"NO SONG UNSUNG, NO WINE UNTASTED"†— EMPLOYEE ADDICTIONS, DEPENDENCIES, AND POST-DISCHARGE REHABILITATION: ANOTHER LOOK AT THE VICTIM DEFENSE IN LABOR ARBITRATION

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† As sung by Fantine, alone, unemployed, destitute, and a classic victim of circumstances beyond her control forcing her to prostitution and an early death:

I dreamed a dream in time gone by
When hope was high
And life worth living
I dreamed that love would never die
I dreamed that God would be forgiving.
Then I was young and unafraid
And dreams were made and used
And wasted
There was no ransom to be paid
No song unsung
No wine untasted.

HERBERT KRETZMER, *I Dreamed a Dream, from* LES MISÉRABLES (Geffen Records 1986).

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I. INTRODUCTION

Consider the following fact patterns: An airline mechanic, reacting to a supervisor's comments, pushes him into a trash can when the supervisor "gets in his face." The employee is dismissed despite his relatively long-term record of good service to the company. Immediately after his dismissal, he enters an Employee Assistance Program (EAP) and he is referred to counseling for "anger management." At a subsequent arbitration hearing, the union enlists the testimony of his EAP-referred counselor, a psychologist in the business of providing assistance to employees with addictions or dependencies. Under oath, the counselor testifies that the grievant has been attending anger management classes. The counselor further declares the grievant understands his problem with controlling his temper and believes with continued sessions his fits of anger can be controlled.[1] The employee

1. In this particular case (where the senior author served as umpire), the grievant testified the counselor "trained" him to envision a picture of the grievant's wife and daughter when he starts to experience an "anger attack." The grievant is supposed to realize that if he loses his temper, his family will experience the results of his anger. Not wanting to place poverty on his family through loss of employment, the grievant avoids trouble at work.

shows a willingness to accept the fact that he has an "anger problem" and asserts he can be "rehabilitated" through treatment and returned to productive employment.

An employee (a single mother) steals some credit cards from a co-worker's locker. She is arrested when using her co-worker's credit card (reported lost or stolen by the co-worker). She enters a plea to misdemeanor theft, is placed on probation, and notifies management of the situation. Management, not wanting to retain dishonest employees, terminates her employment pursuant to a long-term policy of discharging all employees guilty of theft or dishonesty. At the arbitration hearing, she argues that she was under severe stress due to a death in the family, a sister in jail, and two children in her custody. She also points to her drug addiction as a contributing factor to her workplace conduct. Offered into evidence is a statement from a rehabilitation hospital attesting to her continued efforts and attendance at rehabilitation. Aside from the theft incident, she has been a good worker.

An employee is caught shoplifting on the premises of his employer's customer. At the arbitration hearing, the grievant, through his union, argues that he is "disabled" because he suffers from alcoholism, an eating disorder, and kleptomania. Based on the testimony of his psychologist, the union asserts that the shoplifting was a "behavioral manifestation" of the grievant's obsessive-compulsive disorder which, in turn, was directly affected by his alcoholism, the need for a carbohydrate high, and a similar high he obtained from stealing in situations where he may be caught. The union urges that the arbitrator recognize kleptomania in the same category as alcoholism or drug addiction and, as such, reinstate the grievant when he is successfully rehabilitated.[2]

Feeling despair over his wife's broken promise to patch-up their marriage and a subsequent divorce settlement where he lost his house and visitation rights to his two-year old daughter, an employee, in a depressed mental state and a drug-induced stupor (in this case, a relapse), accumulates three unexcused failures to report to work within a thirty-day period.[3] When the grievant attempted to discuss his problems with management before the dismissal, he is told to "straighten up or he would get a 30-day suspension."[4] At the hearing, the union, urging reinstatement, argues that the grievant could not cope with the cumulative effect of his problems.[5]

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2. The cited case is an actual unpublished decision. *See* Lamont E. Stallworth & Martin H. Malin, *Conflicts Arising Out of Workforce Diversity, in* ARBITRATION 1993: ARBITRATION AND THE CHANGING WORLD OF WORK, PROCEEDINGS OF THE 46TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 104, 109 (Gladys W. Gruenberg, ed., 1994) (referred to as the "Twinkies case"); *see also* Elliot M. Abramson & Carlton J. Snow, *Alcoholism and Kleptomania: Looking at the Legal Inconsistencies*, 7 EMP. REL. L.J. 619 (1982).

3. *See* Wacker Silicones Corp. v. United Steelworkers Local 7237, 95 Lab. Arb. (BNA) 784, 785 (1990) (Hodgson, Arb.).

4. *Id.*

5. *Id.* at 787-88 (ordering reinstatement, reasoning that due to his drug-induced stupor,

Under what circumstances should any of the above employees be given "a pass" for their on-duty conduct when that conduct can be traced to some form of physical (addictive) or psychological (dependent) infirmity? What is an "addictive" or "dependent" state? Should arbitrators treat addiction or dependency the same as a mental or organic medical problem? Would it make a difference if the employee already had been given a "second chance" for similar behavior? Should it matter if an employee enters and successfully completes an Employee Assistance Program after his dismissal? Are there "envelopes" regarding an employee's behavior that cannot be pushed? For example, if an employee's so-called "addiction" or "addictive behavior" resulted in theft or violence to a co-worker, is the employee just out of luck notwithstanding his alcoholism, drug abuse, or mental illness? Should racial or gender differences be recognized by the arbitral community where gender or race can be demonstrated to "cause" the behavior at issue?[6] If so, should arbitrators recognize these special social and racial experiences by applying a "reasonable woman" or "reasonable black-person" standard, as some courts have? [7]

This Article examines situations where "troubled" employees use an "addiction" type defense as a mitigation argument at an arbitration hearing. Part II examines the variants of the victim defense as presented by employees in arbitration hearings. A workable definition of "addiction" is proposed. Part III considers the concept of "just cause" as used by arbitrators in traditional discharge cases. Part IV deals with off-duty considerations. Part V examines the effect of rehabilitation and when, if ever, arbitrators credit post-discharge efforts at rehabilitation by employees. Part VI considers the discrimination argument. Gambling cases are briefly considered in Part VII. The potential applicability of the Americans with Disabilities Act (ADA) and the Rehabilitation Act is considered in Part VIII. Application of substance abuse principles to other areas of workplace conduct is dealt with in Part IX. A conclusion, synthesis, and policy analysis are outlined in Part X.

It is our thesis that there is little hope for addicted or dependent employees who engage in egregious or criminal behavior while at work. Their particular

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the employee did not realize that by not calling in he could lose his job).

6. In this regard, see Stallworth & Malin, *supra* note 2, at 104-29 (discussing how arbitration and mediation can be used to supplement what the authors term "the public justice system" to resolve diversity- or statutory-related disputes).

7. *See, e.g.*, Ellison v. Brady, 924 F.2d 872, 878-79, 54 FEP Cases 1346, 1352-53 (9th Cir. 1991) (applying a reasonable woman standard in determining whether conduct complained of was sufficiently severe or pervasive to constitute a sexually hostile environment); Harris v. International Paper Co., 765 F. Supp. 1509, 1516, 61 FEP Cases 152, 157-58 (D. Me. 1991) (applying a reasonable black person standard in analysis of a black plaintiffs' claim of racially-hostile environment). *See generally* Walter Christopher Arbery, Note, *A Step Backward for Equality Principles: The "Reasonable Woman" Standard in Title VII Hostile Work Environment Sexual Harassment Claims*, 27 GA. L. REV. 503 (1993) (comparing a gender-neutral standard of reasonableness with a gender-based standard of reasonableness to best achieve Title VII objectives).

dependency or addiction will not entitle the employee to a safe harbor before arbitrators and the courts. In selected cases, employees may obtain a second chance in the arbitral forum if they can show (1) there is a nexus between the addiction or dependency and the employee's misconduct; (2) the misconduct has not passed the "envelope of egregiousness"; and (3) the employee is otherwise determined to be salvageable either because of his good work record or his efforts at post-discharge rehabilitation indicating the employee has control over his problem. Arbitrators, who are conservative by nature and generally operate in a conservative environment, recognize the victim defense as part of a mitigation argument, but rule with management where there is question of the employee's ability to continue in the job. This result is consistent with traditional notions of workplace economic efficiency.

II. THE CONCEPT OF JUST CAUSE, TROUBLED EMPLOYEES, AND THE VICTIM DEFENSE: A PRIMER FOR ADVOCATES [8]

A. *Addiction Definitions: Implications for the Labor-Management Practitioner*

The "addiction" argument has its parallel in the insanity defense in criminal law. The insanity defense traces its origins to medieval times where it was thought that a person could not be held guilty of a crime if he had no more understanding of his activity than a wild beast would.[9] A person who is incapable of understanding the nature and quality of his crime is legally insane.[10] There is no medical diagnosis corresponding to the legal definition of insanity (many psychotic and schizophrenic

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8. *See generally* Daniel G. Collins, *Just Cause and the Troubled Employee*, *in* ARBITRATION 1988: EMERGING ISSUES FOR THE 1990S, PROCEEDINGS OF THE 41ST ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 21 (Gladys W. Gruenberg ed., 1989); Dorothy J. Cramer, *Arbitration and Mental Illness: The Issues, the Rationale, and the Remedies*, ARB. J., Sept. 1980, at 10; Donald F. Godwin, *The Problems of Alcoholism in Industry*, *in* ARBITRATION 1975: PROCEEDINGS OF THE 28TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 97 (Barbara D. Dennis et al. eds., 1975); Gerald G. Somers, *Alcohol and Just Cause for Discharge*, *in* ARBITRATION 1975: PROCEEDINGS OF THE 28TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 103 (1975); 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*, ARB. J., Dec. 1982, at 51; Michael Marmo, *Arbitrators View Problem Employees: Discipline or Rehabilitation?*, 9 J. CONTEMP. L. 41 (1983); Janet M. Spencer, *The Developing Notions 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 (1979); Benjamin W. Wolkinson & David Barton, *Arbitration and the Rights of Mentally Handicapped Workers*, MONTHLY LAB. REV., Apr. 1980, at 41 (1980).

9. *See* H. RICHARD UVILLER, VIRTUAL JUSTICE: THE FLAWED PROSECUTION OF CRIME IN AMERICA 268-69 (1996).

10. *See* M'Naghten's Case, 8 Eng. Rep. 718 (H.L. 1843); *see also* RICHARD MORAN, KNOWING RIGHT FROM WRONG (1981).

patients are rational much of the time).[11] Accordingly, what results is continued litigation over the legal meaning of insanity with doctors from either side offering medical opinions regarding the mental condition of the defendant.

Similar to the insanity defense, troubled employees often cite mental and physical infirmities as the underlying cause of their workplace difficulties. The concept of "guilt," they argue, should be reserved for employees who are free of involuntary addictions and dependencies. Addiction-type arguments thus surface as an affirmative defense once management establishes, generally by the standard of clear and convincing evidence, that the employee engaged in misconduct deserving of discipline or discharge. The burden is accordingly on the union, as the representative of the employee, to raise the issue and prove its relevance and applicability. The union advocate should be prepared to submit medical or other expert testimony in support of its theory that the employee suffers from an "addiction" or "dependent condition" and that this condition was the "cause" of behavior found inappropriate to management.[12]

A threshold problem for the advocate contemplating an addiction or dependency defense is formulating some definition of the term that is operationally useful to the parties. The definition should indicate with reasonable clarity what the advocate must show when asserting the grievant is suffering an addiction or dependency condition. Saying an employee is "addicted" or "dependent" does not make it so.

What exactly is an "addiction" or "dependent condition"? Why is it important to formulate a definition of "addiction" or "dependency"? What causes "addiction"? Biology, chemistry, emotions, or conditioning? What does it mean to assert that an employee is "addicted" or "dependent"? If it is concluded that an employee is addicted to something (alcohol, drugs, sex, food, gambling, shopping, smoking, the

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11. The last two cases of note where defendants successfully asserted the defense were John Hinckley, Jr. (who shot President Reagan to impress the lovely and talented actress Jody Foster), *see Hinkley v. United States*, 163 F.3d 647, 648 (D.C. Cir. 1999), and Lorena Bobbitt (who apparently had her own agenda in surgically removing her husband's penis), *see Bobbit Says Trial of His Wife Was "A Setup, Totally Biased,"* DAYTON DAILY NEWS, Jan. 25, 1994, at 8A. The defense was also asserted by John du Pont (accused of murdering an Olympic wrestling champion at his Philadelphia estate), *see* Samuel F. Yette, *Bar Association Votes to Stop Wrongful Judicial Practices*, PHILA. TRIB., Feb. 14, 1997, at 2A, and Mark Bechard (a mental patient who stabbed two nuns to death in a convent in Waterville, Maine), *see* Sharon Mack, *Bechard Not Criminally Responsible: Judge Rules Delusions Led to Slaughter*, BANGOR DAILY NEWS, Oct. 17, 1996, at 1A. The defense was recently rejected for John Salvi (who shot two receptionists at point-blank range at a Brookline, Massachusetts womens' health clinic in 1994), *see* Fox Butterfield, *Dispute Over Insanity Defense Is Revived in Murder Trial*, N.Y. TIMES, Mar. 4, 1996, at A10. Salvi eventually committed suicide while in prison. *Id.*

12. *See, e.g.*, Suburban Mfg. Co. v. Sheet Metal Worker Int'l Ass'n Local 415, 77 Lab. Arb. (BNA) 1200, 1203 (1981) (Rimer, Arb.) (reversing dismissal for sleeping caused by use of Valium); *see also infra* notes 13-32, 281-83 and accompanying text.

Internet, or golf) or someone (an ex-lover or movie star), what use is this to the labor-management practitioner? Our research into the legal and medical journals indicates that there is no exact, universally-accepted definition of what an addiction is.[13] Indeed, it is a term that lacks conceptual clarity, both in the medical, legal, and arbitral fields. In this respect, we have found numerous and often conflicting definitions of the term "addiction." In lay terms, the problem was aptly put by Joann Ellsion Rodgers as follows:

> Ask 10 Americans what addiction is and what causes it and you might get at least 10 answers. Some will insist addiction is a failure of morality or a spiritual weakness, a sin and a crime by people who won't take responsibility for their behavior. If addicts want to self destruct, let them. It's their fault; they choose to abuse.
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> For the teetotaler and politician, it's a self-control problem; for sociologists, poverty; for educators, ignorance. Ask some psychiatrists or psychologists and you're told that personality traits, temperament, and "character" are at the root of addictive "personalities." Social-learning and cognitive-behavior theorists will tell you it's a case of conditioned response and intended or unintended reinforcement of inappropriate behaviors. The biologically oriented will say it's all in the genes and heredity; anthropologists that it's culturally determined. And [former vice president] Dan Quayle will blame it on the breakdown of family values.[14]

Not only is there no universal definition of addiction, there is no broad consensus that the word "addiction" is the appropriate word to describe such activities or behaviors. It has been suggested that one should substitute "dependence" or "addictive behaviors" for the word "addiction."[15] Does a dictionary help? According to the *American Heritage Dictionary*, the word "addict" is defined as a verb as: "[t]o devote or give (oneself) habitually or compulsively," and defined as a noun as: "[o]ne who is addicted, as to narcotics."[16] *Black's Law Dictionary* defines the word "addict" using Illinois case law.[17] According to *Black's*, an addict is "[a]ny individual who habitually uses any narcotic drug so as to endanger the public morals, health, safety, or welfare, or who is or has been so far addicted to the use of such narcotic drugs as to have lost the power of self-control with reference to his

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13. *See generally* Rex Greene, *Towards a Policy of Mercy: Addiction in the 1990s*, 3 STAN. L. & POL'Y REV. Fall 1991, at 227, 228.

14. Joann Ellison Rodgers, *Addiction—A Whole New View*, 27 PSYCHOL. TODAY, Sept.-Oct. 1994, at 32, 35.

15. Robert C. Rinaldi et al., *Clarification and Standardization of Substance Abuse Terminology*, 259 JAMA 555, 555 (1988).

16. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 78 (3d ed. 1992).

17. BLACK'S LAW DICTIONARY 37 (6th ed. 1990) (citing People v. McKibben, 321 N.E.2d 362, 364 (Ill. App. Ct. 1974)).

addiction." [18] This is of little help, especially if narcotics is not the employee's problem. Alcohol and drug addiction are also considered both disabling illnesses and willful misconduct, further causing problems for the labor-management practitioner.

Other less rigid definitions of addiction that have been suggested define components of an addiction. One theory suggests the symptoms of substance dependence (used as a synonym for addiction) fall into three categories: (1) compulsion or loss of control; (2) tolerance; and (3) impairment.[19] Probably the most popular view of an addiction is that it is simply a "disease."[20] In this sense, "either [you have] it or you [do] not."[21] While this is a popular theory for the general population, it does not withstand scientific scrutiny and is not as widely accepted among experts as it is in the general population.

Is it important for the labor or management practitioner to have consensus on the issue? One thing most of the definitions of addiction have in common is that they invariably focus on *physical* manifestations. Adopting a physical focus, addiction generally requires substance dependence with tolerance and withdrawal effects.

Defining an addiction is further complicated by the inconsistent use of terms. Consider the terms "addiction" and "dependence." Was President William Jefferson Clinton "addicted" to or "dependent" on twenty-one year old White House Intern Monica S. Lewinski when he engaged in "sex"(by whatever definition President Clinton offers) while "alone" with her in the Oval Office? Was former Shorewood, Washington Elementary School teacher Mary K. LeTourneau (age 36) "addicted" or "dependent" when she had a sexual relationship with her former sixth-grade student, Vili Fualaau, a thirteen-year old who fathered a child with her? [22] (Unlike the President, Mary LeTourneau admits she needs treatment.). For some, these terms are interchangeable. For others, this is not the case at all. In the August 1995 issue of the *Harvard Mental Health Letter*, the authors distinguish addiction from dependence by stating that addiction does not include tolerance but does include a definite loss of control.[23] The authors also point out that there is a greater emphasis on social consequences for addictions than for dependencies.[24] For all practical purposes, the terms "addiction" and "dependence" are used interchangeably, and they

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18. *Id.*

19. *Treatment of Drug Abuse and Addiction—Part 1*, 12 HARV. MENTAL HEALTH LETTER (Harv. Med. Sch.), Aug. 1995, at 1.

20. *See* Rodgers, *supra* note 14, at 35.

21. *Id.*

22. *See generally* Carol M. Ostrom et al., *The Other Face of LeTourneau*, SEATTLE TIMES, Feb. 12, 1998, at B1 (discussing LeTourneau's sexual encounter with a former middle school student in violation of the terms of her release from jail). The former teacher was sent back to prison for again seeing the boy just weeks after she had been released from jail and had been forbidden to see him. *Id.*; *see also* John Cloud, *A Matter of Hearts*, TIME, May 4, 1998, at 60-64.

23. *Treatment of Drug Abuse and Addiction—Part 1*, *supra* note 19, at 1.

24. *Id.*

include the three components that (by modern and current usage) define chemical dependence: compulsive use, loss of control, and continued use despite adverse consequences.[25]

There has been further confusion created by the division of dependence into two components: *physical dependence* and *psychological dependence*.[26] Physical dependence involves a development of a tolerance to the substance, while psychological dependence requires a craving for the drug. One practitioner noted that addictive behaviors are normal, a natural part of our "wiring."[27] Everyone has the capacity for some type of addiction. Many people whose addictions are considered diseases, or whose addictions progress to the disease stage, receive special status and command treatment for their addictions. Should they? If addiction takes place in stages (as many believe) and in the brain (no dispute here), there may be good reason to consider "addiction" as simply a "conditioning process" complete with its own reward structure. Accordingly, there may be little reason to treat addictions as having a single cause and a single cure.

Where does this leave the labor-management practitioner? Does the definition matter? If so, how and for whom? Does the definition of "substance use," "abuse," "dependence," and "addiction," have more utility for the scientific community than the labor-management community?[28]

We believe that the most useful approach for the labor-management advocate is to consider addiction as some type of *process* whereby an employee's behavior—that functions both to produce pleasure and (at times) to provide escape from internal discomfort—is employed in some automatic pattern characterized by (1) *recurrent* failure to control the behavior (powerlessness), and (2) continuation of the behavior despite significant negative consequences (unmanageability).[29] The addicted employee tends to be stimulus oriented with behavior developed over the course of repeated physical or cognitive occurrences. No single factor, however, is likely to explain an employee's addictive behavior. External reinforcers (drugs, alcohol, sex, shopping, gambling, the Internet, or whatever) interact with the employee's "chemistry" or "wiring" to produce internal states that are perceived as rewarding or aversive. The employee is then led to conduct a pattern of behavior he cannot manage that is usually destructive to his well-being and job. To change an

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25. *See id.*

26. For a discussion of physical dependence and psychological dependence, see RICHARD SAFERSTEIN, CRIMINALITIES: AN INTRODUCTION TO FORENSIC SCIENCE 254-58 (6th ed. 1998).

