RETHINKING THE WORK-FAMILY CONFLICT IN THE LABOR ARBITRATION CONTEXT

JULIE GLASS*

INTRODUCTION

• M—,[1] a Licensed Practical Nurse, was hired by Monroe County Hospital in October 1976. M— was a single parent and the sole supporter of five children.[2] Over the next two years, she amassed what her employer considered an unsatisfactory number of absences, and received several warning notices. On September 21, 1978, M— called the nursing office and explained that because she was ill, she would be unable to report for her assigned shift. The following day, M— requested an unpaid leave of absence to attend to

* B.A., 1987, The Johns Hopkins University; J.D., 1993, New York University School of Law (expected). This Note has benefited from the interest and encouragement of many people. I would like to thank Gabrielle Semel and Alan Compagnon, Counsel, District 1 - Communications Workers of America, for their insights and enthusiasm when I initiated this project. My gratitude also goes to the members of this journal for their help throughout the writing and editing process. In particular, I would like to thank Julie Novkov for generously sharing her time with me, and for commenting on numerous drafts of this Note with both rigor and warmth. I would also like to thank Josh Goldfein, Sherri Levine, Jody Rosen Knower, Andrew Shear, and Diane Thompson.

1. In published arbitration cases, the worker grieving a discipline or discharge is typically identified as "the grievant," or by her first initial. In most of the following cases, the initials used are those which appeared in the actual text; however, where the arbitrator did not provide initials, I have done so myself. These are indicated by asterisks the first time they are used and do not correspond to the name of the grievant.

2. County of Monroe v. Civil Serv. Employees Ass'n, Local 828, 72 Lab. Arb. (BNA) 541, 543 (1979) (Markowitz, Arb.).

serious problems with her children. The request for leave was denied.[3]

Two days before M— requested leave, her eldest daughter had been suspended from school because she exhibited threatening, possibly violent, behavior. School authorities had advised M— to take a leave of absence so that she could devote time and energy to her daughter's therapy.[4] Although her unpaid leave had been denied, M— did not report to work on September 23, 1978. Following a hearing at the Hospital, M— was fired.[5]

• T—, a Federal Aviation Administration Security Police Officer at Washington National Airport, was employed to patrol the boundaries of the airport. In addition to his duties as a Security Officer, T— was a part-time student at a nearby community college. The Veterans Administration paid his tuition and provided him with a monthly stipend.[6] For nine years, T— worked the midnight shift. This shift enabled T to accommodate not only his work and school, but also the child-care responsibilities he shared with his wife and a baby-sitter.

Following allegations that on one occasion T— had fallen asleep during his shift, he was reassigned from the midnight shift to a daylight shift commencing at 7:30 a.m. The change in his work schedule made it difficult for him to schedule classes that satisfied his major. T—'s V.A. benefits were contingent upon his continued enrollment in class. In addition to jeopardizing his V.A. benefits, the reassignment to the daylight shift prevented T— from meeting his share of the child-care responsibilities.[7]

• H— had been a machine operator at Pinto Valley Copper Corporation for thirteen years. On July 11, 1983, he requested two days excused absence so that he could travel to California, where his daughter was recovering from serious surgery. He informed management about the reason for the request, but because his attendance record was deemed "pretty bad," management denied the request. H— was told that he could only take the days if he would swap scheduled days of work with another employee or credit the days against accrued vacation time. H— declined management's proposals for how the days should be taken but missed work and went to California anyway.[8] For doing so, H— was suspended for insubordination under the company's AWOL policy.[9]

• B— worked in the Chill Pack Department of a poultry processing plant.[10] On July 21, 1986, B— failed to report to work because her son was ill

3. *Id.* at 542.
4. *Id.* at 543.
5. *Id.* at 542.
6. Federal Aviation Admin., Wash. Nat'l Airport v. Int'l Union of Police Ass'n, 80 Lab. Arb. (BNA) 1018, 1019 (1983) (Everitt, Arb.).
7. *Id.* at 1020.
8. Pinto Valley Copper Corp. v. United Steelworkers of America, Local 586, 83 Lab. Arb. (BNA) 1300 (1984) (Lennard, Arb.).
9. *Id.* at 1301.
10. Gold Kist Inc. v. United Food & Commercial Workers, Dist. Union 442, 89 Lab. Arb. (BNA) 66, 67 (1987) (Byars, Arb.).

and she needed to be home to care for him. The absence was documented as unexcused. Management reviewed B—'s absentee and tardiness record and noted that in addition to several other unexcused absences in the previous months, she had already received a final warning for tardiness. In light of her record, B— was terminated.[11]

These stories were all told during actual labor arbitration proceedings. I retell them now because they demonstrate some of the ways in which the contemporary worker is forced to balance the competing, often contradictory, demands of workplace and family. This tension results from the assumption that the workplace can be insulated from the demands of family life, an assumption which has persisted since the rise of industrial capitalism. At that time the family ceased to be a unit of production,[12] and was recast as a privatized institution, essentially a sanctuary from the world of paid employment.[13]

The exclusion of women, particularly married women, from the labor force exacerbated the bifurcation of work and family.[14] Men became the primary economic agents within family units while women retained responsibility for child-rearing and other domestic tasks. Those women who did participate in the labor force were treated as marginal employees and were pushed into a few low-paying fields.[15]

The workplace has thus been structured upon the gendered division of work and family, and the normative values established in the workplace reflect the male experience. These workplace values fail to accommodate the competing obligations of family life. The worker is not viewed as a member of a

11. *Id.*

12. For an overview of the transition to industrial capitalism, see Heidi I. Hartmann, *Capitalism, Patriarchy, and Job Segregation by Sex, in* CAPITALIST PATRIARCHY AND THE CASE FOR SOCIALIST FEMINISM 206 (Zillah R. Eisenstein ed., 1979). *See also* THOMAS DUBLIN, WOMEN AT WORK (1979); LABOR AND LOVE: WOMEN'S EXPERIENCE OF HOME AND FAMILY 1850-1940 (Jane Lewis ed., 1986).

13. Nancy E. Dowd, *Work and Family: Restructuring the Workplace*, 32 ARIZ. L. REV. 431, 434 (1990).

14. Note that the division of work and family, and the norms of the workplace which evolved as a result, was shaped by a dominant white culture which was distinct from the African American experience. Families and gender roles evolved differently in many African American communities. *See* Carol Stack, *Sex Roles and Survival Strategies in an Urban Black Community, in* BLACK FAMILIES 96 (Harriette P. McAdoo ed., 1981). Stack points out that in contrast to white dominant culture, African American families have included values emphasizing participation of women as well as men in the labor force. Dowd, *supra* note 13, at 465. Yet, as Nancy Dowd points out, the long history of labor force participation by African American women in no small part relates to the marginalization of African American men in the labor force. Dowd, *supra* note 13, at 465. Moreover, while freed from the narrow sex-roles of the white family, African American women have been marginalized by the normative gender values in the workplace. *See* JACQUELINE JONES, LABOR OF LOVE, LABOR OF SORROW: BLACK WOMEN, WORK, AND THE FAMILY FROM SLAVERY TO THE PRESENT (1985).

