

## **NONDISCIPLINARY TERMINATIONS AND DEMOTIONS IN ARBITRATION**

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### **ABSTRACT**

This article examines 131 published arbitration awards dealing with terminations and demotions for non-disciplinary reasons. Of significance to employers is the fact that if the action taken is truly premised on non-disciplinary reasons, it is relieved from shouldering both the burden of proof and establishing just cause. One particularly difficult issue—that of an employee's physical ability to perform his/her job, is of concern to employers and employees alike, not to mention the arbitrators who adjudicate these types of cases. Possible ADA violations further cloud the picture. Often, the line becomes blurred between non-disciplinary actions for alleged physical inability to perform, and disciplinary ones. This article also explores distinctions between non-disciplinary and disciplinary demotions and when each action may be appropriate.

### **NONDISCIPLINARY TERMINATION AND DEMOTIONS IN ARBITRATION**

To an employee faced with dismissal, whether the termination is based on disciplinary or nondisciplinary reasons may not matter much. Nevertheless, there are significant differences between disciplinary and nondisciplinary actions. In the first place, if the employee is penalized for disciplinary reasons, the parties' collective bargaining agreement will almost always specify that the discharge must be for "just cause" [1]. Arbitral just-cause standards are far more difficult to establish than those "at will." Moreover, disciplinary dismissals place the initial burden of proof on the employer.

On the other hand, nondisciplinary terminations normally involve situations where an employee has allegedly violated some provision of the parties' collective bargaining agreement, such as extending a leave of absence without permission, failing to call in to report an absence for three consecutive days, failing to return from a layoff, etc. [2]. Often, but not always, these requirements are outlined in the seniority provisions as ways an employee can lose his/her seniority (i.e., be terminated or demoted). There is no misbehavior involved in nondisciplinary actions because there is no violation of the rules of conduct. Moreover, if a nondisciplinary termination case is appealed to arbitration, the burden of proof rests on the shoulders of the grievant/union to show that the employer's actions were a pretext for discharge, or that the employer, in terminating/demoting an employee, was acting arbitrarily or capriciously [3].

Of course, the union or aggrieved employee may protest employer actions through the grievance procedure, and ultimately, an arbitrator may be required to resolve such dispute. This article reviews nondisciplinary terminations as well as nondisciplinary demotions, using all published arbitration awards of the Bureau of National Affairs (BNA), *Labor Arbitration Reports*, and the Commerce Clearing House's (CCH), *Labor Arbitration Awards*, covering the years 1986 to 1996. A few older cases are included for purposes of perspective regarding the issues raised. In all, a total of 131 cases were reviewed.

### **FAILURE TO REPORT FOR WORK WITHOUT NOTIFICATION**

The seniority provisions in many collective bargaining agreements contain a requirement that an employee will lose his/her seniority if s/he fails to notify the employer within some stated period of time while absent—typically three or four consecutive “days” [4]. The presumption regarding the failure to call in is that the employee has quit, absent some mitigating circumstances. In this regard, an arbitrator upheld the termination of an employee who did not call in for three consecutive days, when such notification was required by the parties' collective bargaining agreement [5]. Although the employee had been admitted to the hospital, his case was never serious, he never lost consciousness, and a telephone was available to him or his wife to notify the company. Arbitrator Newmark, quoting from an earlier decision noted:

Based on a long and consistent line of arbitral authority, it is quite clear that the question of the propriety of the grievant's termination does not require an ethereal balancing of equities involved in just cause discharge cases; rather, it is a question of strict contract interpretation [5, at citing 6].

In another case, an employee was absent four consecutive days from work because he had been incarcerated [7]. A friend of the grievant had called to notify

the company after the grievant's second day of absence. While investigating the circumstances of the incarceration, the employer discovered the employee had been previously convicted of a felony and had replied falsely to a question on his employment application in that regard. Consequently, what may have begun as a nondisciplinary termination became one involving just cause [8]. However, arbitrator Odom's comments regarding the nature of terminations for failure to report are instructive:

It is common for a collective bargaining agreement to contain provisions whereby employees' employment and seniority rights are severed automatically following absences of three or four consecutive days without notice to the employer. In such instances, the employees are considered to have "voluntarily quit," and both the employers and the employees' unions are provided a basis on which to justify removal of the employees from their roles [7, at 4603].

