

WORK / FAMILY CONFLICT, UNION STYLE:

LABOR ARBITRATIONS INVOLVING FAMILY CARE

June 14, 2004

WORK LIFE LAW

A Program of American University Washington College of Law



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EXECUTIVE SUMMARY

The following report reviews published arbitrations in which unions argued that employees were improperly punished due to family responsibilities. We reviewed 67 arbitrations with key words related to work/family conflict and found 31 cases in which unionized employees were fired or otherwise disciplined for making choices one would expect of a responsible parent or family member. Our research shows that a considerable amount of confusion and uncertainty exists around the issue of work and family amongst employers, employees, *and* the legal profession, and this confusion is revealed in the wide range of arbitration decisions. Several decisions supported the value that employers are more important than family, while others deemed home obligations as legitimate excuses for occasional absences or problematic worker behavior. Still other decisions were based on the employee's track record, favoring workers if they had 'clean' records but penalizing them if they had had previous disciplinary problems.

The cases we reviewed underscore several important questions that companies and their employees are struggling to work out: When should absences from work result in discipline against employees? What are excusable family conflicts and what are not?

The major findings of the report are:

1. *Men experience difficult choices between work and family. Nearly two-thirds of the cases we reviewed involved men caring for family members.*
2. *Workers who are parents are not the only ones experiencing workplace conflict due to home obligations. Obligations to spouses, grandchildren and parents were other triggers for conflict.*
3. *Single parenthood adds an additional stressor. Employers assume workers — especially men — have spouses to ease parenting responsibilities, but single parents often have no safety net when crises emerge.*
4. *Most union contracts are devoid of family-friendly language, leaving conflicts up to arbitrators' interpretations on a case-by-case basis.*
5. *Workers stand a better chance of prevailing against their employers if they can show they communicated their conflicts to superiors and, made substantial efforts to adjust their schedules, find substitute caregivers or otherwise make up for their difficulties.*
6. *Employers stand a better chance of prevailing against employees if they can show they attempted to find substitute workers or otherwise negotiate with employees facing difficult home situations.*
7. *Several unions have successfully negotiated important work-family policies for their members.*

In addition to reviewing and summarizing the cases, we pose recommendations for employees and employers to avoid ending up in arbitration over work-family conflict. We recommend that:

1. *Unions promote particular behaviors among members, including communicating family issues with supervisors and the union, maintaining a 'clean' employment record, avoiding missing work, and documenting attempts to find substitute care.*
2. *Employers educate supervisors and managers about employees' rights to care for family members and how to respond reasonably to caregiving requests, particularly when situations are urgent.*
3. *Unions bargain for family-friendly concessions in contracts, including creating child care consortiums and referral, creating child care centers, allowing workers to use sick leave for children and ill family members, developing flexible schedules, making overtime less burdensome, and rethinking personal leave.*

I. INTRODUCTION

Imagine that you are “Phil,” a mechanic at a paper manufacturing company, where you have worked for 14 years. Your wife has ovarian cancer and needs constant care. On a Saturday, you are called by your company to work a mandatory emergency shift. You refuse, because you must care for your spouse and have no one else to do it. You are fired for insubordination.

Phil’s case is not fictional. Nor is the case of “Jane,” a single parent whose mentally and physically disabled child needed special care. Jane was a janitor who had been employed by an Illinois

packaging company for 27 years and worked a 60-hour week. When her babysitter did not show up for work one day, she called in to her supervisor and said she would not be in. She was fired. So was another single mother whose case we reviewed, because she left in the middle of her shift when she was told her daughter was being taken to the emergency room.

In all of these situations, unions defended their members before a neutral arbitrator and the employees were reinstated. As extreme as these cases might appear, they are in fact not atypical.

II. BACKGROUND

Work/family conflict is often portrayed as a professional women’s issue. Yet recent research has shown that men experience work/conflict as well — sometimes more than women, as was the surprising finding in the Families and Work Institute’s 2002 National Study of the Changing Workforce.¹ A survey of unionized workers uncovered similar issues; two-thirds of unionized fathers said they were unhappy with the amount of time they dedicate to their children; half of working mothers agreed.² In fact, nearly one-third of all unionized employees surveyed said their biggest work-related concern was not having enough time for family and personal life.³

Workers’ concerns are well founded. Compared to the 1960s, the average American employee works the equivalent of six extra 40-hour weeks per year.⁴ And total weekly work hours for dual earner couples increased from 81 in 1977 to 91 in 2002.⁵ Even when measured against working conditions in the mid-1990s, workers presently spend three extra

40-hour weeks on the job.⁶ Presently, Americans work longer hours than their European counterparts.⁷

Not only do workers spend more time on the job, they also have less control over the hours they work. In fact, nearly three-quarters of working adults say they have little or no control over their work schedules.⁸ And more than 15 million workers do not work between the hours of 6 a.m. and 6 p.m.⁹ The majority work the alternative schedule because it is either the “nature of the job” that requires the hours or the shift is mandated by the employer.¹⁰

Lower-income workers are especially hard pressed to find workplaces where they are given some degree of control over their work schedule. One study found that flexible scheduling is available to nearly two-thirds of workers with incomes of more than \$71,000 a year but to less than one-third of working parents with incomes less than \$28,000.¹¹

Increased hours and lack of flexibility are not the only challenges that working parents and caregivers face. Few blue-collar employers offer benefits that help workers manage their caregiving responsibilities. According to 2003 statistics from the Department of Labor, only 1% of employers of blue-collar workers provide monetary assistance for child care.¹² Little more than 2% of these employers provide on-site or off-site child care and a mere 6% provide child care resources and referral services.¹³

Workplaces devoid of benefits and flexibility put a great deal of stress on all workers, but especially on those with responsibility for children. Among parents of younger children, childhood illness is a major concern. Children, particularly young ones, get sick frequently, often four to six times a year.¹⁴ Given that two-thirds of U.S. children live in families where all parents work, one working parent needs to stay home when a child is sick.¹⁵

Adults' work schedules are affected by child care responsibilities long after children leave preschool. Emotional support and one-on-one interactions with children are crucial during the adolescent years where high parental involvement can significantly influence both positive self esteem and high educational expectations.¹⁶ Moreover, active parental involvement and supervision into the high school years can help prevent juvenile crime and other risky behavior: most teenage pregnancies and teen violence occur between 3 p.m. and 6 p.m.¹⁷

Caring for children can be particularly problematic for blue-collar workers, since child care breakdowns are more common in less affluent families.¹⁸ A study of child care in Massachusetts found that four out of 10 low-income parents were forced to miss work because of problems with child care arrangements; nearly three-fourths lost pay due to work/family conflicts.¹⁹

Workers struggle to meet the needs not only of their children, but of their parents: one in four families also take care of elderly relatives.²⁰ Among people age 50 to 64 needing support for their health and emotional needs, 84 percent rely on informal care giving networks.²¹ The Families and

Work Institute's study found that over one-third of workers provided elder care in the prior year with 13% taking time off from work to meet elder care responsibilities.²² The study found that men and women engaged in elder care in equal proportions.²³ Another study found that one in ten workers provide 40 or more hours of unpaid assistance to elderly relatives each month.²⁴ Nearly 3 out of 4 of these unpaid caregivers are working women who make accommodations in their daily schedule to provide elder care.²⁵

With pressing child and elder care responsibilities, workers who lack workplace flexibility must devise creative methods of resolving work/family conflicts. About one in three working families with children under six rely on "tag teaming," with parents working different shifts so that each can care for the child when the other is at work.²⁶ The evening shift is the most common alternative work schedule, accounting for 40% of all nonstandard work shifts among full-time workers and more than half of those among part-time workers.²⁷ Among dual-earner couples, fathers take on a significant share of child care responsibilities; they become the primary caregivers of the children when their wives are at work.²⁸

Many working families rely on family members for assistance, with less affluent families much more likely than professional and managerial families to rely on family members instead of paid care. In fact, one-third of low-income families must rely on a relative to care for their children while they are at work.²⁹ Heavy reliance on family-delivered care continues in families with older children. Nearly one-fifth of children aged six through 12 are cared for by relatives outside of school hours.³⁰

Grandparents are one of the relatives most frequently called upon to care for the children of working parents; over one-fifth of preschool-aged children are primarily cared for by grandparents when their mothers are at work.³¹ And a new study reports that 2.4 million grandparents have *primary* responsibility for the care of their grandchildren.³² Over one-fourth of these grandparents had cared for their grandchildren for five or more years.³³

Because the average age at which Americans become grandparents for the first time is now 47, three-fourths of grandmothers and almost nine out of ten grandfathers are in the labor force.³⁴ Thus, more than one-third of grandmothers who provide care for preschool-aged children are otherwise employed.³⁵ Many grandmothers work “split shifts” with their daughters to provide child care, i.e. the grandmother cares for the children when her daughter is at work, then the grandmother heads off to her own job when the daughter returns from work.³⁶ These older family caregivers are vulnerable to the same work/family conflicts faced by their grown children.