15. Racial disadvantages compounded gender disadvantages for African American women. While the labor force participation of white women and African American women has converged over the last twenty-five years, many African American women in the late nineteenth and early twentieth centuries were barred from factory work and from white female occupations such as secretarial work. They were largely confined to domestic employment and manual labor. *See* JONES, *supra* note 14.

family unit, but as an individual actor, and is held accountable for her individual choices and burdens.[16] Workplace culture demands that workers organize their lives so as to prevent the obligations of family life from interfering with work demands. When family concerns do affect job performance, they are treated as intrusions that upset the efficiency of the workplace and for which the worker may be penalized.[17]

The labor force has changed dramatically since this ideology was formed. As a result, the assumptions of the past are inappropriate to the workplace of today. Contemporary workers, in contrast to the paradigmatic male breadwinner of an earlier era, are no longer insulated from the competing demands of family life.

While the majority of households in the United States are comprised of married couples,[18] "traditional" households with a male income earner and a female at home constitute fewer than twenty percent of all American families.[19] Of the more than fifty million married-couple families in the United States,[20] both spouses are wage earners in over half.[21]

Although two-parent families continue to account for the greatest number of American families with children, this kind of family no longer predominates.[22] Single parent households have increased dramatically.[23] In addition, there has been an increase in the number of families with children that exist outside the traditional marriage framework. These include gay and lesbian couples, for whom marriage is not legally recognized, and heterosexual

16. Dowd, *supra* note 13, at 431.

17. *Id.* at 433. Dowd points out that since the onset of industrialization, the structure and role of the family has historically shifted to adapt to economic changes. In particular, women moved in and out of the workplace during certain periods to accommodate particular needs of the workplace. However, "women were treated as marginal workers, periodically encouraged to enter the workforce . . . but otherwise expressly or impliedly limited by their ascribed family role." *Id.* at 434. As a result the workplace did not have to restructure along lines that would accommodate changes in the family.

18. *Id.* at 439, n.44.

19. Elaine Zimmerman, *California Women's Economic Agenda Project, in* THE WOMEN'S ECONOMIC JUSTICE AGENDA: IDEAS FOR THE STATES 215 (Linda Tarr-Whelan & Lyme C. Isensee eds., 1987).

20. WOMEN'S BUREAU, U.S. DEP'T OF LABOR, CARING FOR ELDERLY FAMILY MEMBERS 1 (Facts on U.S. Working Women No. 86-4, 1986) [hereinafter CARING FOR ELDERLY FAMILY MEMBERS].

21. In March 1988, wives in 56% of all married-couple families were wage earners. In March 1972, the figure was 40%. WOMEN'S BUREAU, U.S. DEP'T OF LABOR, 20 FACTS ON WOMEN WORKERS 2 (Facts on U.S. Working Women No. 90-2, 1990) [hereinafter FACTS ON WOMEN WORKERS].

22. In 1970, married couples with children under the age of 18 constituted 40% of all families; by 1985, they accounted for only 29%. Dowd, *supra* note 13, at 441.

23. Between 1970 and 1985, the number of families maintained by single women grew by 90%, and now represents 17% of all American families. WOMEN'S BUREAU, U.S. DEP'T OF LABOR, WOMEN WHO MAINTAIN FAMILIES 1 (Facts on U.S. Working Women No. 86-2, 1986) [hereinafter WOMEN WHO MAINTAIN FAMILIES]. Another five percent of households were maintained by single men. David E. Anderson, *Nation's Household Size Reaches Record Low*, UPI, Dec. 7, 1989, *available in* LEXIS, Nexis Library, UPI File.

couples who choose not marry.[24]

An important trend over the last two decades has been the increase in the number of women in the labor force.[25] In 1989, sixty-nine percent of all women between the ages of eighteen and sixty-four were in the labor force;[26] a majority of these women were working full-time.

These changes, in both the structure of the family and the composition of the workplace, are significant to everyone. The implications of this trend are important to everyone. While the impact may be greatest for wage-earning women, who have traditionally performed care-giving and other domestic-related tasks, conflicts between work and family involve all members of the family. Children[27] and elderly family members[28] are affected, as are many male wage-earners who support families alone, have an employed spouse or partner, or for various reasons must attend to family matters.

In many cases, a worker will be able to balance the competing demands of work and family; she will have organized her life so that this is generally possible. However, at times it may be undesirable, or simply impossible, for a worker to subordinate the responsibilities of her family to the demands of her employer. The family is, after all, a central social institution and its demands are both complex and substantial.[29] Forcing workers to place work demands over family demands devalues the family demands and encourages workers to

24. For further explanation of changing family structures, see Kris Franklin, *"A Family Like Any Other Family": Alternative Methods Of Defining Family In Law*, 18 N.Y.U. REV. L. & SOC. CHANGE 1027 (1992).

25. Women have accounted for 62% of the increase in the labor force since 1979. FACTS ON WOMEN WORKERS, *supra* note 21, at 1. The U.S. Department of Labor defines labor force participation as either working or looking for work. WOMEN WHO MAINTAIN FAMILIES, *supra* note 23, at 1.

26. *Id.* In terms of labor force participation, there is parity between white women, African American women, and Hispanic women. In 1989, 57.2% of white women, 58.7% of African American women, and 53.5% of Hispanic women over the age of fifteen were in the labor force. As of 1985, 61% of women who maintain families in the labor force compared with 54% of these women in 1975. FACTS ON WOMEN WORKERS, *supra* note 21, at 1.

Moreover, 65% of all women with children under the age of 18 are now in the labor force. Over half of these women (56%) have children under the age of six. FACTS ON WOMEN WORKERS, *supra* note 21, at 3.

27. In March 1988, approximately 33 million children under the age of 18 had mothers in the labor force. FACTS ON WOMEN WORKERS, *supra* note 21, at 3.

28. The United States Department of Health and Human Services has reported that functionally impaired, elderly family members are largely cared for by female family members, with adult daughters providing 29% of the care and wives providing 23% of the care. CARING FOR ELDERLY FAMILY MEMBERS, *supra* note 20, at 2. Longer life expectancies and delays in childbearing suggest that an increasing number of women between the ages of 45 and 49 will be caring for children under 18 as well as for elderly family members. *Id.* at 3.

29. As recently as 1982, maintenance of a "good home life" for the average family of four required 60 hours of work per week. Such work involves a myriad of domestic tasks, relationships with numerous commercial and public institutions, and other chores which insure that the needs of each member of the household are fully met. DOLORES HAYDEN, REDESIGNING THE AMERICAN DREAM: THE FUTURE OF HOUSING, WORK, AND FAMILY LIFE 64 (1984) (*citing* Heidi I. Hartmann, *The Family as the Locus of Gender, Class and Political Struggle: The Example of Housework*, 6 SIGNS: J. OF WOMEN IN CULTURE & SOC'Y 366 (1981)).

conform to outdated norms. In so doing, it generates a work-family conflict[30] which puts both jobs and families at risk.

As a practical matter, it may be to an employer's advantage to accommodate employees experiencing work-family conflicts. Employees who are experiencing such conflicts may be distracted, and therefore less productive, at work. Moreover, such employees may experience absenteeism and tardiness that ultimately cost the employer significant sums in lost revenue. If the employer provides employees with the encouragement and accommodation to resolve work-family conflicts effectively, the result may well be mutually beneficial. Employees can effectively resolve work-family conflicts and employers can look forward to greater efficiency in the workplace.

This Note explores the work-family conflict in one important context: grievance proceedings in the labor arbitration forum. I will argue that, while arbitrators have shown a willingness to consider the impact of work-family conflicts their conceptions of these conflicts, and their analyses in particular cases, continue to reflect the values of the gendered workplace. The assumptions employed in resolving such disputes must be revised if the work-family dilemma is to be equitably resolved through labor arbitration.

Part I of this Note is a basic overview of grievance procedures and the role of labor arbitration in disciplinary proceedings. It also explores the concept of "just cause," the standard of review generally applied in such cases.