Odom further explained that the absence-notification provision was not a disciplinary one because the requirement was placed in the seniority section of the collective agreement. Moreover, as management has the right to unilaterally make and enforce call-in requirements, the contract provision would be redundant [9]. In addition, the contract provision is not disciplinary because management is entitled to be informed that an employee has not quit and intends to return to work [7, at 4603-4604].

In a case with an interesting twist, an employee failed to call in to report his absences for four consecutive days [10]. Subsequently, the grievant's wife called the company to request an emergency leave for him because he was suffering from a "mental illness"—a gambling addiction. The arbitrator noted it was company policy to consider extenuating circumstances in such matters and to assist drug users and alcoholics. He also observed there was no clear past practice whereby all employees absent without notification had been terminated. Therefore, he reinstated the grievant without back pay, while remarking:

Compulsive gambling is now widely recognized as a disease, and was even a subject of a piece on a recent 60 Minutes television program wherein eminent psychiatrists stated that compulsive gambling is indeed a mental disorder [10, at 3865].

### **FAILURE TO RETURN FROM A LAYOFF**

Often, a collective agreement will provide that an employee will lose his/her seniority when s/he fails to return to work within a fixed number of days after being recalled from a layoff. Usually, an employer is obliged to direct its notice of recall only to an employee's last-known address/phone number. Therefore, it is

important that employees keep employers apprised of changes in residence and/or telephone number. If an employee fails to return to work in the contractually permitted time period, s/he is presumed to have resigned.

In this regard, the termination of two welders who refused to return to work within five days after being recalled from layoff was deemed to be proper [11]. The employees claimed they wished to remain on a layoff status. However, arbitrator Hewitt observed:

A layoff is *not* something that an employee can create. A layoff is created only by the company. Conversely, the company also terminates the layoff when it recalls the employees. An employee normally cannot continue on layoff when the layoff is completed since there is no layoff in effect [11, at 5222].

In a related matter, an employee was recalled from layoff by telephone, based on a form he had completed indicating the jobs for which he wished to be considered [12]. When recalled, he wanted to change his job selection, but the company claimed he could not do this. The employee did not report for work and was terminated [12].

However, an employee who was not physically able to return to work from layoff was held to have been improperly dismissed [13]. The employer was required to rely on a return-to-work slip completed by the employee's physician, but the doctor indicated that she (the employee) was not able to return to work until three weeks after she was terminated. Arbitrator Bankston ordered her reinstated and made her whole.

### **TERMINATION FOR LOSS OF SOME JOB-RELATED QUALIFICATION**

A number of arbitration awards dealt with situations when an employee lost an important job-related qualification, other than a physical one (see later section of this article). For example, in one case, the failure of an ambulance driver to maintain a valid driver's license required for her position led to her termination [14, 15, 16]. The maintenance of certificates and licenses were a driver's responsibility and she had been previously warned the employer would not tolerate a lapse of licenses or certificates. Moreover, the fact that she had not informed the company that her license had lapsed placed her position at risk [17].

In another case, two valets were terminated when the employer's new insurance carrier refused to include them because of their poor driving records [18]. They could not perform their duties because of uninsurability. The valets had been offered other jobs and there was no evidence that the employer deliberately changed its insurance carrier so as to deny them coverage. Arbitrator Tamoush noted:

It is axiomatic, of course, that employees must be “ready, willing and able” to perform the duties of their position [18, at 4305; 19].

There does not seem to be much dispute that the company is not obligated to employ persons in the job in question who they cannot insure [18, at 4305].

Nevertheless, a close analysis of other arbitration awards reveals that an employer’s obligation to employees may not end with the decision by an insurer that certain employees may be uninsurable. While employers are not obliged to absorb the higher costs of premiums caused by employees’ poor driving records, they are obliged to take the following steps before imposing termination:

1. Inform employees that their driving records could place their jobs in jeopardy;
2. Conduct an investigation to determine whether other insurance options are available; and
3. Take all reasonable steps to protect the jobs of affected employees [20, at 5691; 21].

