

7. See William T. Bielby, *Minimizing Workplace and Gender Bias*, 29 CONTEMP. SOC. 120, 121-22 (2000) (stating that individuals relatively free of prejudice can be equally as susceptible to stereotyping as those with animosity toward a particular group); Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CAL. L. REV. 945, 951 (2006) ("Implicit biases are especially intriguing, and also especially problematic, because they can produce behavior that diverges from a person's avowed or endorsed beliefs or principles.").

8. Krieger, *supra* note 3, at 1188; see also James L. Hilton & William von Hippel, *Stereotypes*, 47 ANN. REV. PSYCHOL. 237, 237-71 (1996) (reviewing recent psychological literature with emphasis on the cognitive and motivational factors behind stereotyping).

attribute conduct by a particular member of a group to characteristics presumed to be held by all members of that group.⁹ In contrast, prescriptive stereotypes specify ways in which members of the group are supposed to behave. They are often based on descriptive stereotypes and establish norms against which observers evaluate group members' conduct.¹⁰

The existence of such unconscious stereotyping has been known among psychologists and sociologists for decades. Beginning with Linda Hamilton Krieger's path-breaking article in 1995,¹¹ legal scholars have focused primarily on the implications of such cognitive biases for the substantive law of discrimination.¹² The business community has taken notice as concerns over cognitive bias have been raised in large class action discrimination lawsuits.¹³

During the 1980s and 1990s, a large majority of state courts and circuit courts of appeals established gender bias taskforces.¹⁴ Among other things, some of the task forces were concerned with "unconscious prejudice."¹⁵ Perhaps the most pernicious effects of such "unconscious prejudice" arise when it affects the outcomes of cases. Gender or other characteristics of litigants and witnesses should generally not affect the outcome of a given case. Finders of fact should not overtly or unconsciously evaluate a claimant's claim or a respondent's defense based on the party's race, gender, ethnicity, or other irrelevant characteristics.

This Article presents a study of whether irrelevant characteristics of a

9. See Reskin, *supra* note 4, at 322.

10. *Id.*

11. Krieger, *supra* note 3.

12. See, e.g., *Symposium on Behavioral Realism*, 94 CAL. L. REV. 945 (2006); Samuel R. Bagenstos, *Implicit Bias, "Science," and Antidiscrimination Law*, 1 HARV. J.L. & PUB. POL'Y 477, 479-80 (2007); Tristen K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 99-100 (2003); Mark R. Poirier, *Is Cognitive Bias at Work a Dangerous Condition on Land*, 7 EMP. RTS. & EMP. POL'Y J. 459, 466 (2003); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 479-522 (2001); Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129, 1138-1143 (1999); see also Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1494-95 (2005) (discussing the role of concerns with cognitive biases in broadcast licensing); Martin H. Malin, *Interference with the Right to Leave under the Family and Medical Leave Act*, 7 EMP. RTS. & EMP. POL'Y J. 329, 368-73 (2003) (discussing implications of cognitive biases in interpreting FMLA's prohibition on employer interference with the right to leave).

13. See Roger Parloff, *The War over Unconscious Bias*, FORTUNE, Oct. 15, 2007, at 90.

14. For an excellent review, see *Symposium: The Federal Courts*, 32 U. RICH. L. REV. 603, 609-14 (1998).

15. Lynn Hecht Schafran, *Will Inquiry Produce Action? Studying the Effects of Gender in the Federal Courts*, 32 U. RICH. L. REV. 615, 616 (1998) (quoting Justice Ruth Bader Ginsburg's foreword to the Report of the Special Committee on Gender of the D.C. Circuit Task Force on Gender, Race and Ethnic Bias).

grievant in an arbitration conducted pursuant to a collective bargaining agreement affect the outcome of the grievance. In the study, we presented members of the National Academy of Arbitrators with four grievances involving the discipline or discharge of an employee where the event triggering the discharge resulted from a conflict between the employee's work and family responsibilities. We varied the grievant's sex and one other characteristic of the case in an effort to determine whether implicit biases affect the outcome of the case. Does a man fare better on the same facts than a woman? Does a married parent fare better than a single parent? Do conflicts over childcare receive a more favorable response from arbitrators than conflicts over eldercare?

Part II of this Article discusses the role of labor arbitrators in adjudicating disputes over the interpretation and application of collective bargaining agreements and their evolving role as adjudicators of disputes arising under the public law. Part III presents the study's methodology and results. Part IV offers some tentative implications for adjudicators generally based on the study's results.

II. WHY STUDY LABOR ARBITRATORS?

At first glance, labor arbitrators appear to be a relatively small and specialized group of adjudicators. They are selected jointly by unions and employers to resolve disputes arising under the collective bargaining agreement (CBA) which governs the employer's employees. It is rare that a CBA does not have a grievance and arbitration procedure.

A grievance is a claim by an employee or union that the employer breached the CBA.¹⁶ For example, an employee who believes that he or she was disciplined or discharged in violation of a contractual requirement of just cause may file a grievance raising the claim. The grievance procedure specifies a number of steps through which the grievance is discussed at successively higher levels within the union's and employer's hierarchies. When the grievance is discussed at the highest level of the procedure and no agreement resolving the grievance is reached, the union may demand arbitration. The CBA typically provides that the parties will jointly select the arbitrator and that the arbitrator's award will be final and binding on all parties involved.

Although parties have the ability to sue to enforce CBAs,¹⁷ such

16. Some CBAs also provide for employers to file grievances alleging that the union breached the contract.

17. See 29 U.S.C. § 185 (2000) ("Suits for violation of contracts between an employer and a labor organization . . . may be brought in any district court of the United States having jurisdiction of the parties"); *Groves v. Ring Screw Works*, 498 U.S. 168, 172 (1990)

lawsuits are usually impractical because of the time and expense involved. In the absence of a grievance and arbitration procedure, a union is far more likely to resort to a strike or lesser job action than to attempt to enforce the CBA. Thus, traditionally, labor arbitration was regarded more as a substitute for workplace strife than for litigation.¹⁸ The Supreme Court has referred to the employer's agreement to abide by the grievance and arbitration procedure as the quid pro quo for the union's agreement not to strike during the term of the CBA,¹⁹ and Professor David Feller has suggested that the no-strike clause and the grievance and arbitration procedure are the true essence of the typical CBA.²⁰

At the heart of the labor arbitration system is the parties' mutual selection of the arbitrator. Because of such mutual selection, the Supreme Court views labor arbitrators as "indispensable agencies in a continuous collective bargaining process."²¹ According to the Court, the collective bargaining agreement "is more than a contract; it is a generalized code to govern a myriad of cases which the draftsman [of the written collective bargaining agreement] cannot wholly anticipate."²² The arbitrator is called upon to help resolve those disputes that the parties either did not wholly anticipate, or for other reasons have decided to resolve through arbitration. "Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and [] provid[ing] for their solution in a way which will generally accord with the variant needs and desires of the parties."²³

Thus, according to the Court, "[t]he labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment."²⁴ The parties have bargained for the arbitrator to "bring his informed judgment to bear in order to reach a fair solution of a problem."²⁵

Therefore, the arbitrator is selected by and accountable to the parties. The parties' expectations, as perceived by the arbitrator, are the primary

(holding that federal law provides a remedy for breach of a collective bargaining agreement).

18. See *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960).

19. *Boys Markets, Inc. v. Retail Clerks Union Local 770*, 398 U.S. 235, 248 (1970).

20. David Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CAL L. REV. 663 (1973).

21. *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 596 (1960).

22. *Warrior & Gulf*, 363 U.S. at 578.

23. *Id.* at 581.

24. *Id.* at 582.

25. *Enter. Wheel*, 363 U.S. at 597.

constraints on arbitral decision-making.²⁶ The mutual selection process is self-policing. Arbitrators who defy the parties' expectations do not remain arbitrators for very long.²⁷ Consequently, judicial supervision of labor arbitrators is extremely limited. Courts must enforce an arbitrator's award as long as the award draws its essence from the CBA,²⁸ the most deferential standard of review known in the law. Arbitral findings of fact are completely outside the bounds of judicial review. "'Improvident, even silly factfinding' does not provide a basis for a reviewing court to refuse to enforce the award."²⁹

This broad, unreviewable discretion that labor arbitrators have in deciding cases provides a compelling reason to study their decision-making. Arbitral approaches to decision-making have a strong flavor of legal realism. More than forty years ago, Sylvester Garrett, one of the most distinguished arbitrators of his time, made the following observations on the role of intuition in arbitral decision-making:

The creative and intuitive nature of this [decision-making] function . . . has a counterpart in the conventional judicial process. Judges are not often driven to given results in difficult cases by the inexorable compulsion of concepts, maxims, logic, and language. Almost always there is a choice among several potentially applicable sets of principles.

One knowledgeable judge . . . has written that the vital motivating impulse for judicial decision often is a "hunch" or intuition as to what is right or wrong for the particular case. Judge Hutcheson's explanation of the opinion-writing process will seem familiar to many an arbitrator. He went on to write that, having reached a 'hunch' decision, "the astute judge, having so decided, enlists his every faculty and belabors his laggard mind, not only to justify that intuition to himself, but to make it pass muster with his critics."³⁰

26. See Martin H. Malin & Robert F. Ladenson, *Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the Steelworkers Trilogy to Gilmer*, 44 HASTINGS L.J. 1187, 1198-99 (1993) ("Parties select arbitrators who they believe will resolve grievances in a manner consistent with [their] expectations. In turn, arbitrators, who want to work again, generally do not disappoint them.").

27. See generally Julius G. Getman, *Labor Arbitration and Dispute Resolution*, 88 YALE L.J. 916, 928-31 (1979).

28. *Enter. Wheel*, 363 U.S. at 597.

29. *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001) (quoting *Paperworkers v. Misco, Inc.*, 484 U.S. 29, 39 (1987)).

30. Sylvester Garrett, *The Role of Lawyers in Arbitration*, in ARBITRATION AND PUBLIC POLICY, PROCEEDINGS OF THE 14TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 102, 122 (Spencer D. Pollard ed., 1961) (citing Hutcheson, *The Judgment Intuitive: The Function of "Hunch" in Judicial Decisions*, 14 CORNELL L.Q. 274, 285

Twenty-four years later, Mr. Garrett reiterated his recitation of this model of arbitral decision-making and observed that since his initial observations, many other arbitrators had expressly concurred with that model.³¹

The intuitive judgments involved in arbitral decision-making are influenced by the values held by individual arbitrators. As James Gross observed, "We as . . . arbitrators . . . use values to judge the conduct of others in disciplinary cases and to determine what constitutes just cause for discipline in those cases."³² These values, and their influence on arbitral intuitive judgments, evolve along with changing mores in society. As Richard Mittenenthal, commenting on Gross's paper at the National Academy of Arbitrators' Fiftieth Meeting, observed:

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 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,

(1929)).

31. Sylvester Garrett, *The Interpretive Process: Myths and Reality*, in ARBITRATION 1985: LAW AND PRACTICE, PROCEEDINGS OF THE 38TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 121, 144-46 (Walter J. Gershenfeld ed., 1986) (citing, *inter alia*, Gabriel Alexander, *Reflections on Decision Making*, in COLLECTIVE BARGAINING AND THE ARBITRATOR'S ROLE, PROCEEDINGS OF THE 15TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 1, 7 (Mark Kahn ed., 1962); Peter Seitz, *How Arbitrators Decide Cases: A Study in Black Magic*, in COLLECTIVE BARGAINING AND THE ARBITRATOR'S ROLE, PROCEEDINGS OF THE 15TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS at 159 (Mark Kahn ed., 1962); see also Alex Elson (Chairman), *Decisional Thinking*, Chicago Panel Report in DECISIONAL THINKING OF ARBITRATORS AND JUDGES, PROCEEDINGS OF THE 33RD ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 63, 84-87 (James L. Stern & Barbara D. Denis eds., 1980) (describing how in making their decisions, arbitrators are influenced by their family, environment, formal and informal education and general experience); Howard S. Block (Chairman), *Decisional Thinking*, West Coast Panel Report, in DECISIONAL THINKING OF ARBITRATORS AND JUDGES, PROCEEDINGS OF THE 33RD ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 119, 124-30 (James L. Stern & Barbara D. Denis eds., 1980) (noting how intuition plays a part in arbitrators' decision-making process)).