Part II explores how arbitrators are in practice attempting to reconcile the competing demands of work and family. It will establish that, while arbitrators are in many ways sensitive to these competing demands, they have nonetheless retained traditional conceptions about the relationship between work and family. Arbitrators often analogize work-family conflicts to workplace misconduct, and assess cases involving work-family conflicts according to a set of factors traditionally used in discipline and discharge cases. These factors evolved in the male-dominated workplace of the past, and accordingly, they do not effectively accommodate the competing demands placed upon the contemporary worker. Ultimately this Note will argue that arbitrators need to develop a new approach for dealing with work-related conflicts: a policy which recognizes the present relationship between work and family and the ways in which working people experience both.

Finally, Part III addresses the need to confront the work-family conflict in collective bargaining. Contractual language which addresses the work-family conflict is the most desirable solution for reconciling the tensions between the two institutions. In addition, the approaches of arbitrators to resolving the work-family conflict must also be revised.

I have chosen to focus on the arbitral arena for several reasons. First, as the stories told earlier demonstrate, cases involving the uneasy relationship

30. Nancy E. Dowd uses this term to describe the tension between the two institutions. Because the term is brief and clear, I have likewise chosen to use it. Dowd, *supra* note 13, at 450.

between work and family are reaching arbitration. Collective bargaining agreements often include procedures through which workplace discipline may be challenged by an employee. Labor arbitration, the final step in the grievance process, is thus a major forum for challenging the discipline imposed as a result of family conflicts and reconciling the tension between work and family demands. Second, the grievance procedure may be the only vehicle through which an employee can afford to challenge a discipline or discharge arising out of some family concern. In some cases female workers might be able to sustain Title VII claims, but the time and money involved in these lawsuits may be prohibitive.[31] Insofar as the Family and Medical Leave Act is concerned, time and financial constraints, coupled with the bill's substantive limitations, would also restrict its applicability in resolving work-family conflicts.[32]

A third and final factor led me to focus on arbitration: arbitrators have demonstrated a commitment to addressing a variety of social issues that come to bear on the employment relationship.[33] This commitment can be attributed to the principles of fairness which arbitrators employ in their highly discretionary role in resolving grievance disputes.[34] Published opinions,[35] articles,[36] and conference papers[37] indicate that arbitrators have begun to consider,

31. For a discussion of other limitations of Title VII litigation, see Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183, 1233 (1989).

32. The Family and Medical Leave Act (PL 103-3) requires employers with more than 50 employees to provide up to 12 weeks of unpaid leave to employees experiencing family emergencies. While the bill represents an important step toward accommodating workers who cope with work-family conflicts, it will provide workers with no more protection than that already provided in most collective bargaining agreements. *See* BUREAU OF NATIONAL AFFAIRS, BASIC PATTERNS IN UNION CONTRACTS (1975).

33. In addition to the material mentioned *infra* addressing the work-family conflict, considerable work over the last decade has examined the ways in which arbitrators should view alcoholism, drug abuse, and mental illness in the workplace. For example, see Dorothy J. Cramer, *Arbitration and Mental Illness*, 35 ARB. J., Sept. 1980, at 10; Michael Marmo, *Arbitrators View Problem Employees: Discipline or Rehabilitation?*, 9 J. CONTEMP. L. 41 (1983); George Nicolau, *The Arbitrator's Remedial Powers, Arbitration 1990: New Perspectives on Old Issues*, 43 NAT'L ACAD. ARB. PROC. 73, 78-84 (1991); Janet Maleson Spencer, *The Developing Notion of Employer Responsibility For The Alcoholic, Drug-Addicted Or Mentally Ill Employee: An Examination Under Federal And State Employment Statutes And Arbitration Decisions*, 53 ST. JOHN'S L. REV. 659, 685-711 (1979).

34. According to the terms of most collective bargaining agreements, arbitrators must determine whether a penalty has been imposed for just cause. They are also accorded broad remedial powers to modify penalties which they deem to have been excessive or imposed without just cause. Arbitrators must make value judgments about the nature of an employee's alleged misconduct and the propriety of the penalty.

35. *See infra* Part II.

36. Marcia L. Greenbaum, *The 'Disciplinatrator,' The 'Arbichiatrist' and the 'Social Psychotrator': An Inquiry into How Arbitrators Deal with a Grievant's Personal Problems and the Extent to Which They Affect the Award*, 37 ARB. J., Dec. 1982, at 51.

37. *See* Daniel G. Collins, *Just Cause and the Troubled Employee*, 41 NAT'L ACAD. ARB. PROC. 21 (1989); George Nicolau, Arbitral Response to the Troubled Employee, Address at the 15th Annual Collective Bargaining Conference of the Federal Mediation and Conciliation Service and the Northwest Chapter Industrial Relations Research Association (Mar. 6, 1991).

among other issues, how the work-family conflict affects their decisions and awards. It is my hope to contribute to this ongoing dialogue.

I
A BRIEF OVERVIEW OF GRIEVANCE PROCEDURES AND THE ARBITRATION PROCESS FOR DISCIPLINE AND DISCHARGE CASES

Collective bargaining agreements cover approximately twenty percent of all workers in the United States.[38] Perhaps the most important aspect of a collective bargaining agreement is the grievance procedure.[39] The grievance procedure — which is included in almost every collective bargaining agreement — is a mechanism for resolving disputes between management and any worker who believes she has been wronged.[40]

The grievance procedure usually includes a series of procedural steps to be taken by the aggrieved worker within certain time periods. Typically, the worker begins by lodging a complaint with her union steward, who reviews the complaint and determines whether it has merit.[41] If the union steward finds there is merit to the claim, the worker and her union representative will meet with management to resolve or settle the grievance.[42] If no settlement is reached, the worker may appeal her case through the successive steps of the grievance procedure, petitioning higher-ranking union and management officials at each step.[43]

According to the terms of most collective bargaining agreements, if the dispute cannot be resolved through negotiation, the parties may opt for a voluntary arbitration proceeding.[44] Arbitration is the final step of the grievance procedure, and opinions and awards are generally final and binding.[45] Disci-

38. WOMEN'S BUREAU, U.S. DEP'T OF LABOR, WOMEN IN LABOR ORGANIZATIONS 1 (Facts on U.S. Working Women No. 89-2, 1989).

39. FRANK ELKOURI & EDNA ASPER ELKOURI, HOW ARBITRATION WORKS 153-55 (4th ed. 1985).

40. *Id.* at 155.

41. *Id.* at 156.

42. Generally, workers will retain the option of pressing a grievance on their own. However, it is considered an obligation of the union steward to distinguish between legitimate and frivolous grievances. *Id.*

43. *Id.* at 165.

44. Approximately 96% of all collective bargaining agreements have an arbitration provision. COX, BOK, GORMAN & FINKIN, LABOR LAW: CASES AND MATERIALS 745 (11th ed. 1991). For a description of the procedures to select arbitrators or boards of arbitrators, see FAIRWEATHER'S PRACTICE AND PROCEDURE IN LABOR ARBITRATION 62-78 (Schoonhoven ed., 3rd ed. 1991) [hereinafter FAIRWEATHER'S]; ELKOURI & ELKOURI, *supra* note 39, at 135-38.