Even when families are able to rely on child care centers, they still must cope with the center’s often inflexible hours and policies. Many close after normal business hours, and charge steep fees (often \$1 per minute) if children are picked up late.

For all these reasons, work/family conflict is not just a professional women’s issue. It is a major issue for men: one recent study even found that men reported significantly higher levels of work interference with their families than similarly situated women.³⁷ It is a major issue for nonprofessionals: a recent survey of unionized workers reported that nearly one-third said that their biggest work-related concern was not having enough time for family and personal life.³⁸ And it is also an issue for nonparents, given that 85% of elder care is delivered through informal networks of family and friends.³⁹

In short, family care issues affect many adults, not only for the three months covered by the Family and Medical Leave Act⁴⁰, but for the 20 years or longer that it takes to raise a child, or to care for an elderly parent or ill partner. This report shows that, in the absence of workplace protections, American workers — men as well as women, grandparents and non-parents as well as parents — can become vulnerable for doing what virtually any parent, spouse, or child would do.

Examining Work-Life Conflict in the Unionized Workplace

In an attempt to illustrate how work/family issues affect the typical worker, our inquiry is focused on the unionized workplace, and the issues that arise when workers are disciplined or dismissed for choosing to fulfill their caregiving responsibilities at the expense of their work duties. Their stories include:

- A police officer who refused to report to work early rather than leave young children at home alone
- An auto worker who needed three days to attend his mother-in-law’s funeral
- A janitor who missed a day of work to care for a child with physical and mental disabilities
- A mechanic who stayed home to care for his cancer-stricken wife
- A material handler who took time off to care for an asthmatic son
- A packer who left work after learning that her young daughter was being taken to the emergency room

In each of the cases we examined, the workers challenged their employer’s disciplinary actions through the grievance and arbitration process specified in their collective bargaining agreements. And in all of the cases we studied, the employer-worker dispute led to an arbitration hearing — a meeting where the union and the employer present their sides of the story, and a neutral arbitrator, mutually selected by the employer and the union, determines whether the employer’s disciplinary action violated the contract. In determining whether the contract was violated, the arbitrator decides whether to uphold or set aside the disciplinary action.

The cases we reviewed fall into five distinct categories. The first were cases where the arbitrator found for the worker because the employer engaged in harsh or erroneous decision-making. On the opposite side of the spectrum were cases where the worker lost because he or she clearly disregarded the rules of the workplace. A third category involved compromises between employers and employees.

A fourth entailed cases in which the decisions were entirely based on the previous record of the employee. Finally, and unfortunately, we discovered decisions that fell completely outside of the spectrum: in these cases the arbitrator refused to acknowledge the importance of the worker's caregiving responsibilities.

III. CASE REVIEW

We group our cases into the following categories:

a) employee victories where caregiving was deemed as an appropriate excuse; b) employer victories where workers disregarded workplace rules; c) cases (victories or losses) where workers' employment history — good or bad — was the crucial deciding factor in the outcome; d) employer victories where arbitrators disregarded caregiving as an appropriate excuse, and e) compromises between workers and employers.

A. Employee victories where caregiving was valued

In some arbitration hearings, arbitrators have taken an enlightened view of the workers' family care responsibilities. Often their holdings reflect the view that the existence of a legitimate family care reason precludes an employer from having just cause to take a negative employment action against a worker.

*In re State of New York, Rochester Psychiatric Center*⁴¹ — A single mother of a five year old child and 14 month old child was discharged after she refused to work mandatory overtime on three separate occasions due to her inability to find child-care. The mother worked the night shift at the center and employed a babysitter who was only able to watch the children at night because she also had a day job. All workers at the center were expected to work mandatory 8 hour overtime shifts and were informed of the overtime usually only a few hours before the end of their regular shift. The mandatory overtime rotated among the workers.

The mother explained to her supervisor that she was unable to find child care for the entire overtime shift, but offered to either (1) work a couple of extra hours of overtime, rather than a whole shift or (2) bring her children to the center to sleep while she worked. The mother even asked the supervisor if she knew anyone who could take care of the children on short notice. The supervisor rejected both suggestions and instead, cited the

mother for misconduct when she failed to work overtime. The first time the mother refused the overtime she was suspended. The second time she was suspended again. The third time, the employer fired her. The arbitrator found the mother technically guilty of insubordination, but refused to uphold her dismissal. In explaining his conclusion he stated, "No person should be forced to choose between his children *or* his livelihood." The arbitrator fined the mother \$1.00 and ordered her to give her employer 30 days notice of three days per month when she would be able to work a full overtime shift. He also noted that, "It is her efforts to be a good parent that have created her problems at work."

*In re Knauf Fiberglass*⁴² — A single mother of a three children was dismissed from her job as a packer after she left in the middle of her shift after receiving a phone call that her daughter had fallen and was being taken to the emergency room. The arbitrator declared that "we must take the norm of parental care seriously" and ordered the mother reinstated. The mother had worked for the company in various positions for nine years. She had a history of attendance problems and was twice placed on a special probationary program where she was permitted to have only one excused and one unexcused absence. During her second probationary period, which lasted for 180 days, she used up both of her absences within two weeks — one for an unverified doctor's appointment and one when she took her daughter to a verified doctor's appointment.

The mother received the emergency call a little over three months into the probation. After receiving the call, she informed her supervisor why she had to leave. He informed her that leaving work could place her job in jeopardy. The mother left work anyway, and brought her daughter home after determining that she did not need emergency care. A few days later, she brought her daughter to the doctor. When she returned to work the mother presented the doctor's slip to document the reason

for her absence but she was given a five-day notice of her discharge. The arbitrator determined that it was “fundamentally unfair” to discharge the mother when her reason for leaving work was to attend to her potentially-injured child and that her absence at that time was not a continuation of her pattern of poor attendance. The arbitrator ordered the mother reinstated, but permitted the employer to require the mother to continue on a modified probationary program.

*In re Tenneco Packaging*⁴³ — The worker was a long-term worker, working 60 hours a week, and a single parent taking care of a mentally and physically disabled child. She was terminated for taking off work to care for her son when her daycare provider was unable to come to work. Her employer terminated her for “excessive absenteeism,” arguing that neither the worker nor the union ever furnished proof that her absence from work was justified. The arbitrator ruled in favor of the worker because the employer failed to request such proof from the worker as required by the Wisconsin Family and Medical Leave Act. The arbitrator noted that, “It would be difficult to believe that her supervisors in the Company were not aware of the physical and mental disabilities her son has. The burden of caring for such a child would obviously be the central condition of her life.”⁴⁴ The arbitrator also considered that the worker’s 60 hour work week, coupled with the difficulty of arranging alternative child care for a mentally and physically disabled child, contributed to the need for a “more flexible application of the excessive absenteeism provision of the Attendance Policy.”⁴⁵

*In re Social Security Administration*⁴⁶ — The worker called into work one morning to request emergency leave. Both her regular and back-up sitters were unavailable and she had to stay home with her son. She spoke with one of the supervisors, who responded to the worker that they were short-staffed and that the worker would have to try and secure child care. The worker hung up and called back shortly thereafter to notify the supervisor, in not-so-friendly terms, that she would not be coming in that day. The worker was charged with being AWOL. During the arbitration, the supervisor

contended that she did not have time to discuss the situation with the worker because the worker had ended their phone conversation abruptly. The supervisor also stated that she did not believe a true emergency existed. The arbitrator ruled in favor of the worker, even though the worker hung up on the supervisor. “[T]he fact is that...[the supervisor] never explored the problem with the [g]rievant, made any suggestions to her, or indicated that she might be of help...I regard this as a two-[way] street...both sides would have been well advised to make better efforts at communication.”