### **FAILURE TO RETURN FROM A PERSONAL LEAVE OF ABSENCE**

Leaves of absences may generally be granted for two reasons: personal or medical necessity. They are normally regulated by provisions in the parties’ collective agreement or by policy. Usually a certain date is established for the employee to return from a leave. This date may or may not be changed as circumstances dictate. Of course, the expected return date is crucial because the employer and the union must be made aware of whether the employee intends to return to work. For example, in one case the company failed to notify a grievant of the ending date of her leave [22]. She understood she had been granted a six-week leave, not a thirty-day one as the company maintained. The company stated that the contract allowed only thirty-day leaves, with extensions in similar increments. The grievant was found to have been improperly terminated when the union was successful in showing that the company had been inconsistent in following the leave provision and had not permitted the grievant a chance to explain her understanding before she was terminated.

Another employee escaped termination after he had been granted a two-month leave of absence to travel out of the country and was given an addition two months after losing his American entry card [23]. He telephoned the company the day before the leave ended to announce that he would return in one week, which he did. However, even if he had failed to call in, he could not have worked, as employees were on layoff. He was subsequently reinstated without back pay.

## FAILURE TO RETURN FROM A MEDICAL LEAVE OF ABSENCE

There are a number of reported cases dealing with the issues of an employee's alleged failure to return from a medical leave within a prescribed time period, and/or when an employer properly or improperly aborts such leave. Of course, relevant contract language and other circumstances will be crucial in such cases. For example, an employee was held to be improperly terminated for failing to return from a medical leave of absence that had been approved by her supervisor [24]. The parties' collective agreement allowed a medical leave for "bona fide medical disability" for up to six months. A past practice (interpreting "bona fide medical disability") existed that permitted a medical leave if there was a letter from a doctor supporting one. After the grievant provided such a letter, the company wanted her to undergo a further medical examination. Arbitrator Hardbeck argued that she was not required to supply further medical information, and therefore, there were no grounds for revoking her leave of absence.

In the absence of specified time limits for certain types of disability leave, an employee may be permitted an indefinite leave of absence [25]. There are two arbitral schools of thought regarding the propriety of indefinite leave (in the absence of contractually-imposed time limits). One of these schools is represented by arbitrator Shieber in the *Kimberly-Clark Corporation* case [26]. He suggested that when an absence is to be for an unreasonable period of time and there is little prospect that the employee can return to work, termination may be warranted. Also, in another case, the contract provided that employees "shall not lose seniority rights when they remain off on account of sickness [27, at 680]. The grievant had not worked in the plant for over three years because she was allergic to printers' dust and ink. Arbitrator Duff argued:

When a worker's health is permanently impaired and he [she] lacks the physical ability to regularly attend his [her] job and perform his [her] assigned work duties, his [her] condition will justify a non-disciplinary discharge for just cause [27, at 682].

On the other hand, arbitrator Volz commented:

. . . the law abhors a forfeiture of a valuable right, such as the termination of seniority . . . [28, at 3019]; and

. . . [A] forfeiture clause to terminate the seniority of a long-term employee suffering from a compensable occupational disease must be clear and unambiguous [28, at 3020].

In the Volz case, the contract specified that employees on "sick leave" for more than two years were subject to the termination of their seniority. The parties'

collective agreement did not define “sick leave,” but other parts of the contract differentiated between sickness and compensable injury [28, 29].

However, when an employee is given clearance to return to work without restriction and the employee fails to report at the end of his/her medical leave, termination will almost always follow [30]. As a corollary, when the employer’s doctor and the employee’s doctor provide a release to return to work, the company should not refuse to accept such release, provided the employee does not pose a danger to himself/herself or others [31].

Of course, employees will face termination if they fail to return from leave within contractually specified time limits, absent other circumstances to the contrary [32]. For example, the termination of the seniority of a plant security guard was upheld when he failed to return to work within five days after the expiration of his medical leave [33]. The company sent him a letter to return or provide documentation from his personal physician to support an extension of the leave. No explanation of his work status was made by the grievant. In a related case, an employee on a medical leave due to a nonoccupational injury returned to work one day before the end of the twelve-month [leave] limit, and then resumed his absences [34]. The arbitrator found it was not a bona fide return to work, saying it was not reasonable to interpret the medical leave provision [35] in such a way that an employee could perpetuate his/her seniority status by making an “annual appearance.”