45. *See* United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960) (holding that "[t]he federal policy of settling labor disputes by arbitration would be undermined if the courts had final say on the merits of the awards"). However, the Court went on to say that an arbitration award is binding only to the extent that it "draws its essence" from the collective bargaining agreement. *Id.* at 597. When the arbitrator exceeds the scope of her

plinary matters comprise the largest category of cases that go to arbitration.[46]

The arbitrator's job is to determine whether, under the terms of the collective bargaining agreement, the penalty imposed upon the employee is fair. In some instances, language of the contract will directly address this issue.[47] It would, however, be impossible to account for every type of infraction that might occur during the life of a labor contract, so the parties typically agree to the standard that a discipline or discharge shall be incurred only where imposed with "just cause."[48] In fact, this standard is so commonly accepted that, even where it is not enunciated in a labor contract, many arbitrators will apply it as the standard of review.[49]

In stating the "bedrock principles"[50] of "just cause," Daniel G. Collins has articulated one of the clearest assessments of the term. First, the alleged misconduct must be job-related in order to be a basis for discipline or discharge.[51] Second, the penalty imposed by an employer must be nondiscriminatory in nature. Third, the penalty must be corrective rather than punitive. In other words, the basis of the penalty must be the employer's right to efficiency in the workplace, and not simply her desire to punish an employee. A related assumption is that increasing the severity of penalties will make clear to an employee that in order to retain her job, she must correct her behavior.[52]

In sum, the intent of the just cause standard is to balance the interests of both employer and employee. It protects an employer's right to impose discipline in order to maintain the efficiency of her operation. At the same time, it protects an employee's interests by requiring that a penalty be equitable and reasonable.[53]

Nonetheless, the just cause standard remains poorly articulated.[54] It confers upon the labor arbitrator considerable discretion, and as a result, various

authority, a court may be required to reject the award. *See Vacation, Enforcement, or Correction, in* FAIRWEATHER'S, *supra* note 44, at 388-455.

46. *See* Roger I. Abrams & Dennis R. Nolan, *Toward a Theory of "Just Cause" in Employee Discipline Cases*, 1985 DUKE L.J. 594, 595 n.3. The authors state that the Federal Mediation and Conciliation Service estimates the percentage of arbitration cases concerning disciplinary matters to be 40%.

47. According to data gathered by the Bureau of National Affairs, 84% of all collective bargaining agreements contain specific grounds for discharge. Grounds most often established in contracts are: violation of leave provisions (55%); unauthorized absence (50%); participation in unauthorized strikes (41%); dishonesty or theft (26%); intoxication (23%); incompetence or failure to meet workplace standards (20%); violation of company rules (20%); insubordination (18%); misconduct (18%); failure to obey safety rules (13%); and tardiness (9%). BASIC PATTERNS IN UNION CONTRACTS, *supra* note 32, at 7.

48. Discharge for "cause" or "just cause" is found in 97% of all collective bargaining agreements indexed by the Bureau of National Affairs. *Id.*

49. ELKOURI & ELKOURI, *supra* note 39, at 652.

50. Collins, *supra* note 37, at 23.

51. As Collins notes, the question of whether misconduct is job related will turn to a significant degree on the nature of the job and the needs of the employer. Thus, "just cause" is a fairly broad and flexible concept. *Id.*

52. *Id.* at 23.

53. *Id.* at 26.

54. *See* Abrams & Nolan, *supra* note 46, at 595.

conceptions of just cause are employed. Arbitrators are often influenced by what they deem to be their proper role in balancing the interests of employers and employees.[55] Likewise, labor arbitrators will be influenced by value judgments about the aggrieved employee's conduct and the resulting penalty.

Arbitrators are aware that their own values inform their review of employee conduct and consequent discipline.[56] Yet although they have begun to consider how personal values influence their attitudes about various types of employee conduct, they have not similarly scrutinized their mode of analysis in these cases.

In reaching conclusions about the equity of disciplinary actions, arbitrators traditionally consider a number of factors including the employee's work record, her length of service, and her knowledge of the work rules. This Note contends that these factors are rooted in a more gendered and bifurcated vision of the workplace. Established in a context in which work-family conflicts were never anticipated, these factors are ill-suited for use in cases arising out of such conflicts. As the following section will show, their application in the work-family context reifies the gendered model of workplace norms and disadvantages employees trying to balance work and family responsibilities.

II
RETHINKING ARBITRAL APPROACHES WHERE THE WORK-FAMILY CONFLICT IS AT ISSUE

Arbitrators are not insensitive to the work-family conflict and the difficulties it imposes on workers.[57] As will be discussed later in this section, arbitrators frequently posit that, to some extent, employers must accommodate employees coping with work-family conflicts. However, as Collins has pointed out, it is equally clear that arbitrators do not treat work-family conflicts as a complete excuse for conduct that would normally justify discipline or discharge. While they often modify penalties, arbitrators also instruct employees to improve their records or face increasingly severe workplace penalties, in-

55. *See* ELKOURI & ELKOURI, *supra* note 39, at 664-67. The authors point out that some arbitrators believe it is not their job to replace the employer's judgment with their own unless the discipline is excessive, unreasonable, or abusive of managerial discretion. Other arbitrators argue that to effect just cause, it is the responsibility of the arbitrator to consider, among other factors, the customs and habits of industrious life and the standards of justice prevalent in the community. *See also* Dennis R. Nolan & Roger I. Abrams, *The Labor Arbitrator's Several Roles*, 44 MD. L. REV. 873 (1985).

56. In a recent speech, George Nicolau, a prominent labor arbitrator, candidly noted that these value judgments may be rooted in generational influences. As an example, he pointed out that arbitrators have been inclined to distinguish between alcoholism and drug use, particularly hard drugs, in evaluating discipline and discharge cases. Nicolau, *supra* note 37, at 9. However, Nicolau also alluded to the fact that these generational influences affect arbitrators' opinions in cases dealing with work-family conflicts. *Id.* at 15.

57. Indeed, in each of the cases discussed in the start of this Note, the arbitrator reinstated the employee. However, as will be discussed *infra*, these employees were not reinstated without penalty.

cluding termination.[58]

This arbitral response is linked to the fact that, fundamentally, arbitrators analogize conduct associated with work-family conflicts to workplace misconduct. While appreciating the fact that many workers balance home and family obligations with work, arbitrators continue to operate under the assumption that the workplace should be insulated from outside demands. Therefore, family issues that compromise an employee's performance are understood as misconduct or as a disruption deserving of discipline. Such a response is based on the traditional orientation of the workplace in which male workers with no child-care responsibilities or other non-financial family obligations could provide a single-minded commitment to their employers;[59] however, this profile no longer predominates in the United States workforce. The contemporary worker, male or female, is likely to be balancing work with a diverse set of family obligations.[60]

Particularly illustrative of the way in which arbitrators analogize work-family conflicts to other misconduct is their reliance on traditional factors when balancing the interests of employers and employees. These factors, as mentioned in Part I, include examination of an aggrieved employee's performance record, length of service, and prior knowledge of work rules.

While these factors may aid the arbitrator's task in other types of misconduct cases, reliance on them is often misplaced in the context of work-family conflicts. Cases arising out of work-family conflicts are, in fact, distinct from other misconduct cases. Contrary to the paradigmatic worker showing notable disregard for workplace policies, the employee in this context is trying to balance her competing obligations to two institutions demanding her attention and commitment. This merger of institutional pressures is accounted for in neither the values of the gendered workplace, nor in traditional arbitral approaches. As a result, application of these factors must be reexamined in this context. The remainder of this section will explore the application of these traditional factors in the context of the work-family conflict,[61] and explore

58. Collins, *supra* note 37, at 27; *see, e.g.*, County of Monroe v. Civil Serv. Employees Ass'n, Local 828, 72 Lab. Arb. (BNA) 541, 543 (1979) (Markowitz, Arb.), discussed *supra* in text accompanying notes 2-5. The grievant was reinstated following discharge for poor attendance. The arbitrator determined that the triggering incident, absence because of a daughter's suspension from school, mitigated against a penalty of dismissal. However, the arbitrator also stated that the employer was entitled to attendance and that no matter how good the grievant's excuses were, if she failed to improve her record, she could be terminated with just cause. *See also* Knauf Fiber Glass v. Glass, Pottery, Plastics & Allied Workers, Local 32, 81 Lab. Arb. (BNA) 333 (1983) (Abrams, Arb.).