*In re Interlake Material Handling Division*⁴⁷ — The worker was a divorced father whose son was asthmatic. His employer terminated him under the attendance policy of the collective bargaining agreement after he had exceeded the allowed number of excused absences and had received two final warnings. The Union argued that although the worker had violated the attendance policy, the employer had allowed other workers to provide documentation explaining the reasons for their absenteeism and thereby avoid disciplinary action. The Union provided evidence of the disparate application of the policy in which the worker was not allowed to prove to the employer that he needed additional time off to care for his sick son, even though the employer had extended this privilege to several other workers. None of these instances were related to family-caregiving issues. The arbitrator ruled in favor of the worker, concluding that the employer’s disparate treatment of the worker invalidated the employer’s claim of just-cause.

*In re Board of Directors, Little Rock School District*⁴⁸ — A female school custodian was terminated after she left town unexpectedly because her father died. The worker received notice late at night that her father had passed away in Kansas. She immediately called the head custodian and informed the supervisor that she was leaving town in order to make funeral arrangements for her father. She also asked the supervisor to tell the school principal about her family emergency and the supervisor repeatedly promised to do so.

The worker had been in Kansas for 12 days when she received a letter informing her that she was terminated because she abandoned her job by failing to properly notify the principal at her school that she would be absent from work. The arbitrator upheld the grievance, finding that the worker had not been discharged for just cause, and ordered the worker reinstated. The arbitrator found that the worker properly notified a supervisor about her absence, and was not required to also get in touch with the principal.

*In re Supermarket Acquisitions Corporation*⁴⁹ — A male short-service worker was fired for excessive tardiness because he was often between one and 11 minutes late to work. The worker was the father of two sets of children who lived with their mothers in different parts of New York City. The worker lived with one family and frequently visited the other family. The worker claimed he had difficulty getting to work on time after his visits.

The arbitrator noted that, “there is hardly a working individual who does not have to cope with personal problems. But the vast bulk of them refuse to allow such problems to interfere with the performance of their basic job responsibilities.” Nevertheless, the arbitrator ordered the discharge converted to a final warning and disciplinary suspension without pay because the employer inconsistently disciplined employees who were frequently late.

B. Employer victories where workers disregarded rules

A common problem in this category of cases is that workers failed to communicate the reason for their absence. Men commonly are leery of supervisor reactions if they request workplace accommodations for their child care responsibilities. They often try to cope with such responsibilities in ways that hide them from the workplace.⁵⁰

Arbitrators interpreting contractual provisions requiring just cause for discipline and discharge have not been particularly sympathetic to workers who walk off their jobs or refuse assignments without advising supervisors of their need for time off due to family care responsibilities.

*In re City of Columbus*⁵¹ — A worker was suspended when he refused to work overtime at the end of his shift because of the need to pick up his child at school. He never asked to be excused from overtime and never told the employer why he was leaving. Earlier in the day, the worker and the other truck drivers were notified that they were on standby for overtime because of an impending snow storm. They were told an hour before the end of their shift that they would be required to work overtime for snow removal. The employer’s overtime policy provided that workers would be accommodated for reasonable excuses. Another worker was allowed to leave at the end of the regular shift, pick up his wife and then return to work. But the worker never asked; he simply left. The arbitrator denied his grievance.

*In re United States Steel Corp.*⁵² — The worker was issued a 15-day suspension following the worker’s second absence due to child-care problems, where the worker made no effort to arrange alternate child-care or swap shifts and he had a poor disciplinary record. The arbitrator ruled that the suspension was reasonable in light of the worker’s “unenviable disciplinary record,” and noted that “If he had tried to swap and that was not permitted...that would have presented a different case. Here, [the] [g]rievant simply did nothing.”

*In re Southern Champion Tray Co.*⁵³ — A married father of a school-aged child was discharged from his position as a mechanic after he left work at the end of his scheduled shift to pick up his child from school, rather than obeying his supervisor’s orders to stay overtime and complete a machine repair. The arbitrator determined that the employer had just cause to discharge the father because the father made no effort to try to satisfy his parental obligations before he disobeyed three direct orders. Instead, even though the father was given a full day’s notice that he might be required to work overtime, the father assumed that the repair would be completed during the regular shift and made no arrangements to have someone else pick his son up at school. Several times during the regular shift the supervisor told the father that he might have to work late and, at least once, asked him if he

needed to make arrangements for his child. The father replied falsely that he had already “taken care of it.” When it became clear that the job would not be completed during the regular shift, the father called his wife to pick up the child and learned that her car had broken down and she couldn’t get to the school. At the end of his shift, the father left the plant without explaining his dilemma to his supervisor. When asked by the arbitrator why he didn’t ever tell the supervisor about his dilemma, the father replied, “I thought I did all that I could and I was tired of fussing. I didn’t feel anything else could be worked out.”

*In re Velva Sheen Manufacturing Company*⁵⁴ — A single mother working at manufacturing plant was discharged 14 months after her employer implemented a new attendance policy and identified her as having a high rate of absenteeism. A supervisor attempted to counsel the worker about her attendance problems, but she reacted defensively and told the supervisor that “My kids come first, no matter what.” The manager, who had been a single mother herself, told the worker that she understood the competing demands of work and family, and that the interests of her children would be best served if the mother had a steady income. An assistant production manager also offered the mother a leave of absence in order to work out a plan to deal with her competing work and family responsibilities; the mother declined the offer. The company monitored the attendance of the worker for 60 days after the counseling session, but the worker’s record did not improve. The worker was terminated. The arbitrator found that the worker was given sufficient notice regarding the requirements of the new attendance program and was properly informed that she was not meeting the program requirements. The arbitrator noted that, “While being sympathetic to the grievant’s plight in struggling to balance her home life with the meeting of work responsibilities, it cannot be found that the company acted improperly here in the way that it demanded regular work attendance and then acted on such a demand. Indeed, it can easily be imagined that there are other employees amongst the...plant workforce who face a similar struggle and yet who apparently are able to regularly attend work.” Therefore the arbitrator denied the grievance.

*In re GAF Corporation*⁵⁵ — A father was fired for being habitually late to his job as a hydropulper operator. The father claimed he was “beset with family problems,” and that these problems explained his tardiness. The family problems included: his divorce; the fact that his wife was often not at home to take care of their children and came home late from work; that he had problems securing a babysitter; and that his car often broke down. The employer attempted to correct the worker’s tardiness problem by placing the worker in a non-disciplinary counseling program, but after no improvement occurred, the company began applying progressive levels of discipline. At arbitration, the union argued that the company should have been lenient with the employee because, though he was dealing with numerous personal problems, he always showed up for work; albeit often late, and when he was late, he always called in.

The arbitrator denied the grievance because he found that the worker was not credible — specifically, the worker falsified a document that he attempted to use at the arbitration. The arbitrator noted though, that if the employee had been credible, the employee’s proffered reasons for his tardiness would have been mitigating factors. Additionally, the fact that the employee always called in would also have served as a mitigating factor.