32. James A. Gross, *Value Judgments in Arbitration: Their Impact on the Parties' Arguments and on the Arbitrator's Decisions*, in ARBITRATION 1997: THE NEXT FIFTY YEARS, PROCEEDINGS OF THE FIFTIETH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 212, 213 (Joyce M. Najita ed., 1998).

which in turn affect our view of what is a reasonable penalty.³³

Mutual selection of the arbitrator by the parties legitimizes the role of arbitral intuition and value judgments in the decision-making process. The parties typically recognize the arbitrator's wide range of discretion and the major role that the arbitrator's personal perspective on labor relations, as influenced by her background, training, and ideological viewpoints, can play in resolution of the grievance. Consequently, the parties often pay attention to these matters when selecting an arbitrator.

John Dunsford has observed that, once selected to hear a case, an arbitrator's options in handling the matter are practically unlimited. The only meaningful restraints are those tacitly conveyed by the parties as to their expectations. As an arbitrator's reputation and docket grow, a reciprocal conditioning comes into play. The parties are presumed to be familiar with the arbitrator's conduct, rulings, and decisions and, by their selection, represent that the arbitrator's past performance is their expected standard for the current matter.³⁴

Similarly, Edgar Jones has commented on the link between the parties' selection process and the legitimate role of the arbitrator's personal values in resolving a grievance: "[I]n this process of competitive selection, 'his own brand' was analyzed and adopted [by the parties] as their own brand [of justice], whatever may have been their respective expectations . . ."³⁵

The view of the arbitrator as a purely private dispute adjudicator reached its zenith in the Supreme Court's 1974 decision in *Alexander v. Gardner-Denver Co.*³⁶ Gardner-Denver fired Alexander, who grieved his discharge as violative of the CBA's requirement of just cause.³⁷ His union pursued the grievance to arbitration, where an arbitrator held that Gardner-Denver had just cause and denied the grievance.³⁸ Alexander then sued alleging that his discharge was racially motivated, in violation of Title VII

33. Richard Mittenenthal, *Comment, Value Judgments in Arbitration: Their Impact on the Parties' Arguments and on the Arbitrator's Decisions*, in *ARBITRATION 1997: THE NEXT FIFTY YEARS, PROCEEDINGS OF THE FIFTIETH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS* 212, 231-32 (Joyce M. Najita ed., 1998).

34. John E. Dunsford, *The Role and Function of the Labor Arbitrator*, 30 *ST. LOUIS U. L.J.* 109, 112-13 (1985).

35. Edgar A. Jones, Jr., *A Meditation on Labor Arbitration and "His Own Brand of Industrial Justice"*, in *ARBITRATION 1982: CONDUCT OF THE HEARING, PROCEEDINGS OF THE THIRTY-FIFTH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS* 1, 11 (James L. Stern & Barbara D. Dennis eds., 1983) (emphasis omitted).

36. 415 U.S. 36 (1974).

37. *Id.* at 39.

38. *Id.* at 42.

of the Civil Rights Act of 1964.³⁹ The United States Court of Appeals for the Tenth Circuit held that the adverse arbitration award barred Alexander's lawsuit.⁴⁰ The Supreme Court reversed.⁴¹

The Court held, *inter alia*, that a union lacks authority to waive an employee's right to a judicial forum for the employee's statutory claim.⁴² The Court also reasoned that the labor arbitration forum was ill-suited for resolving statutory claims and that labor arbitrators, as privately-appointed and privately-accountable adjudicators, were not institutionally competent to resolve such claims.⁴³

In recent years, however, the role of the labor arbitrator has evolved from a purely private interpreter of the parties' CBA to a quasi-public adjudicator, interpreting and applying the public law.⁴⁴ Ironically, one of the major legal developments broadening the role of the labor arbitrator occurred in the non-unionized sector. A number of employers required employees, as a condition of employment, to arbitrate any claims arising out of their employment, including claims arising under regulatory statutes. Employees resisted enforcement of these agreements by bringing lawsuits under the relevant employment statutes. All circuits that considered the issue, except for the Fourth Circuit, relied on *Gardner-Denver* and its progeny to hold that such pre-dispute agreements to arbitrate statutory employment claims were unenforceable.⁴⁵ In *Gilmer v. Interstate/Johnson Lane Corp.*,⁴⁶ the Supreme Court sided with the outlier Fourth Circuit and held that an agreement contained in a securities exchange's registration obligating the employee to arbitrate all claims against his employer was enforceable with respect to the employee's claim under the Age

39. 42 U.S.C. §§ 2000e-1 to 2000e-17 (2000).

40. *Gardner-Denver*, 415 U.S. at 43.

41. *Id.*

42. *Id.* at 51-52.

43. *Id.* at 52-53 & n.16 (citing Harry Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1016 (1955) ("[The arbitrator] is rather part of a system of self-government created by and confined to the parties. He serves their pleasure only, to administer the rule of law established by their collective agreement.")).

44. See Martin H. Malin & Jeanne M. Vonnhoff, *The Evolving Role of the Labor Arbitrator*, 21 OHIO ST. J. ON DISP. RESOL. 199 (2005).

45. See *Alford v. Dean Witter Reynolds, Inc.*, 905 F.2d 104, 106-07 (5th Cir. 1990), vacated, 500 U.S. 930 (1991); *Uteley v. Goldman Sachs & Co.*, 883 F.2d 184, 186-87 (1st Cir. 1989); *Nicholson v. CPC Int'l, Inc.*, 877 F.2d 221, 230 (3d Cir. 1989); *Swenson v. Mgmt. Recruiters Int'l, Inc.*, 858 F.2d 1304, 1305-07 (8th Cir. 1988); *Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544, 1553-54 (10th Cir. 1988); *Johnson v. Univ. of Wisconsin-Milwaukee*, 783 F.2d 59, 62-63 (7th Cir. 1986). But see *Gilmer v. Interstate/Johnson Lane Corp.*, 895 F.2d 195, 197-203 (4th Cir. 1990), *aff'd*, 500 U.S. 20 (1991) (holding enforceable a pre-dispute agreement to arbitrate a statutory employment claim under the Age Discrimination in Employment Act).

46. 500 U.S. 20 (1991).

Discrimination in Employment Act.⁴⁷

Gilmer did not expressly overrule *Gardner-Denver*. Instead, *Gilmer* distinguished *Gardner-Denver* as a case arising under a collective bargaining agreement where the arbitrator's authority was limited to interpreting and applying the CBA and did not extend to resolving statutory claims.⁴⁸ A major tenet of the reasoning employed in *Gardner-Denver*, however, was the Court's view that the arbitral forum was poorly suited for resolving statutory claims.⁴⁹ This aspect of the Court's reasoning relied on the privately-selected arbitrator's lack of institutional competence to adjudicate statutory claims. The *Gilmer* Court flatly rejected that portion of the rationale:

The Court in *Alexander v. Gardner-Denver Co.* also expressed the view that arbitration was inferior to the judicial process for resolving statutory claims. That "mistrust of the arbitral process," however, has been undermined by our recent arbitration decisions. "[W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution."⁵⁰

Not surprisingly, encouraged by the affirmance in *Gilmer*, the Fourth Circuit continued its pattern in arbitration cases and held that employees covered by CBAs were required to pursue their statutory claims through the CBA's grievance and arbitration procedure.⁵¹ The Fourth Circuit was again an outlier, as all other circuits that addressed the issue held that *Gardner-Denver* continued to control.⁵² In *Wright v. Universal Maritime Service Corp.*,⁵³ the Court declined to resolve the issue of whether an employee can be compelled to arbitrate a statutory claim under the provisions of a CBA. The Court held, however, that if such an agreement waiving the judicial

47. *Id.* at 23.

48. *Id.* at 33-34.

49. *Gardner-Denver*, 415 U.S. at 56-58 (discussing how "[a]rbitral procedures . . . make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII).

50. *Id.* at 34 n.5 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-27 (1985)).

51. See *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 879-885 (4th Cir. 1996) (holding that arbitration of employees' Title VII and disability claims was mandatory under the CBA).

52. See *Penny v. United Parcel Serv.*, 128 F.3d 408, 414 (6th Cir. 1997); *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 363 (7th Cir. 1997); *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1452 (10th Cir. 1997); *Brisentine v. Stone & Webster Eng'g Corp.*, 117 F.3d 519, 526 (11th Cir. 1997); *Varner v. Nat'l Super Mkts.*, 94 F.3d 1209, 1213 (8th Cir. 1996); *Tran v. Tran*, 54 F.3d 115, 117 (2d Cir. 1995).

53. 525 U.S. 70 (1998).

forum is to be enforced, the agreement must be clear and unmistakable.⁵⁴ In so doing, the Court recognized the tension between *Gilmer* and *Gardner-Denver*,⁵⁵ but declined to resolve it definitively.

Most courts considering defense requests to compel plaintiffs to arbitrate their statutory claims under their CBA have applied *Wright* and found no clear and unmistakable waiver of the right to litigate.⁵⁶ Not surprisingly, the Fourth Circuit has found clear and unmistakable waivers and has dismissed employees' lawsuits asserting statutory claims for failure to take those claims through the CBA's grievance and arbitration procedure.⁵⁷ In *Pyett v. Pennsylvania Building Corp.*,⁵⁸ however, the Second Circuit held that even a CBA's clear and unmistakable waiver of the right to a judicial forum is unenforceable. The Supreme Court has granted certiorari in *Pyett* and presumably will decide the issue left unresolved in *Wright*. If the Court reverses the Second Circuit, "the ultimate question for the arbitrator would be not what the parties have agreed to, but what federal law requires"⁵⁹

Even if the Court affirms the Second Circuit in *Pyett*, the arbitrator's role will continue to broaden from private adjudicator of private disputes to quasi-public interpreter of public law. Parties have expressly incorporated the public law into their contracts through the inclusion of non-

54. *Id.* at 80.

55. *Id.* at 75, 77.

56. See, e.g., *Fayer v. Town of Middlebury*, 258 F.3d 117, 122-23 (2d Cir. 2001) (finding the arbitration clause at issue was even narrower than the clause at issue in *Wright* and therefore did not bar the plaintiff from bringing his First Amendment claims in a court action); *Rogers v. New York Univ.*, 220 F.3d 73, 75-76 (2d Cir. 2000) (holding that CBA's arbitration clause did not contain sufficiently clear and unmistakable waiver of employees' right to a federal forum with respect to claims under employment discrimination statutes); *Kennedy v. Superior Printing Co.*, 215 F.3d 650, 653-54 (6th Cir. 2000) (holding that the arbitration clause in the CBA did not compel employee to arbitrate his ADA claim, because agreement did not explicitly reference ADA); *Bratten v. SSI Servs., Inc.*, 185 F.3d 625, 630-32 (6th Cir. 1999) (holding that arbitration clause of CBA did not deprive district court of jurisdiction to hear the merits of an employee's ADA claim, because the ADA was not specifically mentioned in the CBA); *Quint v. A.E. Staley Mfg. Co.*, 172 F.3d 1, 8-9 (1st Cir. 1999) (holding that, in light of *Wright*, a CBA which did not specifically mention the ADA or any other federal anti-discrimination statute posed no bar to a lawsuit).