27. Rodgers, *supra* note 14, at 32.

28. Howard J. Shaffer, *The Most Important Unresolved Issue in the Addictions: Conceptual Chaos*, 32 SUBST. USE & MISUSE, 1573, 1573-80 (1997).

29. Aviel Goodman, *Addiction: Definition and Implications*, 85 BRIT. J. ADDICTION 1403, 1403-08 (1990).

employee's addictive behavior requires a change in the employee's reward mechanism lodged somewhere in the brain. Pavlov was right all along. Behavior that results in rewards that are valued will be repeated, often to excess.[30] By focusing on the *process* of addiction—specifically the recurrent failure of the employee to control his behavior despite negative consequences—the labor-management practitioner can prepare his case by assembling expert testimony and exhibits to show "addiction" or "dependency" and, as later indicated, that the condition was the cause of adverse job-related behavior. No "addiction" or "dependency" state, whether alcoholism, drug addiction, sexual addiction, kleptomania, or mental disability, should ever be diagnosed by a non-expert witness, including the grievant employee. To assert that an employee is "addicted" or "dependent" is, first and foremost, a conclusion based in medicine or psychology with ramifications both in the medical and legal field. Again, saying it does not make it so. The use of experts is critical.[31] Competent medical testimony is necessary to establish the employee's dependency, the nexus to the misconduct, the effect of rehabilitation on future work performance, and specific actions or safeguards to control future conduct. Select the arbitrator carefully by reading his or her decisions in an effort to determine what "buttons to push" and what arguments are likely to be credited.[32]

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30. Management experts will recognize this as a standard motivational model. An employee will respond to a reward structure if (1) he or she is convinced that the *performance exerted leads to an outcome* (money, status, security, interaction, self-actualization, etc.) that (2) *is valued by the employee.* For a discussion of this and other motivational models, see generally JAMES H. DONNELLY, JR. ET AL., FUNDAMENTALS OF MANAGEMENT 155-57 (1975). Thus, an employee may not exert effort if he believes it will not lead to a specific outcome or, alternatively, because the outcome is not valued by the employee. For example, an employee may realize that working more means more money, but if more money is not desired, the use of money as a motivational tool will not be effective.

31. *See generally* MARVIN F. HILL, JR. & ANTHONY V. SINICROPI, EVIDENCE IN ARBITRATION 166-80 (2d ed. 1987) (discussing medical evidence). Regarding expert testimony, the following advice to advocates has been offered:

> When the issue before the arbitrator is related to some science, profession, occupation, or factual issue beyond the competence of the average layman, an expert may be used. Thus, arbitrators have received and credited expert testimony from physicians, polygraph examiners, psychiatrists, mechanical engineers, handwriting, and even addiction, experts. In such cases, however, it is generally required that the advocate calling the expert satisfy the arbitrator that the expert's qualifications and skills are sufficient to lend a professional opinion on the matter at issue. The advocate should accomplish this by setting forth the witness's education, training, experience, publications, and professional reputation. In most cases the advocate should have the expert's vita (including articles and books) prepared and copied for the arbitrator and the other side.

MARVIN F. HILL, JR. ET AL., WINNING ARBITRATION ADVOCACY 188-89 (1997) (footnote omitted).

32. *See generally* HILL ET AL., *supra* note 31, at 97-110 (discussing selection of arbitrators).

B. *Application of Just Cause Concepts to "Troubled" or "Addicted" Employees*

Thomas Miller and Susan Oliver (then Managing Director, Employee Relations, and Counsel, American Airlines, respectively), in a paper presented before the National Academy of Arbitrators, addressed the question of whether arbitrators apply traditional concepts of just cause to "troubled employees" who engage in misconduct or unsatisfactory job performance.[33] They correctly point out that troubled employees frequently argue that, but for their alcohol- or drug-dependency problem, they would not have engaged in misconduct warranting discipline.[34] Also, troubled employees frequently maintain that their successful treatment following termination should be credited by arbitrators hearing their cases[35]—discussed in Part VII of this Article. Miller and Oliver, citing Denenberg and Denenberg,[36] maintain that many arbitrators have adopted three approaches in deciding discharge cases where alcohol or chemical dependency is asserted as a defense:

> 1. *Traditional Corrective Discipline Model.* Arbitrators using this approach uphold discipline or discharge without regard to an employee's claimed alcoholism or chemical dependency as long as the employer has properly adhered to all pertinent disciplinary requirements.
>
> 2. *Therapeutic Model.* Under this model alcoholism or chemical dependency is viewed as an illness warranting opportunities to recover, including leaves of absence and rehabilitation. An employee's subsequent failure to refrain from misconduct or to correct performance deficiencies is not viewed as cause for discipline, but as a need for additional treatment.
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> 3. *A Modified Corrective Discipline Model.* This approach takes a middle ground between the traditional corrective discipline and the therapeutic model. These arbitrators view alcoholism or chemical dependency as an illness, and routinely allow one "second chance" after there has been some opportunity for rehabilitation. However, should there be a subsequent failure to correct the behavior, the employee will be held fully accountable.[37]

Miller and Oliver assert that arbitrators hearing airline cases limit their approach to either the traditional corrective discipline or the modified corrective discipline models.[38] We submit that arbitrators reach the same result in non-airline

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33. Thomas R. Miller & Susan M. Oliver, *Just Cause and the Troubled Employee: II. A Management Viewpoint, in* ARBITRATION 1988: EMERGING ISSUES FOR THE 1990S, PROCEEDINGS OF THE 41ST ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 34 (Gladys W. Gruenberg ed., 1989).

34. *Id.* at 35.

35. *Id.* at 40.

36. TIA SCHNEIDER DENENBERG & R.V. DENENBERG, ALCOHOL AND DRUGS: ISSUES IN THE WORKPLACE 3 (1983).

37. Miller & Oliver, *supra* note 33, at 41.

38. *Id.*

cases, although the standards operative in the protective services may call for the "traditional corrective model." The reported cases indicate that the victim defense is alive and well in labor and industrial relations. However, the conditions under which the defense is successful, one focus of this article, are complex and not always predictable.

III. THE TRADITIONAL CONCEPT OF JUST CAUSE

Few, if any, collective bargaining agreements contain a definition of just cause. Even so, arbitrators have held that the concept of just cause is the same as "good cause," "proper cause," or just plain "cause."[39] Indeed, some arbitrators and courts have found that a just cause provision can be implied in the parties' collective bargaining agreement even when the agreement is silent. The reasoning is that the parties are not engaging in an academic exercise in recognizing the union and providing various job protections for employees. Thus, the Court of Appeals for the Fifth Circuit, in *Smith v. Kerrville Bus Co.*,[40] held that a discharged bus driver could maintain an action under the Labor Management Relations Act[41] for wrongful discharge, even though the parties' collective bargaining agreement was silent as to any formal grievance or arbitration procedures and corresponding just cause provisions.[42] The court declared that "[i]n instances where the language of a collective contract does not explicitly prohibit dismissal except for just cause, arbitrators typically infer such prohibitions from seniority clauses or grievance and arbitration procedures."[43] The court went on to note that "[t]o hold as a matter of law that management could, at its sole discretion, terminate an employee without cause would in effect allow it the unqualified power to avoid contractually mandated rights and benefits."[44]

Is there a consensus among arbitrators with respect to the meaning of just cause? Within the context of alcohol addiction, Arbitrator William Belshaw, in *Hiram Walker & Sons Inc.*,[45] sustained the dismissal of a fork lift operator—a capable, intelligent, long-term employee (in the arbitrator's opinion)—who was

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39. *See, e.g.*, Lockheed Eng'g Sciences Co. v. International Ass'n of Machinists & Aerospace Workers Local 2515, 101 Lab. Arb. (BNA) 1161, 1164 (1993) (Neas, Arb.) ("It is common to include (in a contract) the right to suspend and discharge for 'just cause,' 'justifiable cause,' 'proper cause,' 'obvious cause,' or quite commonly simply for 'cause.' There is no significant difference between these various phrases.").

40. Smith v. Kerrville Bus Co., 709 F.2d 914, 113 L.R.R.M. 3741 (5th Cir. 1983).

41. 29 U.S.C. § 185(a) (1994).

42. Smith v. Kerrville Bus Co., 709 F.2d at 919-20, 113 L.R.R.M. at 3745-46.

43. *Id.* at 917, 113 L.R.R.M. at 3743.

44. *Id.* at 919, 113 L.R.R.M. at 3745.

45. Hiram Walker & Sons, Inc. v. Distillery Worker's Union Local 55, 75 Lab. Arb. (BNA) 899, 900 (1980) (Belshaw, Arb.).

found to be under the influence while on the job.[46] Belshaw noted that "[the grievant] blew the deal not once but twice, and, despite that, made a really insufficient effort to either solve the problem or save his job (the same thing)."[47] What is particularly instructive is the Arbitrator's analysis and approach in ruling as he did. Addressing the concept of "just cause," Arbitrator Belshaw had this to say:

> There are many definitions of "just cause." All of them, however, sooner or later, get back to some evaluation of industrial punishment in the light of mores, those behavioral rules that structure a society, like it or not. And it is a very individual process, in arbitration, at least, because the determiner is, indeed, both single and final.
>
> In years of exposure and study and thought, both to and of the bad as well as the good, some conclusions have inevitably emerged, and one of them is a definition of what "just cause" probably is, for here and now. It seems to be that cause which, to a presumably-reasonable determiner (is there one here?), appears to be (not necessarily is), fair and reasonable, when all of the applicable facts and circumstances are considered, and are viewed in the light of the ethic of the time and place. That's a mouthful, in words, but it really is only, bottom-line, another expression of the now-common expression, "fair shake."[48]

Perhaps the most often-quoted statement of the criteria used by arbitrators to determine the existence of just cause (in one manner or another) is in the form of a series of questions provided by Arbitrator Carroll Daugherty:

1. Did the company give the employee forewarning or foreknowledge of the possible or probable 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? . . .

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46. *Id.* at 901.
47. *Id.* at 900.
48. *Id.*

> 6. Has the company applied its rules, orders, and penalties even handedly 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?[49]

Arbitrator Daugherty maintained that a "no" answer to any one or more of the above questions normally signifies that just and proper cause for discipline did not exist.[50] The problem for arbitrators and practitioners who insist on applying the Daugherty tests religiously has been expressed by Arbitrator John Dunsford as follows:

> While these tests concededly embody sound personnel policy in the administration of a disciplinary system and are admirable standards which many parties voluntarily follow, the proposition that an arbitral consensus dictates that their absence normally requires the invalidation of discipline is hard to justify either in practice or principle, at least in the private sector. [51]

Arbitrator Jack Clarke, in *Kellogg Co.*,[52] stated the principle this way:

> Just cause consists of many elements. Four of those elements are proof that the employee engaged in the misconduct for which he or she was disciplined, the absence of disparate treatment, proof that the discipline was meted out fairly, and the existence of a rational relationship between the misconduct and the discipline imposed.[53]

The following thoughts of Arbitrator Raymond Roberts, in *Ritchie Industries, Inc.*,[54] are particularly noteworthy:

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49. Enterprise Wire Co. v. Enterprise Indep. Union, 46 Lab. Arb. (BNA) 359, 363-64 (1966) (Daugherty, Arb.); *see also* Grief Bros. Cooperage v. United Mine Workers Local 15277, 42 Lab. Arb. (BNA) 555, 558 (1964) (Daugherty, Arb.).

50. Enterprise Wire Co. v. Enterprise Indep. Union, 46 Lab. Arb. (BNA) at 362-63; Grief Bros. Cooperage v. United Mine Workers Local 15277, 42 Lab. Arb. (BNA) at 557.

51. John E. Dunsford, *Arbitral Discretion: The Tests of Just Cause*, *in* ARBITRATION 1989: THE ARBITRATOR'S DISCRETION DURING AND AFTER THE HEARING, IN PROCEEDINGS OF THE 42D ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 23, 29 (Gladys W. Gruenberg ed., 1990).

52. Kellogg Co. v. American Fed'n of Grain Millers Local 252, 93 Lab. Arb. (BNA) 884 (1989) (Clarke, Arb.).

53. *Id.* at 891.

54. Ritchie Indus., Inc. v. UAW Local 1540, 74 Lab. Arb. (BNA) 650 (1980) (Roberts, Arb.).

> "Just cause" is a term of art as employed in Collective Bargaining Agreements. Attendant upon that term are established concepts of industrial fairness and due process of both a substantive and procedural nature.
>
> Two aspects of these concepts are significant . . . .
>
> The first of these aspects is that there must be some reasonable cause to justify disciplinary action or termination. Such cause is usually divided into two categories. The first and most frequently encountered category is where the employee is guilty of an industrial offense against Company rules actually or constructively known to the employee. An industrial offense involves wrong doing or culpability on the part of the employee, either of commission or omission. Some such industrial offenses are so serious that they are classified as industrial "felonies" which will justify discharge for a first offense. Others are less serious and are regarded as industrial "misdemeanors" which require progressive and corrective discipline before discharge will lie.
>
> Under concepts of just cause, an employee may be subjected to disciplinary action only if he has committed an industrial offense, i.e., he is guilty of wrong doing or culpability. If an employee is not guilty of culpability or wrong doing, the employer has no "cause" to impose disciplinary penalties or sanctions upon the employee. . . .
>
> The second class of reason or "cause" which will justify corrective action and, ultimately, termination of the employment relationship under the concepts of "just cause" is non-disciplinary in nature. Such cause is one that substantially impairs the essence of the employment relationship so that the employer cannot reasonably be expected to continue it, notwithstanding that the employee is guilty of no-fault, wrong doing or culpability. Common examples of this class of "cause" for termination are where the employee, through no fault of his own, is simply unable to perform the work with reasonable efficiency to earn his wages, or where the employee, through no fault of his own, has excusable absenteeism that is so extensive that it impairs the employment relationship, or where the employee develops an irreconcilable conflict of interest with his employer even though he is not guilty of wrong doing.[55]

What is clear from examining arbitrators' decisions in the area of just cause is that any determination of just cause requires two separate considerations: (1) whether the employee is guilty of misconduct; and (2) assuming guilt, whether the discipline imposed is a reasonable penalty under the circumstances of the case. The universal rule in grievance arbitration is that the employer must carry the burden of proof of just cause in a discipline or discharge case.[56] If special mitigating

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55. *Id.* at 655 (citations omitted).

56. *See generally* HILL & SINICROPI, *supra* note 31, at 32-47 (discussing quantum and burden of proof).

circumstances are alleged (*i.e.*, a dependency, addiction, or some defense related to the employee's mental capacity), as stated by one arbitrator, "the Union is responsible to prove not only that they exist, but also that they were mitigating—that they somehow alleviated the employee's answerability for his/her breach."[57]

IV. OFF-DUTY CONSIDERATIONS, DRUGS, ALCOHOL, "ADDICTIONS" AND JUST CAUSE: FACTS IN SEARCH OF A THEORY

A. *A Brief Overview of Arbitrators' Treatment of Off-duty Misconduct*[58]

It is well established that management's right to supervise the workforce does not generally extend to the employee's off-duty, off-premises conduct unless such activity affects or impacts the employer's business.[59] Arbitrator David Goodman, in *Trailways, Inc.*[60] discussed the jurisdiction of management in off-duty conduct as follows:

> It is submitted that an individual, by signing on to an employment relationship, does not generally expect his or her private life to be scrutinized by the employer, nor does the existence of an employment relationship automatically entitle an employer to reach beyond the workplace and dictate, by discipline, the private lifestyles, morals and behavior of its employees. Simply, private misconduct is not employee misconduct unless there is a connection which links the activity to the workplace. Stated differently, only when the employee brings his private life to the job does the employer have a right to intervene.[61]

In *Fairmont General Hospital*,[62] Arbitrator Alfred Dybeck outlined the controlling principle in off-duty conduct cases as follows:

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57. Air Force Logistics Command Aerospace Guidance & Metrology Ctr. v. American Fed'n of Gov't Employees Local 2221, 91 Lab. Arb. (BNA) 946 (1998) (Dworkin, Arb.).

58. An exhaustive treatment of off-duty conduct is found in MARVIN F. HILL, JR. & JAMES A. WRIGHT, EMPLOYEE LIFESTYLE AND OFF-DUTY CONDUCT REGULATION (1993).

59. *See generally id.*

60. Trailways, Inc. v. United Transp. Union Local 1648, 88 Lab. Arb. (BNA) 1073, 1083-84 (1987) (Goodman, Arb.) (reversing discharge of 10-year bus driver with good work record for having tested positive for marijuana; no evidence that driver was under influence when he reported to work, and neither company rules, collective bargaining agreement, nor that DOT regulations bar off-duty, off-premises use of marijuana).

61. *Id.* at 1080-81.

62. Fairmont Gen. Hosp. v. Retail Union, 58 Lab. Arb. (BNA) 1293, 1295-96 (1972) (Dybeck, Arb.) (holding that hospital properly suspended and later discharged maid who was arrested and convicted of shoplifting at local department store, reasoning that such conduct can be cause for dismissal when it reflects on ability of employee to perform work).

> The arbitral opinion on this subject [off-duty misconduct] appears clear. While generally an employee's conduct away from the place of business is normally viewed as none of the employer's business, there is a significant exception where it is established that an employee's misconduct off the premises can have a detrimental effect on the employer's reputation or product, or where the off-duty conduct leads to a refusal, reluctance or inability of other employees to work with the employee involved.[63]

Arbitrator Harvey Nathan, in an unpublished decision, expressed the principle adopted by most arbitrators this way:

> [T]he generally accepted standard among arbitrators is that proof of off-duty misconduct, even when serious and/or criminal, does not justify automatic discharge. An employer must show that the conduct has a demonstrable effect on the employer's business. In this regard, saying it does not make is so. An employer must do more than simply make the pronouncement that it has or will be injured by retaining an employee who has engaged in off-duty misconduct. It is always possible that any employer could theoretically lose a customer, lose face with the public or suffer some general loss of business reputation by employing "convicts." An employer must demonstrate some meaningful nexus between the off-duty conduct and the employee's employment.[64]

Arbitrator Nathan, in concluding that the employer, a large midwestern city, had been justified in its decision to discharge a firefighter who had pleaded guilty to felony-theft, given the characteristics of the firefighter's job, stated as follows:

> To begin with, there must be a recognition of the special nature of the work involved. Departmental employees are highly skilled personnel engaged in a variety of public health and safety functions. Their work is an integral and critical part of the functioning of the public body for which they serve. They are recipients of public trust. As such they have special duties and special rights. They are uniformed. They operate within a formal chain of command. They have access to private property under a variety of circumstances and may be called upon to assist police. Their conduct and appearance while on duty or off duty is specifically regulated. . . .
>
> . . . [T]he particular crime involved, theft, or possession and sale of stolen property, renders the grievant particularly unsuited for fire fighting.[65]

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63. *Id.* at 1295.
64. Unpublished Decision (April 12, 1984) (Nathan, Arb.).
65. *Id.*

Arbitrator Stanley Sergent, in *FAA v. National Traffic Controllers Ass'n*,[66] articulated the rule followed in the federal sector as follows:

> Based on the inherently offensive and egregious nature of the crime of incest of which the grievant stands accused in the present case, a presumption of nexus [between the conduct of the grievant and the mission of the agency] is proper. That presumption, however, is rebuttable. As the Merit Systems Protection Board (MSPB) explained:
>
> > In all cases it is the Agency's burden to establish that the alleged off-duty misconduct affects the efficiency of the service. . . . The rebuttable presumption never shifts the ultimate burden of proof from the Agency proposing the action. . . . The rebuttable presumption merely shifts to the employee the burden of going forward to present some persuasive evidence refuting the nexus assertion[s].
>
> The employee may rebut the presumption of nexus by showing that not only will his off-duty conduct not interfere with or adversely affect his performance of his job but also that his off-duty conduct will not interfere with or adversely affect his co-workers' performance of their jobs and/or the overall accomplishment of the Agency's mission and responsibilities.[67]

A general review of arbitration decisions indicates that the criteria considered by arbitrators in connection with the merits of discipline or discharge for off-duty misconduct belong in four categories: (a) damage to the employer's business, reputation, or to both; (b) unavailability of the employee for work (usually by incarceration); (c) impact of the grievant's reinstatement on fellow employees (their refusal to work with the off-duty offender or their potential exposure to danger from the offender); and (d) unsuitability for continued employment in light of the proven misconduct.[68] Many cases involve only one or two of these criteria. Moreover, such criteria often overlap in practice.[69]

B. *Application of Off-duty Misconduct Principles to Drug and Alcohol Cases*

Do the same considerations apply in drug or alcohol cases where the employee's use takes place off-duty and the employee shows no signs of impairment at work? Is it necessary that management have a rule prohibiting off-duty use before discipline or discharge can be imposed?