*In re Sutter Roseville Medical Center*⁵⁶ — A male nuclear medical technician was terminated for refusing to report for emergency callbacks. The worker lived far from the workplace and was responsible for picking his son up from school. The worker’s previous supervisor had exempted him from emergency callbacks because he was not able to meet the minimum 30 minute turnaround time for the emergency callbacks. But when a new supervisor was hired, he changed the required turnaround time to one hour, which the worker would have been able to comply with. The worker nevertheless refused to report for emergency callbacks, and told the supervisor that he had to pick up son from school. At no time did the worker attempt to make alternative arrangements for his child. The worker received progressive warnings, counseling, and suspensions for failing

to report for the callbacks. After failing to report for five callbacks, the worker was terminated.

The arbitrator found that the worker should have followed the general arbitration principle of, “Obey now, grieve later,” because complying with the overtime did not endanger his safety. Nor did the arbitrator find that the worker’s need to pick his child up from school exempted him from the “obey now, grieve later” rule because the worker had never attempted to make arrangements for someone else to pick up his child. The arbitrator noted that, “As important as a youngster’s care may be, this situation is not the sort that provides an exception.” Therefore, the arbitrator denied the grievance and upheld the termination.

C. Cases where arbitration decisions were based on workers’ disciplinary records

When a worker is caring for a spouse, child or relative, situations inevitably arise where the worker is unable to arrive at work on time, unable to accept an overtime assignment or unable show up for a shift, and thus is forced to violate his employer’s attendance or overtime policies. Where the employer blindly enforces its progressive discipline policy, these “caregiving emergencies” can cause the worker to quickly progress up through the levels of discipline, and can ultimately lead to the worker’s discharge. But because an employer must have “just cause” to impose any form of discipline, a worker with caregiving responsibilities may have valid reasons to challenge an employer’s disciplinary measures.

In the arbitrations we reviewed, workers and their union representatives frequently filed a grievance in which the employer moved to dismiss the worker, but failed to challenge less severe disciplinary actions. By failing to “grieve early” and challenge less severe forms of discipline, workers and their union representatives lost out on the chance to give the employer early notice that the employee had work-life conflict. Additionally, by passively allowing the worker to build up a long disciplinary record, they gave the employer a weapon to use against the worker during the arbitration process — the worker’s poor disciplinary record.

1. When a poor disciplinary record hurts a worker

*In re Midwest Body, Inc.*⁵⁷ — A male manufacturing worker was terminated after he did not report for overtime on a Saturday and failed to come to work the following Monday. The company alleged that the worker failed to notify anyone that he would be absent. The worker alleged that, when he was leaving work that Friday, he told his foreman that he would not be able to work on Saturday. He also alleged that he told the same thing two other supervisors. None of the supervisors testified that the worker had spoken to them about his absence, but two employees testified that the worker had yelled out to his supervisor that he would not be showing up for work because he had personal problems.

The worker’s supervisor confronted him the next time he showed up for work and asked the worker to explain the reason for his absence. The worker said he had “family problems” and refused to elaborate. The worker also refused to be more specific about the reason for his absence during a meeting with two supervisors and a union representative. He again said that he had “family problems” and “bills to pay.”

The arbitrator denied the grievance. The arbitrator examined the employee’s work history and noted that absenteeism was “something of a habit” for the employee. Therefore, the arbitrator found that the company had no reason to be “lenient” with the employee, and therefore properly discharged him.

2. When grieving early helps a worker

*In re Social Security Administration*⁵⁸ — A female worker was charged with being AWOL when she was unable to find a sitter for her seven-year old child and failed to report to work. The mother, who did not live near relatives, used the agency’s childcare referral service to select a regular babysitter as well as an emergency babysitter for her child. On one of the worker’s scheduled work days both babysitters cancelled. The worker called work to request emergency leave, but her supervisor was on phone and authorized another supervisor to resolve the employee’s problem. This supervisor told the worker that her unit was short-

staffed, that she didn't believe that the worker had a true emergency, and that the worker should try to get a babysitter. The worker asked to speak to her immediate supervisor, but the supervisor refused to let her do so. The worker got angry and hung up. A few minutes later, the worker called back and asked to talk to her immediate supervisor. After learning that the supervisor was still on phone, the worker got angry again and hung up. The worker failed to come into work, and the agency charged her with being AWOL.

The arbitrator upheld the grievance and ordered the AWOL charge removed from the worker's record. The arbitrator noted that the worker had a good employment record and had never before requested emergency leave because of a babysitting problem. The arbitrator determined that both the supervisor and the grievant had failed to communicate properly. But since the worker showed that she was experiencing a true childcare emergency because "the two people she reasonably and legitimately depended on for childcare were suddenly and unexpectedly unavailable," the arbitrator found for the worker.

D. Cases where the arbitrator refused to find value in caregiving responsibilities

*In re Town of Stratford*⁵⁹ — A mother of three children was given a five-day suspension without pay from her job as a police officer after she refused to report for mandatory overtime due to her inability to secure child care. The arbitrator determined that the police department was a "military-like" organization whose proper functioning depended on workers following proper orders. Therefore, the arbitrator found that the department properly suspended the mother for failing to follow proper orders and did not have to take into account her reasons for not complying with the orders. The arbitrator cited previous cases where the department suspended other officers for refusing to comply with mandatory overtime. The arbitrator also determined that failure to report to work due to child care responsibilities could not be equated with failure to work as a result of sickness. The arbitrator noted that an officer claiming sickness

could bring a doctor's note as proof of an illness, a caregiver could offer no such credible proof. The arbitrator asked sarcastically, "Can the Department require the potential babysitters to write notes as to why they could not fulfill their requirements to the Police Officer?"

*In re Piedmont Airlines, Inc.*⁶⁰ — A flight attendant with two children ages 18 months and two years refused an order to extend her shift and take an extra flight because she had no child care. Her child care provider was unable to stay over and her husband was unable to cover. The company extended the shift of another flight attendant, causing a 45-minute delay in the flight. The company suspended the worker for seven days and the arbitrator denied her grievance. The arbitrator recognized that illness was an accepted excuse for refusing to extend a shift but rejected the union's argument that the worker's child care situation was an emergency or compelling reason to refuse the assignment.

*In re Washtenaw County Friend of the Court Unit*⁶¹ — A female attorney was discharged after she took unexcused unpaid leave in order to care for her boyfriend's two young children. Before her discharge, the woman requested five weeks of unpaid leave, to be taken in three 10-12 day increments. In her leave request she offered to come into her office for a minimal amount of hours during her weeks of leave and proposed to do other work at home. Her contract required unpaid leave to be granted as a matter of right for: illness (physical or mental), pregnancy, or a prolonged illness in the immediate family. The employer had discretion to grant education and personal leave. Her supervisor (who had recently been appointed) denied her request for leave, citing her capabilities and experience as reasons why he could not afford to have her out of the office. The arbitrator upheld the dismissal and stated, "The employee 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 she was not the wisest. However, having made that decision, she lacks standing to complain about the loss of employment."

*In re Budget Rent-A-Car Systems*⁶² — A shuttle driver with 20 years of service — who was the father of a child with a serious heart condition — was discharged for excessive absenteeism and leaving early from work on numerous occasions. The company utilized a progressive discipline system where workers accumulated points for each violation of company policy; workers were discharged once they earned 24 points. The grievant was absent numerous times during a five month period. During this period, the worker's son underwent heart surgery.

While the worker requested, and was granted, leave to care for his son under the FMLA, the worker failed to submit full documentation for the absences. For instance, the worker submitted a note that indicated his son was “ill,” but did not describe the severity of the illness. The worker also suffered an on-the-job injury during this time, and, while he submitted documentation for some of the absences, he failed to fully document all absences. For example, the worker submitted a note explaining that he was “under the care of a physician” but it did not indicate if the doctor recommended that he stay home from work.

The arbitrator denied the grievance. The arbitrator found that the worker failed to submit proper documentation for all doctor's visits and caregiving responsibilities. The arbitrator noted that the documentation submitted regarding the son's care did not indicate that the son was suffering from a severe condition or that the son had doctor's appointments on those days.