57. See, e.g., *Aleman v. Chugach Supports Servs., Inc.*, 485 F.3d 206, 215-17 (4th Cir. 2007) (dismissing employees' lawsuits due to presence of "a clear and unmistakable provision under which the employees agree to submit to arbitration") (quoting *Carson v. Giant Food, Inc.*, 175 F.3d 325, 331 (4th Cir. 1999)); *Safrit v. Cone Mills Co.*, 248 F.3d 306, 307-09 (4th Cir. 2001) (dismissing employee's Title VII claim because the CBA provided that the parties would "abide by all the requirements of Title VII," and that "[u]nresolved grievances under this Section are the proper subjects for arbitration.").

58. 498 F.3d 86, 90 (2d Cir. 2007), cert. granted sub nom. *Penn Plaza, LLC v. Pyett*, 128 S. Ct. 1223 (2008).

59. *Wright*, 525 U.S. at 79.

discrimination clauses in their CBAs, which commonly refer to Title VII and other public laws.⁶⁰ Similarly, parties increasingly refer to the Family Medical Leave Act (FMLA)⁶¹ in their CBAs.⁶²

When employees and their unions grieve discrimination or other statutory violations, the arbitration, with increasing frequency, is the employee's sole opportunity to resolve this claim. For example, in *Collins v. New York City Transit Authority*,⁶³ the plaintiff was fired after he allegedly assaulted his supervisor. He grieved and a tri-partite arbitration board upheld his termination.⁶⁴ Plaintiff sued, alleging that his employer discharged him due to his race and prior EEO complaints, in violation of Title VII.⁶⁵ The district court granted the defendant's motion for summary judgment and the Second Circuit affirmed.⁶⁶ The court placed particular weight on the arbitration award upholding the plaintiff's discharge.⁶⁷ The court opined:

[A] decision by an independent tribunal that is not itself subject to a claim of bias will attenuate a plaintiff's proof of the requisite causal link [between the adverse employment action and the allegedly illegal motive]. Where, as here, that decision follows an evidentiary hearing and is based on substantial evidence, the Title VII plaintiff, to survive a motion for summary judgment, must present strong evidence that the decision was wrong as a matter of fact—e.g. new evidence not before the tribunal—or that the impartiality of the proceeding was compromised.⁶⁸

Other courts have reached similar results.⁶⁹ A number of state courts

60. See ELKOURI & ELKOURI, HOW ARBITRATION WORKS 516 (Alan Myles Rubin ed., 6th ed. 2003) ("It is common for many agreements to include nondiscrimination and anti-sexual harassment [statutory] provisions.").

61. 29 U.S.C. §§ 2601-54 (2000).

62. See Jeanne M. Vonhof & Martin H. Malin, *What a Mess! The FMLA, Collective Bargaining and Attendance Control Plans*, 21 ILL. PUB. EMPLOYEE REL. REP., Fall 2004, at 1, 3 (noting that parties are actually including the exact language from parts of the FMLA into their collective bargaining agreements).

63. 305 F.3d 113 (2d Cir. 2002).

64. *Id.* at 117.

65. *Id.*

66. *Id.* at 118, 120.

67. *Id.* at 119.

68. *Id.*

69. See *Darden v. Illinois Bell Tel. Co.*, 797 F.2d 497, 504 (7th Cir. 1986) (holding that the district court was correct in according the arbitrator's ruling great weight); *Martinez v. Amalgamated Transit Union Local 1056*, 2005 WL 1485246, at *1, *5 (E.D.N.Y. June 23, 2005) (applying *Collins*); *Norris v. New York City Housing Auth.*, 2004 WL 1087600 at *1, *9 (S.D.N.Y. May 14, 2004) (also applying *Collins*); *Clark v. UFI, Inc.*, 98 F. Supp. 2d 320, 336 (E.D.N.Y. 2000) (holding that an arbitrator's judgment should be given weight when procedurally fair); *Umpierre v. SUNY Brockport*, 1997 WL 599314 at *1, *4 (N.D.N.Y.

have held that employees who lost their grievances in arbitration were collaterally estopped from litigating common law tort claims arising out of the same set of facts.⁷⁰

If the Supreme Court upholds the Second Circuit in *Pyett*, its rationale will probably be that the union lacks authority to waive the individual employee's right to a judicial forum for statutory claims. Where, however, no such issue of agency is present, even the Second Circuit compels parties to arbitrate their public law claims under the CBA. For example, in *Interstate Brands Corp. v. Teamsters Local 550*,⁷¹ Interstate Brands sued the union under section 303 of the Labor Management Relations Act for damages resulting from an alleged secondary boycott. The CBA's grievance procedure provided for the parties to arbitrate "all complaints, disputes or grievances arising between them involving questions of interpretation or application of any clause or matter covered by this Agreement, or any act or conduct or relation between the parties hereto, directly or indirectly."⁷²

Relying on *Wright*, Interstate argued that the strong presumption of arbitrability should not apply because it was pursuing a claim under a federal statute.⁷³ Interstate maintained that any waiver of its right to bring its claim in federal court had to be clear and unmistakable.⁷⁴

The Second Circuit rejected the argument. According to the court, *Wright's* requirement of a clear and unmistakable waiver resulted from concerns with the union waiving the individual employee's right to sue.⁷⁵ The court reasoned that the *Wright* requirement did not apply to an employer's agreement in a CBA to arbitrate its statutory claims.⁷⁶ Accordingly, the court held that Interstate was required to arbitrate its

Sept. 26, 1997) (holding that plaintiff's inability to discredit the legitimacy of the arbitrator's proceedings undermines plaintiff's claims of employment discrimination).

70. See, e.g., *Kelly v. Vons Cos.*, 79 Cal. Rptr. 2d 763, 769-70 (Cal. Ct. App. 1998) (granting preclusive effect in fraud and negligent representation case to findings in labor arbitration over facility closure); *Bulger v. Lieberman*, 667 A.2d 561, 562 (Conn. App. Ct. 1995) (making arbitration panel's decision that employee resigned binding on her subsequent wrongful termination suit); *Taylor v. People's Gas Light & Coke Co.*, 656 N.E.2d 134, 141 (Ill. App. Ct. 1995) (ruling that collateral estoppel arising from prior arbitration precluded claims for malicious prosecution, tortious interference with contract, and negligent hiring). But see *Taylor v. Lockheed Martin Corp.*, 6 Cal. Rptr. 3d 358, 362-63 (Cal. Ct. App. 2003) (refusing to give arbitration award preclusive effect with respect to statutory claims); *Camargo v. Cal. Portland Cement Co.*, 103 Cal. Rptr. 2d 841, 855-56 (Cal. App. 2001) (same).

71. 167 F.3d 764 (2d Cir. 1999).

72. *Id.* at 765.

73. *Id.* at 767.

74. *Id.*

75. *Id.*

76. *Id.*

section 303 claim against the union.⁷⁷

Not surprisingly, courts are taking a broader view of labor arbitrator authority to interpret and apply the public law. Courts have compelled employers to arbitrate grievances despite employer arguments that the grievance would necessarily require the arbitrator to interpret and apply the public law.⁷⁸ They are also enforcing arbitration awards whose rationales are based on the arbitrator's interpretation and application of public law. For example, in *Butler Manufacturing Co. v. United Steelworkers of America*,⁷⁹ the employer discharged an employee pursuant to a negotiated attendance control plan embodied in a memorandum of understanding between the employer and the union. The arbitrator determined that two of the absences for which the grievant had been charged were FMLA-protected and ordered the grievant reinstated with half back pay.⁸⁰ The employer sued to vacate the award.⁸¹

The union argued that the award drew its essence from the contract and cited a provision of the agreement that stated, "Butler Manufacturing Company offers equal opportunity for employment, advancement in employment, and continuation of employment to all qualified individuals in accordance with the provisions of law and in accordance with the provisions of this Agreement for the represented employees covered by it."⁸² The district court, however, determined the quoted language to be "nothing but boilerplate anti-discrimination commitments that did not necessarily pull the FMLA into the agreement,"⁸³ and held that the arbitrator exceeded her authority by relying on the FMLA. The Seventh Circuit reversed. The court reasoned:

If there was some kind of "clear statement" rule that applied to CBAs and to the match between a CBA and an arbitrator's authority, perhaps [the district court's analysis] would have been right. But there is no such rule. Instead . . . the standard asks only whether the arbitrator's interpretation can rationally be linked to the CBA. Here, a broader look . . . demonstrates that the arbitrator's award did draw its essence from the parties' agreement. Article 2, paragraph 13 . . . does not say only that

77. *Interstate Brands Corp.*, 167 F.3d at 767.

78. See *Cal. Correctional Peace Officers Ass'n v. State*, 47 Cal. Rptr. 3d 717, 726 (Cal. Ct. App. 2006) (holding that arbitration was not precluded even though the issue in dispute was governed by statute); *Knipp v. Lawrence County Bd. of Comm'rs*, No. 04CA34, slip op. at 3 (Ohio Ct. App. June 14, 2005) (finding that pursuant to a CBA, an employee was obligated to grieve and arbitrate her claim that her discharge violated a state statute).

79. 336 F.3d 629 (7th Cir. 2003).

80. *Id.* at 632.

81. *Id.* at 631.

82. *Id.* at 633.

83. *Id.*

there will be "equal opportunity for employment . . . in accordance with the provisions of this Agreement . . ." In the ellipsis between the word "employment" and the last phrase comes the phrase "in accordance with the provisions of law." We have no reason to think that this reference to external law is either surplusage or "mere boilerplate." We find that Article 2, paragraph 13 conferred on the arbitrator the authority to consider the FMLA.⁸⁴

The First Circuit has taken an even more expansive view of arbitral authority. In *Coastal Oil of New England, Inc. v. Teamsters Local 25*,⁸⁵ the CBA provided, *inter alia*, that the employer would either maintain workers' compensation insurance or provide injured employees with the same benefits as provided for in the Massachusetts worker's compensation statute.⁸⁶ The CBA covered only one of the employer's three facilities.⁸⁷ The same union represented the employees at the other two facilities, but each facility had its own CBA.⁸⁸

An employee covered by the CBA was injured on the job.⁸⁹ Following his recovery, he sought reinstatement but was advised that there were no openings.⁹⁰ The union and employer agreed that the employee would be reinstated to the next available opening.⁹¹ Subsequently, the employee learned of an opening at one of the other two facilities.⁹² When the employer refused to award him that position, he grieved and the union took the claim to arbitration.⁹³

The arbitrator, relying on the Massachusetts Worker's Compensation Law, ordered the employer to reinstate the grievant to the position at the other facility which was covered by a different CBA.⁹⁴ The First Circuit upheld the arbitrator's authority to do so.⁹⁵ Relying on *Gilmer* and its progeny, the court gave the employer's attack on the arbitrator's authority short shrift:

How can the arbitrator, in determining whether appellant lived up to the contractual obligations mandated by . . . the Revere Agreement, fail to address whether the provisions of the

84. *Id.* at 633-34 (citation omitted).

85. 134 F.3d 466, 468 (1st Cir. 1998).

86. *Id.* at 468.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Coastal Oil of New England, Inc.*, 134 F.3d at 468.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 470.

Massachusetts Worker's Compensation Law, incorporated into that agreement . . . have been met?

The response to this question as well as to appellant's challenge to the arbitrator's authority to interpret the aforementioned Massachusetts statute is self-evident. Obviously, the arbitrator acted properly and within the scope of his delegated authority. We can perceive of no valid reason why the parties could not also agree to have statutory rights enforced before an arbitral forum.⁹⁶

Thus, labor arbitrators have evolved from their original roles as purely private adjudicators of the parties' private law, as expressed in their collective bargaining agreement, to quasi-public officers interpreting and applying the public law. This evolving role of labor arbitrators provides a further basis for studying their decision-making.

III. THE STUDY

A. *Background*

More than ninety percent of all CBAs require just cause for discipline and discharge. Employees who believe that they have been disciplined or discharged without cause may file grievances challenging those actions. An arbitrator might sustain a grievance completely, ordering the employer to reinstate the employee if discharged and to make the employee whole for lost wages and benefits. The arbitrator may deny the grievance, allowing the discipline or discharge to stand. The arbitrator may also sustain the grievance in part, reducing the discipline to a lesser penalty.