### **TERMINATION BECAUSE OF EXPIRATION OF DISABILITY BENEFITS**

A few reported nondisciplinary arbitration cases involved situations when employees were terminated upon the expiration of their short- or long-term disability benefits. One arbitrator believes all such terminations are disciplinary in nature, demanding that a just cause standard be met [36]. He maintained:

Failure to be available for work can be proper cause for termination. Such termination does not fall into the usual categories of disciplinary nor voluntary. However, it still remains a discharge and requires proper care or just cause [36, at 4664].

For example, an employee was unavailable following the expiration of her disability benefits. No notice was given her that she would be subject to termination after the benefits expired, and the fact that the company had extended other employees’ disability benefits amounted to disparate treatment [36].

In another case, an employer improperly terminated an employee when his long-term disability benefits were discontinued. The parties’ collective agreement provided that seniority shall accrue during any period of disability due to a workers’ compensation injury or other injury or illness. Seniority could be lost

only when an employee was on a layoff for more than one year and “for reasons other than sickness or accident” [37, at 3167]. Similarly, when a contract clause stated that employees with more than five years of service would not lose their jobs because of a disability lasting “for a period of over one (1) year,” a grievant who possessed such seniority was improperly terminated. The arbitrator noted that the clause in question provided employees protection for an indefinite period [38, at 3322].

### **TERMINATION FOR PHYSICAL INABILITY TO PERFORM THE WORK**

An important category of nondisciplinary terminations may occur when an employer contends an employee no longer possesses the physical ability to perform his/her job up to acceptable standards. Often cases of this type revolve around medical opinion, and of course, there is sometimes sharp disagreement between the grievant’s/union’s physician and that of the company. Arbitrators presume that expert medical opinions, given in good faith, are correct [39]. Such medical judgments, however, should be based on supporting evidence and not represent mere speculation (or probabilities) that an employee may not return to work [40].

Arbitrator Dworkin has noted:

It is universally recognized that, in the absence of contract language to the contrary, an employer is not required to retain an employee who will not or cannot perform his/her responsibilities. It is also acknowledged that Management’s right to terminate an employment relationship because of an individual’s inability to perform his/her job must be exercised rationally and responsibly [40, East Ohio, at 5582; 41; 27].

For example, in one case a company properly terminated a service operator on the basis of a doctor’s opinion that he would not be able to return to work because of complications resulting from an on-the-job injury [42]. The employee suffered from chronic rotator-cuff disease and could not perform his job duties without causing permanent harm to himself. There was a certainty of the harm and no less-demanding job was available.

Since the American with Disabilities Act (ADA) went into effect in 1992, arbitrators have taken note of two (relevant) parts of that law, namely, the idea of a qualified individual with a disability and the concept of “reasonable accommodation.” Unions have argued in termination cases dealing with an employee’s alleged inability to perform a job due to a physical problem, that employers have not only the duty to refrain from discrimination based on such employee’s handicap, but also to extend reasonable accommodation. In one case, an employee was deemed to be properly terminated when her skin allergies



prevented her from becoming a productive worker [43]. She was required to work with chemicals and despite the use of protective gloves and an assignment to light-duty work, the allergic contact dermatitis on her hands worsened when she was even in the vicinity of chemicals. Arbitrator Nicholas maintained she was not a qualified individual with a disability within the meaning of the ADA because there was no showing that her condition limited one or more of life's major activities when she was away from the workplace. Moreover, the employer did attempt to accommodate to her condition, but to no avail.

Similarly, there was no violation of the parties' collective bargaining agreement or the ADA when an employer failed to reinstate an employee who was attempting to return to work from a medical leave of absence for multiple sclerosis [44]. The employee had suffered a blackout in February of 1994, which prompted the leave. There was no place in the plant to work because it was too hot (the employee was not permitted to work in extreme heat) and it was not safe (another restriction was that the employee could not work closer than six feet from a machine). Thus, there could be no reasonable accommodation for the employee.