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66. FAA v. National Traffic Controllers Ass'n, 108 Lab. Arb. (BNA) 857 (1997) (Sergent, Arb.).

67. *Id.* at 863 (citations omitted).

68. *See, e.g.*, MARVIN HILL, JR. & ANTHONY V. SINICROPI, MANAGEMENT RIGHTS: A LEGAL AND ARBITRAL ANALYSIS 194-209 (1986); HILL & WRIGHT, *supra* note 58.

69. HILL & SINICROPI, *supra* note 68, at 198.

Arbitrator Marlin Volz in *Ashland Petroleum Co.*,[70] had this to say on the issue:

> Given the scientific evidence that alcohol, and drugs such as marijuana and cocaine, linger in the body after being ingested, it was not unreasonable to promulgate rules permitting disciplinary action to be taken in the event that an employee uses, or is under the influence of a controlled substance, while on company premises, company business, or during work hours, even if the substance has not been ingested during such times.[71]

In *Ashland*, Arbitrator Volz, while upholding the validity of the employer's rules regarding drug possession and use, nevertheless reversed the dismissal of an employee terminated for testing positive for marijuana and cocaine.[72] Arbitrator Volz found the employee's drug-abuse problem and participation in a post-discharge rehabilitation program to be mitigating factors.[73] In the Arbitrator's words, "where the disease of addiction to alcohol, or drugs is involved, after-the-fact participation in a rehabilitation program is entitled to consideration."[74] Arbitrator Volz found that the same principles (regarding post-discharge conduct) that apply to the illness of alcoholism also apply to the illness of drug addiction.[75]

Many arbitrators have refused to get "bogged down" in the "presence" verses "impairment" distinction and have instead taken the following approach outlined by Arbitrator A. Dale Allen, Jr. in *Shell Oil Co.*[76] as follows:

> To make the point that drug testing may not prove job-related impairment is to miss the point. The reason to test is to allow the employer rationally to determine that there has been recent drug use, and to conclude reasonably that there is the possibility of future impairment—perhaps while on the job—as a result of subsequent use. Especially in a safety sensitive job, employers need the ability to determine that given reliable evidence of recent illicit drug use, they should not have to assume the risk that an individual might repeat past behavior and become impaired while on the job.[77]

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70. Ashland Petroleum Co. v. Oil Workers Int'l Union Local 3-505, 90 Lab. Arb. (BNA) 681 (1988) (Volz, Arb.).

71. *Id.* at 686.

72. *Id.*

73. *Id.* at 687.

74. *Id.*

75. *Id.* As noted below, *infra* notes 76-82 and accompanying text, we submit that Arbitrator Volz's opinion does not represent the better weight of authority.

76. Shell Oil Co. v. Oil Workers Int'l Union Local 4-367, 93 Lab. Arb. (BNA) 273 (1989) (Allen, Arb.).

77. *Id.* at 277.

In sustaining the discharge the Arbitrator pointed out that grievant failed at two attempts at rehabilitation.[78]

Arbitrator Samuel Nicholas, Jr., in *Day & Zimmermann, Inc.*,[79] similarly concluded that job impairment is not always the issue in a discharge case:

> The time for believing that the so-called drug problem can be detected by outward, visible signs of drug use has long since run. Literature from the medical community reflects that a given person may possess the ability for ingesting and using drugs on a regular basis without exhibiting any physical manifestations of impairment. But at the same time, the absence of physical signs of impairment cannot be taken to mean, or even suggest, that an employee is not operating under potential dangerous mental impairment brought on by drug use. Most notable among these potential mental deficiencies are the reaction times which are so essential in the prevention of potentially serious accidents.[80]

The other line of cases (and probably the majority view) holds that absent a specific contractual provision to the contrary, the off-duty use of marijuana and/or cocaine will not alone result in a termination, especially where one or more of the following considerations are present:

(1) the grievant is a long-term employee,

(2) his or her work record is good,

(3) the offense is onetime,

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78. *Id.* at 275.

79. Day & Zimmerman, Inc. v. United Bhd. of Carpenters & Joiners Local 2543, 94 Lab. Arb. (BNA) 399 (1990) (Nicholas, Arb.).

80. *Id.* at 405; *see also* Columbia Gas, Inc. v. Utility Workers Union Local 475, 102 Lab. Arb. (BNA) 513, 516 (1994) (Duff, Arb.) (sustaining dismissal of construction equipment operator who twice tested positive for cocaine, where negotiated policy permits discharge when employee's system is found to contain illegal drug, and employee occupied safety-sensitive position governed by federal regulations requiring removal of employees with positive drug tests; noting that "[n]othing guarantees that multiple treatment and/or rehabilitation opportunities will be afforded to multiple offenders"); Vista Chem. Co. v. Oil Workers Union Local 4-555, 99 Lab. Arb. (BNA) 994, 998 (1992) (Baroni, Arb.) ("The Company cannot afford to allow a person with drugs in his system to remain on the job until he physically manifested signs of actual drug intoxication before removing him. Such action would amount to a clear cut public policy violation and a breach of the overall 'safe and healthful and productive work environment' objective of the Company's Substantive Abuse Policy."); Chicago Transit Auth. v. Amalgamated Transit Union Local 308, 96 Lab. Arb. (BNA) 1165, 1173 (1991) (Goldstein, Arb.) (holding that just cause existed for the dismissal of 15-year train motorman solely on basis of positive test for marijuana, even though no sign of impairment was shown); Southern Cal. Rapid Transit Dist. v. United Transp. Union, 96 Lab. Arb. (BNA) 20, 24 (1990) (Gentile, Arb.) (sustaining dismissal of 18-year bus operator on basis of two positive tests for cocaine within six days apart; rejecting grievant's denial of drug use).

(4) no work-related impairment is shown, and

(5) the grievant is not working for the protective services, the transportation industry, or a nuclear facility.[81]

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81. *See, e.g.*, Scenuck Mkts., Inc. v. Teamsters Local 688, 102 Lab. Arb. (BNA) 1016, 1023-24 (1994) (Suardi, Arb.) (reversing suspensions for positive marijuana and cocaine test where evidence does not support finding that grievant was under the influence while at work; expert testimony established that impairment cannot be presumed merely on basis of test results, and there was no showing of actual adverse effect on customer and employee relations); OHSE Foods, Inc. v. United Food & Commercial Workers Int'l Union Local 576, 100 Lab. Arb. (BNA) 809, 809 (1993) (Eisler, Arb.) (holding just cause absent for dismissal of employee "whose post-accident drug tests administered 65 hours after accident showed level of marijuana exceeding amount at which employee is presumed under collective-bargaining [agreement] to be under the influence, where test could not disclose whether grievant had reached particular intoxication level at time injury occurred"); Air Force Logistics Command v. American Fed'n of Gov't Employees Local 1617, 98 Lab. Arb. (BNA) 1097, 1098-99 (1992) (Harr, Arb.) (reducing discharge to suspension for 14-year federal employee who tested positive for cocaine, reasoning that agency failed to show that grievant was cocaine addict or even recreational user; removing grievant for first-time positive test negates intent of agency's drug program); Crucible Compaction Metals v. United Steelworkers Local 14034, 94 Lab. Arb. (BNA) 540, 544-45 (1989) (Harkless, Arb.) (reversing dismissal of autoclave operator for refusing to agree to conditions for continued employment, including completion of in-patient drug rehabilitation program, following disclosure that he had smoked marijuana daily, off-duty, for 15 years, where plant rule contained no prohibition against off-duty drug use, and employee exhibited no signs of on-job impairment); Metropolitan Transit Auth. v. Transport Workers Union Local 260, 93 Lab. Arb. (BNA) 477, 478-79 (1989) (Allen, Arb.) (finding that an employee dismissed for using cocaine was entitled to "second chance" by entering drug rehabilitation program as condition of reinstatement, reasoning that grievant had clean five-year employment record, was excellent worker, and another employee was reinstated after he had successfully completed rehabilitation program; employer not required to pay cost of program, employer can require drug screen prior to grievant's return to work, and grievant subject to random drug testing for 12 months); Southern Cal. Gas Co. v. Utility Workers Union Local 132, 89 Lab. Arb. (BNA) 393, 398 (1987) (Alleyne, Arb.) (finding employer improperly discharged employee for testing positive for marijuana and cocaine, where employee admitted only to using marijuana off the job and test results did not prove he used either drug on the job, reasoning that job-related alcohol problems are more numerous and more serious than job-related drug problems); Kroger Co. v. Bakery Workers Local 372-A, 88 Lab. Arb. (BNA) 463, 463, 467 (1986) (Wren, Arb.) (holding discharge for use of illegal drug (cocaine) excessive, finding that misconduct was one-time occurrence, employee performed work satisfactorily on day of use, evidence of aberrant behavior by employee was minimal, contract prohibits possession of narcotics but is silent as to their use except in relation to "intoxication," and management failed to prove that misconduct created risk of harm; further stating, "in the absence of proof of either the inadequacy of work performance, intoxication, or the creating of a risk of harm, the proof that an employee used cocaine is insufficient to constitute just cause to sustain Grievant's discharge"); Union Oil Co. v. International Union of Petroleum & Indus. Workers, 88 Lab. Arb. (BNA) 91, 91 (1986) (Weiss, Arb.) (holding that "just cause did not exist for suspension of four employees who tested positive for drug use as a result of off-duty use of marijuana or cocaine, where employer made no claim that employees were unable to perform duties, had no published rule prohibiting mere presence of illegal drug in employee's system while at work, and had not told employees that they could be subjected to drug screening tests without notice and could be suspended if results were positive"); Chicago Transit Auth. v. Amalgamated Transit Union, 80 Lab. Arb. (BNA)

A fair reading of the cases indicates that while improper (positive) readings themselves can lead to discipline or termination, in general, arbitrators have not sustained discharges based simply on one positive test without examining all the facts and circumstances surrounding the events giving rise to the dismissal. When the employer can demonstrate an overriding need for management to prevent drug impairment on the job and use off the job (police, fire, bus, and train operators, offshore oil drilling employees, and airlines, for example), there is no need to wait until a drug- or alcohol-using employee shows signs of impairment or suffers a reaction that is adverse to job performance. At the other end of the distribution are those cases (noted above) where the arbitrators have not sustained dismissals absent some showing of on-the-job impairment and/or some important interest to be served by a restrictive policy. The notice management provides to employees at his or her initial point of hire is important, if not dispositive, in most cases. Arbitrators have little trouble effecting a dismissal of an employee who is told "up front" that management will not tolerate *any* drug use, both on and off the premises. A positive test for drugs is thus similar to testing over the legal limit for alcohol. Test positive at .08, for example, and the game is up, notwithstanding any argument regarding the absence of impairment. The extent to which the employee's post-discharge rehabilitation plays a part in the ultimate decision to uphold the termination is considered in the following section.

V. POST-DISCHARGE CONDUCT: THE EFFECT OF REHABILITATION

In grievance arbitration cases, post-discharge evidence is generally not considered relevant in a just cause determination. With selected exceptions, the issue in a discipline or discharge case is whether management was justified in imposing its penalty *based upon the facts known when it took the action.* For example, in *DeVry Institute of Technology,*[82] Arbitrator Herbert Berman declared the rule arbitrators apply as follows:

> The determination of reasonable cause must be made as of the time when the disciplinary action was taken. Theoretically, time should be made to stand still. Since this is impossible, and since the arbitration process itself takes time, every effort must be made to eliminate from consideration any variables of experience that followed after the disciplinary action.

663, 669 (1983) (Meyers, Arb.) (reversing dismissal of yard foreman who tested positive for cocaine, rejecting employer's argument that enormous amount of damage done in accident precluded grievant's entry into counseling program; noting that grievant had excellent work record prior to drug-abuse incident and rejection for program solely because of damage done in accident was based on an irrational and arbitrary standard).

82. DeVry Inst. of Tech., 87 Lab. Arb. (BNA) 1149 (1986) (Berman, Arb.).

> Some arbitrators have dissented from this principle. Some have suggested, for example, that new complaints may be added to the original cause for discharge if "the company brought up the matter sufficiently in advance of the hearing that the union had a fair opportunity to develop a response." . . . Others have suggested that after-the-fact allegations may be material in determining whether an unjustly discharged employee should be reinstated or awarded back pay.[83]

Arbitrator Elliott Goldstein offered the following rationale for the rule:

> The basis for the general rule [against crediting after-the-fact conduct by the grievant] seems so obvious that the Arbitrator will not set out all the reasons supporting the rule, except that all relate to fairness to the Employer and the difficulties of assessing the genuineness of reform and "seeing the light" at so late and convenient a time.[84]

Arbitrator Marlin Volz considered the issue of post-discharge conduct in *Ashland Petroleum Co.*,[85] and outlined the thinking of arbitrators on this issue as follows: "As a general rule, post-discharge conduct is not relevant. However, where the disease of addiction to alcohol, or drugs is involved, after-the-fact participation in a rehabilitation program is entitled to consideration."[86]

There is a school of thought that suggests, in the words of Arbitrator John Sembower in *San Gamo Electric Co.*,[87] that post-discharge evidence is sometimes relevant if within the original "theory of the case" (the rationale management advanced at the time of the dismissal).[88] Addressing the Union's objection to all evidence produced by the company relating to investigations undertaken by it *after* the actual decision was made to discharge the Grievant (on grounds that the only relevant and material evidence is that which management had before them or prior to or contemporaneous to discharge), the Arbitrator had this to say:

> [A]n employer may investigate further in an effort to buttress the action already taken, but not to add an entirely new ground for action or to enlarge the

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83. *Id.* at 1158 (citation omitted) (relying on principle stated in Penn-Dixie Cement Corp. v. United Cement Workers Int'l Union Local 4, 29 Lab. Arb. (BNA) 451, 457 (1957) (Brecht, Arb.)).

84. General Tel. Co. v. Communication Workers, 90 Lab. Arb. (BNA) 689, 694 (1988) (Goldstein, Arb.). See *infra* notes 104-12 and accompanying text for discussion of *General Telephone Co.*

85. Ashland Petroleum Co. v. Oil Workers Int'l Union Local 3-505, 90 Lab. Arb. (BNA) 681 (1988) (Volz, Arb.).

86. *Id.* at 687.

87. San Gamo Elec. Co. v. Selco Union, 44 Lab. Arb. (BNA) 593 (1965) (Sembower, Arb.).

88. *Id.* at 600.

> penalty. . . . The post-disciplinary investigations seem well within the original "theory of the case" adopted by the Company. Both sides were represented by especially astute counsel, so that between them in their opening colloquies, the elements of "surprise" were minimized, and the overall length of the proceeding . . . afforded the Union a full opportunity to make any adjustments necessary to meet the "new" evidence.[89]

To what extent do arbitrators credit the post-discharge rehabilitation efforts of an employee? Does the general rule against crediting post-discharge evidence preclude consideration of after-discharge rehabilitation? Arbitrator Dennis Nolan, in *Atlantic Southeast Airlines, Inc.*[90] summarized the better rule regarding the issue of post-discharge conduct and rehabilitation as follows:

> Arbitrators used to cite a firm rule that an employee's post-discharge conduct was irrelevant to a discharge case. One part of the "rule," that an employer's discharge decision must stand or fall on what it knew at the time of the discharge, retains some force today. The other part, that post discharge conduct is irrelevant to the appropriate remedy for a wrongful discharge, was never true. . . . They [arbitrators] have almost always considered evidence about claimed recovery from a disabling illness such as alcoholism when deciding whether reinstatement was warranted.[91]

Arbitrator Jack Stieber, in *Aeroquip Corp.*[92] stated the rule followed by arbitrators this way:

> Usually, in grievance arbitration post-discharge evidence is not considered relevant. The basic issue is whether management's action was justified based upon the facts known when it took the discharge action. However, it has long been recognized by many arbitrators that there are exceptions to this general rule. Alcoholism and drug addiction cases are considered among the exceptions due to the recognition that addicted employees are often unable to face up to their problem and accept the rigors of treatment until something drastic, such as loss of a job, befalls them.[93]

In *Tecumseh Products Co.*,[94] Arbitrator Stephen Frockt considered the dismissal of a seventeen-year welder who cited his alcoholism as a mitigating factor for

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89. *Id.*

90. Atlantic S.E. Airlines, Inc. v. Association of Flight Attendants, 101 Lab. Arb. (BNA) 515 (1993) (Nolan, Arb.).

91. *Id.* at 524.

92. Aeroquip Corp. v. UAW Local 1806, 95 Lab. Arb. (BNA) 31 (1990) (Stieber, Arb.).

93. *Id.* at 33.

94. Tecumesh Prods. Co. v. International Bhd. of Elec. Workers Local 2360, 105 Lab. Arb.

absenteeism problems and being under the influence while on the job (apparently the Grievant had been involved in a minor accident; when sent to the Company doctor, it was determined that Grievant was under the influence while examined).[95] In sustaining the actions of the Company, Arbitrator Frockt stated the principle followed by many arbitrators as follows:

> Alcoholism is a disease and should be considered a ground for mitigation of discipline. However, management's tolerance cannot be limitless. The employee must prove that he is making a good faith effort to confront his addiction and to overcome it. . . .
>
> Had [Grievant] made a good faith, continuous effort at rehabilitation during the six month period between his discharge and the hearing, the undersigned would have considered the usage of an award of reinstatement under very limited and strict terms and conditions. . . . A careful review of the evidence, including the critical testimony of [Grievant] himself, which the undersigned has reviewed many times, reveals lack of candor and a half-hearted effort at rehabilitation which is designed to impress the undersigned rather than to provide the total effort necessary by him for his own rehabilitation.[96]

Regarding the Grievant's post-discharge arrest for DUI and another arrest for public intoxication, the Arbitrator ruled that this evidence could be considered in a just-cause determination.[97] The Arbitrator reasoned:

> It is settled arbitral law that post-discharge conduct by a grievant which adversely affects an employer's business which includes behavior which leads to a refusal, reluctance or inability of other employees and management to work with a grievant, can be cause for an arbitrator to refuse to exercise his discretion in reducing the discipline imposed. . . . I conclude that the Company's tolerance toward [the Grievant], which it obviously has liberally exhibited in the past, should not be stretched further through a reduction of the decision of the Employer to discharge [the Grievant].[98]

A case illustrating the expected result when the employee engages is egregious conduct is *City of Palo Alto*,[99] a classic theft case. Arbitrator Adolph Koven

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(BNA) 626 (1995) (Frockt, Arb.).

95. *Id.* at 627.

96. *Id.* at 630-31.

97. *Id.* at 630.

98. *Id.* at 631 (citation omitted).