Because of the effects that evolving societal mores and practices can have on arbitral interpretations of just cause, we chose to provide arbitrators with four grievances where the discipline or discharge arose out of a work-family conflict. The demographic revolution in the workplace has become an accepted fact of life. The 1950s model of a two-parent household in which only one parent worked outside the home has long faded into obscurity. Today a child raised in such a household is in a distinct minority. In March 2002, only 23.7% of all children in the United States lived with two parents and had only one parent in the labor force.⁹⁷

96. *Id.* at 469-70. *But see* Sheriff of Suffolk County v. AFSCME Council 93, 856 N.E.2d 194, 198 (Mass. App. Ct. 2006) (holding that an arbitrator lacked authority to interpret and rely on a state statute as the basis for decision).

97. See JASON FIELDS, CHILDREN'S LIVING ARRANGEMENTS AND CHARACTERISTICS: MARCH 2002, at 9 tbl.4 (U.S. Census Bureau 2003) (showing that in 20.7% of families with two parents the father was the sole parent in the workforce, and in 3.0% of such families the mother was the only parent in the workforce).

The predominance of single-parent and dual-worker households has greatly increased the tension that employees feel between responsibilities to their jobs and responsibilities to their families. For example, it has been estimated that one in three working families with children under six relies on split shifts for childcare (i.e., parents working different shifts so that each can care for the child while the other is at work).⁹⁸ Additionally, an increasing number of workers—an estimated one-third of workers in a recent study—are responsible for caring for elderly parents and in-laws.⁹⁹

The external law has responded to these demographic changes in many ways. Most visible is the FMLA. Other legal developments, although not as visible as the FMLA, nevertheless reflect recognition of these societal changes. For example, in *Prickett v. Circuit Science, Inc.*,¹⁰⁰ the Minnesota Supreme Court overruled prior case law and held that a single father discharged for refusing a shift change because he could not find childcare was entitled to unemployment benefits.¹⁰¹ The court rejected the employer's argument that the claimant was disqualified because he had been terminated for willful misconduct.¹⁰² The court wrote:

[W]e hold that the employee's failure to report to a new shift assignment because of an inability to obtain adequate care for the employee's dependent child does not constitute misconduct justifying denial of unemployment compensation benefits. To hold otherwise would be to ignore significant facts about the world today. In 1990, almost 60% of children in Minnesota lived in families in which both parents worked outside the home. Another 9.3% lived in families with one working parent. If Prickett had left his child without supervision, he would have been subject to criminal sanctions. He also could have been sanctioned for failure to support Kyle. Under these limited circumstances, Prickett seemed to have no choice but to do as he did and we cannot hold that he engaged in "wilful misconduct."¹⁰³

A review of published arbitration awards finds no consensus of arbitral opinion in handling discipline and discharge grievances arising out

98. See Harriet B. Presser, *Toward a 24-Hour Economy*, 284 SCI. 1778 (June 11, 1999) (relying on statistics from the Current Population Survey performed in 1997 in discussing the impact on families of the increased prevalence of nonstandard work schedules).

99. See JAMES T. BOND ET AL., HIGHLIGHTS OF THE NATIONAL STUDY OF THE CHANGING WORKFORCE 29 (2002) (examining survey results on the changing conditions of the American workforce).

100. 518 N.W.2d 602 (Minn. 1994).

101. *Id.* at 605.

102. *Id.*

103. *Id.* at 605-06 (citations omitted).

of work-family conflicts. For example, in *Town of Stratford*,¹⁰⁴ a police officer refused an order that she report for duty at noon instead of her scheduled 4:00 p.m. start time because she was unable to get childcare to cover the early start.¹⁰⁵ The town suspended her for five days for insubordination.¹⁰⁶ The arbitrator denied her grievance, finding that the absence of childcare was not analogous to illness, which would have justified refusal of the order.¹⁰⁷

Similarly, in *Washtenaw County*,¹⁰⁸ the grievant was an attorney with the County Friend of the Court.¹⁰⁹ She sought a leave covering six weeks during the summer when she and her common law husband would have custody of her husband's two young daughters.¹¹⁰ The Friend of the Court denied the request because he was new and would be carrying out numerous changes and could not afford the absence of an attorney with the grievant's capabilities and experience.¹¹¹ She proposed working three days per week or taking files home to work on and reporting for work whenever she could.¹¹² The Friend of the Court denied both requests.¹¹³ The grievant did not appear for work on Monday of the first week that she and her husband had the girls.¹¹⁴ The Friend of the Court allowed her to use her last sick day for that Monday and ordered her to report for work on Tuesday.¹¹⁵ The grievant did not and she was fired.¹¹⁶

The arbitrator denied her grievance.¹¹⁷ He held that the employer's denial of her leave requests was not arbitrary or capricious, opining that the denial "seem[ed] based upon a fair analysis of the work commitment that was expected of the grievant . . . [I]t would appear that an attorney of the grievant's extraordinary capabilities and admirable work habits would be sorely missed and put the department at a great disadvantage were her leave granted."¹¹⁸

Finding the leave of absence denial proper, he also upheld her

104. 97 Lab. Arb. Rep. (BNA) 513 (1991) (Stewart, Arb.).

105. *Id.* at 513.

106. *Id.*

107. *Id.* at 514.

108. 80 Lab. Arb. Rep. (BNA) 513 (1982) (Daniel, Arb.).

109. *Id.* at 513.

110. *Id.*

111. *Id.*

112. *Id.* at 514.

113. *Id.*

114. *Washtenaw County*, 80 Lab. Arb. Rep. (BNA) 513, 514 (1982) (Daniel, Arb.).

115. *Id.*

116. *Id.*

117. *Id.* at 516.

118. *Id.* at 515.

discharge.¹¹⁹ In reaching this conclusion, the arbitrator stated:

What possible response could an employer have in such a situation other than termination of the employee. To permit her to continue at her whim as to which days she would work or not would simply be accepting her terms of employment and, in effect, granting the leave of absence which already had been denied. There was absolutely no assurance from the grievant of any absolute commitment to her employment but rather that it would all depend upon her ability to get a babysitter or make some other arrangements. None of the alternatives were viable in the eyes of the employer and properly so.¹²⁰

The arbitrator further opined:

There is no doubt whatsoever in this case that the grievant was acting out of unselfish and commendable motivation to provide for two young children a type of stability that they had not experienced before. The grievant at the time was certainly capable and able to weigh in the balance her employment against the urgency of her personal problems. She made her choice at that time and who is to say it was not the wisest. However, having made that decision she lacks standing to complain about the loss of the employment.¹²¹

In contrast, in *Jones Operation & Maintenance Co.*,¹²² the grievant had been starting her shift at 9:00 a.m. to accommodate her childcare needs. She took maternity leave.¹²³ Upon her return, the employer required that she begin her shift at 7:30 a.m.¹²⁴ She was unable to find childcare for that shift and was terminated.¹²⁵ The arbitrator sustained her grievance because the employer was unable to justify its denial of the request for schedule accommodation.¹²⁶

In *Rochester Psychiatric Center*,¹²⁷ a single parent worked the 3:00 - 11:20 p.m. shift. Mandatory overtime rotated among all employees.¹²⁸ The grievant knew when her name reached the top of the rotation list but did not know when she would be tapped for overtime.¹²⁹ Determination of the

119. *Id.* at 516.

120. *Washtenaw County*, 80 Lab. Arb. Rep. (BNA) 513, 515 (1982) (Daniel, Arb.).

121. *Id.* at 516.

122. 93 Lab. Arb. Rep. (BNA) 239 (1989) (Schwartz, Arb.).

123. *Id.*

124. *Id.*

125. *Id.* at 239-40.

126. *Id.* at 243.

127. 87 Lab. Arb. Rep. (BNA) 725, 726 (1986) (Babiskin, Arb.).

128. *Id.* at 726.

129. *Id.*

need for overtime, usually a second eight hour shift, was made late in the shift and grievant was unable to obtain childcare on such short notice.¹³⁰ Grievant refused to work the overtime and was suspended.¹³¹ She refused a second time and was suspended again.¹³² When she refused a third time, the employer fired her.¹³³

The arbitrator opined, "No person should be forced to choose between his children or his livelihood."¹³⁴ He further stated, "No arbitrator on earth would sustain discharge on the facts of this case."¹³⁵ He reduced the discharge to a one dollar fine and required the parties to agree on three days per month, arranged thirty days in advance, during which the grievant would be available to work overtime.¹³⁶

A systematic survey of all published arbitration awards found widely divergent approaches to discipline and discharge grievances where the incident giving rise to the adverse employment action arose out of a work-family conflict.¹³⁷ Many of the reported awards are difficult to reconcile, at least on their face. Some appear to regard family responsibilities as personal to the employee and as matters that the employer has a right to expect not to interfere with job performance. Others seem to regard family responsibilities as a relevant factor that employers must consider in assessing discipline and seem to find implicit in the just cause requirement a requirement that employers attempt to accommodate such responsibilities.

The role of societal values and arbitral intuition in arbitrator decision-making begs the question of what factors may explain the divergent results in the published arbitration awards dealing with discipline and discharge resulting from work-family conflicts. Specifically, although consideration of grievances with family-work conflict at their core should not be affected by the *gender* of the grievant, there is reason to suspect that it might. The typical finding in the vast social psychology literature on stereotyping is that individual members of stereotyped groups are judged consistently with group stereotypes.¹³⁸ With regard to gender, this means that individual

130. *Id.* at 726-27.

131. *Id.* at 726.

132. *Id.* at 727.

133. *Rochester Psychiatric Center*, 87 Lab. Arb. Rep. (BNA) 725, 727 (1986) (Babiskin, Arb.).

134. *Id.* (emphasis omitted).

135. *Id.*

136. *Id.* at 728.

137. MARTIN H. MALIN ET AL., WORK-FAMILY CONFLICT UNION STYLE: LABOR ARBITRATIONS INVOLVING FAMILY CARE (American University Center for Worklife Law, 2004), available at http://www.uchastings.edu/site_files/WLL/conflictunionstyle.pdf.

138. See generally DAVID J. SCHNEIDER, THE PSYCHOLOGY OF STEREOTYPING (2004) (focusing on the development of categorical stereotypes and their effects on society);

women tend to be judged as less aggressive, more emotional, more nurturing, less competent in workplace settings, and less capable in leadership roles than comparable men.¹³⁹

Furthermore, parental status affects judgment about workplace competence as well. Studies show that students perceive employed mothers and fathers as differentially effective in the workplace. Numerous researchers have documented that college students perceive employed mothers as less nurturing, less professionally competent, less reliable, and less committed to the workforce than single women and fathers.¹⁴⁰ In

Brewer, *supra* note 6, at 3 (defining stereotyping).

139. See generally Monica Biernat & Diane Kobrynowicz, *Gender- and Race-based Standards of Competence: Lower Minimum Standards but Higher Ability Standards for Devalued Groups*, 72 J. PERSONALITY & SOC. PSYCHOL. 544, 544-57 (1997) (discussing that members of devalued groups are judged on lower minimum standards and must work harder to demonstrate their ability); Jennifer Boldry et al., *Gender Stereotypes and the Evaluation of Men and Women in Military Training*, 57 J. SOC. ISS. 689, 689-705 (2001) (linking the lower evaluations of women involved in military training to gender stereotypes); Kay Deaux, *From Individual Differences to Social Categories: Analysis of a Decade's Research on Gender*, 39 AM. PSYCHOL. 105, 105-16 (1984) (describing research showing the prevalence of gender stereotypes, including traits that are more likely to be ascribed to women); Alice H. Eagly & V. J. Steffen, *Gender Stereotypes Stem from the Distribution of Women and Men into Social Roles*, 46 J. PERSONALITY & SOC. PSYCHOL. 735, 735-54 (1984) (describing stereotypical beliefs attributed to the sexes and tracing these beliefs to the differing distribution of men and women in various social roles); Madeline E. Heilman, *Description and Prescription: How Gender Stereotypes Prevent Women's Ascent up the Organizational Ladder*, 57 J. SOC. ISS. 657, 657-74 (2001) (arguing that gender stereotypes lead to gender bias because of the discrepancy between stereotypes of women and the skills viewed as necessary for upper-level management positions).