E. Cases where the arbitrator crafted a compromise

*In re Jefferson Smurfit Corp.*⁶³ — A father of a three-year old boy was suspended for three days when he refused to work overtime and left after getting an emergency call from his wife that their child was ill. Near the end of the worker's shift, he was told he had to stay four hours beyond his usual end of shift because a worker had called in sick. The father initially told the supervisor that he would try to get one of the two other qualified workers to take the overtime shift. After failing to convince either of the two workers to work the

overtime, the father told his supervisor that he was feeling sick and unable to work the overtime. The supervisor, in accordance with company policy, told him that if he was sick he would not have to work the overtime but he would have to have a fitness exam. The father then declined the exam and agreed to work the overtime. Twenty minutes into the overtime period, he received a call from his wife. His wife told him that she wanted him to come home because their child was feverish and she was almost out of medication and was unable to get more because he had taken her car to work. The man told his supervisor about the situation. The supervisor permitted the man to leave, but told him that he had to bring documentation to prove that his refusal to work overtime was justified by a real emergency. When the worker returned to work, the only documentation he was able to produce was a receipt from Walmart showing that he had purchased medication late the previous day — far after the time his overtime shift would have ended.

While the union argued that the worker should have been assessed a disciplinary point under the company's no-fault attendance policy, the arbitrator determined that the father's Walmart receipt was insufficient documentation to support his claim that he could not work overtime. Yet, despite this finding, the arbitrator refused to uphold the three-day suspension. Instead, the arbitrator held that the suspension would have been “for cause” if the company had proved the worker's reason for leaving was *fraudulent* rather than merely insufficient. However, the arbitrator found that the employer failed to prove fraud. Taking into account the worker's clean employment record, the arbitrator reduced the suspension to a written warning and ordered that the worker be compensated for any lost pay resulting from the suspension.

*In re Mercer County Association for the Retarded*⁶⁴ — A worker refused a call in for overtime because her husband was not home and she could not leave her mentally retarded son alone. The employer suspended her for three days. The arbitrator wrote, “It is not uncommon for employees to have disabled parents or other relatives living with them that require constant care. To permit these

employees to be excused because of their personal problems puts an added work burden on the other employees and makes that unavailable worker much less useful, if not an undesirable employee... Considering the basic requirement of the job is to care for the residents, if an employee is unavailable for reasonable mandatory overtime, that employee is not meeting the full requirements of the job and is not acceptable for employment in this particular care facility." Nevertheless, the arbitrator found that it was "not firmly established and published to employees that caring for a family member not in a critical or serious health situation is not an acceptable excuse," and ordered the suspension reduced to a written warning.

*In re Allied Paper, Inc.*⁶⁵ — A worker refused a Saturday call-in for emergency mandatory overtime because his wife was seriously ill with ovarian cancer and there was no one to stay with her. The worker had been called because he was low on the required overtime list in terms of amount of overtime already worked and the company was equalizing overtime among the workers. The company suspended him for insubordination. The arbitrator sustained the grievance, but conditioned the company's obligation to compensate the worker for his lost pay on the worker's successful submission of a plan proposing how he would work overtime in a manner consistent with his wife's medical condition.

*In re Tractor Supply Co.*⁶⁶ — An employer posted notice of two hours mandatory overtime the day before the overtime was to be worked. Workers had the option of reporting the next day two hours early or staying two hours after their regular shifts ended. Then the employer took down the notice and a supervisor clarified that the following day's work could be handled with voluntary overtime. After some workers had left for the day, the employer reposted the mandatory overtime notice. The worker arrived at the start of his regularly-scheduled shift and learned of the mandatory overtime. The worker refused to work the overtime because he needed to get home to care for his grandchild.

The worker's stepson had joint custody of his 18-month old son. Due to the child's medical condition, the court required that the child be cared for by the family instead of a babysitter. The worker cared for the child while his stepson worked as the evening manager of a store, where he was the only manager on duty. If the worker had known of the overtime the day before, he would have reported two hours early, but because he had to care for his grandson, he notified his supervisor that he would not work the overtime. The supervisor asked him why and the worker replied that it was none of his business. The supervisor told the worker that accommodations had been made for reasonable excuses and again asked why he could not stay for the two hours of overtime. The worker again said it was none of his supervisor's business. The supervisor ordered the worker to work the overtime. The worker left and was fired for insubordination. The arbitrator emphasized the worker's failure to explain why he could not stay to the supervisor. However, he found that worker's need to care for the child and the confusion concerning the notice the day before made the discharge unreasonable and reduced the penalty to a thirty day suspension.

*In re Fawn Engineering Corp.*⁶⁷ — The worker was terminated after he was absent for three days to attend his mother-in-law's funeral. Although he did not directly notify his employer for the reason of his absence, he requested his son to do so. Unfortunately, the son failed to make the necessary phone calls. The employer, however, was aware that the worker's mother-in-law had died because another worker had showed the manager a copy of the funeral service. The worker was nevertheless fired under the terms of the collective bargaining agreement, which provided that a worker would be discharged when absent for three days or more without notifying the employer. The employer contended that it had applied the applicable contract language. But the employer had also granted the worker three days bereavement pay. Therefore, because the employer knew, or should have known, that the worker was attending the funeral of his mother-in-law, the arbitrator ruled in

favor of the worker. However, because the worker relied upon his son to notify the employer, rather than calling the employer himself, the worker's net back pay was cut in half.

*In re Los Angeles County, Department of Public Social Services*⁶⁸ — A female eligibility worker was suspended for five days for failing to report to work on the day after a holiday. The worker, an immigrant from Mexico, was adopted by a Mexican woman after her father abandoned her family while she was a child. The worker's adoptive mother and other relatives, none of whom spoke English, traveled from Mexico to visit the worker. The worker requested and received leave from work so that she could spend time with her adoptive family. On the day her family was supposed to fly back to Mexico, their flight was cancelled. The family was put on a flight that left four days later. The worker returned to work after her leave expired, but asked her supervisor for an additional day of leave so that she could help her family navigate the airport. The supervisor told the worker that she was being transferred and that she would have to request leave from her new supervisor.

This new supervisor refused to give the worker the full day off because numerous workers had already taken the day off or called in sick. The supervisor offered to give the woman two hours off in the morning, but the woman refused because her family's flight was in the afternoon. The worker told the supervisor that she would not show up for work and the supervisor warned her that she would be subject to discipline. The worker did not show up for work, and instead, accompanied her family to the airport.

The arbitrator reduced the suspension from five days to three. The arbitrator wrote, "the grievant knew that it was wrong not to come to work... however, she felt forced to choose between two competing responsibilities — her obligation to her employer...and the obligation to assist her adopted family." But, while recognizing the validity of both obligations, the arbitrator also declared that, "notwithstanding the fact that the grievant acted honorably and with integrity, she must bear

the consequences of her actions." Therefore, the arbitrator imposed a three-day suspension — the minimum penalty for failing to report to work.

*In re Penske Truck Leasing*⁶⁹ — A male customer service representative was discharged due to excessive absences and tardiness. The worker was a caregiver for his ill grandmother. The worker had worked for the company for only 16 months, but had left early without authorization 20 times and had failed to report to work or call in 13 times. Before firing the worker, the company counseled the employee about his absences, issued a written warning and suspended him. The company also offered to reinstate the employee, but he did not show up for work on the day he was to be reinstated. Additionally, the company asserted that the worker never told any of his supervisors that he was caring for his grandmother; instead he first raised the issue at arbitration. Moreover, the worker's attendance problems continued even after his grandmother passed away.

The arbitrator found the worker's explanation for missing work unpersuasive and questioned why the worker never mentioned his caregiving responsibilities to his supervisors. Nevertheless, the arbitrator allowed the worker a "third chance" to improve his attendance. Therefore, the arbitrator upheld the grievance, but held that the worker could be summarily discharged if was late or missed any days during a 90-day "final warning" period.