### **REASONABLE ACCOMMODATIONS**

As previously noted, employers may be expected to make reasonable accommodations for employees who are disabled but otherwise qualified. Arbitrator Talarico commented in this regard:

It is incumbent upon the Employer, seeking to return a disabled employee to an alternative position because of physical limitations to, insure that (1) the employee has clear and accurate information regarding the requirements of [the] position; (2) that there is no question that the employee can physically perform all aspects of that position; and (3) to clearly appraise [sic] the employee of the ensuing consequences if she refused to accept that position [45, at 5681].

However, there may be limitations as to the extent of such accommodations. As arbitrator Redel explained:

Employers have an obligation to make accommodations for the handicapped and are expected to incur some expense in making a position or work station available to a qualified handicapped employee. These accommodations are not required for employees, who because of their handicap, are physically unable to efficiently perform at standards set by the employer for the duties required in that job [46, at 4937].

In arbitrator Redel's case, the termination of an employee was upheld due to his inability to substantially perform the functions of any job in the bargaining

unit. He (the grievant) was permanently restricted from lifting more than ten pounds, which precluded performance of any unit job.

Not only are employers not required to accommodate employees who cannot perform any job up to standard, but they are not obliged to make a job out of bits and pieces of others or create a special position solely for such employee [46, 47].

## **DEMOTIONS**

Demotions may be either nondisciplinary or disciplinary in nature. Both, of course, have the same result, namely that an employee is placed in a lower position, usually with less pay, and usually for the duration of his/her tenure with the employer. Nevertheless, the circumstances under which a demotion becomes disciplinary or nondisciplinary in nature, or even if a demotion can be imposed at all, have been the subject of a goodly number of arbitration decisions. Unfortunately, the motivation behind a demotion is not always clear. For example, an employee may have been warned and even disciplined for work-related problems before a demotion is imposed. Is the demotion a continuation of the disciplinary chain, or a conclusion by management that the employee is incapable of performing his/her job at an acceptable level? As a normal rule, when an employee possesses the ability to perform the work, but due to a lack of attention, carelessness, or negligence, it is done improperly, the situation usually demands a disciplinary response (demotion) instead of a nondisciplinary one [48]. A demonstrated inability to perform the work, caused by a lack of education, experience, qualifications such as a license, etc., will often trigger a nondisciplinary demotion [49]. Arbitrator McDermott observed in this regard:

It should be emphasized that the obligation of an employee to perform his job in a satisfactory fashion is a continuous one. Furthermore, it is possible that an employee through the years may perform his job in a satisfactory manner, but at a later time his performance may deteriorate to the point of becoming unsatisfactory. If the basis for the deterioration is beyond the control of the employee, and keeping him on his present job creates a safety hazard or results in below standard output, then it is within the authority of the employer to demote the employee down to the next highest ranking job that is within his capabilities. In such case it is not a disciplinary matter, but one of incompetence. On the other hand[,] if the deterioration grows out of personal misconduct, then disciplinary measures are in order with the object of correcting the misbehavior and of trying to make the employee once again a fully productive person on his job [50, at 1112].

## **NONDISCIPLINARY DEMOTIONS**

In the absence of specific contract language, arbitrators often permit employers to demote employees for nondisciplinary reasons, based on the management

rights clause. For example, the right to demote has been inferred from management's ability to "select and assign employees," "to direct the working force," and "to promote and transfer employees [51, at 5196; 52, at 4075]. Arbitrator Flannagan noted in this regard:

... arbitration authority is generally uniform to the effect that non-disciplinary demotions—that is, because of inability lack of efficiency or lack of competency, is a management right limited only by the requirement that such action not be arbitrary, capricious or discriminatory [cite omitted] [51, at 5196].

He also maintains that the residual right to demote has been enforced unless specifically disallowed by provisions in the collective bargaining agreement [51, at 5196].

Employers may insist in arbitration that a demotion was nondisciplinary in nature for several reasons. First, unlike discipline-based demotions, they do not require specific contract language permitting the action to be taken, and secondly, if the demotion is truly nondisciplinary, the burden of proving that the demotion was arbitrary or capricious falls on the union [52; 53, at 3540].