140. See e.g., Judith S. Bridges & Claire Etaugh, *College Students' Perceptions of Mothers: Effects of Maternal Employment-Childrearing Pattern and Motive for Employment*, 32 SEX ROLES 735, 747-48 (1995) (discussing studies in which mothers continuously employed during pregnancy were seen as less committed than other employees); Judith S. Bridges et. al, *Trait Judgments of Stay-at-home and Employed Parents: A Function of Social Role and/or Shifting Standards?*, 26 PSYCHOL. WOMEN Q. 140, 147-49 (2002) (discussing the perception that working mothers are less in communion with their jobs and their children than working fathers); Amy J.C. Cuddy et al., *When Professionals Become Mothers, Warmth Doesn't Cut the Ice*, 60 J. SOC. ISS. 701, 711-14 (2004) (discussing a loss in perceived confidence in women upon becoming mothers); Claire Etaugh & Cara Moss, *Attitudes of Employed Women Toward Parents Who Choose Full-time or Part-time Employment Following Their Child's Birth*, 44 SEX ROLES 611, 616-18 (2001) (discussing the perception that full-time employees experience more stress and are less family-oriented than reduced-time employees); Claire Etaugh & Denise Folger, *Perceptions of Parents Whose Work and Parenting Behaviors Deviate from Role Expectations*, 39 SEX ROLES 215, 221-22 (1998) (investigating the perceptions of employment status of parents following the birth of a child); Kathleen Fuegen et al., *Mothers and Fathers in the Workplace: How Gender and Parental Status Influence Judgments of Job-Related Competence*, 60, J. SOC. ISSUES 737, 748-49 (2004) (discussing the polarizing effects of parenthood and the judgment holding mothers to stricter employment standards than fathers); Cecilia L. Ridgeway & Shelley J. Correll, *Motherhood*

research examining parental status and hiring decisions, application letters were mailed to several accounting firms. Among other variables, the applicant's gender and parental status were manipulated. Employers were less likely to contact mothers. However, fatherhood did not affect a male applicant's success.¹⁴¹ Recent research found that mothers are less likely than childless women to receive call-backs in response to job applications, whereas fathers received *more* call-backs than childless men.¹⁴² Negative attitudes toward mothers may stem from the perception that employed mothers deviate from gender expectations. Employed fathers, by contrast, conform to the role of provider.¹⁴³ Arbitrators, acting upon such stereotypes, may treat mothers more harshly and with less sympathy when considering grievances.

On the other hand, the opposite may be true. Since family interference with fathers' work life violates societal expectations for men, arbitrators may treat men more harshly while considering work life grievances. For example, an arbitrator may view a father who refuses an overtime shift because of childcare concerns more negatively than a woman who does the same because childcare is not in the male domain.¹⁴⁴

Of course, the recent demographic changes in the workplace might have influenced gender roles so that gender does not affect arbitrator decision-making. Norms of fairness focus on the merits of a case rather than the grievant's individual attributes. Social psychology literature suggests that factors such as gender play a smaller role in perceptions if large amounts of *individuating information* are available.¹⁴⁵ For example,

as a Status Characteristic, 60 J. SOC. ISS. 683, 690-92 (2004) (citing studies that show that college students perceive full-time employed mothers to be less committed, professional and nurturing than their peers).

141. Michael Firth, *Sex Discrimination in Job Opportunities for Women*, 8 SEX ROLES 891, 898 (1982) (examining the extent of sex discrimination in the job market for accountants).

142. Shelley J. Correll et al., *Getting a Job: Is There a Motherhood Penalty?*, 112 AM. J. SOC. 1297 (2007) (discussing the substantial wage penalty suffered by mothers and demonstrating hiring bias against mothers).

143. See, e.g., Bridges & Etaugh, *supra* note 140 at 39; Fuegen et al., *supra* note 140 at 40.

144. See, e.g., Martin H. Malin, *Fathers and Parental Leave*, 74 TEX. L. REV. 1047 (1994) (focusing on work-leave policies for fathers); Martin H. Malin *Fathers and Parental Leave Revisited*, 19 N. ILL. U. L. REV. 25 (1998) (exploring restrictions on work-leave policies for fathers). See generally B. Ann Bettencourt et al., *Evaluations of Ingroup and Outgroup Members: The Role of Category-Based Expectancy Violation*, 33 J. EXPERIMENTAL SOC. PSYCHOL. 244, (1997) (examining the role of category-based evaluation and the effects of its violation).

145. See generally Ziva Kunda & Paul Thagard, *Forming Impressions from Stereotypes, Traits, and Behaviors: A Parallel-Constraint-Satisfaction Theory*, 103 PSYCHOL. REV. 284 (1996) (examining how stereotypes combine with other information about people to affect

when all one knows about a worker is his or her gender, that knowledge may guide evaluations in a stereotypical direction. But with a high degree of knowledge about a worker's performance, circumstances, etc., the role of gender in an evaluation of that worker may weaken. Thus, while gender stereotypes may generally lead a female worker to be evaluated more negatively than a male worker, specific knowledge that a man and woman both have good performance records (or bad performance records), for example, typically results in judgments being driven largely by that specific, individuating information and much less so by gender.

In short, the literature on how stereotypes guide judgments of others provides abundant evidence that gender and other social category memberships (e.g., race, age, socioeconomic status) can bias judgment in stereotypical directions. At the same time, we know that gender stereotypes can operate paradoxically, such that a father may be perceived as a better parent than a mother (presumably because he is being evaluated with respect to lower expectations for his group), that violations of gender roles may harm both men and women, and that some situational factors such as amount of knowledge may mitigate stereotyping effects.¹⁴⁶ The external validity of much of the research supporting these conclusions is questionable, however, because it has been carried out with samples of undergraduates rather than with "real-world" decision makers such as arbitrators, hence the focus of the present research.

Though not extensive, there is a literature that has focused specifically on the role of grievant gender in the arbitration context. In one experimental study, gender of both arbitrator and grievant had no impact on judgments,¹⁴⁷ but in another study by the same authors, female grievants were treated more favorably than male grievants, particularly by female arbitrators.¹⁴⁸ Several published studies of actual arbitration decisions have

impressions).

146. See Diane Kobrynowicz & Monica Biernat, *Decoding Subjective Evaluations: How Stereotypes Provide Shifting Standards*, 33 J. EXPERIMENTAL SOC. PSYCHOL. 579, 579-601 (1997) (examining how subjective evaluations relevant to stereotypes are translated into open-ended descriptions, objective judgments, and Likert-type ratings); Ziva Kunda et al., *Equal Ratings but Separate Meanings: Stereotypes and the Construal of Traits*, 72 J. PERSONALITY & SOC. PSYCHOL. 720, 720-34 (1997) (exploring the effects of stereotypes on the meaning of traits used to describe groups and their members).

147. S. L. Oswald & S. B. Caudill, *Experimental Evidence of Gender Effects in Arbitration Decisions*, 4 EMP. RESP. & RTS. J. 271 (1991) (discussing the arbitrator gender and arbitrator-grievant gender effects on the decisions of arbitrators on a hypothetical sexual harassment case).

148. S. B. Caudill & S. L. Oswald, *A Sequential Selectivity Model of the Decisions of Arbitrators*, 14 MANAGERIAL & DEC. ECON. 261 (1993) (discussing the arbitrator gender and arbitrator-grievant gender effects on the decisions of arbitrators on a hypothetical drug-testing case).

also found that arbitrators treated female grievants more favorably than male grievants,¹⁴⁹ with one finding no effects related to the grievant's gender.¹⁵⁰ However, these field studies typically have not controlled for factors such as severity of the workplace offense. One field study which did control for severity of offense found no gender effects in arbitrator decision making,¹⁵¹ but another doing the same found that female grievants were less successful than male grievants.¹⁵²

A review of the published research specific to arbitral decision-making demonstrates mixed results regarding the effects of grievant gender. The field studies that have been done are useful, but of course they are limited in that case attributes vary tremendously and confounding variables may exist between grievant demographics and case features, or between arbitrator characteristics and case features, etc. The experimental work that has been done is also limited in that predictors tend to be varied only in isolation (as in studies that manipulate only grievant sex effects), and testing of interactions between arbitrator and grievant features is rare. The present research attempts to answer the questions left open by these case studies and experiments.

In the research described below, we asked arbitrators to make judgments in four cases, all relevant to work-family conflicts. In each case, we varied other features of the grievant in addition to gender, such as marital status and conflict based on child versus eldercare. This method allows for determination of the relative weight of gender in arbitral decision making compared to, and in interaction with, these other features.

149. Brian Bemmels, *Gender Effects in Discharge Arbitration*, 42 INDUS. & LAB. REL. REV. 63 (1988) (investigating statistics showing that female grievants were more likely to have their grievances sustained than male grievants when the arbitrator was male); Brian Bemmels, *Gender Effects in Discipline Arbitration: Evidence from British Columbia*, 31 ACAD.MGMT. J. 699 (1988) (discussing further evidence of gender bias in arbitration results); Brian Bemmels, *The Effect of Grievants' Gender on Arbitration Decision*, 41 Indus. & Lab. Rel. Rev. 251 (1988) (discussing the role of gender in grievance arbitration).

150. Jack E. Steen et al., *A Reexamination of Gender Bias in Arbitration Decisions*, 45 LAB. L.J. 298 (1994) (focusing on gender bias in arbitration decisions considering an influx of women into the market).

151. Dan R. Dalton et al., *The 'Iron Law of Paternalism' in Employee Grievances and Arbitration? A Comparison of Disciplinary and Nondisciplinary Cases*, 10. EMP. RESP. & RTS. J. 291 (1997) (finding that the results of arbitration show no statistically significant dependence on the gender of the arbitrator).

152. Debra J. Mesch, *Arbitration and Gender: An Analysis of Cases Taken to Arbitration in the Public Sector*, 24 J. COLLECTIVE NEGOTIATIONS IN THE PUBLIC SECTOR 207 (1995) (showing data that indicates women tend to lose more cases and receive fewer compromise outcomes than men in arbitrations).

B. Study Methodology

Participants were 284 arbitrators (236 male, 48 female) who replied to a request to participate in a study about arbitration decisions. The population from which this sample was drawn included all 634 members (as of fall 2004) of the National Academy of Arbitrators,¹⁵³ each of whom received a solicitation letter by mail. This represents a response rate of 44.8%.¹⁵⁴ Participants could either complete the paper-and-pencil instrument included with the solicitation letter or could choose to visit a website that linked to an on-line version of the same instrument. Eighty-nine percent of respondents completed the paper-and-pencil version.

Each participant was exposed to four case vignettes, each depicting a labor grievance, and was asked to render a judgment on the grievance ("I would sustain the grievance in its entirety," "I would sustain the grievance in part," or "I would not sustain the grievance"). Each of the four cases involved an employee filing a grievance after being fired or suspended; each case also kept the merits of the case constant but varied two important details. First, in each case, the grievant was described as either a man or woman (manipulation of "grievant sex"), and second, one other aspect of each grievant's background or history was manipulated. These four case vignettes are described below:

Case One described a police officer (male or female) grieving a suspension for insubordination after failing to report for duty eight hours early because of childcare problems. For half of the respondents, the police officer was depicted as a single parent; for the other half, as a married parent (manipulation of grievant marital status).