*In re Marion Composites*⁷⁰ — A male production worker was suspended for refusing to work overtime an entire weekend. The worker's wife had recently left him, he was on mild tranquilizers to cope with this event, and he was responsible for caring for his children when his wife was unable to. When the company told workers on Thursday that they would have to work overtime on both Saturday and Sunday, the worker first refused to work either day because he was "tired and worn out." Later that day, he said he could work one day, but could only work eight hours, not twelve, because he had to care for his children. However, the company scheduled him to work a twelve hour shift on both days. The worker showed up for one day of overtime, worked eight

hours and then left. The company gave the worker a three-day suspension for leaving early from his shift, and for insubordination (failing to follow the order to work overtime both days). Additionally, the supervisor said that the worker never informed him that he could not work both days.

The arbitrator reduced the suspension to a warning and ordered back pay. The arbitrator found that the worker had properly informed his supervisor of his caregiving responsibilities. Moreover, the arbitrator noted that the worker had an excellent employment record and had consistently shown willingness to accept overtime on previous occasions. Finally, the arbitrator said that, “Nowadays, employers must give some consideration to the personal problems of their employees. This is not to say that they should coddle them. In today’s world, working families are often under a high degree of stress, and it may not be possible for the employee to leave his or her problems ‘at the gate’...when we consider grievant’s entire situation...we believe that a suspension of three days was too harsh a punishment for his offense.”

*In re Jefferson Partners*⁷¹ — A male bus driver was discharged for refusing to accept an assignment and for insubordination. The worker was on the road and called the dispatcher twice to see if he would be assigned a run over the Thanksgiving holiday. The dispatcher told the driver that it was unlikely he would receive an assignment because business was slow. Therefore, the worker started driving to visit his children. Before the worker reached his children, a dispatcher called and told the driver he was needed for a run. The worker said he was on the road to pick up kids and asked to have the run assigned to someone else. The dispatcher refused to reassign the run, telling the worker that he had not asked for the day off. The driver responded with vulgar language and then hung up. The company terminated the driver based on the incident — but also explained that the termination was based the worker’s extensive discipline record.

The arbitrator found that the company did not properly investigate the grievance and relied solely on the word of the dispatcher. The arbitrator

also noted that that company has permitted other workers to decline runs without receiving discipline. Therefore, the arbitrator ordered the worker reinstated, but gave him a one month suspension for using vulgar language.

*In re Boise Cascade Corporation, Insulite Division*⁷² — The father of a severely handicapped son was fired from his job at a manufacturing plant for excessive absenteeism. The worker filed a grievance to protest the discharge and was reinstated on the condition that he meet with a counselor about his absenteeism and provide documentation for any subsequent absences due to family illness. The worker met with a counselor, but the counselor informed him that counseling would not be worthwhile because the worker’s absenteeism was due to his caregiving responsibilities, and not an “individual” problem. (The worker often had to travel with his son to doctor’s appointments in a nearby town.)

The worker’s attendance was reviewed annually, and after two years the worker was told he still needed to improve his attendance record. The following year, the worker was injured on the job. He returned to work the next day with a doctor’s note restricting him to “light work.” A little over two weeks later, the worker experienced chest pains and called in to work. The next day he saw a chiropractor for treatment of his pain. While the chiropractor recommended “light work,” the worker’s physician cleared him for work. Nevertheless, the worker continued to miss work for two more days, and on the day of his discharge, came to work with a note from a second chiropractor excusing him for three days of missed work.

The arbitrator found that, since the date when the worker initially agreed to document his absences, the worker had successfully done so. Therefore, the arbitrator found that the employer should have accepted the worker’s documentation for the three-day illness. The arbitrator upheld the grievance, but because of the employee’s poor attendance record, the arbitrator refused to order the company to pay back pay and placed the employee on probation for one year.

*In re State of New York, Department of Correctional Services*⁷³ — A male correction officer, stepfather to a boy who had been shot and paralyzed, was terminated for excessive absenteeism and tardiness. The company had attempted to discharge the worker once previously, but the worker's grievance was upheld. In the instant arbitration, the worker was absent from work without prior authorization a total of 24 working days over an eight month time span, and was tardy 10 times during the same period. The company counseled the employee about his absenteeism while also giving him numerous warnings and disciplinary memos.

The union argued that the employee had never been absent without leave (AWOL); instead he had called in, and was excused from work during each of the documented absences. The union argued that the company had to examine the reasons for absences, and could not discipline

the employee for reasonable absences. Some of the absences resulted from his need to be at the hospital with his stepson after the young man had major surgery. The worker also was ill on many occasions with the flu, hypertension, diarrhea and pharyngitis. Additionally, the worker was absent due to the death and funeral of his brother-in-law.

The arbitrator found two reasons to uphold the grievance. First, the arbitrator found that the worker's attendance had improved since the first arbitration and that the worker should have been permitted more time to show that his attendance could further improve. Additionally, the arbitrator found that the worker's family tragedy was a mitigating factor, and refused to "hit" the worker with a "second heavy blow" by permitting the discharge. Instead, the arbitrator fined the worker \$500 as a penalty for his absentee rate.

IV. HOW WORK/FAMILY ISSUES ARE RESOLVED IN THE UNIONIZED WORKPLACE

State of the Unionized Workplace

The United States boasts 6.5 million female union members and 9.9 million male members, many of whom have caregiving responsibilities.⁷⁴ Currently, unionized workplaces are more likely to provide a range of family benefits than non-unionized workplaces.⁷⁵ Union members are also more likely to be informed about their rights to take caregiving leave under various federal laws, and are less likely to worry about losing their jobs when they take such leave.⁷⁶

But many unionized workplaces are still far from family-friendly. Mandatory overtime, emergency callbacks, and rotating shifts can wreak havoc on a caregiver's schedule, especially when the worker is a single parent or part of a dual-earner couple. In fact, some workers have taken drastic steps to highlight policies that severely burden caregivers. For instance, a group of over 500 female workers at one unionized workplace engaged in the following tactic to demonstrate the detrimental effects of mandatory overtime:

Whenever the employer required the workers to work overtime, the group of women had their babysitters drop their children off at their workplace. When the security guards saw the children, they were dumbfounded, and when the women were confronted by their managers, they said, "I would be put in prison and my children would be taken away from me if I leave them home alone — I cannot do that. You told me I had to stay, so they're going to come here."⁷⁷

While such tactics dramatically demonstrate the work-family conflicts many workers face, most workers are wary of actively clashing with their employers. Instead, workers with caregiving responsibilities struggle to be "ideal workers" within systems that do not accommodate such obligations and they often face discipline when they must fulfill their caregiving responsibilities.

Progressive Discipline

Discipline — how and when it will be imposed, and in what form — is an issue that is discussed extensively during any contract negotiation between a union and an employer. Under most collective bargaining agreements, the employer agrees to utilize a system known as "progressive discipline." A progressive discipline policy calls for an employer to impose progressively more severe disciplinary actions as an employee repeatedly violates company policy.

A typical progressive discipline system includes the following steps:

- Verbal Warning
- Written Warning (+ suspension)
- Final Written Warning (+ longer suspension)
- Termination

Exceptions to this system are made where an employee engages in a single instance of serious misconduct and immediate termination is necessary. Additionally, many policies dictate that an employee's climb up the disciplinary ladder can be halted and reversed where the employee maintains a clean disciplinary record for a set period of time.

When implemented properly, a progressive discipline system promotes predictable and equitable treatment of employees by restricting supervisors' discretion regarding discipline; gives employees time to correct problems before being subject to termination; and helps employers identify and counsel struggling employees before their conduct becomes problematic. But such systems can be abused, both by employees who chronically violate company policy but never commit quite enough violations to make them eligible for termination, or by employers who blindly enforce such policies rather than counseling disciplined employees in ways to avoid further discipline.