99. City of Palo Alto v. International Ass'n of Fire Fighters Local 1319, 90 Lab. Arb. (BNA) 361 (1988) (Koven, Arb.).

sustained the dismissal of a twenty-seven year exemplary firefighter who admitted incidents of petty theft from his co-workers, despite contentions that (1) the misconduct was a "cry for help" due to severe personal problems; (2) the employer should have recommended an employee assistance program; and (3) the Grievant has since achieved rehabilitation and expungement of his criminal record.[100] Arbitrator Koven outlined the rule followed by the arbitral community:

> No matter what the outcome, this case is a tragic case. It centers entirely on whether the penalty of discharge can be, ought to be mitigated. As has been said so many times and undoubtedly will again be said again and again, an employer bears a most heavy burden to justify discharge of a senior employee with as good a work record as this Grievant's. Balanced against this very heavy burden we also know that ordinarily neither stress, seniority, nor work record can excuse an employee's intentional commission of a crime against one's fellow employees and employer. It is well established that theft of money or property, no matter how small the value, is in legalese, a *malum in se* offense, and a *malum in se* offense ordinarily calls for summary discharge. That is so because in the employment context there is no such thing as "petty" theft. In that context, we know that arbitral authority makes no distinction between an employee who steals fifty cents or five dollars from his employer as against an employee who steals five hundred dollars or more.[101]

Arbitrator Koven went on to point out the relationship problems for the parties if he were to reinstate an employee found guilty of stealing from co-employees:

> If it is up to anyone, it is the city and his employer who could choose voluntarily to give the Grievant still another chance; indeed, if the Grievant is to successfully take up where he left off with his fellow firefighters as though nothing happened, his recall or reinstatement must come from the city and not take place as the result of an arbitrator's order compelling the three parties, the Grievant, his fellow firefighters, and his employer, to live together as they had before. To force the parties to live together is to run the substantial risk of burdening the parties with additional difficulties, not necessarily involving future thefts, but difficulties of trust and harmony of the employees with each other.[102]

Arbitrator Koven concluded that he was without authority to direct reinstatement absent a showing the dismissal was arbitrary, discriminatory, or unreasonable.[103]

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100. *Id.* at 361.
101. *Id.* at 363.
102. *Id.* at 364.
103. *Id.*

Arbitrator Elliott Goldstein, in *General Telephone Co.*,[104] found post-discharge rehabilitation efforts insufficient to reverse a dismissal of an employee for a "peeping" incident.[105] The record indicated that the grievant, while in the course of installing wires in an apartment complex, removed air conditioning vents and engaged in acts of voyeurism (viewing women through vents in attics of six apartments) on company time.[106] The grievant admitted he falsified time sheets and in some instances claimed overtime when he was engaged in peeping acts.[107] Following his termination, the grievant entered into therapy with a psychologist.[108] During these sessions, the grievant came to the understanding that childhood incidents led to his "peeping Tom" compulsion.[109] The record also indicated that the grievant was aware of an Employee Assistance Program (EAP), but never sought assistance because he did not realize he had a problem.[110]

Recognizing the tendency by some arbitrators to consider post-discharge treatment as one possible mitigating factor, at least in alcohol and substance abuse cases, Arbitrator Goldstein nevertheless ruled that this trend could not be extended to acts of voyeurism.[111] His reasoning is particularly instructive and represents the better view with respect to kleptomania or voyeurism:

> I believe it would be a serious mistake, both in reasoning and logic, to conclude that the narrow exception giving consideration to an employee's post-discharge behavior . . . should include the situation presently before me. First, unlike the precedent arbitration cases cited by the Union, the Grievant's psychological dysfunction did not manifest itself in behaviors generally seen in discharge cases involving alcohol and drug abuse, such as absenteeism, tardiness or poor work performance. The Grievant's acts of voyeurism had a direct and serious impact upon the Employer both in terms of its potential liability and the extreme potential harm inflicted on its customers. This is crucial in assessing the rights of both Employer and Grievant . While I am not unmindful of the medical view that voyeurism is an illness, I believe that the inherent risks, dangers, and criminal culpability associated with the Grievant's actions and the exposure to liability for the Employer preclude any post-discharge consideration by me on the Grievant's behalf, unless the parties had clearly in their contract negotiated such an intent. I find no such contract

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104. General Tel. Co. v. Communication Workers, 90 Lab. Arb. (BNA) 689 (1988) (Goldstein, Arb.).
105. *Id.* at 694-96.
106. *Id.* at 691-92.
107. *Id.* at 691.
108. *Id.* at 692.
109. *Id.*
110. *Id.*
111. *Id.* at 694-95.

> language or bargaining history which supports a conclusion that the agreement creating an EAP program mandates reinstatement of a kleptomaniac or voyeur. I so hold.[112]

Unfortunately for the advocate, drug and alcohol screening is perhaps the leading area where courts have substituted their judgement for the arbitrators' and have reversed arbitrators' decisions reinstating employees, especially in the Third and Fifth Circuits.[113] In one decision, for example, the Fifth Circuit has made it clear that

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112. *Id.* at 695.

113. *See, e.g.*, Warrior & Gulf Navigation Co. v. United Steelworkers, 996 F.2d 279, 281 n.8, 143 L.R.R.M. 2982, 2984 (11th Cir. 1993) (overturning dismissal of employee reinstated who twice tested positive for drugs, under collective bargaining agreement that "plainly and explicitly allowed company to fire employee"); Exxon Shipping Co. v. Exxon Seamen's Union, 993 F.2d 357, 360, 143 L.R.R.M. 2312, 2314-15 (3d Cir. 1993) (vacating award reinstating helmsman testing negative for marijuana at Coast Guard level but positive under employer's policy as violative of public policy against having "drug users operate commercial vessels"); Gulf Coast Indus. Workers Union v. Exxon Co., 991 F.2d 244, 248, 143 L.R.R.M. 2375, 2377 (5th Cir. 1993) (vacating award reinstating employee on aftercare rehabilitation program who tested positive for cocaine, noting that arbitration awards are not inviolate and can be reviewed to determine whether they violate public policy); E.I. DuPont de Nemours & Co. v. Local 900, Int'l Chem. Workers Union, 968 F.2d 456, 459, 141 L.R.R.M. 2204, 2205 (5th Cir. 1992) (overturning award where arbitrator found employees used marijuana on company's premises; reasoning that once arbitrator found just cause for dismissal, he was without authority to impose remedy); Delta Air Lines, Inc. v. Air Line Pilots Ass'n, 861 F.2d 665, 674, 130 L.R.R.M. 2014, 2021 (11th Cir. 1988) (striking down award that reinstated pilot who flew while intoxicated); Iowa Elec. Light & Power Co. v. Local 204, Int'l Bhd. of Elec. Workers, 834 F.2d 1424, 1428, 127 L.R.R.M. 2049, 2051 (8th Cir. 1987) (reversing award, citing existence of Nuclear Regulatory Commission policy as evidence of significance of federal nuclear safety policy); Amalgamated Meat Cutters & Butcher Workman Local 540 v. Great W. Food Co., 712 F.2d 122, 125, 114 L.R.R.M. 2001, 2003 (5th Cir. 1983) (vacating award reinstating tractor-trailer driver who overturned truck while intoxicated). *But see* Monroe Auto Equip. Co. v. UAW Local 878, 981 F.2d 261, 264, 142 L.R.R.M. 2150, 2152 (6th Cir. 1992) (upholding arbitration award reinstating mechanic who tested positive for marijuana based on arbitrator ruling that drug use does not in itself justify discharge); Florida Power Corp. v. International Bhd. of Elec. Workers Local 433, 847 F.2d 680, 683, 128 L.R.R.M. 2762, 2764 (11th Cir. 1988) (reversing lower court's vacation of arbitration award finding employee's arrest on drug charges insufficient to sustain dismissal for coal yard fuel operator's off-duty drug arrest; declaring that it has "no enthusiasm for the arbitrator's decision" but notes, "the arbitrator performed the very role contemplated by the parties to that agreement"); Northwest Airlines, Inc. v. Air Line Pilots Ass'n, 808 F.2d 76, 83, 124 L.R.R.M. 2300, 2306 (D.C. Cir. 1987) (sustaining award reinstating pilot who admitted flying plane while intoxicated, where FAA had recertified pilot after completion of alcohol rehabilitation program).

See generally Bernard D. Meltzer, *Arbitration and the Courts: Is the Honeymoon Over?: II. After the Arbitration Award: The Public Policy Defense*, *in* ARBITRATION 1987: THE ACADEMY AT FORTY, PROCEEDINGS OF THE 40TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 39 (Gladys W. Gruenberg ed., 1988); Jan Vetter, *Enforceability of Awards*: I. *Public Policy Post*-Misco, *in* ARBITRATION 1988: EMERGING ISSUES FOR THE 1990S, PROCEEDINGS OF THE 41ST ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 75 (Gladys W. Gruenberg ed., 1989); R. Wayn Estes, *Other Arbitral Issues*: III. *Life After* Misco, *in* ARBITRATION 1989: THE ARBITRATOR'S DISCRETION BEFORE

an arbitrator is not even free to consider the "post-discharge good works" of the grievant (in the case, rehabilitation efforts) in determining whether there was just cause for discharge.[114] The result is that advocates litigating drug and alcohol cases may have to arbitrate grievances in two forums, once before the arbitrator they selected and once before a reviewing court. Where the actions of the grievant are such that the public or the grievant's co-employees could be at risk, a reviewing court is likely to venture close to (or even past) the envelope of determining whether the arbitrator's award is rationally derived from the parties' collective bargaining agreement. While there are no quick fixes to the problem of overreaching court review, we recommend using an arbitrator who understands how to "immunize" the award and opinion.[115]

AND AFTER THE HEARING, PROCEEDINGS OF THE 42D ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 170 (Gladys W. Gruenberg ed., 1989). For an interesting commentary, see Judge Frank H. Easterbrook's analysis of the public policy exception in *Arbitration, Contract, and Public Policy*, *in* ARBITRATION 1991: THE CHANGING FACE OF ARBITRATION IN THEORY AND PRACTICE, PROCEEDINGS OF THE 44TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 65, 76 (Gladys W. Gruenberg ed., 1992) (noting that "[m]ost 'public policy' cases come from awards that strain credulity").

114. Gulf Coast Indus. Workers Union v. Exxon Co., 991 F.2d at 255, 143 L.R.R.M. at 2383. In that case, the appellate court held that an arbitrator was without authority to consider the post-discharge rehabilitation efforts of the grievant where the parties framed the issue as follows: "Was [grievant] discharged for just cause and, if not, what is the appropriate remedy?" *Id.* at 255-56, 143 L.R.R.M. at 2383. The court reasoned that because the issue is worded in the past tense, it is equivalent to asking: "Did Exxon possess just cause on June 15, 1990, to terminate [grievant]?" *Id.* at 256, 143 L.R.R.M. at 2384. According to the Fifth Circuit, it is permissible for an arbitrator to consider "only later-discovered evidence which established the situation at the time of the discharge, not evidence of later changes in the situation." *Id.*, 143 L.R.R.M. at 2384.

It may be advisable for the advocate never to ask an arbitrator to render a decision based on the post-discharge behavior of the grievant—simply introduce the evidence and request that the arbitrator reach a decision in light of all the circumstances surrounding the discharge. Hopefully, the arbitrator reads the decisions of the courts and understands how to "immunize" his award.

115. In this regard, see the excellent paper presented by attorney George H. Cohen in *Arbitration and the Courts*: I. *Erosion of the Arbitration Process by the Courts: Can the Award and Opinion Be Immunized?*, *in* ARBITRATION 1992: IMPROVING ARBITRAL AND ADVOCACY SKILLS, PROCEEDINGS OF THE 45TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 149 (Gladys W. Gruenberg ed., 1993). Beginning on a light note, his suggestions are as follows:

> *First*, where the issue submitted is whether an employee has been discharged for just cause, be careful not to make findings that an employee's pattern of aggressive, hostile conduct toward the supervisor warrants a discharge but then declare that in your judgment the employee's personality shortcomings could be overcome by a "Dale Carnegie Course" and issue an award holding that upon successful completion of that course, the employee must be reinstated. . . .
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> *Second*, where a contract expressly vests the employer with the sole authority to establish and maintain reasonable rules concerning its operations, you can conclude that a rule is unreasonable and set aside for lack of just cause a discharge for violating that rule. But mark this well! Don't take the further step of creating a new rule to replace the one you struck down and/or direct the

Our research indicates that depending on the industry and the facts of the particular case, at minimum, arbitrators will (and should) take note of the post-rehabilitation efforts of employees (at least in the sense that the evidence is taken into the record), given, of course, that the arbitrator is convinced that the grievant's efforts are genuine and not simply "convenient." Even if the grievant's efforts are unfavorable to his case (as where the employee does not complete a rehabilitation program), the evidence is likely to be considered. In this respect written reports and statements of drug and alcohol counselors are often credited notwithstanding hearsay concerns.[116] Still, the fact of rehabilitation, while relevant, is simply one factor to be taken into account. By itself it is not dispositive of the just cause issue.[117]

> employer to implement your new concoction. No matter how satisfying this frolic might be to the ego, please understand that doing so—even in the name of providing a remedy—trods on the employer's exclusive authority under the contract to set workplace rules, and thereby exceeds the express limits of the arbitrator's authority.
>
> *Third*, in a similar vein be mindful of situations where the parties have placed in the agreement other explicit limits on the arbitrator's authority. Some contracts, for example, contain a provision stating that, with respect to a grievance concerning a no-strike clause, the arbitrator shall be limited to determining whether the grievant engaged in conduct violating that provision and, if the arbitrator finds such a violation, the particular discipline imposed by the employer shall not be subject to arbitration. Once again, no matter how unreasonable that discipline may appear to you, the parties have effectively tied your hands; stay away!
>
> . . . [A]n arbitrator should focus attention to the greatest degree possible on the contract as the source of the decision. If the opinion does this, a court will be hard pressed to conclude that the arbitrator was out of bounds in fashioning the award. . . . But what you should do—indeed, in my judgment, must do—is to explain your thought process with clarity. In doing so, you will not only demonstrate that you did not commit the heinous offense of "ignoring" the plain language of a contract provision but also highlight that at the very least you are "arguably constituting or applying the contract"—the cornerstone for establishing nonreviewability of the award. In the same vein, you must keep in mind the courts who have construed—wrongly to be sure—the "drawing its essence from the contract" criterion to mean that an award can be set aside if the arbitrator fails to address the applicability of a contract provision cited by one of the parties as authority in support of its construction of the agreement. That potential pitfall can be avoided, of course, by addressing each of the cited provisions, even those you view as totally inapplicable.
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> Finally . . . avoid the entire spectrum of these problems by opting not to write an opinion.

Id. at 157-58 (citations omitted).

116. *See infra* note 130 and accompanying text.

117. See, for example, Arbitrator Robert Penfield's discussion in *St. Louis Paint Manufacturing Co. v. Paint Warehousemen Local 604*, 88 Lab. Arb. (BNA) 1251, 1251 (1987) (Penfield, Arb.) (sustaining dismissal of employee for repeatedly sniffing chemical compound at work,

If an employee has successfully completed a post-discharge rehabilitation program, what arguments are likely to be advanced by the advocate? In one form or another, advocates have advanced the following arguments that employees, testing positive for alcohol or illegal drugs, should be given another chance, especially where they have successfully completed rehabilitation after dismissal:

1. Treating employees who are addicted to drugs and alcohol as if they were non-addicts constitutes unfair treatment. Employees with alcohol and drug-dependency problems simply cannot be treated the same as non-addicted employees. As such, arbitrators must recognize the special status of addicted or dependent employees.
2. Because alcohol and drug addiction is an "illness," an employee's refusal to stop substance abuse is just another symptom of addiction rather than proof of incorrigibility. Rehabilitation, not discharge, is the preferred course for these employees.
3. Addicts cannot be expected to respond to progressive discipline the same as non-addicted employees. As such, prior work records and disciplinary warnings should carry less weight for addicted relative to non-addicted employees.
4. The goal of progressive discipline should be to persuade an addicted or dependent employee to accept the fact of his addiction or dependency and the need to enter a rehabilitation program. Accordingly, the employer has an obligation to offer and recognize rehabilitation efforts.
5. Employers are ideally suited to assist addicted employees because management can threaten them with loss of their jobs and income if the employee again fails.
6. One who is accorded another chance and completes treatment before returning to work, does not necessarily pose a safety risk. At the same time the employer is saved the expense and time involved in training another employee.
7. There is no law or legal precedent holding there is an explicit public policy against granting another chance to an employee who has successfully completed rehabilitation.[118]

How should arbitrators resolve these arguments? Are some arguments more persuasive than others? What about employees who relapse even after given a second chance?

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notwithstanding entrance into drug rehabilitation program).

118. The decision of Arbitrator Marlin Volz in *Ashland Petroleum Co.* discusses several of the above arguments advanced by the union on behalf of the grievant in that case. *See* Ashland Petroleum Co. v. Oil Workers Int'l Union Local 3-505, 90 Lab. Arb. (BNA) 681, 685 (1988) (Volz, Arb.).

As they have in cases where employees allege the effects of involuntary mental disorders as a defense to poor work performance or some other job infirmity,[119] some arbitrators have sometimes recognized the potential of employees who claim that they have or can overcome the debilitating effects of "addiction," *even after repeated relapses.* Illustrative of these cases is *Thrifty Drug Stores Co.*,[120] where Arbitrator Edward Peters ruled that the grievant should be given another opportunity to demonstrate that he had "managed to acquire an acceptable control over his [alcohol] problem."[121] Arbitrator Peters agreed with the union that relapses in the treatment of chronic alcoholism were a common occurrence and the major problem was getting the employee to accept that he has a problem.[122]

Similarly, in *City of Buffalo*,[123] the grievant, an account clerk stenographer and a fifteen-year employee, was found intoxicated at work and given a leave of absence to be hospitalized, after which she enrolled in Alcoholics Anonymous.[124] She was discharged after she was again found drunk at work.[125] In reducing the penalty to a two-month suspension, Arbitrator Rinaldo found significant the grievant's willingness to faithfully attend Alcoholics Anonymous and group therapy.[126]

Likewise, in *Chrysler Corp.*,[127] an employee was dismissed for reporting to work under the influence.[128] The grievant had been repeatedly admonished and penalized for alcohol abuse at work.[129] Arbitrator Gabriel Alexander, in reversing the dismissal, credited the grievant's post-discharge rehabilitation, including joining Alcoholics Anonymous and taking help from a church.[130] The Arbitrator rejected the employer's argument that the employee had ample opportunity to reform his conduct

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119. *See, e.g.*, State of Vermont Dep't of Corrections, 102 Lab. Arb. (BNA) 701, 708-09 (1994) (McHugh, Arb.) (holding just cause existed to dismiss male corrections officer for engaging in sex acts with female co-worker on five separate occasions in state vehicle and offices while on duty; rejecting argument that disparate treatment existed where employer failed to discipline female co-worker, the other participant in the acts of fellatio for which the grievant was dismissed; crediting evidence provided by therapist who diagnosed her as suffering from mental health disorders resulting from childhood sexual abuse which rendered her incapable of consenting to the sexual acts).

120. Thrifty Drug Stores Co. v. Warehouse Workers Union Local 26, 56 Lab. Arb. (BNA) 789 (1971) (Peters, Arb.).

121. *Id.* at 794.

122. *Id.* at 793-94.

123. City of Buffalo v. Civil Serv. Employees Ass'n, 59 Lab. Arb. (BNA) 334 (1972) (Rinaldo, Arb.).

124. *Id.* at 335.

125. *Id.*

126. *Id.* at 337.

127. Chrysler Corp. v. UAW Local 961, 40 Lab. Arb. (BNA) 935 (1963) (Alexander, Arb.).

128. *Id.* at 935.

129. *Id.* at 935-36.

130. *Id.* at 936. The arbitrator credited written statements to the effect that the grievant was doing well in the programs. *Id.*

before he was dismissed and that, therefore, no mitigating significance should be accorded his subsequent efforts.[131] No conditional remedy was ordered,[132] although the facts arguably called for one.

In all three cases—*Thrifty Drug Stores Co.*, *City of Buffalo*, and *Chrysler Corp.*—reinstatement was ordered after the employee suffered a relapse. Clearly, some arbitrators are receptive to the argument that alcoholism is a disease and it is common for individuals to suffer relapses. Case law indicates that the length of time since the last abuse of alcohol or drugs is usually less important than the steps the employee takes to obtain treatment of his or her disability through medical care, rehabilitation, and similar actions. To this end, no employee is likely to be reinstated unless the arbitrator is convinced that the grievant has a reasonable chance to succeed in becoming a useful employee. The term often used is "salvageable."[133] The union that convinces the arbitrator that his client is salvageable clearly has a better chance at reinstatement than would otherwise be the case. Non-salvageable employees, by definition, are rarely reinstated.[134]

VI. THE DISCRIMINATION ARGUMENT IN DRUG AND ALCOHOL CASES: IS THE ADDICTED EMPLOYEE ACCORDED AN ADVANTAGE OVER THE "NON-ADDICTED" GRIEVANT BY LABOR ARBITRATORS?

What should be the rule when non-addicted employees assert "discrimination" arguments? Specifically, that management engages in unfair discrimination in treating addicted or dependent employees the same as non-addicted employees. This argument, of course, is endemic to the "victim defense."

Drug and alcohol use frequently gives rise to charges of disparate treatment by employees who are non-addicted. It is often claimed on behalf of a grievant discharged for alcohol use, for example, that other employees who admit to an alcohol problem have been offered rehabilitation, and this may indeed be viewed as evidence of disparate treatment for the employee who does not have an alcohol problem and/or will not admit to a problem.

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131. *Id.*

132. *Id.* at 935-36.

133. *See* Marvin F. Hill, Jr. & Anthony V. Sinicropi, *Remedies, Troubled Employees, and the Arbitrator's Role*, *in* ARBITRATION 1989: THE ARBITRATOR'S DISCRETION DURING AND AFTER THE HEARING, PROCEEDINGS OF THE 42D ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 160, 168 (Gladys W. Gruenberg ed., 1990).

134. *See, e.g.*, Bayou Steel Corp. v. United Steelworkers Local 9121, 92 Lab. Arb. (BNA) 726, 730-31 (1989) (Chumley, Arb.) (refusing to grant an employee, found intoxicated at work, a second chance at rehabilitation, where insurance manager believed employee, recognized as an alcoholic, did not want to participate in aftercare program).