Case Two described an employee (male or female) grieving his/her firing after three occasions of refusing to work a second shift on overtime on short notice. For half of the respondents, the employee refused overtime because she or he was a single parent of two children and had been having difficulties finding childcare on short notice; for the other half, because she

153. National Academy of Arbitrators Home Page, www.naarb.org (last visited Oct. 9, 2008). The National Academy of Arbitrators (NAA) represents the elite membership of labor arbitrators in the United States and Canada. Applicants for NAA membership must have a minimum number of years of arbitration experience, must have decided a minimum number of cases in the five years preceding their applications, must demonstrate widespread acceptability as reflected in the diversity of unions and employers selecting them for cases, must receive outstanding references from NAA members, union advocates and management advocates, and must agree to abide by the NAA's Code of Professional Responsibility. It is common for unions and employers to mandate NAA membership when selecting arbitrators to hear their cases.

154. The population of arbitrators included 93 women and 541 men. Thus, the response rate was higher for female arbitrators (51.6%) compared to male arbitrators (43.6%).

or he was the primary caregiver for an elderly parent and had been having difficulties finding elder care on short notice (manipulation of reason for refusal to work overtime).

Case Three described a grievant (male or female) who was suspended for insubordination after refusing to extend a work shift. For half of the respondents, the grievant was depicted as wanting to attend his or her child's dance performance; for the other half, a prior commitment to help move an elderly disabled neighbor into a nursing home that would be difficult to reschedule was the reason for the refusal (manipulation of reason for refusal to work overtime).

Case Four described a grievant (male or female) who had been fired after using up FMLA leave and was still having difficulty with lateness and missed work. This grievant was explicitly compared to two employees who were coping with alcoholism for whom the employer had made special concessions (and not fired). For half of the respondents, the grievant had used up FMLA-guaranteed leave to care for a chronically sick child; for the other half, the care was for a chronically sick elderly parent (manipulation of type of family care).

Each arbitrator-participant was exposed to one version of each case. Four sequences of cases were used in the manner depicted below, and participants were randomly assigned to a sequence:

	Case One	Case Two	Case Three	Case Four
Sequence 1.	M- Married	F- Child	M- Neighbor	F- Child
Sequence 2.	F- Married	M- Parent	F- Child	M- Parent
Sequence 3.	M- Single	F- Parent	M- Child	F- Parent
Sequence 4.	F- Single	M- Child	F- Neighbor	M- Child

After rendering a decision on each case, participants were also asked to judge the blameworthiness of the grievant as well as rate their level of sympathy for the grievant's case. Because these judgments generally followed the same pattern as the decisions, they will not be discussed here. At the end of the questionnaire, participants also answered a number of demographic questions. The mean age of the sample was 65 (range from 39 – 93); the mean years of experience in arbitration was 28.5 years (range from 5 – 58); the mean political affiliation value was 3.10 (on a scale ranging from 1=liberal to 7=conservative). Roughly 64% of the sample practiced arbitration full-time; the most common industries represented were manufacturing (55%), public sector (44%), education (38%), and transit (33%).

For each case, decisions were converted into a scale ranging from 1-3, where 1 was a decision *not* to sustain a grievance, 2 was sustenance in part,

and 3 was sustenance of the grievance in its entirety. We then computed 2 (sex of grievant) \times 2 (other manipulated factor) Analyses of Variance (ANOVAs) on this decision variable, for each case. Analysis of Variance is a statistical procedure that tests for mean differences among conditions. Specifically, it indicates the effects of each manipulated variable as an independent "main effect" (e.g., a main effect of grievant sex would indicate that the mean decision differed for men and women, regardless of the other manipulated factor), as well as the "interaction" between the manipulated variables. For example, an interaction between grievant sex and the other factor—say, marital status—would indicate that the mean decision differed somewhere among the four "cells" of the sex by marital status matrix. Alternatively, the effect of gender might differ when parents are presented as single versus married, or the effect of marital status might differ for men versus women. Whenever a significant interaction was found in the analyses reported below, follow-up tests were used to pinpoint the source of the effect and to determine which cell (or cells) in the matrix was "driving" the interaction.

C. Results

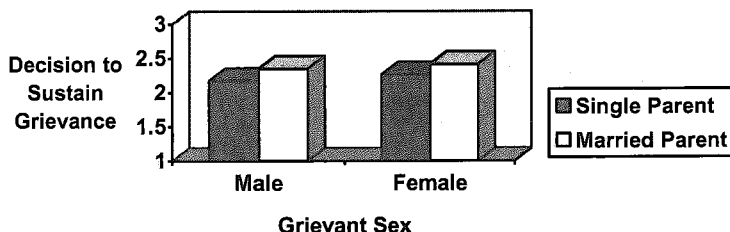
Case One, the married/single, male/female police officer, was based on the facts of *Town of Stratford*, discussed earlier.¹⁵⁵ Although the arbitrator in that case denied the grievance, only 19.4% of the arbitrators in our study agreed. Almost half (49.1%) responded that they would sustain the grievance completely and almost another third (31.5%) would have sustained the grievance in part.

Decisions on this case were submitted to a Grievant Sex by Marital Status Analysis of Variance. Only the main effect of Marital Status was significant, albeit at what is considered a "marginal level" ($F(1,269) = 3.05$, $p < .08$). Overall, arbitrators were more favorable toward (more likely to sustain the grievance of) a *married parent* grievant ($M = 2.38$, $SD = .75$) than a *single parent* grievant ($M = 2.21$, $SD = .79$). Though the interaction with parent sex was not significant, the relevant means are graphically presented in Figure 1, where the y-axis depicts the mean decision value ranging from 1 (do not sustain grievance) to 3 (sustain in its entirety) on the scale described above. As can be seen, the tendency for more negative decisions for single relative to married parents held both when the parent was male and female. To put this in more concrete terms, arbitrators sustained the grievance in its entirety 54% of the time when the grievant

155. See *supra* notes 104-07 and accompanying text (discussing *Town of Stratford* in detail).

was married, compared to 44% of the time when the grievant was a single parent.

Figure 1: Grievance decisions in Case 1, by grievant sex and marital status.

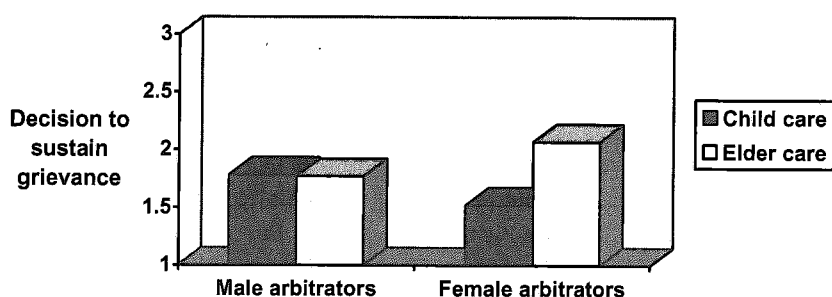


Case Two, the single mother/father of two young children or the primary caregiver of a chronically ill elderly parent, was based on *Rochester Psychiatric Center*.¹⁵⁶ Although the arbitrator in that case opined that no arbitrator would uphold discharge on those facts, 44.8% of our sample disagreed and indicated that they would deny the grievance. Another 32.1% responded that they would sustain the grievance in part and only 23.1% indicated that they would sustain the grievance completely.

We computed a Grievant Sex \times Reason for Refusal (child care/elder care) ANOVA on grievance decisions in this case. No effects were significant (all F s < 1). But when the sex of the *arbitrator* was also included in this analysis, a reliable two-way interaction emerged between the sex of the arbitrator and the reason for the refusal to work overtime ($F(1,269) = 4.82, p < .05$). As depicted in Figure 2, among male arbitrators, there was no evidence of differential decision-making based on grievant features. However, among female arbitrators, there was a reliable tendency to render less favorable judgments for grievants with childcare difficulties than for grievants with eldercare difficulties ($F(1,269) = 5.65, p < .02$). More specifically, female arbitrators decided entirely in favor of grievants with eldercare concerns 40.7% of the time, compared to 14.3% in favor of grievants with childcare concerns.

156. See *supra* notes 127-36 and accompanying text (discussing *Rochester Psychiatric Center* in detail).

Figure 2: Grievance decisions in Case 2, by arbitrator sex and child/elder care



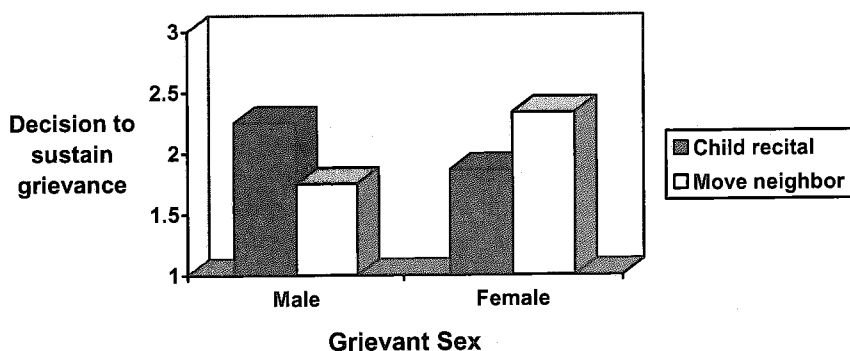
Case Three presented the male/female employee who refused overtime to attend a child's dance recital or to help an elderly neighbor move into a nursing home. The largest group, 41.1% of respondents, denied the grievance. Those that sustained the grievance were divided almost equally: 29.6% sustained completely and 29.3% sustained in part.

A Grievant Sex \times Reason for Refusal ANOVA indicated a main effect of reason for refusal ($F(1,269) = 4.46, p < .05$). Arbitrators were more sympathetic to a grievant who refused overtime to help a neighbor ($M = 2.01, SD = .81$) than to one who refused overtime to attend a child's dance recital ($M = 1.79, SD = .84$). This may not be surprising as the case for helping the neighbor move is perhaps more compelling. It was a one-time event and could not be rescheduled easily; in contrast, one might reasonably assume that there would be future dance recitals to attend.

An additional analysis that also included the sex of the arbitrator revealed a reliable three-way interaction ($F(1,272) = 4.04, p < .05$). Among male arbitrators, the tendency to favor grievants helping neighbors relative to those attending a dance recital remained significant ($F(1,272) = 5.65, p < .05$) but the sex of the grievant had no effect on judgments. Male arbitrators ruled entirely in the grievant's favor 34.3% of the time when the refusal reason was moving a neighbor, compared to 24.8% of the time when the reason was attending a dance recital. Among female arbitrators, however, the interaction between grievant sex and reason for refusal was significant ($F(1,272) = 3.98, p < .05$). This interaction is depicted in Figure 3, where it is clear that male grievants were *avored* when they refused overtime to attend a dance recital compared to when they helped a neighbor, but *female* grievants were favored when they moved a neighbor relative to when they attended a dance recital. Simple effects analyses indicated that these individual trends were not statistically reliable

(presumably because of the small sample of female arbitrators). Nonetheless, female arbitrators sustained the grievance in its entirety 50% of the time when the male grievant attended a dance recital (but only 16.7% of the time when he helped a neighbor move), and 44.4% of the time when the female grievant moved a neighbor (but only 28.5% of the time when she attended a dance recital). Again, among male arbitrators, those who refused overtime to help an elderly neighbor were favored over dance recital attendees, regardless of grievant sex.