Resolving Problems in the Unionized Workplace

Commonly, workers challenge their employer's disciplinary actions through the grievance and arbitration process specified in their collective bargaining agreements. The arbitrations we review in this report are the "last step" in this process; it begins when a worker who believes that the employer violated one or more provisions of the contract files a grievance. The contract provides procedures for discussing the grievance, typically with the matter handled initially by a union representative and the immediately-involved supervisor and then progressing through successively higher levels of authority within the employer and the union. The union resorts to arbitration if it is not satisfied with the employer's responses in the grievance discussions. At the arbitration hearing, the union and the employer present their sides of the story, and a neutral arbitrator, mutually selected by the employer and the union, determines whether the contract was violated. For the purposes of this paper, we reviewed published arbitration decisions.

Many disputes are settled informally. And many arbitration awards are never published. Therefore, our discrete set of arbitration awards reflects only a small portion of the cases where workers are disciplined due to their caregiving responsibilities. But though our review constitutes only the "tip of the iceberg," we can say with confidence that many other similar situations arise in the lives of America's working families.

Regardless of how an employment dispute arises, each dispute involves three actors with distinct and oftentimes conflicting interests: the worker, the union and the employer. By and large, workers with caregiving responsibilities desire consistent work schedules, employer-sanctioned emergency personal leave for caregiving crises and flexible enforcement of attendance policies. Employers, on the other hand, value workers who are timely, rarely absent and have the flexibility to work shifting work schedules. Unions value worker job security and consistent administration of employer policies.

When disputes do go to arbitration, the arbitrator must weigh these competing interests. The set of facts that each side presents has a significant effect on the arbitrator's decision. An arbitrator will not look kindly on a worker who walks off the job without giving his supervisor any notice or explanation — regardless of the nature of his family emergency. Likewise, if an employer appears to have implemented an arbitrary policy that is not supported by a compelling business need, the arbitrator is not likely to uphold disciplinary measures based on that arbitrary policy.

In the absence of specific contract provisions relating to caregiving responsibilities, an employer's ability to discipline workers is limited only by applicable state and federal statutes and by the "just cause" language that is present in almost all collective bargaining agreements. Such clauses often state that the employer must have "just cause" to discipline or discharge workers, but these clauses rarely outline the contours of "just cause."⁷⁸ Basically, the parties have agreed to refine the concept of just cause on a case-by-case basis through the grievance procedures, with unresolved disputes submitted to arbitration.

Arbitrators have developed general criteria for just cause. In an often cited award, *Enterprise Wire Co.*⁷⁹, arbitrator Carroll Daugherty outlined a set of seven guiding questions:

1. Did the company give to the employee forewarning or foreknowledge of the possible or probably disciplinary consequences of the employee's conduct?
2. Was the company's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the company's business and (b) the performance that the company might properly expect of the employee?
3. Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?
4. Was the company's investigation conducted fairly and objectively?

5. At the investigation did the “judge” obtain substantial evidence or proof that the employee was guilty as charged?
6. Has the company applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?
7. Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the employee’s proven offense and (b) the record of the employee in his service with the company?

Although arbitrators differ over the general utility of Daugherty’s seven questions, our case review indicated that in evaluating discipline raising conflicts with caregiving responsibilities, arbitrators tended to focus on questions 1, 2, 3, 6, and 7. Many of the variances in arbitration decisions can be attributed to the arbitrator giving greater and lesser emphasis to one or more of these factors.

For instance, arbitrators who issued the harshest decisions against workers tended to focus on the management’s need for the safe, orderly and efficient operation of the company’s business. These arbitrators consistently set a low standard for the type of managerial order that would be considered “reasonably related” to the company’s goals. Once an order met the standard, the arbitrator rarely took into account the pressure the worker was under as a result of his or her caregiving responsibilities. These arbitrators invariably found that the employer had “just cause” to discipline the worker.

On the other hand, the most family-friendly arbitrators often focused on whether the degree of discipline was reasonably related to the seriousness of the worker’s offense. These arbitrators tended to consider the worker’s personal circumstances in deciding whether the worker had a legitimate reason for taking the actions that he or she took. If the worker was found to have been acting in response to valid caregiving responsibilities, the arbitrators typically determined that the worker was disciplined too harshly, and therefore, that the employer did not have “just cause” to discipline the worker to the extent taken.

Many arbitrators fell somewhere in between family-friendly, and family-insensitive. These arbitrators attempted to balance the interests of the employer with the interests of the worker. A close examination of the cases showed us that, while a discrete set of cases are determined solely on the arbitrator’s valuation of family care responsibilities, the majority of decisions hinged on the employers’ reasons for disciplining and the degree of discipline plus one or more of the following factors: (1) the worker’s work history, (2) the worker’s willingness to discuss the reasons for his or her conduct, (3) the employer’s willingness to investigate the reasons for the worker’s conduct and (4) the employer’s flexibility regarding absences and overtime.

V. RECOMMENDATIONS

A. When the Contract Lacks Family-Friendly Language

As the reviewed cases demonstrate, most contracts do not yet contain family-friendly contract language. Instead, workers who are disciplined when they abandon their workplace responsibilities to fulfill caregiving responsibilities must rely on an arbitrator's interpretation of the contract's general "just-cause" language. Therefore, these workers are forced to operate in a constant state of uncertainty, where they never know if their actions are protected by their collective bargaining agreement.

Though a great deal of ambiguity is created by such contracts, workers and union representatives should not feel that they lack control over the outcome of their grievances. Rather, unions can encourage workers to adopt practices that will increase the likelihood that any discipline the worker receives will be reduced or overturned by an arbitrator. Unions should promote the following best practices:

- **Urge workers to communicate with their supervisor and union.** When a man is not accustomed to sharing details of his personal life, explaining to a supervisor that he can't work overtime because he has to pick up his child from school can be a difficult task. But it is also a step that, if taken, could avoid disciplinary problems altogether or cause an arbitrator to rule in a worker's favor. The lack of notice to the employer appeared to be especially important in both *City of Columbus* and *Southern Champion Tray Co.* where the employer's discipline was upheld. Both cases involved unscheduled overtime, and in both there was evidence that the employer would have excused the worker from working all or part of the overtime shift if the worker had only discussed his caregiving responsibilities with his immediate supervisor. The arbitrators, understandably, were unsympathetic when the workers failed to communicate. The workers were, in essence, their own worst enemies.
- **Counsel workers not to miss work, or to do so only as a last option.** When a worker can demonstrate that he or she has attempted to fulfill caregiving responsibilities without interfering with work duties, an arbitrator is likely to more closely examine the reasonableness of the employer's discipline. For instance, in *United States Steel Corp.* The arbitrator upheld a worker's suspension and focused on the fact that the worker — who was having difficulty securing child-care — had not attempted to swap shifts with other workers before refusing to show up for a scheduled shift. In contrast, in *Rochester Psychiatric Center*, the arbitrator refused to uphold the worker's dismissal for refusing to work overtime because the mother had proposed a number of alternative work arrangements to her supervisor that would have allowed her to work overtime and fulfill her caregiving responsibilities.
- **Grieve less severe disciplinary actions.** Where an employer is blindly enforcing a progressive discipline policy, even an employee with a valid reason for violating company policy can quickly rack up an extensive disciplinary record. Participating in the grievance process when a worker is in the early stages of a progressive discipline system allows the worker to formally notify the employer that he is having difficulty balancing his work and family responsibilities. And where a worker's grievance is upheld, the worker decreases the likelihood that he will become eligible for termination. In *Social Security Administration* the arbitrator upheld the worker's grievance in part because the worker had a clean employment record. Because the worker won her grievance, she also retained that clean record.