As arbitrator Flannagan noted, if the union can prove that the employer acted unreasonably, arbitrarily or capriciously when demoting an employee, the demotion will be voided. If an employer has failed to correct an employee or provide notice of an impending demotion when performance has not improved, it is also likely that the demotion will be set aside [54]. In a nondisciplinary demotion case, arbitrator Canestraight outlined four conditions, any one of which, if proven, would be sufficient to justify disqualification from the job:

- (1) if an employee lacks or no longer possesses sufficient skill to perform his or her regular job;
- (2) the employee regularly fails to meet established production standards;
- (3) the employee normally or frequently is (rather than occasionally) careless. Mistakes are repeated and continued over a substantial period of time; and
- (4) employee's inattention, if repeated, would endanger him or her or others in the shop [52, at 4075].

These four conditions are discussed below:

1. If employee lacks or no longer possesses sufficient skill. In a federal government case, the demotion of an air traffic controller was held to be proper [55]. The controller returned from a medical leave of absence for a stress-related disability and unsuccessfully completed an air traffic control training program. It was found that the training was fair and that he did not complain. The controller was offered a lower position instead of termination, to prevent loss of pension benefits.

However, an employee's attitude, standing alone, cannot be a sufficient reason for demotion. Arbitrator Cerone noted:

Attitude is not a proper basis for a nondisciplinary disqualification. Any attitude problems that may exist are better dealt with through the timely use of progressive discipline [56, Archer, at 14].

In addition, even when an employer properly disqualifies employees, it must not prevent them from reapplying to their former positions [57].

2. Failure to meet established standards. Arbitrator Canestraight indicated this category involved a failure to meet production standards. In my opinion, this category is the same as the first, because if an employee lacked needed skills, s/he would no doubt be unable to meet established production standards. There is room in this (second) category to also include the loss of certain job qualifications. For example, in one case, there was a state requirement that certain types of welders be tested and state-certified for at least three-year intervals [58]. A welder who failed the test was properly demoted. In another case, a detective violated the department's residency requirements for six months, in that he did not live within thirty minutes of the employer [59].

3. The employee normally or frequently (rather than occasionally) is careless. In *Gilbarco, Inc.*, an employee committed numerous stocking errors and after repeated reprimands, she was demoted. The employer's action was not arbitrary, and she had been given adequate training after receiving a promotion. It was held by the arbitrator that the demotion was nondisciplinary, as the next discipline step would have been termination [51].

Another employee, a press operator, was disqualified and demoted after his negligent job performance resulted in \$100,000 damage to his machine [60].

4. Safety. It has been said that an employer's right to direct the workforce also includes the right to remove an unsafe worker from a potentially dangerous work assignment [61, at 3930]. For example, the demotion of a truck driver to an in-plant job after he was involved in several accidents and convicted of a number of moving violations was held to be proper [61]. Similarly, the demotion of another employee was sustained [62]. The employee was removed from a job involving the operation of a machine after he had placed his right hand in the press mechanism, while failing to push the "stop" button. Arbitrator Duff observed:

If an employee of long experience demonstrates that he/she no longer may be relied upon to observe safe work practices, then management has an obligation to take reasonable steps to protect him/her from such inadequacy [62, at 88].

## DISCIPLINARY DEMOTIONS

As previously noted, arbitrators generally will not permit management to use demotion as a form of discipline unless the parties' collective agreement specifically provides for it [63, at 4498]. However, in an interesting case with a unique fact situation, an employer was held to have properly demoted an employee instead of firing him, although disciplinary demotions were not permitted in the language of the collective bargaining agreement. Because the employee had twenty years of service, the company exercised leniency in using demotion instead of termination [64]. The reasons given for the arbitral position limiting disciplinary demotions only to situations in which they are permitted in the parties' contract are that such demotions may otherwise violate employees' contractual seniority rights and that they may also amount to an indeterminate sentence without a terminal point [65, at 4498]. Moreover, demotion as discipline may not be imposed if an employee has the demonstrated ability to perform his/her job [66]. For example, a municipality was not permitted to demote an employee from police captain to patrolman because he had [verbally] sexually harassed a female patrol officer [66]. A suspension was held to be proper in the case because it was related to the city's rules of conduct, but a demotion was not warranted because there was no showing that the grievant was incompetent. Nevertheless, there was just cause to demote an employee from deputy sheriff to corrections officers after the employee had commented on a matter under investigation and made false and misleading statements on television [67]. There was a provision in the parties' collective bargaining agreement prohibiting conduct that brought discredit to the [sheriff's] department. Demotion was the fifth step in a six-step progressive disciplinary plan.