Figure 3: Grievance decisions in Case 3, by grievant sex and reason for overtime refusal, female arbitrators only

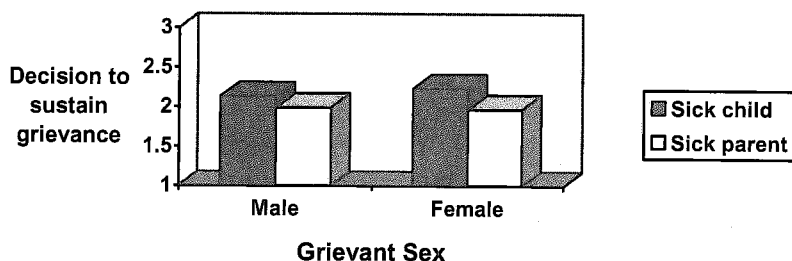


Case Four, the male/female employee with the chronically ill child/parent, injected an element not present in the other cases. The grievant was compared to other employees who (1) had similar attendance difficulties; (2) attributed those difficulties to alcoholism; and (3) were not fired when they sought help for their addictions. In this case, 30.4% of responding arbitrators indicated that they would sustain the grievance completely, 45.6% would sustain the grievance in part and 23.9% would deny the grievance.

We analyzed decisions on the target's grievance using a Grievant Sex X Type of Care (elder, child) ANOVA. A main effect of type of care emerged ($F(1,269) = 4.86, p < .05$). Arbitrators were more likely to find in favor of the grievant when s/he was caring for a chronically sick child ($M = 2.18, SD = .73$) than when he or she was caring for a chronically sick parent ($M = 1.98, SD = .73$). Figure 4 depicts the means separately for female and male grievants, but it is clear that the sex of the grievant made no difference in these decisions. Overall, arbitrators found in favor of the

childcare provider 37% of the time but in favor of the eldercare provider only 25.5% of the time.

Figure 4: Grievance decisions in Case 4, by grievant sex and type of care being provided



Interestingly, there were no significant differences between eldercare and childcare providers in the tendency to sustain grievances *in part*. Of arbitrators presented with a grievant who had a sick child, 44.1% sustained in part. Compare this to arbitrators presented with a grievant with a sick parent, which were sustained in part 46.9% of the time. It is very likely that arbitrators sustaining the grievance in part viewed it as a case of disparate treatment and intended to reduce the discipline to a measure comparable to that given the two employees whose absenteeism was due to alcoholism. Thus, the impact of childcare versus eldercare responsibilities seemed to matter among arbitrators who viewed the case independently of the alcoholic employees and either sustained the grievance entirely or denied it.

An additional analysis that included sex of the *arbitrator* revealed a tendency for female arbitrators to rule in favor of the grievant more often than male arbitrators (regardless of grievant attributes $F(1,268) = 4.93, p < .05, M_s = 2.27$ and 2.03 , respectively). That is, across all versions of this case, female arbitrators sustained the grievance in its entirety 41.7% of the time, while male arbitrators did so 28.5% of the time.

In addition to gender, we also considered whether other demographic features of arbitrators played a role in their decision-making. Eighty-five percent of the arbitrators in this sample were parents. Perhaps because of this skew, we found no evidence that parental status mattered for decision making in any of these cases (all relevant $ps > .27$).

On average, the arbitrators had 28.5 years of experience ($SD = 9.23$, range = 5 - 58 years). Female arbitrators ($M = 23.6$ years, $SD = 7.38$) not only had significantly less experience than male arbitrators ($M = 29.4$

years, $SD = 9.26$, $t(255) = 3.74$, $p < .01$), but were younger as well ($M = 59.8$ versus 66.2 , $p < .01$).

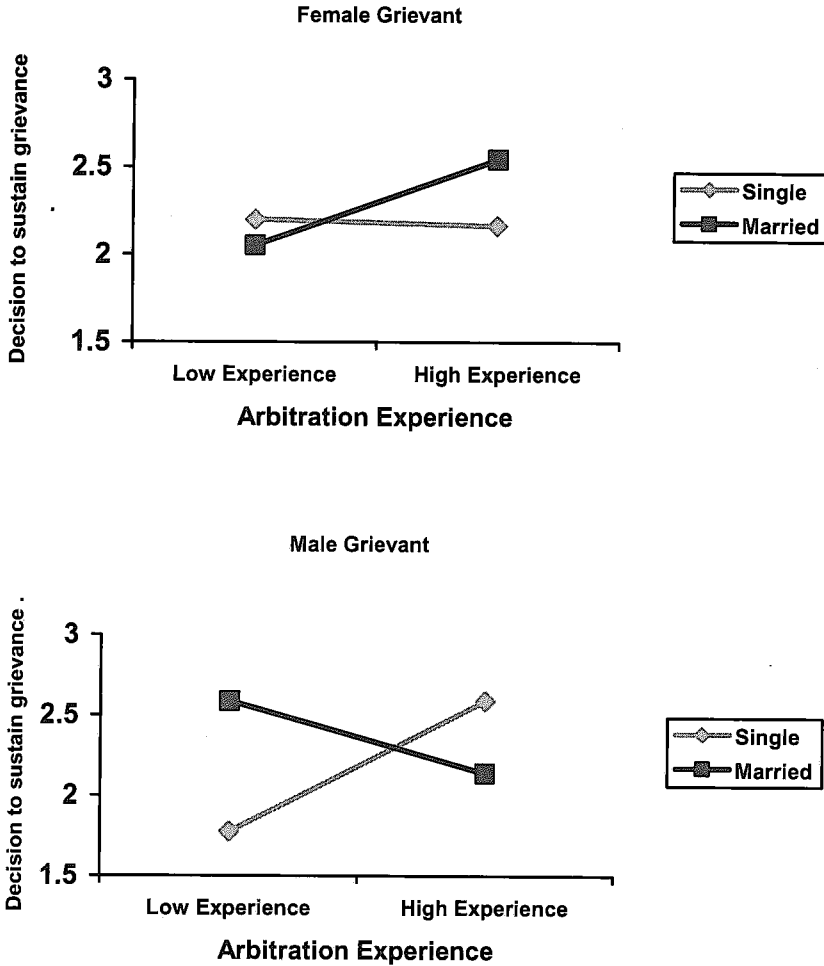
For each of the four cases, we entered the two manipulated case variables (e.g., sex and marital status in Case One), years of experience in arbitration (centered), and all possible interactions (with arbitrator sex as a covariate) into a multiple regression equation. In two cases (Cases 1 and 3), experience affected arbitrator decision making.¹⁵⁷

Specifically, in Case One, the three-way interaction between sex of grievant, marital status of grievant, and arbitrator experience was significant ($B = .05$, $SE = .02$, $t(245) = 2.02$, $p < .05$).¹⁵⁸ We decomposed this interaction by conducting Grievant Marital Status \times Experience regressions within each level of grievant sex, and found no effects in the case of female grievants, $ps > .25$ (see top panel of Figure 5), but a reliable two-way interaction in the case of male grievants, $B = .03$, $SE = .02$, $t(117) = 1.99$, $p < .05$ (see bottom panel). Simple slopes analysis indicated that this interaction was driven by the effect of marital status among arbitrators with low experience: married male grievants were particularly likely to be favored over single male grievants when arbitrators had little experience ($B = -.52$, $SE = .25$, $t(244) = 2.05$, $p < .05$). No other simple slope effects were significant ($ps > .14$) though there was a trend for married male grievants also to be favored over married female grievants among those with low arbitration experience ($p = .12$).

157. We also found some evidence that political ideology (liberalism or conservatism) moderated judgments, with liberals tending to favor female over male grievants and conservatives tending to favor male over female grievants, particularly when childcare issues were involved. For a full report of these findings, see Monica Biernat & Martin H. Malin, *Political Ideology and Labor Arbitrators' Decision-Making in Work-Family Conflict Cases*, 34 PERSONALITY & SOCIAL PSYCHOLOGY BULLETIN 880 (2008).

158. This effect remained significant when age was controlled for in the analysis. When age was substituted for experience in the regression, the comparable Age \times Grievant Sex \times Marital Status interaction was not significant, $p > .90$. This suggests that the effect was driven by arbitration experience and not by age.

Figure 5. Arbitration experience as a predictor of grievance decisions, by grievant sex and marital status, Case One¹⁵⁹



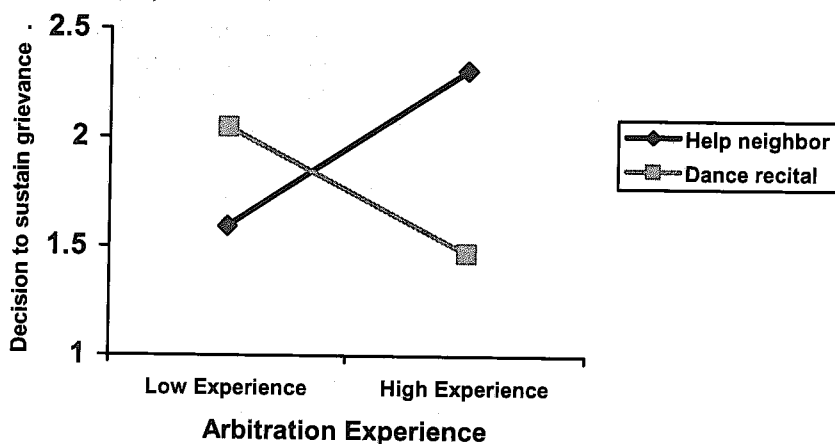
In Case Three, grievance decisions were affected by Arbitration Experience as a main effect ($B = .02$, $SE = .01$, $t(244) = 2.26$, $p < .03$) and by the Experience \times Reason interaction ($B = -.04$, $SE = .02$, $t(244) = 2.83$, $p < .01$).¹⁶⁰ As can be seen in Figure 6, arbitration experience predicted

159. Values are plotted in Figures using the value of the continuous variable, experience, set at one standard deviation above and below the mean.

160. This effect remained significant when age was controlled in the regression. But when age replaced experience in a comparable regression equation, the Age \times Reason interaction was also significant, $p < .01$. Thus, this effect is not uniquely attributable to

increased likelihood of sustaining a grievance for workers who refused overtime to help move an elderly neighbor (simple slope $B = .02$, $SE = .01$, $t(244) = 2.28$, $p < .02$) but insignificantly less likelihood of sustaining a grievance for workers who refused overtime to attend a child's dance recital ($p > .40$). This interaction was also driven by the significant effect of reason for refusal to work overtime among those with greater arbitration experience ($B = -.84$, $SE = .27$, $t(244) = 3.10$, $p < .01$), an effect that was marginally significant (and reversed) among those with less arbitration experience ($B = .45$, $SE = .26$, $t(244) = 1.72$, $p < .09$).

Figure 6. Arbitration experience as a predictor of decision-making, by reason for refusal to work overtime, Case Three



experience but rather could equally well be termed an age effect. Indeed, the fact that those who helped the elderly were judged favorably by elder arbitrators may make self-interest a viable explanation for this effect.

IV. ANALYSIS

As a primary finding, this study determined that straightforward gender bias is largely absent from arbitration decisions. The only case where the grievant's gender made a difference in the likely outcome of the grievance was Case Three, and then only for female arbitrators. However, because of the small sample size of female arbitrators, the result was not statistically significant.

On the other hand, our study revealed potential implicit bias against single parents. In Case One, if arbitrators had differentiated among grievants based on marital status, we would have intuitively expected them to favor single parents, on the assumption that married parents might have called on their spouses for assistance in order to work the emergency call-in. Yet arbitrators' reactions were completely opposite to this intuitive hunch, treating the single parents significantly more negatively than the married parents. This was particularly so when arbitrators with relatively less experience in labor arbitration judged male grievants. Police officers who are single fathers may be unusual or contrary to the occupational "prototype." This bias may therefore reflect animosity toward the atypical worker, a bias that was overcome among those with more arbitration experience.

Arbitral experience also played a significant role in Case Three, where increased experience enhanced the tendency to favor the neighbor-helping grievant. If one argues that it is *unreasonable* to be biased against single parents but *reasonable* to favor an employee who makes a one-time, time-constrained commitment to help a needy neighbor, the results can be construed as indicating that arbitration experience increased *reasonable* decision-making. It is interesting to note, however, that when the grievant was male, female arbitrators favored the father choosing to attend his daughter's dance recital over the neighbor-helper (see Figure 3). This reversal may reflect female arbitrators' greater receptivity to (and appreciation of) men acting outside of traditional gender roles.¹⁶¹ Interestingly, past research that has specifically examined how female arbitrators respond to female versus male grievants has typically found no gender differences.¹⁶² But our data suggest that female arbitrators may

161. Mary E. Kite, *Changing Times, Changing Gender Roles: Who Do We Want Women and Men To Be?*, HANDBOOK OF THE PSYCHOLOGY OF WOMEN AND GENDER 215-27 (Rhoda K. Unger ed. 2004).