59. Abrams, *supra* note 31, at 1193.

60. See *supra* text accompanying notes 19-30.

61. The organization of the reporter system suggests the way in which the law views the work-family conflict. Cases are not indexed under headings such as "personal crisis" or "family issues," and only recently did one of the major reporter series (Labor Arbitration Reports, published by the Bureau of National Affairs) create headings for "child-care" and "single mother." Therefore, as Collins notes, even when an attorney locates cases with precedential value, she cannot be sure that they represent all of the relevant cases in a reporter. Moreover,

ways in which arbitration of these cases could give more consideration to the conflicts between work and family responsibilities.

A. Consideration of an Employee's Prior Work Record

In most cases involving work-family conflicts, the discipline or discharge is based on allegations of tardiness, absenteeism, or insubordination by the grievant. Generally, the grievant's prior work record was a determinative factor for arbitrators[62] who traditionally view the employee's prior work record as evidence of the integrity of the relationship between employer and employee. A pattern of misconduct suggests to the arbitrator that the employee is not meeting her obligations in the workplace and thus has been deservedly penalized. Conversely, an offense may be mitigated by a satisfactory past record, which is assumed to be evidence that the misconduct is exceptional and unlikely to recur.[63]

Insofar as the prior work record is concerned, three distinct categories of employee conduct and arbitral responses emerge. First, where work-family conflicts contributed to an employee's unsatisfactory record, many arbitrators upheld the penalties.[64] Second, arbitrators upheld penalties in cases in which

published opinions account for only a fraction of all labor arbitration opinions and cannot be regarded as representative. Collins, *supra* note 37, at 27.

Overall, relatively few opinions address the work-family conflict. Marcia Greenbaum, a labor arbitrator herself, has explored why personal problems, including the work-family conflict, appear so rarely in published opinions and awards. She speculates that the parties may settle many of these cases at early steps in the grievance procedure. If a case does go to arbitration and the work-family conflict is discussed at the hearing, the arbitrator may choose to address it briefly, or not at all, in the written opinion. In such cases, the arbitrator may in fact have given weight to the worker's personal issues but simply decided that issues such as the work-family conflict should not bear upon her opinion and award. Greenbaum also notes that because work-family conflicts may involve issues of a very personal nature, the parties may simply decline to have the case reviewed for publication. Thus, the published opinions may reflect only a fraction of those involving a work-family conflict. Greenbaum, *supra* note 36, at 54.

The following discussion is based on a review of every case published in the Labor Arbitration Reports between January 1979 and June 1990. The majority of the cases were located under headings for discipline and discharge, tardiness, and absenteeism. Other cases were found under "leave of absence" and "refusal to work overtime."

62. *See* ELKOURI & ELKOURI, *supra* note 39, at 679-81. Some collective bargaining agreements limit the review of an employee's prior work record to a period of time.

63. *Id.* at 679.

64. U.S. Steel Corp., S. Steel Div. v. United Steelworkers of Am., Local 1013, 95 Lab. Arb. (BNA) 610 (1990) (Das, Arb.) (noting the employee's otherwise poor attendance record, the Board of Arbitration determined that a fifteen-day suspension was appropriate for an employee following his second absence attributed to child-care problems); Rohm & Haas, Texas Inc. v. Oil, Chemical, & Atomic Workers Int'l Union, 91 Lab. Arb. (BNA) 339 (1988) (McDermott, Arb.) (discussed *infra* text accompanying note 67); Safeway Stores, Inc. v. United Food & Commercial Workers, Local 1222, 81 Lab. Arb. (BNA) 657 (1983) (Wiolmoth, Arb.) (discussed *infra* text accompanying note 96); General Elec. Co. v. International Union of Elec., Radio & Machine Workers, Local 707, 74 Lab. Arb. (BNA) 290 (1979) (MacDonald, Arb.) (discharging with just cause an employee with a history of tardiness and absenteeism although three occasions of absenteeism were attributable to his care for a sick child); Midwest Body, Inc. v. Allied Int'l Workers of Am., Local 187, 73 Lab. Arb. (BNA) 651 (1979) (Guenther, Arb.) (upholding

work-family conflicts chronically impaired the employee's ability to perform her duties. Third, where work-family conflicts bore no connection to a pattern of misconduct, arbitrators were willing to reduce the penalty; nevertheless, they expressed a belief that some penalty was appropriate.[65]

In this section, I briefly discuss the first two responses, however, the main analytic focus is the third arbitral response. I do not challenge responses to the first variety of cases because it appears that in these situations the work-family conflict is not at the root of the employee's troubles. I do not critique the second category of cases because many collective bargaining agreements in fact feature leave-of-absence provisions that provide employees with leave time to resolve chronic conflicts.[66]

The case of W— illuminates the first category. W— was often absent or tardy prior to the time she took maternity leave. Arbitrator Thomas J. McDermott saw her workplace difficulties as only partially attributable to the strains of being a single parent. In denying the grievance, he noted:

> As to the problems encountered as a single mother, it [sic] does invoke sympathy. However, the evidence does not support the finding that her attendance problems were due solely to that situation. Prior to her maternity leave she had an extremely poor record. . . . Even after her return to work, when her attendance again began going down hill, the excuses she was giving . . . were the same as she had been giving [before her maternity leave.] Only on a few occasions did she attribute her tardiness to . . . her child.[67]

In the second category of cases, where work-family conflicts chronically impaired an employee's ability to perform, the arbitrators were disinclined to

---

discharge where employee attributed his two consecutive absences to "family problems" and "bills to pay;" but according to the arbitrator the employee's poor prior record established good reason for the employer to accord the employee no leniency).

65. *U.S. Steel Corp.*, 95 Lab. Arb. (BNA) 610; IRS v. National Treasury Employees Union, Chapter 66, 89 Lab. Arb. (BNA) 59 (1987) (Gallagher, Arb.) (discussed *infra* text accompanying notes 80-85); Indian Indus., Inc. v. International Union of Elec., Elec., Technical, Salaried & Machine Workers, Local 848, 86 Lab. Arb. (BNA) 573 (1985) (Traynor, Arb.) (upholding penalty with just cause against an employee with a poor attendance record even though the unexcused absences which triggered the discipline could be attributed to problems she was experiencing with her children); *Safeway Stores, Inc.*, 81 Lab. Arb. (BNA) 657; Knauf Fiberglass v. Glass, Pottery, Plastics, & Allied Workers Local 3d., 81 Lab. Arb. (BNA) 333 (1983) (Abrams, Arb.) (reinstating without back pay an employee with a record of absenteeism who, because of an injury to her child that required immediate medical attention, exceeded the number of absences permitted on her special probation); Washtenaw County v. Michigan Council 25, Local 2733 (AFSCME), 80 Lab. Arb. (BNA) 513 (1982) (Daniel, Arb.) (discussed *infra* text accompanying notes 88-92); Entex, Inc. v. Oil, Chemical & Atomic Workers Int'l Union, Local 4-227, 78 Lab. Arb. (BNA) 1323 (1982) (Milertz, Arb.) (discussed *infra* text accompanying note 87), *General Electric Co.*, 74 Lab. Arb. (BNA) 290; *Midwest Body, Inc.*, 73 Lab. Arb. (BNA) 651; County of Monroe v. Civil Serv. Employees Ass'n, Local 828, 72 Lab. Arb. (BNA) 541, 543 (1979) (Markowitz, Arb.) (discussed *supra* text accompanying notes 2-5).