Arbitrator Anthony V. Sinicropi, in *American Airlines, Inc. v. Association of Professional Flight Attendants*,[135] discussed a claim of disparate treatment and had this to say on the issue:

> Disparate treatment of similarly situated individuals may serve to vitiate particular discipline on the basis that the Employer, in fact, lacks just cause to enforce discipline in a particular case. The doctrine of impermissible disparate treatment requires that the employees be similarly situated in terms of proven misconduct, employment record, and other salient factors. Moreover, it is not enough that the Employer handed out different discipline in a particular case. Rather, the proven disparity must be without any conceivable rational basis or otherwise based on impermissible factors such as Union activity. The concept of disparate treatment does not require that employees be treated equally, but that employees are not somehow unfairly singled out. Differences in managers and the circumstances of a particular case indicate that considerable leeway is afforded the Employer.[136]

Similarly, in *Ohio v. AFSCME Local 11*,[137] Arbitrator Rhonda Rivera stated the principle followed by arbitrators this way:

> The disparate treatment claim is essentially an affirmative defense which may be asserted to overcome a claim of just cause. The burden is on the Union. In the case at hand, the Union did show that a number of employees were facially treated differently from the Grievant. Different treatment alone does not prove disparate treatment. . . . To prove disparate treatment, the "different treatment" must either have no reasonable and contractually appropriate explanation or be motivated by discrimination or other ill purpose.[138]

In another case, *Ohio Department of Rehabilitation & Corrections*,[139] the same arbitrator noted:

> Disparate treatment is not *per se* unjust; disparate treatment is inherently fair when an individual's problems are weighted in any decision. In fact, the Union would argue that mitigation evidence is important to every discipline decision.

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135. American Airlines, Inc. v. Association of Prof'l Flight Attendants, No. SS-144-87 (1988) (Sinicropi, Arb.) (unpublished decision).

136. *Id.* at 9.

137. Ohio v. AFSCME Local 11, 99 Lab. Arb. (BNA) 1169 (1992) (Rivera, Arb.).

138. *Id.* at 1173.

139. Ohio Dep't of Rehabilitation & Corrections v. Ohio Civil Serv. Employees' Ass'n Local 111, 93 Lab. Arb. (BNA) 1186 (1990) (Rivera, Arb.).

> Such flexibility is a necessary management tool, as well. A recognition that not every employee is treated exactly the same does *not* justify a charge of invidious discrimination against any employee or any other intentional discrimination. To show disparate treatment strong enough to overcome management's decision requires the Union to show by clear and convincing evidence purposeful discrimination.[140]

Arbitrator Rivera correctly pointed out that to compare the cases of two employees, "we must know each employee's total work record, longevity, and past discipline including prior mitigating circumstances."[141]

The underlying consideration in all these cases is whether there is clear and convincing evidence of purposeful discrimination or, quoting Arbitrator Sinicropi, whether "the proven disparity [is] without any conceivable rational basis or otherwise based on impermissible factors such as Union activity."[142] As stated by one arbitrator: "Absolute consistency in the handling of rule violations is, of course, an impossibility, but that fact should not excuse random and completely inconsistent disciplinary practices."[143] Acceptance of the argument that management's conduct must in all cases be dictated by the manner in which it deals with other employees would prohibit the employer from exercising discretion or making any exceptions. In any given case there are numerous parameters that can account for disparate treatment of what would otherwise be viewed as similarly-situated employees. Articulating these principles, Arbitrator Stanley Sergent, in *FAA v. National Air Traffic Controllers Ass'n*,[144] ruled that employees who are working in different regions and for different supervisors cannot be considered "comparison employees" for purposes of analyzing a claim of disparate treatment.[145] In that case, Arbitrator Sergent held that the FAA lacked just cause to suspend an air traffic controller who was indicted for incest with his teenage daughter, reasoning that the agency did not show that the stress the grievant was under impaired his mental and physical fitness

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140. *Id.* at 1188.

141. *Id.*

142. American Airlines, Inc. v. Association of Prof'l Flight Attendants, No. SS-144-87, at 9 (1988) (Sinicropi, Arb.) (unpublished decision).

143. Georgia-Pacific Corp. v. International Ass'n of Machinists & Aerospace Workers Local 1362, 80 Lab. Arb. (BNA) 1321, 1322 (1983) (Milentz, Arb.); *accord* Century Prods. Co. v. International Ass'n of Machinists Dist. No. 28, 101 Lab. Arb. (BNA) 1, 6 (1993) (Fullmer, Arb.) (stating that "[t]he question is whether the Company could rationally consider the Grievant's offense to be different from [another employee's]").

144. FAA v. National Air Traffic Controllers Ass'n, 108 Lab. Arb. (BNA) 857 (1997) (Sergent, Arb.).

145. *Id.* at 865.

to continue his job.[146] Federal policy of protection of children does not require suspension of an employee who is only *accused* and not *convicted* of child abuse.[147]

A paradigm case is reported by former National Academy of Arbitrators President George Nicolau. In *Northwest Airlines, Inc.*,[148] Arbitrator Nicolau ruled that a sixteen-year alcoholic airline pilot who flew drunk while serving as a first officer should be offered reinstatement at such time that he re-qualifies under the FAA's non-monitoring procedure.[149] Arbitrator Nicolau addressed the Company's discrimination issue as follows:

> The Company also argues that consideration of alcoholism would impose a dual standard and that non-alcoholic rule breakers could complain of disparate treatment if, on a diagnosis of alcoholism, the Company decided to treat the alcoholic differently. But different treatment is not necessarily disparate treatment. Arbitrators have long held that circumstances must be considered and that a wide range of factors (length of service, prior work record, degree of culpability, etc.) can properly be taken into account. Indeed, if those factors are not taken into account and "equal" treatment is imposed, that in itself might be disparate. Even though both may violate the 24-hour rule, the diagnosed alcoholic is in a clearly recognized category which differentiates him medically from the non-alcoholic. That different circumstance permits different treatment. [150]

Arbitrator Nicolau's view arguably represents the better weight of authority among arbitrators with respect to the discrimination issue (as opposed to the result in the case),[151] although we concede there is argument and authority to the contrary.

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146. *Id.*

147. *Id.*

148. Northwest Airlines, Inc. v. Air Line Pilots Ass'n, 89 Lab. Arb. (BNA) 943 (1984) (Nicolau, Arb.). The award was vacated by the federal district court for the District of Columbia, *Northwest Airlines, Inc. v. Air Line Pilots Ass'n*, 633 F. Supp. 779, 122 L.R.R.M. 2311 (D.D.C. 1985), and reinstated by the D.C. Circuit, 808 F.2d 76, 124 L.R.R.M. 2300 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1014 (1988).

149. Northwest Airlines, Inc. v. Air Line Pilots Ass'n, 89 Lab. Arb. (BNA) at 953, 955.

150. *Id.* at 952.

151. What is especially interesting in the case is that the arbitrator rejected the Company's argument that, at the time of its investigation, it had no obligation to determine if the pilot was, in fact, an alcoholic. *Id.* at 952-53. In the arbitrator's words:

> The amount, manner and time of his drinking all demonstrate that [the grievant] was addicted, severely ill, and out of control. Faced with evidence of that magnitude, it could be considered arbitrary for the Company to summarily fire [the grievant] without gathering all the facts and first making a determination whether his actions were volitional or whether his conduct was medically related to alcoholism and an unavoidable result thereof. To refuse to take such a step, not only denies an airman (here, one with long service) a full and fair investigation of all the facts and circumstances, it also fails to take into account the overwhelming

Arbitrators have not gone so far as to rule that an individual gets an automatic "pass" on a first offense simply because he is an alcoholic or drug user, regardless of his prior conduct or efforts at treatment. As stated by one arbitrator:

> Where, however, conduct [in this case absenteeism] is linked to problems of alcoholism or drug addiction, the addicted employee is generally considered to be entitled to a reasonable opportunity before final discipline or discharge to deal forth-rightly and constructively with his/her affliction. This is not to say that such employees receive a pass or are excused from the standards of performance of all employees.[152]

Persuaded that the grievant did not have ample opportunity to rehabilitate herself before she was discharged, the arbitrator ordered reinstatement (without backpay) on the condition that she successfully complete a twenty-eight-day rehabilitation program prior to her return to work.[153]

VII. GAMBLING CASES

Most reported cases in this area involve employees who engage in gambling activities while at work, as opposed to employees who assert gambling as an addiction as an affirmative defense to conduct that is the subject of discipline.[154] However, where the employee can establish a bona fide gambling addiction—*i.e.*, a chronic and progressive psychological disorder characterized by emotional dependence on gambling and a loss of control over his or her gambling activities—

> medical and psychological evidence that the untreated alcoholic does not commit willful, deliberate acts and that this, like other facts, must be weighed in the balance.

Id.

152. Allegheny Ludlum Steel Corp. v. United Steelworkers Local 1138, 84 Lab. Arb. (BNA) 476, 479 (1985) (Alexander, Arb.) (citations omitted).

153. *Id.* at 480.

154. *Compare* Florida Power Corp. v. International Bhd. of Elec. Workers, 86 Lab. Arb. (BNA) 59, 61-62 (1986) (Bell, Arb.) (sustaining discharge of utility employee for presenting bad checks for payment at employee credit union and using employer identification card to cash bad checks at bank; rejecting grievant's compulsive gambling argument, where grievant did not raise argument until arbitration hearing), *with* International Ass'n of Machinists Dist. No. 8 v. Campbell Soup Co., 406 F.2d 1223, 1226-27, 70 L.R.R.M. 2569, 2571-72 (7th Cir. 1969) (upholding arbitrator's award that reversed dismissal of 20-year employee discharged for misdemeanor conviction involving taking bets on premises of employer whose rules provided for discharge of employee violating penal law on premises). *See also* Town of Windsor Locks v. National Ass'n of Gov't Employees Local R1-194, 98 Lab. Arb. (BNA) 1015, 1019 (1991) (Halpern, Arb.) (converting the dismissal of police dispatcher for placing bets during working hours to a suspension where arbitrator found unjustified three-month delay in investigation).

there is no reason to believe that an arbitrator would not treat a gambling addiction similar to alcohol or perhaps even drug addiction.[155]

It is important to distinguish types of gambling-related offenses. Gambling on company premises is a well-recognized offense. Where it was shown that an employee is part of an organized gambling operation, or is making book on his own, and/or uses the employer's premises as a basis for his operations, numerous arbitrators have sustained discharge, even when the employee is long-term with a good work record. This is especially the case where the employee works for the protective services. The fact that the employee has a gambling addiction will not matter. [156]

Similar to drug cases, the employer will have a more difficult time establishing just cause when the offense is off-duty, and off premises, than would otherwise be the case for an on-premises use or possession of evidence of gambling.[157]

The task for the management practitioner is to first establish that the employee has engaged in some type of "serious gambling." Arbitrators distinguish between

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155. In many places gambling has become part of the culture of adolescence. One study of nationwide trends found that the rate of problem gambling among adolescents was 9.4%, more than twice the 3.8% rate for adults. *See* Brett Pulley, *Those Seductive Snake Eyes: Tales of Growing Up Gambling*, N.Y. TIMES, June 16, 1998, at A1.

156. *See, e.g.*, Maurey Mfg. Co. v. International Bhd. of Teamsters Local 714, 95 Lab. Arb. (BNA) 148, 157 (1990) (Goldstein, Arb.) (recognizing above principle, but holding that management improperly discharged a 21-year employee for running illegal, in-house game of chance, where it failed to prove misconduct by clear and convincing evidence; noting that arbitrators require a high burden of proof in cases of the kind recognized and penalized by the criminal law; following the principle that, at minimum, the evidence must be clear and convincing); Kawneer Co. v. Indiana-Kentucky Joint Bd. Local 1923, 86 Lab. Arb. (BNA) 297, 300-01 (1985) (Alexander, Arb.) (allowing employer to search employee's toolbox as part of search for items closely associated with management's policy and rules against gambling on premises, where search ordered after supervisor saw employee conducting what could reasonably be interpreted as gambling-related transaction, and same supervisor has previously seen employee with gambling materials; rejecting Union's constitutional argument). *But see* Cissell Mfg. Co. v. International Ass'n of Machinists & Aerospace Workers Local 681, 95 Lab. Arb. (BNA) 937, 941 (1990) (Kindig, Arb.) (reducing an indefinite suspension and discharge under rule against gambling "on company property" to a 30-day suspension where management failed to prove employee conducted gambling activity on company property); International Minerals & Chem. Corp. v. International Chem. Workers Union Local 35, 83 Lab. Arb. (BNA) 593, 600 (1984) (Kulkis, Arb.) (holding that employer improperly imposed three-day suspension on employees who played cards for money on company property in violation of rule listing gambling as major offense, citing employer's failure to adduce probative evidence of vigorous enforcement of rule).

157. *See, e.g.*, City of Cleveland v. Municipal Foremen & Laborers' Union Local 1099, 91 Lab. Arb. (BNA) 265, 270-71 (1988) (Dworkin, Arb.) (reversing dismissal of superintendent of construction who was indicted under federal RICO Act following his arrest during lunch break on gambling establishment; finding that reports of conduct were not so widespread as to threaten public confidence, any trial might not occur for some time, city's treatment of other employees under indictment was inconsistent, and civil service rule authorizes discharge only for "conviction"; grievant given 30-day suspension).

minor offenses, such as an office sports pool (*i.e.*, Final Four Basketball Tournament or Master's Golf Tournament) and serious offenses such as using the workplace for operating illegal bookmaking. If the offense is serious and occurring on company premises, management is likely to prevail even though the activity is on the employee's own time. An employee must at all times conduct himself properly while on the company's premises. Thus, one arbitrator sustained discharge based on the employee's possession of numbers slips on the premises.[158] This, said the arbitrator, demonstrated that he was conducting his business at work.[159]

A note to advocates: In proving a gambling or drug case, undercover operatives are frequently used. If management's case is based entirely on the hearsay reports of an undercover agent, without any corroboration, an arbitrator is unlikely to sustain the discharge. Arbitrator Harry Graham, in *Mt. Sinai Hospital*,[160] had this to say on proving a case with hearsay evidence:

> There was no attempt by responsible Hospital officials to corroborate the account of events made by Officer Painter. On the basis of his written report the grievant was discharged. To discharge without any attempt to determine if the serious allegations against the grievant were true is slipshod practice of the highest order. This poor personnel practice becomes more serious when criminal charges that blacken the good name of the employee for life are involved. Nonetheless, the employer rushed to judgment. This was a judgment supported by the word of one person, Officer Painter. No attempt was made to ascertain the veracity of his account of events. The witnesses available to the Union were also available to the Employer. They were not interviewed. When three witnesses give substantially identical accounts of an event weight must be attached to their story. To discharge on the word of one employee smacks of haste.[161]

In *Rohr Industries, Inc.*[162] Arbitrator Lionel Goulet, applying a clear and convincing burden of proof standard, outlined his thinking on the subject of admitting and crediting hearsay evidence in a drug case as follows:

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158. Jones & Laughlin Steel Corp. v. United Steelworkers Local 1272, 29 Lab. Arb. (BNA) 778, 780-81 (1957) (Cahn, Arb.).

159. *Id.* at 781; *see also* Bethlehem Steel Co. v. United Steelworkers Local 2610, 45 Lab. Arb. (BNA) 646, 647-48 (1965) (Porter, Arb.) (sustaining dismissal of employee arrested for running illegal numbers racket where evidence showed that some activities were conducted on employer's premises).

160. Mt. Sinai Hosp. v. AFSCME Local 2679, 78 Lab. Arb. (BNA) 937 (1982) (Graham, Arb.).

161. *Id.* at 940.

162. Rohr Indus., Inc. v. International Ass'n of Machinists & Aerospace Workers Dist. Lodge 964, 93 Lab. Arb. (BNA) 145 (1989) (Goulet, Arb.).

> The only evidence admitted to prove that Grievant possessed, used and sold controlled substances are the written and tape recorded statements of three fellow employees who made themselves "unavailable" to testify. . . .
>
> . . . .
>
> The Rules of Evidence were devised during centuries of trials to prevent irrelevant, immaterial, or non-probative matter going to the jury to be considered in its determination. They have little need to be considered by the judge in a bench trial, or by a labor arbitrator. As the advocates for both sides in a labor arbitration often are not lawyers, the arbitrator must give them wide latitude in making their cases. So this arbitrator, like many others, will permit almost anything presented at the hearing to be admitted "for what it is worth." There is no altruism in this; an arbitrator who adopts more restrictive standards runs a higher risk of being overturned by a reviewing court.
>
> That being said, it is still incumbent on the arbitrator to sift through all the evidence that was admitted to determine just what, if anything, the evidence is worth. By applying the rules of evidence, the arbitrator makes evidentiary rulings and determinations in his deliberations, opinion, and award.
>
> In many cases very little weight is given to hearsay evidence, and it is exceedingly unlikely that an arbitrator will render a decision supported by hearsay alone. Here this arbitrator heard testimony from B__ attacking the voluntariness of his statements. The arbitrator had no opportunity to observe witnesses S__ and G__ during direct and cross-examination, so as to be in a position to evaluate their credibility. So their statements are of little probative value.[163]

Because of the increase in gambling through the Internet,[164] it is expected that on-duty gambling cases will only concern management indirectly (unless, of course, the employee is using his employer's computer to wager on the net). That is, when an employee alleges that he suffers from a gambling addiction which, in turn, caused the conduct that resulted in his termination. A showing that the employee's gambling disability resulted in non-egregious work-related misconduct should be considered by the arbitral community as a mitigating consideration.[165]

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163. *Id.* at 156-57.

164. *See* Scott Montpas, Comment, *Gambling On-Line: For a Hundred Dollars, I Bet You Government Regulation Will Not Stop the Newest Form of Gambling*, 22 U. DAYTON L. REV. 163 (1996).

165. *See, e.g.*, Phillips 66 Co. v. International Union of Operating Eng'rs Local 351, 88 Lab. Arb. (BNA) 617, 621 (1987) (Weisbrod, Arb.) (ordering reinstatement of employee found to suffer from pathological compulsive gambling dismissed for being off work four consecutive days without reporting; finding it was more likely than not the employee was mentally incapacitated while off work).

VIII. THE ADA AND REHABILITATION ACT AS POTENTIAL REMEDIES FOR THE GRIEVANT

An employee with an alleged addiction or disabling condition may seek protection under the Americans with Disabilities Act (ADA)[166] or Rehabilitation Act.[167] These two Acts prohibit discrimination against disabled employees and are analyzed under similar frameworks.[168] Courts and arbitrators have struggled to define the extent to which employees can utilize their addictive behavior to achieve protected status under the ADA and Rehabilitation Acts. Particularly important is the extent to which the Acts permit employees to protect their employment status by claiming their employment-related misconduct resulted from a drug or alcohol addiction and, thus, is deserving of statutory protection.[169] With selected exceptions,

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166. 42 U.S.C. §§ 12101-12213 (1994).

167. 29 U.S.C. §§ 701-797b. Section 794 of the Rehabilitation Act prohibits discrimination against any qualified person with a disability by any program or activity receiving federal financial assistance or under any program conducted by any executive agency or the United States Postal Service. *Id.* § 794(a).

168. *See* Ennis v. National Ass'n of Bus. & Educ. Radio, Inc., 53 F.3d 55, 57 (4th Cir. 1995) (discussing the Fourth Circuit's preference for adjudicating ADA claims "in a manner consistent with decisions interpreting the Rehabilitation Act"). To state a claim under the Rehabilitation Act, a plaintiff must establish: (1) he suffers from a handicapping condition; (2) he is "otherwise qualified" for the position in spite of his handicap; (3) he is "being excluded from participation in, being denied the benefits of, or being subjected to discrimination under the program solely by reason of his handicap"; and (4) the relevant program or position is receiving federal financial assistance. Maddox v. University of Tenn., 62 F.3d 843, 846 (6th Cir. 1995); Gallager v. Catto, 778 F. Supp. 570, 577 (D.D.C. 1991). *See generally* Eric Harbrook Cottrell, Note, *There's Too Much Confusion Here, and I Can't Get No Relief: Alcoholic Employees and the Federal Rehabilitation Act in* Little v. FBI, 72 N.C. L. REV. 1753, 1759 (1994); Evan J. Kemp, Jr. & Christopher G. Bell, *A Labor Lawyer's Guide to the Americans with Disabilities Act of 1990*, 15 NOVA L. REV. 31, 34-35 (1991).

To state a claim under the ADA, a plaintiff must meet the elements of a prima facie case under Title VII of the Civil Rights Act of 1994, 42 U.S.C. §§ 2000e-2000e-17. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). In *McDonnel Douglas Corp. v. Green*, the Supreme Court stated:

> The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id. at 802.