Arbitrators have also failed to uphold disciplinary demotions when there have been no prior warnings or progressive discipline to support an employee's alleged inability or unwillingness to perform the job [63, at 3861]. For example, in the *City of Pullman*, a police officer was demoted for alleged deficiencies in his performance, some for which he was never warned. The demotion was subsequently reversed by the arbitrator [68].

Disciplinary demotions may be upheld if there are valid safety concerns or safety violations committed by employees, unless employer action or inaction contributed to the safety problem [63, at 3861]. For example, there was just cause in one case to demote a thirty-year cable splicer/working foreman who failed to test the potential in a 13,000-volt line [69]. A resulting explosion caused an injury to the grievant, damage to the company, and an interruption of power.

A disciplinary demotion may not be warranted when a new criterion is added by an employer as a performance standard. In one case, an eighteen-year employee, weighing 428 pounds, was demoted from a journeyman machinist to a janitor classification, following his recovery and return from a fifth major, job-related injury [70]. The company had never before informed him that his weight

would cost him his job, and it could not prove his obesity was the sole or primary cause of his injuries. Arbitrator Speroff claimed the company had added a new job requirement, i.e., losing weight and keeping it off, to the job specifications, making the matter a disciplinary one [71]. The arbitrator explained:

Whenever a new criterion is introduced as a standard for job performance and meeting and maintaining that standard serves as a penalty or debarment to a previously held classification[,] such an action could easily fall under the rubric of "discipline" [70, at 177].

## DISCUSSION

This article, based on 131 published arbitration awards, explored nondisciplinary terminations and demotions. Such cases mostly involve issues of contract interpretation, rather than alleged violations of employer rules of conduct. In other nondisciplinary matters, the application of management's rights is in question. Nondisciplinary actions are significant because the employer is free from shouldering both the burden of proof and establishing just cause. Nevertheless, an employer must not act arbitrarily or capriciously while effecting nondisciplinary outcomes.

One of the most difficult nondisciplinary areas for the parties, not to mention the arbitrator, are cases that deal with an employee's physical ability to perform his/her job. Arbitrators are divided as to whether an employee on an indefinite leave may retain that status when there exists little chance that s/he may return. What is clear, however, is that when an employee is released to work by both his/her personal doctor and the company doctor, the employee must return from leave or face termination.

Medical opinion regarding an employee's ability to work must be based on supporting evidence and not on future probabilities of physical condition. Arbitrators were in substantial agreement that when an employee could no longer perform his/her job without endangering himself/herself or others, that there was reason for removal. No violation of the ADA exists when an employee is no longer physically able to perform the work and is therefore, no longer "qualified," or when the physical condition is confined to the work situation and ceases to exist away from work. While employers may be obliged to accommodate employees with physical limitations, they are not expected to assign work that would exacerbate the condition or create a special job for the employee.

Nondisciplinary demotions may be effected by employers based on their management rights clause. The right to demote for nondisciplinary reasons has been inferred from management's ability to "select and assign employees," "to direct the workforce," and "to promote and transfer employees." A nondisciplinary demotion may be appropriate if an employee no longer possesses sufficient skill to perform his/her regular job, when the employee regularly fails to

meet established production standards, if the employee is frequently careless, and when the employee's inattention to his/her job, if repeated, would endanger him/her or coworkers.

Arbitrators hold that disciplinary demotions can be invoked only if the parties' collective agreement specifically provides for it. The theory behind this conclusion is that a demotion may violate an employee's seniority or other rights, and that such a demotion constitutes a permanent punishment. Disciplinary demotions usually cannot be used, even if permitted, if an employee has the ability to perform his/her job.