66. *See infra* note 100.

67. *Rohm & Haas*, 91 Lab. Arb. (BNA) at 354.

sustain a grievance. The case of J— illustrates this tendency.[68] J—'s history of tardiness preceded events attributable to a work-family conflict; however, she had successfully improved her record prior to the onset of serious family turmoil. J—'s tardiness resumed after her husband took a job out of town, leaving her alone to care for both their child and thirty-acre farm. She subsequently filed for a divorce. During this period, her younger brother murdered her older brother. Throughout the following year, she was involved in court proceedings regarding both her child's custody and her brother's criminal prosecution.[69]

J—'s employer was aware of the circumstances affecting her performance and granted her considerable time off. Nevertheless, her employer warned her that she needed to improve her attendance record. When her absenteeism persisted, she filed her resignation, but her employer refused it and placed her on a four-month benefits leave. After her return, she came back late from lunch on two occasions and received a final warning. A third occasion prompted her termination.[70]

Arbitrator Janet Gaunt denied the grievance. In her opinion, she noted:

> It is always hard to deny someone another chance; especially in this case where as of the time of the hearing Grievant appeared, with the love and support of a new husband, to have overcome a lot of her personal problems. . . . Nevertheless, my scrutiny is limited to the situation when the Company made its decision. Therefore, I cannot in good conscience order her reinstatement. To do so would be most unfair to the vast majority of Company employees, who maintain satisfactory attendance records at the expense of personal inconvenience; and to the supervisors who made a reasonable effort to 'rehabilitate' Grievant and finally tired of that effort.[71]

In the third category of cases, where the work-family conflict bears no connection to a prior pattern of misconduct, arbitrators were generally unwilling to say that no form of discipline could be imposed. This reflects their hesitancy to distinguish work-family conflicts from other forms of misconduct. Arbitrators consider the totality of the work record, and when they perceive it to be deficient, determine that the employee has violated the basic principle of the employment relationship: that, in exchange for wages and benefits, the employee will meet the employer's business expectations.[72]

---

68. Pacific Northwest Bell Tel. Co. v. Communication Workers of Am., 81 Lab. Arb. (BNA) 297 (1983) (Gaunt, Arb.).

69. *Id.* at 297.

70. *Id.* at 299.

71. *Id.* at 306.

72. Abrams & Nolan, *supra* note 46, at 599. Of course, it should be noted that the conflation of work-family conflicts and other misconduct is what initiated grievance proceedings. Clearly, arbitrators are hearing cases because of employers' reluctance to distinguish between work-family conflicts, other absences, and mere tardiness. *See supra* Introduction.

The case of M—, the nurse discussed earlier,[73] provides a good example of the way in which work-family conflicts become linked to prior acts of misconduct. M— had already amassed what the hospital considered an unsatisfactory number of absences when she began to miss work because of her daughter's emotional problems.[74] Arbitrator Irving Markowitz was sympathetic to M—'s circumstances,[75] and held that the discharge was not for just cause. However, in light of her overall record, he explained:

> When an employee is absent for as often as the grievant (which on the record appears to be at least 10% of her scheduled attendance), even with good cause, her services become of little value to her employer and she should not expect to remain in his employ . . . . The arbitrator will therefore modify the penalty of discharge so that the grievant may return to her position; however, no back pay will be awarded and the period of time from the date of her discharge to the date of her return will constitute a disciplinary penalty for her continuous excessive absenteeism.[76]

With this foundation, the discussion will now focus on the third category of response: cases in which work-family conflicts were clearly distinct from a prior pattern of misconduct. The arbitrator's response in this type of case is of particular concern for two reasons. First, the response in these cases too often fails to account adequately for the contemporary relationship between work and family. Second, and in contrast to cases in which workers experience chronic difficulties, labor contracts generally do not include provisions that protect workers in these situations. As a result, a worker's only recourse may be to turn to the arbitrator for equitable relief.[77]

When a work-family conflict distinct from a prior pattern of misconduct triggers a discipline or discharge, arbitrators must seriously rethink their inclination to enforce or modify the penalty. Instead, they must distinguish work-family conflicts from other workplace misconduct. By linking work-family conflict to a prior pattern of misconduct, arbitrators reinforce the norms of the gendered workplace, in which employers expected a single-minded commitment of employees. Employers can no longer realistically expect such a single-minded commitment from their employees. The workplace is no longer a primarily male domain, and few workers have spouses or partners who can

73. County of Monroe v. Civil Serv. Employees Ass'n, Local 828, 72 Lab. Arb. (BNA) 541, 543 (1979) (Markowitz, Arb.), discussed *supra* text accompanying notes 2-5, 65.

74. *Id.* at 542.

75. It is important in cases such as these, that society (and all those affected) recognize the individual problems of an employee such as the grievant. In the instant case, such problems which were apparently generally known by her employer, were overwhelming to the grievant and made it difficult for her to properly cope with them. *Id.* at 543.

76. *Id.*

77. Many collective bargaining agreements feature leave of absence provisions that afford the employee experiencing a chronic work-family conflict a leave of absence to resolve it. *See infra* note 100.

devote full-time attention to family matters.[78]

If arbitrators are to effectively balance employers' and employees' interests, they must account for the contemporary interplay between work and family. They should not sustain discipline triggered by a work-family conflict if it is based primarily upon demerits otherwise accumulated by the employee. Penalizing employees for attending to family concerns in this way delegitimizes and devalues family life, and reinforces an institutional hierarchy that subordinates the family to the workplace.

Furthermore, while the employee's record may have been poor, arbitrators cannot assume that the employee would have incurred discipline for just cause without a work-family conflict. Arbitrators cannot base a determination of "just cause" on speculation about an employee's potential conduct. To the contrary, the standard would seem to require, at a minimum, that employers impose penalties only when they are sure employees have acted contrary to workplace policy.

B. Regard For Length of an Employee's Service

Arbitrators also place substantial weight upon the length of an aggrieved employee's service for the employer. Arbitrators have traditionally introduced length of service as a mitigating factor in discipline and discharge cases.[79]

Emphasis on length of service is noteworthy in the case of one grievant who, following years of outstanding service, began experiencing a serious tardiness problem linked to family problems.[80] D— was raising three young children on her own, one of school age and two infants. D— told her employer that her difficulties in securing a reliable babysitter contributed to her tardiness.[81] Initially a sympathetic manager allowed her to make up the time she had missed in the morning by remaining at work after hours to make up for her late arrivals, which were not recorded. After managerial changes, however, D— found herself under the direction of a less accommodating supervisor who began noting latenesses on her record. Following warnings and a disciplinary suspension, she failed to improve her record and was fired.[82]

Based on D—'s long record and superior skills, Arbitrator Thomas P. Gallagher concluded that

> [c]onsideration of the grievant's outstanding ability and of the probability that her habit of tardiness was coincident with the infancy of her youngest children — and thus temporary — should have indicated to the Employer that the grievant should be given a

78. *See* Abrams, *supra* note 31, at 1223.