169. *See* Gloria Y. Lee, Note, *Wiping the Slate Clean: Expunging Records of Disability-Caused Misconduct as a Reasonable Accommodation of the Alcoholic Employee Under the ADA*, 81 MINN. L. REV. 1641, 1642-60 (1997).

courts and labor arbitrators correctly distinguish between addiction or dependency and the conduct caused by the addiction or dependency.[170]

Although the arbitrator's jurisdiction generally arises under the parties' collective bargaining agreement and not external law, labor arbitrators are frequently confronted with claims of protective status under the ADA.[171] Arbitrators do not decide cases in a vacuum, and frequently give deference to, or even apply, federal and state statutory law in deciding discharge grievances. For example, in recognizing the applicability of the ADA to the labor arbitration process, Arbitrator William Daniel, in *Meijer, Inc.*,[172] had this to say on the relevancy of the ADA to grievance arbitration:

> Indeed, the arbitrator finds that under a contract requiring just cause for disciplinary action against an employee, rights established by law, such as the ADA, must be taken into consideration in determining whether just cause exists. In other words, to terminate a person for a circumstance which, by law is protected, could not possibly be just and, therefore, cause could not exist under the collective bargaining agreement. However, such obligations established outside the contract and incorporated must be strictly read and applied.[173]

Arbitrator Daniel's position represents the better view regarding the applicability of external law to grievance arbitration.[174] When possible, the parties'

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170. *Id.* at 1654-69.

171. *See, e.g.*, Mason & Hanger Corp. v. Metal Trades Council, 111 Lab. Arb. (BNA) 60, (1998) (Caraway, Arb.) (noting that grievance must be decided based upon applicable ADA law); Wayne County v. Civil Serv. Employees Ass'n, 110 Lab. Arb. (BNA) 1156, 1163 (1998) (Babiskin, Arb.) (sustaining dismissal of manic-depressive receptionist reasoning that parties have fully explored duty to accommodate her condition; noting that an accommodation which eliminates an essential function of the job is not reasonable); Henkel Corp. v. United Steelworkers Local 14340, 110 Lab. Arb. (BNA) 1121, 1125 (1998) (West, Arb.) (holding that arbitrator should consider spirit and letter of the law when making just cause determination involving disabled employee); Culver City Unified Sch. Dist. v. California Fed'n of Teachers, 110 Lab. Arb. (BNA) 519, 525 (1997) (Hoh, Arb.) (holding, in applying the ADA, that school district need not accommodate high school teacher hypersensitive to fragrances by instituting fragrance-free campus policy or requiring students to check fragrance bottles at office); Cramer, Inc. v. United Steelworkers Local 4991A, 110 Lab. Arb. (BNA) 37, 42 (1998) (O'Grady, Arb.) (holding employee's rotator cuff injury not disability within ADA). *But see* Shell Oil Co. v. Oil Workers Int'l Union Local 4-367, 109 Lab. Arb. (BNA) 965, 968 (1998) (Baroni, Arb.) (refusing to interpret ADA in determining whether management properly terminated disabled employee, where ADA not mentioned in collective bargaining agreement and no actual or implied intent to incorporate ADA in agreement).

172. Meijer, Inc. v. United Food & Commercial Workers Local 951, 103 Lab. Arb. (BNA) 834 (1994) (Daniel, Arb.).

173. *Id.* at 840.

174. *See, e.g.*, County of Sacramento v. Sacramento County Employees Org., 109 Lab. Arb. (BNA) 440, 445 (1997) (Gentile, Arb.) (acknowledging the generally recognized principle that the ADA is a proper inquiry for labor arbitrators); Thermo King Corp. v. United Steelworkers Local

collective bargaining agreement should be interpreted to be consistent with federal law. As noted below, however, while protecting certain addictions, the ADA does *not* require sacrificing the seniority rights of other employees arising out of a collective bargaining agreement in order to accommodate a disabled employee.[175] It also will not help the employee when he or she, otherwise determined to be covered by the Act, engages in egregious or criminal behavior.

A. *Statutory Coverage for Addicts: The Effect of the ADA and Rehabilitation Act*

An individual seeking a claim under the ADA or Rehabilitation Act must first prove a "disability," which under the statute is a "physical or mental impairment that substantially limits one or more of the major life activities of an individual."[176] Addictions are generally recognized as disabling diseases covered by both Acts.[177] The individual must establish he is a "qualified individual with a disability,"[178] which is defined as a person who "can perform the essential functions of the employment position" with or without reasonable accommodation.[179] Once an addicted employee establishes he is a "qualified individual with a disability," the

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2175, 102 Lab. Arb. (BNA) 612, 615 (1993) (Dworkin, Arb.) (holding that labor arbitrator, in making determination whether penalty is appropriate, may look to ADA for guidance):

175. Eckles v. Consolidated Rail Corp., 94 F.3d 1041, 1045 (7th Cir. 1996) (holding that "reasonable accommodation" under the ADA does not require disabled individuals to be accommodated by sacrificing the collectively bargained, bona fide seniority rights of other employees), *cert. denied*, 520 U.S. 1146 (1997); Mason & Hanger Corp. v. Metal Trades Council, 111 Lab. Arb. (BNA) at 63 (citing *Eckles* and holding that ADA does not preempt collective bargaining agreement); Contracts, Metals & Welding, Inc. v. International Union of Elec. Workers Local 1001, 110 Lab. Arb. (BNA) 673, 686 (1998) (Klein, Arb.) (applying *Eckles* and concluding that accommodating depressed junior employee by putting him on shift which bumped senior employee off shift violated the parties' collective bargaining agreement because the ADA does not require "trumping" the bona fide seniority rights of a senior employee to accommodate disabled junior employee).

176. 42 U.S.C. § 12102(2) (1994).

177. *Id.* § 12114(a)-(c); 29 U.S.C. § 706(8)(C); *see* Amy L. Hennen, *Protecting Addicts in the Employment Arena: Charting a Course Toward Tolerance*, 15 LAW & INEQ. J. 157, 166 nn.43-48 (1997).

178. 42 U.S.C. § 12111(8).

179. *Id.* The term "reasonable accommodation is statutorily defined as:

> making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision or qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

Id. § 12111(9).

employer must "reasonably accommodate" that employee.[180] The employer is given the opportunity to present a defense by demonstrating this cannot be accomplished without suffering an "undue hardship."[181] "Undue hardship" is best demonstrated by actions requiring a significant difficulty or expense.[182] Absent a showing of "undue hardship," the employer is prohibited from discriminating against an employee.[183]

Drug addicts and alcoholic employees are afforded a range of protection under both Acts.[184] Statutory coverage for drug addicts under the ADA and Rehabilitation Act[185] does not include individuals who are "currently engaged" in the illegal use of drugs.[186] "Currently engaged" is intended to deny protection to an individual whose illegal drug use has "occurred recently enough to justify a reasonable belief" that the person's drug use is current.[187] The ADA does, however, afford disability status to individuals who have successfully completed or are engaged in a supervised rehabilitation program.[188]

Statutory coverage for alcoholism under the ADA and Rehabilitation Act is somewhat broader than for drug addicts. The "current user" exception to disabled individuals only applies to drug addicts. Thus, a current user of alcohol can be a "qualified individual with a disability" whom the employer must "reasonably accommodate."[189] However, and consistent with all notions of common sense,

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180. *See* L. D. Clark, Shields v. City of Shreveport*:* *Federal Grantees Under the Rehabilitation Act Escape Duty of Reasonable Accommodation Toward Alcoholics*, 66 TUL. L. REV. 603, 608 (1991). The "otherwise qualified" element is linked to the "reasonable accommodation" element. *Id.* "When a handicapped person is unable to perform the essential functions of a job, the court must consider whether any reasonable accommodation would enable him to perform those functions." *Id.*

181. 42 U.S.C. § 12111(10). Generally, "[t]he term undue hardship means an action requiring significant difficulty or expense." *Id.* Employers must evaluate four factors when determining whether providing an accommodation would constitute an undue hardship: (1) the nature and cost of the accommodation; (2) the financial resources of the employer; (3) the type of operation of the employer; and (4) the impact of the accommodation on the operation of the facility. 29 C.F.R. § 1630.2 (1998). *See generally* Lee, *supra* note 169, at 1651.

182. *See* 42 U.S.C. § 12111(10).

183. 29 C.F.R. § 1630.9(a).

184. *See* 42 U.S.C. § 12114; 29 U.S.C. § 706.

185. 29 U.S.C. § 706. The wording of the Rehabilitation Act allows for disability protection for current drug users if the discriminatory action is not taken because of current drug use. *Id.* § 706(8)(C)(iii).

186. *Id.* § 706(8)(C)(i); 42 U.S.C. § 12114(a). "The term drug means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act." 42 U.S.C. § 12111(6)(B).

187. Thomas P. Murphy, *Disabilities Discrimination Under the Americans with Disabilities Act*, 36 CATH. LAW. 13, 22 (1995); *see* 29 C.F.R. § 1630.3.

188. 42 U.S.C. § 12114(b).

189. The Rehabilitation Act does not protect a "current user" of alcohol if such current use

management is free to prohibit the illegal use of drugs and alcohol in the workplace,[190] and, as such, may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same job qualifications and performance standards as the employer holds other employees.[191]

B. *Employment Misconduct*

The provision of the ADA allowing employers to hold alcohol or drug addicted employees to the same job qualifications and performance standards as other employees[192] presents the issue of whether management can cite an employee's misconduct *resulting from, or endemic to, an addiction* as grounds for discipline or discharge. Courts are somewhat split on this issue, with the majority of federal circuits holding that an employer may discipline a substance-addicted employee for misconduct, even when the employee's misconduct arises because of the substance addiction.[193] With respect to alcoholism, the majority of courts reason that the ADA is not designed to discriminate in an employee's favor and allow accommodation for an addicted employee for behavior which would be intolerable if committed by a non-addicted employee, even if the non-addicted employee was intoxicated.[194] Further, the ADA supports disciplining employees for misconduct caused by the addiction by providing that an employer may hold an alcohol or drug addicted

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prevents the individual from performing job duties in question or constitutes a direct threat to the property or safety of others. 29 U.S.C. § 706(8)(C)(v). Some commentators argue courts are blurring the "current use" distinction between drug abusers and alcoholics and excluding both categories from the possible status of "qualified individual with a disability." Hennen, *supra* note 177, at 173 (citing Maddox v. University of Tenn., 62 F.3d 843, 847 (6th Cir. 1995)).

190. 42 U.S.C. § 12114(c)(1).

191. *Id.* § 12114(c)(4).

192. *Id.*

193. *See* Collings v. Longview Fibre Co., 63 F.3d 828, 836 (9th Cir. 1995) (holding that the employer terminated employees because of their drug-related misconduct as opposed to their drug addiction); Despears v. Milwaukee County, 63 F.3d 635, 636 (7th Cir. 1995) (stating in dictum that if alcohol addiction is sole cause of the conduct leading to discipline, the employee is protected under the ADA); Maddox v. University of Tenn., 62 F.3d at 848 (upholding termination of alcoholic football coach for public intoxication and driving under the influence of alcohol based on the employee's misconduct and not his status as an alcoholic); Little v. FBI., 1 F.3d 255, 259 (4th Cir. 1993) (stating that "it is clear that an employer subject to the Rehabilitation Act must be permitted to terminate its employee on account of egregious misconduct, irrespective of whether the employee is handicapped"); Taub v. Frank, 957 F.2d 8, 11 (1st Cir. 1992) (finding employee dismissed for addiction-related criminal possession of heroin not protected by the Rehabilitation Act); Teahan v. Metro-North Commuter R.R., 951 F.2d 511, 516 (2d Cir. 1991) (holding employer terminated employee "solely by reason of" his disability, even though the employer disclaimed any reliance on the employee's disability, when behavior relied on is causally related to that disability).

194. Maddox v. University of Tenn., 62 F.3d at 847; *see* Lee, *supra* note 169, at 1655.

employee to the same qualification standards for employment or job performance and behavior as a non-addicted employee.[195]

Disciplined employees argue that discipline for misconduct which occurs as the result of their addiction violates the ADA, which protects "currently using" alcoholics. The Second Circuit supports this position, holding in *Teahan v. Metro-North Commuter Railroad*[196] that when an employer disciplines an employee due to misconduct shown to be caused by the disability, the termination is "solely by reason of" that disability.[197] Other courts suggest, without explicitly holding, a middle-ground approach which would allow protection for misconduct if the employee can demonstrate his or her misconduct was *solely* caused by the addiction. For example, in *Despears v. Milwaukee County*,[198] an employee was demoted when his driver's license was revoked after being convicted of driving under the influence of alcohol for the fourth time.[199] The Seventh Circuit found that Despears' disability (alcoholism) contributed to, but did not compel, the action which resulted in his demotion.[200] A second cause was his decision to drive drunk.[201] Although the *Despears* court did not hold explicitly, the inference is clear that a strong, direct causal connection between the an employee's misconduct and disability may shield an employee from discipline, while an indirect relationship between the misconduct and the disability is not grounds for protection.[202]

Which approach do arbitrators follow? The concept that an attenuated relationship between an employee's misconduct and alleged disability will not afford the employee protection was demonstrated in *Meijer, Inc.*[203] The grievant, a grocery store employee, was diagnosed in 1986 with bipolar personality disorder, but by 1988 made a unilateral decision to discontinue counseling.[204] In 1991, the grievant was disciplined following customer complaints.[205] He then informed his employer of his mental problem and sought counseling one time in order to maintain employment.[206] In 1993, the grievant was terminated for making rude comments to a customer and

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195. 42 U.S.C. § 12114(c)(4); Maddox v. University of Tenn., 62 F.3d at 847-48.
196. Teahan v. Metro-North Commuter R.R., 951 F.2d 511 (2d Cir. 1991).
197. *Id.* at 516-17.
198. Despears v. Milwaukee County, 63 F.3d 635 (7th Cir. 1995).
199. *Id.* at 635.
200. *Id.* at 637.
201. *Id.* at 636.
202. *See* Lee, *supra* note 169, at 1661 (arguing that the affirmative defense of addiction should allow courts to treat misconduct that directly results from the addiction differently from misconduct which is only related to the addiction).
203. Meijer, Inc. v. United Food & Commercial Workers Local 951, 103 Lab. Arb. (BNA) 834 (1994) (Daniel, Arb.).
204. *Id.* at 835.
205. *Id.* at 836.
206. *Id.*

subsequently sought counseling.[207] The Union sought protection under the ADA, claiming the statute required the employer to make a "reasonable accommodation" to allow the grievant to continue his employment.[208] In concluding that the ADA did not apply to this grievance, Arbitrator William Daniel stated:

> Reasonable accommodation under the ADA relates to job work conditions and the extent to which such may be adapted to "accommodate" some physical or mental condition of an individual who is considered disabled. Here, it is doubtful that the grievant's disability existed in terms of that law since it was his failure to seek treatment and to take medication to control it that produced the results and not the mental illness itself. . . . It was his failure, not that of the company, that caused him to be unable to adequately perform his job.[209]

Arbitrator Daniel correctly (we believe) focused on the misconduct and the causal connection to the addiction (disability). Arbitrator Daniel determined that the addiction itself was not the sole cause of the misconduct, but rather the employee's voluntary action in failing to seek treatment.[210] The dismissal was accordingly sustained.[211]

Despears and *Meijer* suggest a "proximate cause" approach to employee discipline based on, or related to, addictive or dependent behavior. Thus, when an employee proves a strong, direct causal relationship between the misconduct and the disability, his disability defense will command serious consideration. However, if the misconduct is only "related to" the disability, the causal connection is weak and the employer will likely be found to have acted on the misconduct rather than the employee's addiction.[212] In either case, the decision maker, whether a court or

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207. *Id.* at 835.
208. *Id.* at 840.
209. *Id.*
210. *Id.* at 841.
211. *Id.*
212. *See, e.g.*, Tierney v. Department of the Navy, 44 M.S.P.R. 153, 156-57 (1990) (reaffirming that an employee claiming handicap discrimination because of drug and alcohol addiction must show not just that his misconduct is "related to" his addiction, but that it was in fact "caused by" it). In the Board's words:

> In order to meet this prong of the causation test, the appellant must show that, at the time of the misconduct, he was under the influence of intoxicants, and that his analytical judgment or free will was so impaired that he lacked self-control over his actions. A claim of general marijuana dependency does not insulate an employee from discipline for willful acts of misconduct committed independently from that condition.

Id.; *accord* Milner v. Department of the Navy, 45 M.S.P.R. 163, 167 (1990) (upholding removal of employee for absenteeism, but rejecting allegation of handicap discrimination

arbitrator applying federal law, will not render a decision without reference to the nature of the misconduct at issue. In this respect, case law indicates that the nature of the misconduct is important and, indeed, sometimes dispositive of the issue.

C. *Egregious and Criminal Conduct*

Case law holds that employers have no obligation to tolerate criminal or egregious misconduct from employees, notwithstanding any addiction argument under the ADA or Rehabilitation Act.[213] Similarly, there is no duty to accommodate a disabled individual presenting a "direct threat to the health or safety of other individuals in the workplace."[214] The acceptable level of accommodation or tolerance for addicted or dependent employees is inversely proportional to the safety interest that must be safeguarded by the employer.[215]

An excellent decision holding that an employer need not tolerate criminal misconduct in the workplace is *Kaiser Aluminum & Chemical Corp.*,[216] in which Arbitrator Matthew Goldberg rejected kleptomania as a defense to a termination based on theft in the workplace.[217] In *Kaiser*, the grievant, a twenty-five year employee, was terminated after management learned he had stolen over $17,000 worth of company property.[218] The grievant cooperated fully with law enforcement

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due to alcoholism).

213. *See, e.g.*, Maddox v. University of Tenn., 62 F.3d 843, 848 (6th Cir. 1995) (concluding that "[e]mployers subject to the Rehabilitation Act and ADA must be permitted to take appropriate action with respect to an employee on account of egregious or criminal conduct, regardless of whether the employee is disabled."); Little v. FBI, 1 F.3d 255, 259 (4th Cir. 1993) (concluding that judicial opinions, agency regulations, and "no lesser authority than common sense, [makes] clear that an employer subject to the Rehabilitation Act must be permitted to terminate its employee on account of egregious misconduct, irrespective of whether the employee is handicapped"); Thermo King Corp. v. United Steelworkers Local 2175, 102 Lab. Arb. (BNA) 612, 615 (1993) (Dworkin, Arb.) (noting that the ADA "does not require employers to make reasonable accommodations for alcoholics and users of illegal drugs").

214. 42 U.S.C. § 12113(b) (1994). A direct threat means "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." 29 C.F.R. § 1630.2(r) (1998). Employers must base their determination on reasonable medical judgment and consider the following factors: "(1) [t]he duration of the risk; (2) [t]he nature and severity of the potential harm; (3) [t]he likelihood that the potential harm will occur; and, (4) [t]he imminence of the potential harm." *Id.*; *see also* Lee, *supra* note 169, at 1652, n.75.

215. *See, e.g.*, Brown v. Department of the Navy, 65 M.S.P.R. 245, 254 (1994) (upholding termination of crane operator, an admitted user of mind-altering drugs, reasoning that "[t]here is little margin for error when one is hoisting an explosive device with a crane into the hold of a ship").

216. Kaiser Alumninum & Chem. Corp. v. United Steelworkers Local 338, 99 Lab. Arb. (BNA) 609 (1992) (Goldberg, Arb.).

217. *Id.* at 612.