162 See Brian Bemmels, *Gender Effects in Discharge Arbitration*, 42 INDUS. & LAB. REL. REV. 63 (1988); William J. Bigoness, & Philip B. Dubose, *Effects of Gender on Arbitrators' Decisions*, 28 ACAD. MGMT. J., 485 (1985); Clyde Scott & Elizabeth Shadoan, *The Impact of Gender on Arbitration Decisions*, 10 J. LAB. RESEARCH 429 (1989).

162 See Brian Bemmels, *Gender Effects in Discharge Arbitration*, 42 INDUS. & LAB.

demonstrate a more nuanced form of gender bias in their favoring of nontraditional men.

Our findings in Case Four reflect that among arbitrators who did not analyze the case as one of disparate treatment vis-à-vis the two alcoholic grievants, there was significant bias favoring grievants with sick children over grievants with sick parents. Unlike Case One, arbitrator experience did not mitigate the resulting bias. Yet, unlike Case Three, one cannot say objectively that the case of the grievant caring for the sick child was more compelling than the case of the grievant caring for the sick parent. These data may indicate that providing eldercare is unlikely to evoke much sympathy when given as an explanation for work-family conflict. However, female arbitrators, overall, were more sympathetic to the Case Four grievant, regardless of the kind of care (child or elder) that the grievant was providing. This effect may be based in the reality of women's greater involvement in all care giving roles relative to men's involvement.

What may explain the overall absence of bias based on grievant gender but the presence of bias based on grievant marital status? Further, what may explain the difference in bias depending on whether the caregiver is caring for a child or a parent? It is likely that arbitrators and professional adjudicators such as judges and administrative agency personnel have a heightened awareness of the potential for gender and/or racial and ethnic bias. Awareness of the potential for bias plays a major role in combating it. On the other hand, there is probably minimal, if any, awareness among arbitrators of the potential for bias either against single parents or in favor of childcare givers over eldercare givers.¹⁶³

Our study shows that awareness and experience may mitigate cognitive biases affecting adjudicative decision-making. But how can cognitive biases be lessened among inexperienced adjudicators such as jurors? Professor Jody Armour has urged that attorneys be allowed to comment directly on parties' and witnesses' races to counteract potential racial biases implicit in jurors.¹⁶⁴ Additionally, a more systematic method

REL. REV. 63 (1988); William J. Bigoness, & Philip B. Dubose, *Effects of Gender on Arbitrators' Decisions*, 28 ACAD. MGMT. J., 485 (1985); Clyde Scott & Elizabeth Shadoan, *The Impact of Gender on Arbitration Decisions*, 10 J. LAB. RESEARCH 429 (1989).

163. Studies of judges have shown how the use of cognitive shortcuts can lead to erroneous decision-making. See Chris Guthrie et al., *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 13-29 (2007) (hypothesizing that judges may make decisions using their intuitive system, which may lead to erroneous or unjust results); Chris Guthrie et al., *Inside the Judicial Mind*, 86 CORNELL L. REV. 777, 784-821 (2001) (using an empirical study to show that judges may use heuristics to make decisions, which may be erroneous).

164. Jody Armour, *Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit*, 83 CAL. L. REV. 733, 768-70 (1995).

of heightening juror awareness of the potential for cognitive biases may prove successful. For example, the standard orientation given to jurors could include a discussion of cognitive biases and implicit stereotyping.

Finally, a closing caveat to our study should be mentioned. Our study presented arbitrators with much more limited case information than they would normally receive in actual grievance hearings and the consequences of their decisions were only hypothetical. This artificiality may limit our ability to generalize our findings. Nevertheless, the experimental method used in our study has many advantages over field studies, most notably the ability to carefully control case features and isolate their effects. The arbitrators in our study seemed to take the cases seriously as well, often offering lengthy explanations for their decisions.

V. CONCLUSION

We began our study with a consideration of stereotyping and the tendency for individuals to demonstrate bias without awareness. Concerns about the effects of gender bias in the context of the changing demographics of the workplace and the difficulties of balancing work and family life prompted our study of labor arbitrators. These difficulties can give rise to problems in the workplace, such as poor attendance, tardiness, lack of availability, and lack of flexibility, that may result in suspension or discharge; this may lead to grievances that eventually find their way to a group of important decision-makers, labor arbitrators. Our study question centered on whether features of the grievants and the labor arbitrators themselves mattered for the outcomes of these cases.

Our findings point to the complexity of the decision-making process and the fact that biases reveal themselves in subtle rather than straightforward ways. By examining decision-making in four cases, we tested whether one particular type of arbitrator tended to have more or less bias than another, simply based on their arbitrator characteristics. We did not find such a result. Instead, arbitrator characteristics *sometimes* predicted decision-making, but were dependent on other features of the case such as the sex of the grievant and/or the nature of the workplace problem, and attributes of the arbitrator, such as his or her sex and/or previous arbitration experience.

These findings resonate with the broader social psychological literature that emphasizes the situational sensitivity of discrimination and bias. Situational norms,¹⁶⁵ the nature of the judgment of decision,¹⁶⁶ and the

165. Samuel L. Gaertner & John F. Dovidio, *The Aversive Form of Racism*, in PREJUDICE, DISCRIMINATION, AND RACISM 61, 66-73 (John F. Dovidio & Samuel L. Gaertner eds., 1986).

quality and quantity of additional information about a target¹⁶⁷ have all been found to moderate the extent to which stereotyping based on social category membership occurs. The present results point to the importance of using more complex research designs to study adjudicator decision-making and, more generally, of taking a more nuanced approach to understanding when and how attributes of the decision-maker may produce biased decisions.

166. Monica Biernat, *Toward a Broader View of Social Stereotyping*, 58 AM. PSYCHOLOGIST 1019, 1020-24(1993).

167. Ziva Kunda & Paul Thagard, *Forming Impressions from Stereotypes, Traits, and Behaviors: A Parallel-Constraint- Satisfaction Theory*, 103 PSYCHOL. REV. 284, 289-91 (1996).

APPENDIX

Case vignettes (with italicized font indicating variations across conditions).

Case One:

Grievant was a *male/female* police officer for a mid-sized municipality who was called in early on emergency overtime. Grievant was called at 11:00 a.m. and ordered to report at noon. Grievant's usual start time was 8 p.m. Grievant refused the order because *she/he* did not have childcare available (grievant was a *married parent of a two-year-old; his wife/her husband was unavailable to care for the child/a single parent of a two-year old*). Grievant made several phone calls to neighbors, friends, and *his/her* regular childcare provider trying to find childcare but was unable to do so. Grievant called the supervisor and explained the situation and the supervisor ordered *him/her* to report at noon. Grievant continued to look for childcare and finally reached *his/her* regular childcare provider who said she could arrive at Grievant's home by 5:45 p.m. Grievant reported at 6 p.m. *She/He* was suspended for insubordination.

Case Two:

Grievant was the primary caregiver for *his/her* chronically ill elderly parent/*was a single mother/father of two children, ages three and five*, who worked the 3:00 - 11:20 p.m. shift at a hospital. Mandatory overtime rotated among all employees. Grievant knew when *his/her* name reached the top of the rotation list but did not know when *she/he* would be asked for overtime. There was no discernable pattern to when the employer required overtime. Determination of the need for overtime, usually a second eight hour shift, was made late in the shift and Grievant was unable to obtain substitute care for *his/her parent/child* on such short notice. Grievant explained the situation to *his/her* supervisor who replied, "You know the system. You'll just have to find a way to cover it." Grievant refused to work the overtime and was reprimanded. Grievant attempted to find individuals who could be available to watch *his/her parent/his/her children* overnight on very short notice but was unsuccessful. *His/Her* regular caregiver/sitter told *him/her* she could not stay beyond 1:00 a.m. unless she had two weeks' notice. Grievant advised *his/her* supervisor who repeated that Grievant would have to find a way to fulfill *his/her* job responsibilities. Grievant refused the mandatory overtime a second time and was

suspended. When Grievant refused a third time, the employer fired him/her.

Case Three:

Contract requires Employer to equalize overtime, both voluntary and mandatory. Employer must offer overtime on a voluntary basis to employees beginning with those who worked the least amount of overtime; if no one volunteers, Employer may force overtime on employees with the least amount of overtime and the least amount of seniority. Grievant had the least amount of overtime and the least amount of seniority and *she/he* was ordered to extend *his/her* shift by four hours. *She/He* refused because *{she/he had made a commitment to help his/her disabled neighbor move into a nursing home that evening. For the past four years, Grievant had cared for his/her neighbor who had no family members living nearby. Finally, Grievant persuaded the neighbor's two children to move their father to a nursing home but the children agreed to do so only if Grievant would oversee the move. Because of the nursing home's requirements, the move had to be arranged three weeks in advance and if it did not take place on the scheduled day, it could not be rescheduled for another month.}/* *{his/her 10-year old daughter was performing in a dance recital that evening at her school. This performance was very important to the child and Grievant had promised to attend.}* Grievant explained the situation to his/her supervisor and offered to work the next time overtime was required. The supervisor replied, "The contract requires you to work overtime now." Grievant refused. Employer forced the next person on the overtime list and suspended Grievant for insubordination.

Case Four:

The employer's attendance control plan assessed occurrence points for tardiness, early departure, unexcused absence and failure to call in when absent or late. After accruing four points, an employee received a verbal warning. After six points, the employee received a written warning. After eight points, the employee received a one-day suspension and a final warning. After ten points, the employee was subject to discharge. When an employee reached ten points, a meeting was convened between the employee and a union representative to discuss whether the employee would be discharged. In most cases, the employer discharged the employee. However, in two cases, the employees admitted at the meeting that their absences resulted from alcohol abuse and that they were at their wits' end and needed help. In each case, the employer referred the

employee to the Employee Assistance Program (EAP) and agreed that if the employee completed the EAP and complied with all the after-care requirements of the EAP counselor, the employee would be reinstated without back pay on a last chance basis.

The *female/male* Grievant, whose job tenure was comparable to that of the two employees discussed above, accumulated ten points, largely for tardiness. Grievant *had a child/cared for a parent* who developed a severe case of Hepatitis. The *child's/parent's* condition deteriorated necessitating hospitalization and eventually a donor liver was located and the *child/parent* received a liver transplant. The *child/parent* was hospitalized for two months and Grievant was granted and used FMLA leave for the entire period. Grievant continued to use FMLA leave to assist *her/his child/parent*. Upon exhausting *her/his* twelve weeks of FMLA leave, Grievant returned to work.

Grievant began accumulating attendance points within a few weeks of returning to work. When *she/he* accumulated ten points, the employer called a meeting with Grievant and a union representative. At the meeting, Grievant indicated that *his/her* record of tardiness was due to *his/her* having to care for *his/her* chronically ill *child/parent*. Grievant related that *his/her child/parent* would suffer relapse attacks with no prior warning and Grievant would rush the *child/parent* to the emergency room and be up most of the night. Grievant's shift began at 6:00 a.m. and, on a sufficient number of occasions, Grievant was unable to get to work on time or to come to work at all after being awake most of the night. Grievant always called in when *she/he* was going to be absent or tardy. Grievant said that *she/he* did not know what to do and asked for help with the situation. The union asked the employer to investigate what resources might be available to assist Grievant but the employer decided to terminate *his/her* employment. The employer rejected the union's suggestion that Grievant's situation was comparable to that of the employees with alcohol problems who were not discharged.