79. See ELKOURI & ELKOURI, *supra* note 39, at 682.

80. IRS v. National Treasury Employees Union, Chapter 66, 89 Lab. Arb. (BNA) 59 (1987) (Gallagher, Arb.).

81. *Id.* at 61.

82. *Id.* at 62.

'last chance' to eliminate her tardiness . . . .[83]

However, in ordering the reinstatement, Arbitrator Gallagher sympathized with the employer's business expectations.[84] As his "last chance" language suggests, he believed that the grievant's work-family conflicts should in no way protect her from termination if her tardiness persisted.[85]

Arbitrators should give less consideration to length of service in cases arising out of work-family conflicts as well as in other discipline and discharge cases. Application of this factor fails to account for the social changes in the workplace and family structure. Moreover, emphasis on length of service disregards the diverse ways in which working people reconcile work and family responsibilities. Labor force participation, particularly that of women, may be punctuated by periods spent out of the labor force raising families or providing care for family members. Consideration of length of service disregards these employment patterns and may penalize workers who choose to, or feel obligated to, spend time out of the labor force performing these essential tasks.

Arbitrators may still regard length of service as an appropriate consideration in some misconduct cases. In part, this may be because they perceive the long-term employees, who have established seniority, as having more to lose than other workers should they be disciplined or discharged.[86] Additionally, there may be a sense that long-term employees have demonstrated commitment to the employer and that in light of this long-term commitment, particularly if coupled with a satisfactory record, the conduct at issue should be treated less severely.

Even if this is so, reliance on this factor is misplaced in the context of work-family conflicts. Emphasis on length of service ignores the fact that many workers arrive in the workplace already encumbered by the numerous demands of family life. Therefore, application of this factor puts short-term employees at a disadvantage. All workers, regardless of their length of service, deserve accommodation when family demands conflict with workplace obligations.

C. Emphasis on an Employee's Knowledge of Rules and Prior Warnings

In some cases, arbitrators tried to determine the extent to which an employee might have been able to prevent a work-family conflict from interfering with the employment relationship.[87] In cases of this type, the employee was perceived to have had enough knowledge of workplace rules, and sufficient

83. *Id.* at 66.
84. *Id.* at 65.
85. *Id.*
86. ELKOURI & ELKOURI, *supra* note 39, at 682.
87. *See, e.g.*, Safeway Stores, Inc. v. United Food & Commercial Workers, Local 1222, 81 Lab. Arb. (BNA) 657 (1983) (Wilmoth, Arb.), discussed *infra* text accompanying note 95; Washtenaw County v. Michigan Council 25, Local 2733 (AFSCME), 80 Lab. Arb. (BNA) 513 (1982) (Daniel, Arb.); Entex, Inc. v. Oil, Chemical & Atomic Workers Int'l Union, Local 4-227, 78 Lab. Arb. (BNA) 1323 (1982) (Milentz, Arb.) (discussed *infra* note 101).

warning, to have managed her affairs differently and avoided whatever discipline was applied.

A case demonstrating this point concerned a lawyer, C—, who requested a leave of absence to care for the two daughters of the man with whom she was involved.[88] The request was denied and C— filed a grievance. At the same time, she suggested a variety of ways in which she might accommodate her employer, such as working part-time during the weeks for which she had requested leave or working at home,[89] but her supervisor rejected these alternatives.

C— attempted to secure a babysitter for the children. Being unable to do so on the first date in question, C— notified her supervisor that she would not be coming to work. She was permitted to use her final sick day to cover the absence, but was notified that disciplinary action would be taken against her if she failed to report to work the following day. When she failed to do so, she was fired.[90]

Arbitrator William P. Daniel denied her grievance. Noting C—'s outstanding skills and the potential harm her absence would impose for her office, Arbitrator Daniel stated that the denial of leave did not violate the collective bargaining agreement. Furthermore, he noted:

> There is, then, no doubt that the grievant was adequately forewarned that refusal to come into work as directed would result in her termination. . . .[91] [T]he 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 that it was not the wisest. However, having made that decision she lacks standing to complain about the loss of the employment.[92]

Arbitral emphasis upon prior warning in cases arising out of work-family conflicts is largely misplaced.[93] Indeed, consideration of this factor demonstrates the failure of arbitrators to fully appreciate the way in which competing institutional demands will influence employee behavior. An employee may be well-versed in the rules and regulations governing her workplace but unex-

88. *Washtenaw County*, 80 Lab. Arb. (BNA) at 513.
89. *Id.* at 514.
90. *Id.*
91. *Id.* at 515.
92. *Id.* at 516.
93. Interestingly, prior knowledge is regarded as a due process concern; namely, that an employee should not be penalized if she has not been properly advised of work rules. ELKOURI & ELKOURI, *supra* note 39, at 683. I do not wish to suggest that these concerns are unimportant in misconduct cases. I do mean to point out that work-family conflicts are distinct from misconduct cases and, insofar as work-family conflicts are concerned, application of this factor is inappropriate.

pectedly find herself in a position in which she feels she cannot comply with them.[94] Like C—, she may choose to, or feel compelled to, compromise those rules to accommodate family obligations. In such cases, knowledge of work rules is not an appropriate consideration and thus should not be the determinative factor in an arbitrator's decision.

D. Developing a New Approach to Just Cause: Family-Conflict Accommodation

The dominant principles of arbitration do not account for the transitions in society that have altered the relationship between work and family. As a result, arbitrators often evaluate cases involving work-family conflict as they do other discipline and discharge cases. To better serve the needs of the workforce, arbitrators must develop a new approach to such cases, one that demonstrates a sensitivity for the contemporary relationship between work and family and the competing obligations faced by today's working people.

One solution to this problem would be a "family-conflict accommodation" approach, which would promote accommodation for the worker who is attempting to reconcile the competing obligations of work and family. This approach would replace the factors traditionally used in discipline and discharge cases with a balancing test that reflects the interplay between work and family. It would continue to recognize an employer's legitimate interest in maintaining the efficiency of her operation while protecting the employees who, through no fault of their own, are coping with the competing demands of work and family. As in traditional discipline and discharge cases, the arbitrator would have sufficient discretion to assess the particular facts of a case and to determine if a penalty was imposed with just cause. The arbitrator would consider whether the grievant is credible and whether she has made sufficient efforts to reconcile her work-family conflicts and whether the employer has made adequate efforts to accommodate the employee.

Recall B—, who had stayed home from work one day to care for her sick child.[95] The absence had been marked as unexcused, and in light of her overall absentee and tardiness record, B— was discharged. There was no connection between B—'s prior record of absenteeism and tardiness and her absence to care for her son. Under a family-conflict accommodation approach, B—'s employer would be entitled to workplace efficiency, while B— would be entitled to some accommodation for work-family conflicts. Here, B— missed only one day because of a work-family conflict, and it is clear that she would have required only minimal accommodation in this instance. Since the employer provided B— with none, it is likely that if the family-conflict accommodation

94. The subject of work rules, and the way in which they may themselves reflect the traditional values of the gendered workplace, is discussed in the conclusion of this Note.

95. Gold Kist Inc. v. United Food & Commercial Workers, Dist. Union 442, 89 Lab. Arb. (BNA) 66 (1987) (Byars, Arb.), discussed *supra* text accompanying notes 10-11.

approach had been applied in this case, B— would have been reinstated with back pay.

III
CONFRONTING THE WORK-FAMILY CONFLICT IN THE CONTEXT OF THE COLLECTIVE BARGAINING AGREEMENT

The language of the collective bargaining agreement is of paramount importance to the effort to reform the arbitration process. Indeed, as many arbitrators note when confronting cases involving work-family conflicts, they are bound by the terms agreed to in the labor contract. The language of the labor contract can make or break a grievance based on a work-family conflict.