218. *Id.* at 610.

officials and his supervisors in returning the stolen property.[219] He was acquitted in a criminal trial based on a finding that he possessed insufficient mental intent.[220]

Arbitrator Goldberg focused on the grievant's misconduct rather than the alleged mental disability in sustaining the grievant's discharge.[221] Arbitrator Goldberg had this to say on this matter:

> There can be no dispute that the rule against theft is reasonably related to the business of the Company. . . . Many authorities have concluded that there are no degrees of theft, no mitigating circumstances. Discharge is always appropriate discipline, no matter what the value of the particular item(s) stolen. It is highly significant that employers need not make "reasonable accommodation" for employees suffering from kleptomania under the[ADA]. In short, even if kleptomania is shown, it is not a recognized defense to a termination based on theft at the workplace.
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> In this instance, therefore, the Company need not look beyond the act of theft itself, and its extent, to establish proper cause. Grievant's motive, or lack thereof, in taking the property has little to do with the manner in which the contract permits the Employer to respond to misconduct of this scope. Grievant may have been acquitted of an associated crime, but whether he *intended* to deprive the Company of its property is beside the point. The fact of the matter is that the Company was deprived of its use for a substantial period. Significant monetary losses may be inferred even though the property was eventually returned. The acts were wholly unjustifiable.
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> . . . .
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> A blanket rule prohibiting theft is generally reasonable on its face. Such a rule is simple, easily understood and easily enforced. Where the magnitude of the offense is as great as it is here, proper cause does not require the Employer to draw fine distinctions based on state of mind.[222]

Likewise, in *Baltimore Sun Co.*,[223] Arbitrator Jonathan S. Liebowitz rejected the argument that the ADA protects an employee who stole from his employer while he was in a cocaine "drug haze."[224] According to the arbitrator, "the Company was entitled to have [the grievant] perform his duties irrespective of the fact he was using drugs at the time."[225] The arbitrator properly ruled that a "qualified individual with

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219. *Id.*
220. *Id.* at 611.
221. *Id.* at 614-15.
222. *Id.* at 614.
223. Baltimore Sun Co. v. Baltimore Newspaper Graphic Communications Union Local 31, 107 Lab. Arb. (BNA) 892 (1996) (Liebowitz, Arb.).
224. *Id.* at 896.
225. *Id.*

a disability" does not include a person who is currently using illegal drugs when management acts on the basis of such use.[226]

Even with the state of the law favoring management, it is still in the employer's interest to have a blanket rule prohibiting criminal or egregious misconduct at the workplace. Indeed, many types of criminal misconduct, even if committed off-duty, will disqualify an employee from continued employment. Individuals with criminal propensities can constitute a direct threat to the safety of the workplace and the employer's economic viability. The employer has an obligation to protect its employees from dangerous employees, and employees have a right to a safe, secure workplace. Therefore, regardless of the disability, arbitral and judicial authority support employer action against individuals who have committed criminal or egregious conduct, and the ADA protects employers who discriminate against individuals—addicted, dependent, or otherwise—because they present a "direct threat" to the workplace.

D. *"Harmless" Misconduct*

A more complicated issue arises when the employee's misconduct is relatively "harmless" in that it does not result in a direct or substantial threat to the employer's economic interest or the company's workforce. Although courts have held that an employer need not permit egregious or criminal conduct in the workplace,[227] it is unclear whether relatively harmless conduct caused by an addiction will be tolerated.[228] Employees committing relatively "harmless" misconduct such as excessive absenteeism or failure to follow company policies argue such misconduct does not seriously endanger the safety of other employees and, therefore, such misconduct should be tolerated and treated as if it were *caused* by their disability.[229] These arguments are not always successful, especially where management can show undue hardship in accommodating the employee. For example, in *County of Sacramento Probation Deptartment*,[230] Arbitrator Joseph Gentile upheld the termination of an employee for excessive absenteeism.[231] The evidence record

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226. *Id.*

227. *See* Maddox v. University of Tenn., 62 F.3d 843, 848 (6th Cir. 1995).

228. *See* Little v. FBI, 1 F.3d 255, 258 (4th Cir. 1993) (finding FBI employee terminated for on-duty intoxication was fired for his misconduct, not because of his alcoholism).

229. *See, e.g.*, Wayne County v. Civil Serv. Employees Ass'n, 108 Lab. Arb. (BNA) 879, 876 (1997) (Babiskin, Arb.) (reinstating manic-depressive receptionist, who was taking drugs that had the side effect of causing memory loss, where evidence indicated change in medication; noting most job errors were minor).

230. County of Sacramento v. Sacramento County Employees Org., 109 Lab. Arb. (BNA) 440 (1997) (Gentile, Arb.).

231. *Id.* at 446.

indicated the absenteeism was caused by a major depressive and anxiety disorder.[232] The grievant's excessive absenteeism dated back to 1994.[233] When she failed to return from a sixty-day medical leave in 1996,[234] she was terminated pursuant to company policy for failing to return to work within five days following a medical leave of absence.[235]

Arbitrator Gentile determined the grievant's mental illness did constitute a disability under the ADA.[236] Given the grievant's disability, the arbitrator discussed whether the Company "reasonably accommodated" the grievant.[237] The grievant presented a letter from her psychologist stating her accommodations.[238] The accommodations included a return to work date approximately one month past her medical leave expiration wherein she would return part time.[239] In addition, the grievant required a more "comfortable" supervisory approach to allow some leeway in performance expectations until she reestablished a working routine.[240] In order to accommodate the grievant, her work would have to shift to other staff and supervisors.[241] Further, because the stress and detail involved in the grievant's accounting job could not be eliminated, accommodating the grievant would require restructuring the essential functions of the job.[242] The termination was upheld because Arbitrator Gentile concluded the accommodations required by the grievant could not be implemented without undue hardship to other staff members.[243]

As demonstrated, even when conduct is not criminal or egregious, misconduct related to a disability can seriously affect the employer's economic viability and have a negative affect on the workplace atmosphere. An employee who is continually absent because of a disability may likely decrease workplace efficiency if co-workers are forced to perform the absent employee's job duties. Therefore, the extra workload and stress caused by a disabled individual's relatively harmless misconduct may permit the employer to prove an "undue hardship"[244] under the ADA. One

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232. *Id.* at 441.
233. *Id.*
234. The grievant's attendance problems were well documented and established the grievant worked only 43.2% of the time from July 1, 1995 to May 25, 1996. *Id.* The grievant's supervisor was aware that the absences were caused by the depression and counseled the grievant concerning excessive absenteeism. *Id.*
235. *Id.*
236. *Id.* at 445.
237. *Id.* at 445-46.
238. *Id.* at 442-43.
239. *Id.* at 443.
240. *Id.*
241. *Id.* at 442.
242. *Id.* at 445.
243. *Id.*
244. 42 U.S.C. § 12112(b)(5)(A) (1994). See *supra* notes 181-83 and accompanying text

arbitrator, in rejecting the union's argument that depression or symptomatic alcohol/drug dependency could serve as a "pass" for an employee who does not meet his schedule, stated: "There are limits to what the Act and elemental fairness require. . . . [A]rbitrators have held routinely that while employers must make allowances for disabilities, they do not have to retain employees who will not or, through no fault of theirs, cannot keep to work schedules."[245] Case law indicates that harmless conduct may not help the employee retain his job, especially if management can prove undue hardship to other employees forced to assume the workload associated with an accommodation.

E. *Rehabilitation*

The ADA and Rehabilitation Act explicitly protect individuals who have successfully completed a rehabilitation program or are participating in a rehabilitation program.[246] Should an employee's efforts at rehabilitation affect the extent to which he can be disciplined under the ADA? Although the ADA permits employers to discriminate against employees who present a direct threat to the safety of other individuals in the workplace,[247] there is a valid argument that rehabilitated individuals no longer fit this criterion (assuming they presented a direct threat before rehabilitation). In such a case, employees argue the employer violates the ADA by discriminating against individuals who have undergone rehabilitation and no longer present a direct threat in the workplace.

As discussed, a bona fide disability and efforts at rehabilitation, however sincere, are not always sufficient to overcome the gravity of the employee's misconduct. This is true regardless of an employee's length and quality of service to the employer. For example, in *Kaiser Aluminum*, the Arbitrator ruled there was insufficient evidence to conclude the grievant underwent successful rehabilitation for the chronic condition of kleptomania.[248] In addition, efforts at rehabilitation which precede discipline may be credited more than rehabilitation following discipline, especially when the employee's rehabilitation is the result of self-referral. Therefore, although an arbitrator may be conscious of an employee's efforts at rehabilitation and the protection the Acts afford rehabilitation efforts, arbitrators have discretion in judging the sincerity and adequacy of the employee's rehabilitation efforts. In this

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for discussion concerning proving undue hardship.

245. Thermo King Corp. v. United Steelworkers Local 2175, 102 Lab. Arb. (BNA) 612, 616-17 (1993) (Dworkin, Arb.).

246. 42 U.S.C. § 12114(b)(1)-(2); 29 U.S.C. § 706(8)(C)(ii).

247. 42 U.S.C. § 12113(b).

248. Kaiser Aluminum & Chem. Corp. v. United Steelworkers Local 338, 99 Lab. Arb. (BNA) 609, 614 (1992) (Goldberg, Arb.). For further discussion of *Kaiser Aluminum*, see *supra* notes 216-22 and accompanying text.

respect, employees who again use illegal drugs or alcohol while in a treatment program cast serious doubt on their rehabilitative potential.

Is the timing of the discipline relevant? Under most collective bargaining agreements' discharge procedures, there is a time lapse between the decision to terminate an employee and the date of discharge. This time lapse permits an addicted employee the opportunity to seek rehabilitation prior to his actual date of discharge. The Second Circuit, in *Teahan v. Metro-North Commuter R.R.*,[249] held that the time for assessing whether an employee has rehabilitated or is a "current user" of drugs or alcohol is at the time of firing.[250] In *Teahan*, the grievant was terminated following five years of employment with Metro-North because his alcohol and drug abuse led to excessive absences.[251] The grievant voluntarily entered a substance abuse rehabilitation program on December 28, 1987, the same day in which he received his discharge letter for absence without permission.[252] The grievant successfully completed his rehabilitation program and returned to work on January 28, 1988, and was not absent again until his dismissal on April 11, 1988.[253] Thus, under the terms of the parties' collective bargaining agreement, there was a delay between the company's decision to terminate the grievant and the actual date of the grievant's termination.[254]

The *Teahan* court recognized that under a collective bargaining agreement the delay between the decision to terminate an employee and the actual termination date allows the employee to seek treatment prior to the final discipline.[255] The pivotal inquiry in such a situation is whether allowing the employee to seek treatment during the delay between the employer's decision to terminate the employee and the actual date of his termination unreasonably prejudices the employer.[256] The court concluded that the "current user" status at the time of the actual dismissal is in accord with the legislative goal of encouraging substance abusers to seek treatment.[257] The *Teahan* court ruled the Act's goals would be defeated in allowing an employer to justify disciplining an employee based on past substance abuse from which the

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249. Teahan v. Metro-North Commuter R.R., 951 F.2d 511 (2d Cir. 1991).
250. *Id.* at 518.
251. *Id.* at 513.
252. *Id.*
253. *Id.*
254. *Id.*
255. *Id.* at 518-19.
256. *Id.*
257. *Id.* at 518 (citing Nisperos v. Buck, 720 F. Supp. 1424, 1427 (N.D. Cal. 1989); Burka v. New York City Transit Auth., 680 F. Supp. 590, 599 (S.D.N.Y. 1988); Tinch v. Walters, 765 F.2d 599, 603 (6th Cir. 1985) (stating that "[a] recovered alcoholic is an individual with handicaps within the meaning of the Rehabilitation Act")).

employee has rehabilitated.[258] The *Teahan* court enunciated several factors to consider in determining whether an individual is a "current user" at the time of firing: "[t]he level of responsibility entrusted to the employee; the employer's applicable job and performance requirements; the level of competence ordinarily required to adequately perform the task in question; and the employee's past performance record."[259] Arbitrators consider similar factors in determining if an employee is properly rehabilitated.

IX. APPLICATION OF SUBSTANCE ABUSE PRINCIPLES TO OTHER AREAS OF WORKPLACE MISCONDUCT: IS THERE A TREND?

There is some indication that principles developed in substance abuse decisions have been applied in cases that are not drug and alcohol-related. An alternative theory is that principles originally articulated in cases involving emotional or mental disability have influenced substance abuse decisions. The result is the same: arbitrators may set aside discharges on the theory that successful post-discharge rehabilitation mitigated the dismissal or, alternatively, dismissals are reversed if the arbitrator concludes that just cause cannot exist in a case where the employee is not able to exercise free will when he engaged in unacceptable work-related conduct.

To illustrate, Arbitrator Harold Wren, in *Zeon Chemicals Kentucky, Inc.*[260] ruled that management lacked just cause to dismiss an employee who fought with a fellow employee and attacked a supervisor the same day.[261] Among other things (the arbitrator had much to say about racial and gender differences in the workplace[262]), the arbitrator cited the good work record of the grievant who, said the arbitrator, "occasionally contributed above and beyond his normal duties."[263] What is especially interesting is that Arbitrator Wren cited the drug and alcohol analogy in ordering reinstatement:

> Where employees have been discharged for alcohol or drug abuse, and there is evidence that, apart from the substance abuse, the person discharged has the potential of becoming an excellent employee, arbitrators provide for a last chance agreement wherein the discharged employee is reinstated with strict controls over his or her future behavior. Although the case before us involves

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258. Teahan v. Metro-North Commuter R.R., 951 F.2d at 518 (citing Walker v. Weinberger, 600 F. Supp 757, 762 (D.D.C. 1985) (stating that the "[u]se of pre-treatment alcohol-related problems for disciplinary purposes is inconsistent with legislative perception of alcoholism as a disease")).

259. *Id.* at 520.

260. Zeon Chems. Ky., Inc. v. Distillery Workers Int'l Union Local 72, 105 Lab. Arb. (BNA) 648 (1995) (Wren, Arb.).

261. *Id.* at 653-54.

262. *See id.*

263. *Id.* at 653.

> fighting in the workplace, the principles developed in the substance abuse cases may be applied in the present case, provided the employee is willing to submit himself to strict controls that will guarantee that he never again lose his temper so as to place the safety of himself, his co-workers, or members of management in jeopardy.[264]

Arbitrator Helen Witt, in *Bethlehem Structural Products Corp.*,[265] ordered reinstatement of a twenty-six year employee dismissed for physically assaulting a crew leader.[266] The arbitrator found persuasive the union's arguments that the grievant "had been seriously ill for more than two years," suffering from depression "so severe that he attempted suicide and was hospitalized twice."[267] With counseling, the employee also overcame alcohol addiction.[268] The arbitrator credited a report provided the parties by the grievant's psychiatrist (in the form of a joint exhibit) who expressed the opinion that if the grievant had not been severely depressed, he would have had better control of his actions.[269] The arbitrator ordered the grievant returned to work when "there is a solid basis on which to conclude that his medical condition no longer poses an unreasonable risk of harm to others."[270]

In *AAFES Distribution*,[271] Arbitrator Bernard Marcus similarly ruled that an employee, found to be suffering from schizo-affection disorder, was not dismissed for just cause for use of obscene and abusive behavior and her absence without leave for three hours.[272] While concluding that her behavior was "egregious and in ordinary circumstances constitutes just cause for discharge," the arbitrator nevertheless found relevant her post-discharge treatment for mental illness and her determination to continue with medication and therapy as needed.[273] Since the grievant was suffering from a mental illness over which she had no control, Arbitrator Marcus noted that the matter was not "disciplinary."[274]

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264. *Id.* at 654.

265. Bethlehem Structural Prods. Corp. v. United Steelworkers Local 2599, 106 Lab. Arb. (BNA) 452 (1995) (Witt, Arb.).

266. *Id.* at 456.

267. *Id.* at 455.

268. *Id.*

269. *Id.*

270. *Id.* at 456.

271. AAFES Distribution v. Retail Union Local 938, 107 Lab. Arb. (BNA) 290 (1996) (Marcus, Arb.).

272. *Id.* at 297.

273. *Id.* at 294-97.

274. *Id.* at 297; *see also* Means Indus., Inc. v. UAW Local 455, 108 Lab. Arb. (BNA) 831, 832 (1997) (Ellmann, Arb.) (holding manic-depressive employee should not have been discharged for absenteeism and tardiness, where he was taking three prescription drugs and had difficulty coping with rules; crediting letter of physician asserting grievant capable of returning to work); American Nat'l Can Co. v. United Steelworkers Local 7436, 106 Lab. Arb. (BNA) 289, 292 (1995) (Giblin,

In a case that strains credulity, Arbitrator Charlotte Neigh, in *City of St. Paul*,[275] ordered a police officer, convicted of criminal sexual assault arising from an off-duty incident with his fourteen-year old baby sitter (where grievant touched her and exposed himself), reinstated with full backpay.[276] Finding the grievant's past work performance good, the arbitrator, in part buying into a victim defense argument, noted the employee suffered sexual abuse as a child and credited his counselor's report that the employee did not fit the stereotype of a hardcore sex offender.[277] A condition of his reinstatement was that the grievant continue to fully cooperate in treatment for his sexual disorder until released by his counselor.[278]

Perhaps the trend is this: Where an employee can show that his or her conduct (for example, absenteeism, fighting, aberrant behavior, insubordination) is a result of antecedent conditions that no longer exist (alcoholism, drug use, domestic problems), the employee is presumptively deserving of a second chance, especially if that employee's behavior has not passed the "envelope" of conduct expected of all employees in that specific industry. Thus, an employee who shows that the reason he was repeatedly late for work was because his alcoholic father kept him awake at night by calls for rides home from taverns, may have a good case when he produces a death certificate showing his father, the cause of his problem, passed away. Similarly, an employee who can show that his divorce "cured" him of job-related misconduct may have a better case than an employee who cannot demonstrate any "cure."[279] For many arbitrators it is insufficient to simply allege the employee has a dependency or addiction problem. The determination whether the employee's misconduct was *caused* by his "disability" or "mental infirmity" is an element of the victim defense. Accordingly, as part of its burden in alleging mitigating conditions, the union will have to demonstrate a cause-and-effect connection between the misconduct and the antecedent disabling condition.[280] This can be done through

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Arb.) (reinstating employee who suffered from depression and sought medical help, even though violent and insubordinate, where doctor canceled appointment); Wacker Silicones Corp. v. United Steelworkers Local 7237, 95 Lab. Arb. (BNA) 784, 788 (1990) (Hodgson, Arb.) (stating that the grievant "was no doubt in such a depressed mental state and drug-induced stupor that he didn't know what he was doing or care what happened to him nor realize that by not calling in it could cost him his job").

275. City of St. Paul, 101 Lab. Arb. (BNA) 265 (1993) (Neigh, Arb.).

276. *Id.* at 267.

277. *Id.*

278. *Id.*

279. *See, e.g.*, Suburban Mfg. Co. v. Sheet Metal Workers Int'l Ass'n Local 415, 77 Lab. Arb. (BNA) 1200, 1203 (1981) (Rimer, Arb.) (reinstating grievant, stating that "[a]s to the remedy, we have only the grievant's statement that he has been rehabilitated and is no longer suffering from the condition prompting the use of Valium nor from its continued use").

280. As stated by Arbitrator Jonathan Dworkin in *Air Force Logistics Command Aerospace Guidance*:

expert testimony[281] or, in certain cases, by urging the arbitrator to take judicial-type notice of the effects of certain types of diseases or mental infirmities.[282] A tenuous

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> The Union failed to meet the burden relative to its position on Grievant's two-year-old divorce and his financial difficulties. The evidence was helpful as background information; but it limited relevance to the issue. It proved that Grievant suffered from chronic stress, a fairly common condition in complex societies. However, a crucial factor was missing. There was no demonstrated cause-and-effect connection between the stress and the misconduct. Without that connection, Grievant's AWOLs stand out as deliberate violations calling for discipline. The stress may be considered as warranting moderation of the penalty, but it is unconvincing support for the argument that the discipline wholly lacked just cause.
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> Likewise, the evidence on alcoholism was deficient because it fell short of establishing that Grievant's alleged alcohol dependency caused him to stay away from work.

Air Force Logistics Command Aerospace Guidance & Metrology Ctr. v. American Fed'n of Gov't Employees Local 2221, 91 Lab. Arb. (BNA) 946, 950 (1988) (Dworkin, Arb.). On the issue of causation, see generally Lawrence Joseph, *The Causation Issue in Workers' Compensation Mental Disability Cases: An Analysis, Solutions, and a Perspective*, 36 VAND. L. REV. 263, 264-69 (1993) (discussing the relationship between employment and a disabling mental or emotional injury).

281. *See, e.g.*, King Soopers, Inc. v. United Food & Commercial Workers Local 7, 110 Lab. Arb. (BNA) 242, 249 (1998) (Snider, Arb.) (citing, in denying challenge to dismissal, the absence of testimony of a mental health professional that the grievant suffered from a mental illness or some other condition which would contribute to her misconduct); *see also* Stone Container Corp. v. United Paper Workers Int'l Union Local 1974, 101 Lab. Arb. (BNA) 943, 947 (1993) (Feldman, Arb.) (pointing out that medical evidence was "hardly clear and convincing that [grievant] was suffering from any mental disorder; the doctor of the grievant did not testify, there were no medical records placed into the file, [and the grievant] did not testify"); Northwest Airlines v. International Bhd. of Teamsters, 89 Lab. Arb. (BNA) 268, 272 (1987) (Flagler, Arb.) (noting compelling reasons for reserving diagnosis of chemical dependency to qualified health care professionals); International Bhd. of Elec. Workers v. New Jersey Bell Tel., 89-2 Lab. Arb. Awards (CCH) ¶ 8381, at 4892 (July 6, 1988) (Nicolau, Arb.) (rejecting claim that mitigation relating to alcoholism should prevent the dismissal of an employee absent medical testimony that employee suffered from alcoholism or that the grievant's prospects for rehabilitation were good).