- **Bargain for family-friendly language**
(see section below)

Likewise, employers can structure their workplace in a manner that recognizes the importance of worker's caregiving responsibilities, while not undermining the management's authority or sacrificing efficiency:

- **Enforce discipline policies with openness.** Most employers want to be fair to all workers. But employers should not blindly enforce policies in the spirit of "fairness." In *Rochester Psychiatric Center*, neither the employer nor the union undertook any effort to address the worker's circumstances that prevented her from working a second shift on short notice. Instead, each time her turn arose in the rotation and she refused the second shift, the employer advanced her through its progressive discipline system, discharging her for the third offense. The arbitrator ordered an accommodation that appeared to meet the worker's child care responsibilities and the employer's interest in spreading the overtime burden equally among the workers, but if the union and employer had sat down to deal with the problem together initially, discharge and arbitration could have been avoided.
- **Work with the union to investigate a worker's reasons for missing work.** On-site supervisors should monitor the disciplinary records of workers and should take remedial actions when a worker's record raises red flags. Such actions could be as simple as attempting to discern the worker's reasons for missing work. And if a worker is unwilling to discuss personal issues with the supervisor, the supervisor should explain his or her concerns to the shop steward, who may be more successful at encouraging the worker to open up. This issue of lack of investigation by the employer arose in *In re Social Security Administration*, where the arbitrator found for the worker. Here, the worker explained in a phone conversation with the supervisor that she was experiencing child care difficulties, but then the worker hung up on

the employer. Yet, despite the worker's behavior, the arbitrator dismissed the employer's disciplinary action because the employer failed to call the worker back to determine the severity of her caregiving situation before commencing disciplinary action. On the other hand, in *Southern Champion Tray Co.*, the employer was sensitive to the worker's child care responsibilities and even asked him if he needed to make arrangements for his child because of anticipated overtime. The arbitrator upheld the worker's discharge when the worker left work to pick his child up from school despite being ordered to stay and work overtime.

- **Recognize that family emergencies, like illnesses, occur without warning.** In the majority of the cases where the arbitrator completely discounted the importance of caregiving, the arbitrator explicitly drew a line between illnesses (justifiable excuses) and caregiving emergencies (unjustifiable excuses). The arbitrator in *Knauf Fiberglass*, on the other hand, took a more balanced approach. In this case, the arbitrator overturned the employer's disciplinary action when the employer dismissed a worker who left work after receiving a call that her child was in the hospital. Though the worker was on a probationary program due to her atrocious attendance record, the arbitrator held that the worker's absence was in response to a true emergency, and therefore could not be counted against the worker's probationary record.

Negotiating for Family-Friendly Contract Language

The inclusion of family-friendly policies in collective bargaining agreements can help create a positive work environment for workers as well as a productive workplace for the employer. When unions and employers agree to abandon rigid workplace rules relating to absenteeism, emergency leave and mandatory overtime, and implement policies that help workers manage their caregiving responsibilities, they eliminate many of the factors that lead to employer-employee conflicts. Therefore, it is in the best interest of union representatives to prioritize the inclusion of family-friendly policies during

contract negotiations. Although employers also benefit from the inclusion of such policies, they will likely be hesitant to adopt provisions that excuse workers from some of their workplace responsibilities. Union representatives, then, must come to the bargaining table armed with specific proposals for modifying the contract and they should emphasize the collective benefits of the policies to the employer.

In fact, some forward-looking unions and employers have already begun to include family-friendly policies in their collective bargaining agreements. The Labor Project for Working Families has tracked union bargaining nationwide and has collected numerous examples of collective bargaining agreements that recognize the caregiving responsibilities of workers. Below, we have cited six examples of contract provisions and other negotiated agreements that can make a workplace more family-friendly and lead to less employer-employee conflicts.⁸⁰

- **Creating child care and elder care consortiums.** The United Automobile, Aerospace and Agricultural Implement Workers of America developed a child care consortium with the help of local businesses. Notably, the caregivers in the consortium offer early-morning and later-evening child care as well as care during school holidays and vacations. Additionally, the consortium helps workers secure emergency child care when their regular child care provider is unavailable. The Communication Workers of America and the International Brotherhood of Electrical Workers worked with an employer to develop a similar elder care consortium where workers can find caregiving services for relatives age 60 and older.
- **Creating on-site or near-site child care centers that are affordable⁸¹ to the average worker.** The United Autoworkers as well as the International Association of Machinists District Lodge 751 have worked with employers to develop child care centers at or near unionized workplaces. Additionally, according to researchers Naomi Gerstel & Dan Clawson, offering on-site child care when a school holiday is a work day is popular with both union members and employers.
- **Offering subsidies for both formal and informal childcare.** Union researchers Gerstel and Clawson found one unionized workplace where the employer offered a \$100 subsidy to workers using informal care — i.e. family members, neighbors and friends, and \$225 for workers sending their children to licensed day care providers. The employer also increased the amount of the informal subsidy where the informal caregivers attended a company-sponsored childcare training session.
- **Allowing workers to use sick leave to care for ill family members.** The Washington-Baltimore Newspaper Guild Union Local 35 successfully bargained for a contract provision that permits workers to use sick leave to care for ill children and family members. The American Federation of State, County and Municipal Employees District 84 Local 2719 negotiated a similar policy; this policy also increases the number of sick days that can be used as the worker spends more time working for the employer.
- **Developing flexible work schedules.** The Communications Workers of America negotiated a policy where individual workers are permitted to vary their work hours around a core work schedule that encompasses 60% of the workday. Similarly, the International Brotherhood of Electrical Workers Union Local 1245 negotiated flexible shifts for workers at a 24-hour company; workers could vary their starting and ending times within a two-hour window.
- **Making overtime less burdensome.** The Washington-Baltimore Newspaper Guild Union Local 35 persuaded an employer to make significant efforts to limit mandatory overtime. The employer also agreed to grant exemptions from overtime to all workers who requested them unless no other worker was available to work. The Communications Workers of America Union Local 7777 also worked with an employer to limit weekly mandatory overtime hours; the policy limited the number of weekly overtime hours and also guaranteed that all workers would work at least one full week per month without overtime.

- **Rethinking personal leave.** The Hotel Employees and Restaurant Employees Union Local 2 bargained for a contract that eliminated traditional leave categories such as paid holidays and sick leave and replaced them with a paid leave policy where workers were not required to state the reason for taking leave. The United Steel Workers of America Union Local 12075 negotiated for paid personal emergency leave. Workers were given a few hours per year that could be used during emergencies; unused leave was rolled over each year. Additionally, researchers Gerstel and Clawson spoke to members of one union that negotiated an emergency leave policy that permitted workers to give notice of their need to use a day of personal leave up until the start of their shift, rather than giving more than one month's notice, as previously required.

Although these provisions are a positive step towards making unionized workplaces more family-friendly, no new policy will become successful unless workers understand its nuances. Therefore, once union representatives have successfully bargained for family-friendly policies, they must educate workers about their newly-gained protections. Because most provisions will not be triggered unless a worker informs the union official or immediate supervisor of his or her family responsibilities, communication between the worker and the union becomes crucial.

For more information on negotiating family-friendly contract language, contact the Labor Project for Working Families via telephone at (510) 643-7088, e-mail at lpwf@uclink.berkeley.edu or on the web at <http://www.laborproject.org/bargaining/index.html>.

VI. CONCLUSION

This report raises the question of when missing work should lead to workplace discipline. Because of the high level of family caregiving, rigid application of workplace rules can leave children home alone, elderly family members without their medication, and seriously-ill spouses without care.

We challenge employers, unions and workers to create family-friendly workplace environments where caregiving responsibilities are legitimized. Therefore, we advise workers to communicate with their employers and unions and make attempts to fulfill their caregiving responsibilities before deciding to miss work. We also recommend that

employers investigate the reasons why workers fail to fulfill their workplace responsibilities and recognize that family emergencies, like illnesses, occur without warning. And finally, we challenge unions and employers to draft collective bargaining that contains family-friendly polices. Working together, all parties can attain a workplace that meets reasonable employer business needs without forcing workers to leave their children and other dependent loved ones home alone.

END NOTES

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- 80.** Each listed example comes from the Labor Project for Working Family's website at <http://www.laborproject.org/bargaining/index.html>.
- 81.** See Gerstel et al., *supra* note 74, (finding that some on-site child care centers had so many "bells and whistles" that the average worker could not afford to send his or her child to the center, instead higher-level professions utilized the centers).