Consider the case of Q—, an employee who left the state to be with her husband, who had sustained serious injuries during the course of his service in the United States Navy.[96] Prior to her departure, she notified her manager of the circumstances surrounding her leave. According to the terms of the collective bargaining agreement, she had the right to take up to two weeks leave of absence in the case of critical injury to a member of her immediate family.[97] Due to the extent of her husband's injuries, and the necessity of two operations to stabilize his condition, Q—'s emergency absence extended beyond the time provided by the labor contract for such absences. When she failed to notify her employer about prolonging her leave, she was fired.[98] Arbitrator Henry Wilmoth sustained the discharge.

> The question here is not one of willful, culpable misconduct by the Grievant or unfair, discriminatory action by the Employer, but the application of the collective bargaining agreement provisions in a situation unpleasant to all parties concerned.
>
> Clearly, Grievant's absence was for compelling reasons, was not prolonged by her choice and the Employer knew of the circumstances surrounding.
>
> We find ourselves weighing the interests of a Grievant who has committed no wrong, against the integrity of the collective bargaining agreement . . . .
>
> I am reluctantly forced to find that the Employer did not violate the collective bargaining agreement.[99]

This case illustrates the binding nature of the labor contract upon the arbitrator and thus underscores the fact that any fundamental restructuring of the relationship between work and family in the arbitral forum must include commensurate attention to the issue in collective bargaining. Unions must

96. Safeway Stores, Inc., v. United Food & Commercial Workers, Local 1222, 81 Lab. Arb. (BNA) 657 (1983) (Wilmoth, Arb.).
97. *Id.* at 658.
98. *Id.* at 657.
99. *Id.* at 659.

insist upon contract language that protects workers from discipline or discharge as a result of work-family conflicts.[100]

Improved contract language can facilitate the kind of workplace restructuring that would resolve the work-family dilemma. As the cases discussed above demonstrate, employers often do not distinguish between conduct related to work-family conflicts and forms of workplace misconduct. Beyond this, some employers have established rules and regulations which penalize those handling personal matters more severely than others who inconvenience the workplace to the same degree.[101]

Improved contract language and inclusion of provisions for "family conflict accommodation" could prevent such practices because it would require of employers greater responsiveness and adaptability to the needs of employees balancing work and family. Thus, such contract language might have the effect of reducing the number of employee grievances related to work-family conflicts and, where conflicts arose nonetheless, most could be settled at earlier stages of the grievance procedure.

Inevitably, some cases will not be settled and arbitration will be required. Contract language which protects workers experiencing work-family conflicts would provide arbitrators with an affirmative mandate to treat family demands as compelling explanations for work-related problems. In addition, such language would help arbitrators to reconcile the competing demands of work and family, and the competing interests of employers and employees, by enunciating a clearer standard of review for cases involving work-family conflict. If the parties were particularly concerned about establishing criteria for reviewing a discipline and assessing just cause, they might establish them in the collective bargaining agreement. Yet even vague language could compel arbitrators to redefine longstanding arbitral policies based upon the traditional — though no longer realistic — bifurcation of work and family.

---

100. Most collective bargaining agreements include provision for personal leaves of absence. Some of these agreements establish that personal leave will be granted for "good" or "sufficient" cause; other contracts stipulate reasons for which leave may be granted, such as family illness or personal business. BASIC PATTERNS IN UNION CONTRACTS, *supra* note 32, at 71.

101. In this regard consider the case of S—. S— was in the process of separation and divorce from her husband, R—, at the time of the triggering incident. One day shortly after the separation, S— was talking to a male co-worker at a shopping center near the worksite when R— arrived and confronted them with a rifle. During the ensuing scuffle, the rifle was discharged twice within a few feet of S—. The co-worker was struck by the butt of the rifle, and required treatment at a nearby hospital. Understandably upset by the incident, S— called her employer and explained that she would not be reporting for work because of an upset stomach. Accordingly, the company charged S— with 3 points under its absence control plan. After learning the actual cause of the absence, the company changed S—'s absence from "illness" to "personal leave - no prior arrangements." This type of absence imposed 11 points under the company's plan and pushed S— over the point score necessary for termination.

Arbitrator Charles R. Milentz denied the grievance, pointing out that although the grievant had been exposed to a "rather traumatic experience," it was of a personal nature; therefore, the penalty imposed by the company was with just cause. Entex, Inc. v. Oil, Chemical & Atomic Workers Int'l Union, Local 4-227, 78 Lab. Arb. (BNA) 1323 (1982) (Milentz, Arb.).

CONCLUSION

The current norms of the workplace evolved out of a gendered division of labor that insulated the workplace from the demands of the family. This division was predicated upon the experiences of the male worker who, lacking complex family obligations, could make a primary commitment to his employer. Men could make this commitment because women were excluded from the workplace and confined to child-rearing and other domestic responsibilities. In light of this division of labor, it was largely unnecessary for workplace norms to develop so as to accommodate the competing demands of the family.

Over the last several decades, however, the complexion of the workplace and the structure of the family have changed dramatically. The traditional family upon which workplace norms were based exists in an ever diminishing fraction of American households. Consequently, the contemporary employee experiences work and family in more complicated and conflicting ways than the paradigmatic male of an earlier era.

Workplace norms have not adjusted to reflect either the new relationship between work and family or the experiences of today's worker. Indeed, workers are expected to prioritize work over family. Because of the retention of these outdated norms, most workers organize their lives so that family obligations will not interfere with workplace obligations. When circumstances arise such that they cannot or choose not to do so, employees may be penalized because such family obligations are treated no differently than other workplace misconduct which interferes with the business needs of the employer.

Arbitrators are not unresponsive to the competing institutional demands placed upon the contemporary worker. In many arbitral opinions dealing with work-family conflicts, arbitrators expressed a certain sensitivity to the questions raised by work-family conflicts and the difficult, sometimes impossible, choices workers are expected to make as a result.[102]

Still, arbitrators have not developed a coherent approach for dealing with cases arising out of work-family conflicts. Generally arbitrators who retain an understanding of the workplace based upon traditional, gendered norms will fail to distinguish between conduct associated with work-family conflicts and other workplace misconduct. They subsequently rely on factors traditionally used in discipline and discharge cases to determine whether a penalty was imposed for just cause. When applied in cases dealing with work-family conflicts, these factors often work to the disadvantage of aggrieved employees.

The task of the arbitrator is to balance the interests of the employer and the employee. Thus, it is necessary for arbitrators to develop an approach to the work-family conflict that will lead to a more equitable resolution of work-

102. For example, see Safeway Stores, Inc. v. United Food & Commercial Workers, Local 1222, 81 Lab. Arb. (BNA) 657 (1983) (Wilmoth, Arb.), discussed *supra* text accompanying notes 96-99.

family conflicts. In this Note, I have argued for a "family-conflict accommodation" approach, a balancing test that would enable arbitrators to determine if, in the context of work-family conflicts, a discipline or discharge was imposed with just cause. This of course is but one idea for addressing the work-family dilemma in labor arbitration.

If provisions for dealing with work-family conflicts were established in collective bargaining agreements, arbitrators would have helpful guidelines for the resolution of such matters. More importantly, such a development could initiate a restructuring of workplace norms so that they might better reflect the present relationship of work and family and the complicated ways in which workers experience both. It is ultimately this restructuring of workplace norms to which we must aspire.