In *Avant v. Department of the Navy*, the MSPB discussed the nature of expert testimony in a case involving a claim of discrimination based on an alleged handicap of alcoholism and cocaine. Avant v. Department of the Navy, 60 M.S.P.R. 467, 477-78 (1994). The Board outlined what expert evidence may include as follows:

> To prove an affirmative defense of handicap discrimination based on alcohol and drug abuse, testimony from the appellant and his family, friends and co-workers as to his drug and alcohol use, while helpful, is generally not sufficient by itself to establish the affirmative defense. Rather, the appellant must present expert evidence as to the existence of a drug or alcohol dependency at the time of the misconduct at issue. This expert evidence may include: (1) Objective clinical findings such as test results and observation of physical signs; (2) medical diagnoses based on evaluation; and (3) evaluation and assessment by a non-medical expert in the field of drug rehabilitations, such as a qualified Employee

at work will rarely (if ever) result in a reinstatement order even if there is a showing that management did not have a policy or, alternatively, if they had a policy, it was not made available to the grievant.[288] Certain types of offenses are "*malum in se*" type offenses where no prior notification is necessary to effect and sustain a dismissal.[289] As stated by one Arbitrator, "'no specific rule is necessary to warrant a finding that discipline is warranted for illegal, criminal activity on Company premises."[290] Employers are entitled to expect that its employees will conduct themselves in a manner conducive to the profit objective of the enterprise. An employee who violates this obligation by engaging in criminal or egregious behavior is subject to discipline, notwithstanding the absence of a rule or the victim defense.

While each case is fact specific, it always helps the union if the employee has an unblemished work record and above-average job evaluations and expresses

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288. Our mothers say "never say never." A showing that management gave every employee in a non-safety position who smoked marijuana at work a first-time pass would arguably result in a favorable ruling for a similarly-situated employee. For this reason, unions are always interested in what happened in the past.

289. As stated by Koven & Smith:

> The "extended pragmatic approach" toward progressive discipline excludes certain types of misconduct by category when possible and according to taste. Some of the more common exclusions follow: "*Malum in se*": In addition to the standard "malum in se" offenses that call for summary discharge, such as theft ("even though the amount of money involved is very small"), arbitrators have recognized the propriety of summary discharge for other serious offenses, among them striking a foreman, gross insubordination, destruction of company property, lending money to a fellow employee at usurious rates and fighting. Moreover, the existence of a progressive discipline system does not mean that management has given up the right to summarily discharge for serious offenses. To put it more technically, a past failure to discharge for a given offense cannot "be considered as a waiver of the right to discharge."

ADOLPH M. KOVEN & SUSAN L. SMITH, JUST CAUSE: THE SEVEN TESTS 343-44 (1985); *see also* Central Ohio Transit Auth. v. Transportation Workers Union Local 208, 88 Lab. Arb. (BNA) 628, 629, 632-33 (1987) (Seinsheimer, Arb.) (upholding dismissal of two employees for smoking marijuana on roof of company-owned facility while on duty; finding no obligation to offer counseling through Employee Assistance Program as company did for employee who was an admitted alcoholic); S.D. Warren Co. v. United Paper Workers Int'l Union Local 1069, 89 Lab. Arb. (BNA) 688, 704-05 (1985) (Gwiazda, Arb.) (sustaining dismissal of employee who twice sold marijuana to undercover agent and urged him to smoke it at work; rejecting contention that employee should have been referred to Employee Assistance Program for substance-abuse problem).

290. Burger Iron Co. v. United Steelworkers Local 2089, 92 Lab. Arb. (BNA) 1100, 1105 (1989) (Dworkin, Arb.) (upholding discharge of five employees observed using, possessing, or selling drugs on company premises; rejecting argument that employees should enter drug-treatment program absent evidence that employees are addicted to drugs); *see also* Lockheed Eng'g Sciences Co. v. International Ass'n of Machinists & Aerospace Workers Local 2515, 101 Lab. Arb. (BNA) 1161, 1164 (1993) (Neas, Arb.) ("It is axiomatic that an employer's written work rules are never intended to be all-inclusive. Arbitrators have consistently held that the absence of a specific rule does not prohibit an employer from disciplining an employee for a unique offense . . . .").

remorse for his misconduct.[291] Expressions of remorse, along with truthful admission of their misconduct upon initial inquiry, arguably demonstrate rehabilitative potential which helps the employee's case. It also favors the union's case where the grievant is not a member of the protective services (police, fire, military, prison guard), nor works for an airline, railroad, transit system, or nuclear facility.[292] The post office (arguably a para-military organization) can also be placed in this category. Unions will have a difficult time convincing management and labor arbitrators that an air traffic controller should be given a pass for his off-duty drug offense. The more routine the job and absence of contact with the public, the better for the employee and his union. A pre-condition for consideration of an arbitrator ordering an Employee Assistance Program is some willingness on the part of the employee to recognize and accept the fact of his addiction.[293] Evidence of the grievant's post-incident efforts at rehabilitation, combined with evidence demonstrating the reasonable likelihood of the grievant's future service as a steady, reliable and safe employee, strengthens the employee's case.[294] An employee's case is strengthened if he or she can show that management was aware of his condition and did nothing to assist the employee.[295] It also helps if the employee demonstrates that medication can control the infirmity giving rise to work misconduct.

The employer's case is bolstered where there is a showing that the grievant has had an on-going drug or alcohol problem, and/or has used or possessed contraband in the past. While courts generally will not admit evidence to show similar past

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291. *See* HILL & SINICROPI, *supra* note 31, at 51-69 (discussing work records).

292. For example, Arbitrator Joseph F. Gentile, in *Southern California Rapid Transit District*, reasoned that notwithstanding the post-discharge rehabilitation efforts of the employee, he could not order reinstatement of a transit worker (dismissed for standing on the hood of a car screaming at the owner after the car came too close to his bus) because a key factor was the public service nature of the employer. Southern Cal. Rapid Transit Dist. v. United Transp. Union, 96 Lab. Arb. (BNA) 1113, 1114-15 (1991) (Gentile, Arb.).

293. Aeroquip Corp. v. UAW Local 1806, 95 Lab. Arb. (BNA) 31, 32 (1990) (Stieber, Arb.); *see also* Nabisco Brands, Inc. v. American Fed'n of Grain Millers Local 343, 86 Lab. Arb. (BNA) 430, 436 (1985) (Cox, Arb.) (pointing out that one condition of entry into Employee Assistance Program is recognition by the employee that he has a problem and his commitment to solve that problem by entering a program).

294. Ashland Petroleum Co. v. Oil Workers Int'l Union Local 3-505, 90 Lab. Arb. (BNA) 681, 689 (1988) (Volz, Arb.) ("In the instant case, the evidence was that the grievant had successfully completed the in-patient portion of his rehabilitation, and was responsibly and reliably in the process of participating in the out-patient phase. Given that his 'sporadic' absenteeism was traced to his drug problem, it is more likely than not that this problem will not recur.").

295. General Mills, Inc. v. American Fed'n of Grain Millers Local 316, 99 Lab. Arb. (BNA) 143, 149 (1992) (Goldman, Arb.) (reinstating a 9-year employee, otherwise deserving of dismissal under no-fault attendance policy, where employer, who was aware of employee's recurring problem with depression, knew or should have known that latest absences were probably due to depression; holding that employee should have been given chance to produce medical documentation).

misconduct (where offered to show similar conduct at issue), arbitrators have not followed suit. Past misconduct of a similar nature is often credited as evidence of a present, disputed charge of misconduct.

A showing that on the day in question the grievant was under the influence at work may be dispositive evidence against the employee at a discharge hearing. Further, unions will have a tough row to hoe where management can demonstrate that reinstatement of the grievant would cause harm to himself, the public at large, customers, or his co-workers. Adverse publicity concerning the incident never helps the grievant.

What is clear from reading both published and unpublished cases is that under a standard just cause submission, arbitrators have the jurisdiction (but not the obligation) to hold an "addicted" or "dependent" employee to a different just-cause standard than that to which other employees are held. We submit that this is nothing new. As noted, arbitrators have for years reinstated employees where the evidence record indicates that the conditions that caused the inadequate job performance are no longer present. Thus, when the grievant's illness is a purely physical one, arbitrators are inclined to grant the employee the opportunity to prove fitness to perform the job. Where mental problems are responsible for deficient job performance, arbitrators are likewise receptive to evidence that the employee's mental deficiency, demonstrated to be the cause of substandard job performance, is no longer present, or if present, is now under control.[296] Drug and alcohol dependency is but one category of mitigating circumstances that advocates assert and, depending upon the facts and circumstances of the particular case, arbitrators credit.

Advocates would do well to distinguish between those causes that are beyond the employee's control and those factors dealing with an employee's unwillingness to do the job (although the distinction is not dispositive). Discussing whether an employee was capable of responding to his employer's rehabilitative efforts, one arbitrator stated the principle this way:

> Progressive discipline presumes an employee can voluntarily modify behavior and comply with workplace rules. Whether because of a lack of good sense or a recalcitrant attitude, the employee who fails to respond should expect little sympathy from an arbitrator. . . .

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296. As stated by Arbitrator Pearce Davis in *Philco Corp.*:

> Mental illness simply cannot be treated as though it makes its victims forever untouchable from an employment point of view. Such an attitude would be grossly inequitable, unfair and improper. Carried to an extreme by industry as a whole, an attitude of this sort would condemn to perpetual unemployment thousands of otherwise productive members of society.

Philco Corp. v. International Ass'n of Machinists Local 1293, 43 Lab. Arb. (BNA) 568, 569 (1964) (Davis, Arb.).

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> . . . The problem is that under certain conditions an employee's ability to respond to progressive discipline is impaired because of factors over which the employee has no control. For example, in cases of illness or substance abuse Arbitrators have recognized special consideration is required under the just cause standard because progressive discipline alone does not address the underlying problem.
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> Arbitrators have also recognized that where an employee's difficulty derives from causes other than substance abuse, similar considerations apply.[297]

Inevitably, arbitrators will balance the employee's job salvageability prospects against management's interest in punishing the employee's conduct. As noted above, when the advocate can demonstrate an overriding need for management to prevent drug or alcohol impairment on-the-job (generally a given) and/or complete absence off-the-job (police, fire, bus and train operators, and offshore oil drilling employees, for example), there is no need to wait until a drug- or alcohol-using employee shows signs of impairment or suffers a reaction that is adverse to job performance. His addiction or dependency will not override management's interest in regulating the conduct, even if that conduct is a result of an addiction or dependency. Where management's interest is less paramount (attendance, shop talk, overall work output where the output does not involve the health or safety of the public), employees with mental or physical dependency problems are likely to get a sympathetic ear, especially when the employee has successfully completed rehabilitation. As outlined by the MSPB, in a case involving the dismissal of a Navy shipboard crane operator who, by his own admission, used mind-altering drugs,[298] accommodation will not be required when the misconduct strikes at the core of the employee's job, the employer's mission, or is so egregious or notorious that an employee's ability to perform his duties or to represent the organization is impaired.[299] The nexus to the job is always important.

Does all this make for good public policy? We see no infirmity in the labor and arbitral community seeking to justify or explain an employee's misconduct, be it on or off duty, as part of a mitigation argument. Following the criminal justice model, which generally recognizes an individual's mental or physical capacity defenses, mitigating circumstances have always been part of the just cause equation

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297. S.E. Rykoff & Co. v. Teamsters Local 85, 90 Lab. Arb. (BNA) 233, 235 (1987) (Angelo, Arb.); *see also* Regents of the Univ. of Mich. v. Local 1583, AFSCME, 94 Lab. Arb. (BNA) 590, 595 (1990) (Sugerman, Arb.) (setting aside university custodian's resignation, finding employee did not have mental capacity to understand significance of action).

298. Brown v. Department of the Navy, 65 M.S.P.R. 245, 248, 252 (1994).

299. *Id.* at 253.

in labor arbitration. In recognition of the costs to employers of carrying troubled employees on the payroll, management has enacted Employee Assistance Programs and other programs aimed at early detection and, where appropriate, rehabilitation. In this sense, both management and labor are motivated to seek treatment. Whether the costs of a program is outweighed by its benefits is a question specific to a particular industry and employer. Generally, Employee Assistance Programs are more than cost efficient.

One problem for employees concerns the nature of the arbitration process. By its nature, labor arbitration is conservative. Arbitrators are selected because of their knowledge of the shop, not because they are therapists or champions of social policy. They reflect the bargain the parties reach, no more, no less. As "contract readers" they are there to implement the intent of the parties.[300] Arbitrators are not in the forefront of social change for employees with serious personal problems, alcohol or drug dependencies, or other personal disabilities.[301] A labor organization, attempting to champion the cause of dependent and addicted employees, is unlikely to make headway in the arbitral forum. A troubled employee has a tough row to hoe if he expects equity from labor arbitrators with respect to his claim that alcoholism or drug

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300. Arbitrator Jules Justin, in the often-quoted *Phelps Dodge Copper Products Corp.* decision, stated that the parties' intent is to be ascertained from the words used in their agreement. Phelps Dodge Cooper Prods. Corp. v. International Union of Elec. Workers Local 441, 16 Lab. Arb. (BNA) 229, 233 (1951) (Justin, Arb.). In the words of Arbitrator Justin:

> Plain and ambiguous words are undisputed facts . . . . An arbitrator's function is not to rewrite the Parties' contract. His function is limited to finding out what the Parties intended under a particular clause. The intent of the Parties is to be found in the words which they, themselves, employed to express their intent. When the language used is clear and explicit, the arbitrator is constrained to give effect to the thought expressed by the words used.

Id.

Arbitrator Louis Solomon stated the rule regarding clear and unambiguous language in the often-quoted *Ohio Chemical & Surgical Equipment Co.* decision, as follows:

> It is a basic and fundamental concept in the arbitration process that an Arbitrator's function in interpreting and applying contract language is to first ascertain and then enforce the intention of the parties as reflected by the language of the pertinent provisions involved. As a necessary and essential corollary is the principle that if the language being construed is clear and unambiguous, such language is in itself the best evidence of the intention of the parties. And, when language so selected by the parties leaves no doubt as to the intention, this should end the arbitrator's inquiry.

Ohio Chem. & Surgical Equip. Co. v. International Ass'n of Machinists & Aerospace Workers Local 1406, 49 Lab. Arb. (BNA) 377, 380-81 (1967) (Solomon, Arb.).

301. *See* Marvin F. Hill, Jr. & Anthony V. Sinicropi, *Remedies, Troubled Employees, and the Arbitrator's Role*, *in* ARBITRATION 1989: THE ARBITRATOR'S DISCRETION DURING AND AFTER THE HEARING: PROCEEDINGS OF THE 42D ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 160 (Gladys W. Gruenberg, 1990).

addiction made him steal, engage in workplace violence, use bad language toward customers, or miss months of work without reporting. Individuals who are not capable of doing the job because of mental or physical illness are in difficult straits. As argued, employees who can trace a minor job infirmity (anything but theft, falsification of time cards, or violence) to a mental illness fare much better than employees who have illegal drugs to blame for serious workplace offenses. We see little hope for troubled employees who seek to impose on management a general duty to accommodate their dependencies and addictions independent of their misconduct. Consistent with or pursuant to an Employee Assistance Program, employers may have to accommodate an employee who, before his or her job performance reaches termination stage, seeks rehabilitation of his mental or physical dependency. After termination, the employee is less likely to receive a remedy in the arbitral forum. While the trend may be to recognize recovered alcoholics and drug abusers as "disabled" or "handicapped" for purposes of state and federal laws, arbitrators have clearly (and we believe correctly) separated the disease from the conduct engendered by the disease. Like the majority of courts interpreting the ADA and Rehabilitation Act,[302] arbitrators will not shield addicted individuals from misconduct that results from a disability while prohibiting discrimination against the disability itself. In most jurisdictions employers may lawfully discipline conduct even if that conduct is "caused" by a protected disability. Consistent with public policy, arbitrators are also less sympathetic to drug abusers than alcoholics, primarily because of illegality considerations. With respect to drug cases, arbitrators also cite a difference between "hard" (heroine, cocaine) and "soft" (marijuana, amphetamines) drugs.[303]

Under a traditional just cause criterion, arbitrators give lip service to applying the same just cause standards to all employees rather than treat some employees differently *because of handicaps or disabilities.* Handicaps and disabilities are recognized as part of a mitigation argument, but in the end it is the employee's *misconduct* that is at the forefront of resolving whether the employee is deserving of another chance. Egregious or criminal conduct in the workplace will invariably get you fired, notwithstanding illness, morality, or equity arguments to the contrary.[304]

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302. *See supra* Part VIII.

303. *See* Joseph Loewenberg, *The Neutral and Public Interests in Resolving Disputes in the United States*, 13 COMP. LAB. L.J. 488, 496 (1992) (noting that despite the similar concern with alcohol and drugs, employers, unions, and arbitrators treat the two differently). *See generally* Tia S. Denenberg, *Drug-Testing Disputes, in* ARBITRATION 1990: NEW PERSPECTIVES ON OLD ISSUES: PROCEEDINGS OF THE 43D ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 235 (Gladys W. Gruenberg, ed., 1991).

304. The late and well-respected Arbitrator Peter Seitz had this to say on this issue:

> I have no real problem in my own mind with respect to the person who is addicted to alcohol and in the workplace performs some outrageous act, which might be arson or pinching the girl in aisle 3 in the warehouse on the midnight shift. There

Arbitrators who err in favor of employees who cannot perform the job in question impose an implicit tax on employers. Arbitrators who substitute their judgment for employers who impose a reasonable penalty for job-related conduct, saddle management with the financial and safety risks associated with illness or relapse. Although at times arbitrators will focus on the employee's potential for improvement in the future, in the last analysis the criterion is current ability and fitness to perform the job, at least as applied by the better weight of authority. Employees who call into question their ability or fitness to perform, because of mental problems or because their egregious conduct calls into question their overall ability to make judgments or to be trusted in a specific position, cannot hope for more than a fair opportunity to make their mitigation argument before a neutral. This, we submit, is consistent with economic and social policy of ensuring that qualified individuals are treated fairly. Troubled employees are evaluated in the first instance by the arbitral community not with respect to their disability or addiction but because of job-related criteria. Their conduct may be inexorably related to the addiction (for example, when an alcoholic is in possession of alcohol or intoxicated at work), but this is aside from the point. We believe the better authority is to focus on workplace conduct with due consideration of mitigating circumstances. If these circumstances are the result of a "disease" for which the employee has no control, it is up to him to assert the defense at arbitration and convince the neutral that he is "salvageable."

Admittedly, the current status of arbitral case law favors management, especially when the employee's conduct is egregious or criminal. Even in those cases where the employee's misconduct is not egregious, an employee has an uphill task in convincing an arbitrator that he deserves another chance because, like the affable Fantine in Les Misérables, he is a "victim" of circumstances which were, at the time of his misconduct, beyond his control. If an employee is reinstated, the arbitrator is more than likely to require continued participation in an employee assistance program or some other conditional remedy.[305] Indeed, failure to mandate some rehabilitative

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> we have the application of the question of just cause. We're not therapists there; we perform a quasijudicial function. We listen to the testimony. We evaluate the quality of the act and the man who performed it in the light of his personality characteristics, and we decide whether or not there is just cause for the kind of discipline the employer has imposed.
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> When you do not have any blatant, outrageous conduct, but where you have alcoholism—that has been called a sickness here—it seems to me you have a problem of an entirely differently character and dimension. There, it seems to me, we might approach it from the question of whether the man still has the physical capacity to perform his job duties.

Discussion, *in* ARBITRATION 1975: PROCEEDINGS OF THE 28TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 125, 126-27 (Barbara D. Dennis & Gerald G. Somers, eds., 1976).

305. *See* Marvin F. Hill, Jr. & Anthony V. Sinicropi, *Remedies, Troubled Employees, and the Arbitrator's Role*, *in* ARBITRATION 1989: THE ARBITRATOR'S DISCRETION DURING AND AFTER THE

treatment as a condition of reinstatement will not advance the cause of the parties and the employee.[306] Any fair balancing of interests mandates such a result.

HEARING, PROCEEDINGS OF THE 42D ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 160, 163 (Gladys W. Gruenberg ed., 1990) (listing examples of conditional remedies).

306. One study found that corrective discipline procedures, without therapy, are unlikely to be effective. *See* HARRISON TRICE & JAMES BELASCO, EMOTIONAL HEALTH AND EMPLOYER RESPONSIBILITY 20-23 (1966).