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## ENDNOTES

1. Even in the absence of a "just cause" requirement in a collective agreement, arbitrators normally impute such a standard, or at a minimum, maintain that no disciplinary action should be arbitrary or capricious.
2. It must be noted here that if rules are specified in the contract, an arbitrator has no right to alter them, or the penalties imposed. By way of contrast, if a rule has been unilaterally promulgated by an employer, an arbitrator may determine whether the rule is "reasonable," i.e., related to some legitimate business purpose, and if so, whether the rule was actually violated.
3. Another category of nondisciplinary actions involve situations when an employee has allegedly lost his/her qualifications to perform the job due to illness, accident, and/or loss of a required license, insurance coverage, etc.
4. The word "days" means calendar days. Sometimes, the contract will refer to "work days" rather than calendar days. The former means the normal work days of the employer and/or those of the bargaining unit as a whole.
5. Engineered Air Systems, Inc., 87-1 Arb. ¶8287 (M. Newmark, arb.) (1987), (CCH).
6. Maremont Corp. 79 LA 1013, 1014 (Devine, arb.) (1982).
7. Alumax Extrusions, 95-2 Arb. ¶5316 (J. Odom, arb.) (1995), (CCH).
8. The grievant was subsequently held to be properly discharged for application fraud, but the (nondisciplinary) termination for failure to notify the company was improper because his friend had called in and the notice requirements were, therefore, met [7].
9. The company could have disciplined the grievant for failing to notify it in advance of his absence from work. It chose not to do so.
10. Phillips 66 Company, Borger Refinery and NGL Process Center, 87-1 Arb. ¶8207 (H. Weisbrod, arb.) (1987), (CCH).
11. Joy Technologies, Inc., Mining Machinery Division, 91-2 Arb. ¶8451 (T. Hewitt, arb.) (1990), (CCH).

12. Consolidation Coal Co., Quarto Mining Company, Powhatan Four Mine, 90-2 Arb. ¶8316 (C. Morgan, arb.) (1990), (CCH).
13. Douglas & Lomason Company, 90-2 Arb. ¶8370 (E. Bankston, arb.) (1989), (CCH).
14. King & American Ambulance Company, 86-2 Arb. ¶8339 (D. Concepcion, arb.) (1986), (CCH).
15. Merchants Fast Motor Lines, Inc. 90-2 Arb. ¶8399 (J. Chumley, arb.) (1990), (CCH).
16. Genesee County Road Commission, 93-2 Arb. ¶3303 (R. Allen, arb.) (1993)
17. For cases where employees lost required driver's licenses and were properly terminated, see [15, 16].
18. Highlands Inn, 86-1 Arb. ¶8306 (P. Tamoush, arb.) (1986), (CCH).
19. Often, in situations similar to this one, the employer relies on the contractual right to "relieve employees from duty due to lack of work or other legitimate reasons" [18, at 4305].
20. Boulder [Colo.] Yellow Cab, Yellow Cab Cooperative Association, 94-2 Arb. ¶4532 (T. Watkins, arb.) (1993), (CCH).
21. International Business Services, Inc., 92-1 Arb. ¶8300 (H. Bernhardt, arb.) (1991), (CCH).
22. Federal Mogul Corporation, 86-1 Arb. ¶8156 (K. Blinn, arb.) (1985), (CCH).
23. Dupli-Color Products Company, Inc., 87-1 Arb. ¶8036 (J. Cox, arb.) (1986), (CCH).
24. Jerry's Nugget, 89-2 Arb. ¶8449 (G. Hardbeck, arb.) (1989), (CCH).
25. See e.g., Aratex Services, Inc., 93-1 Arb. ¶3187 (M. Gordon, arb.) (1992), (CCH). In that case, the collective bargaining agreement stated that seniority was not lost for proven injury. Even so, the company removed an employee on an occupational injury leave from the seniority unit.
26. Kimberly-Clark Corporation, 62 LA 1119 (I. B. Shieber, arb.) (1974), (Lab. Arb.).
27. Kurtz Brothers, Inc., 43 LA 678 (Duff, arb.) (1964), (BNA).
28. Lithonia Lighting Company, Hi-Tek Lighting Division, National Lighting Standards Plant, 86-1 Arb. ¶8003 (M. Volz, arb.) (1985), (CCH).
29. Some arbitrators hold that when an employee suffers an occupational injury or illness, he or she is entitled to indefinite leave as well as reinstatement when recovered. See e.g., Kerr Group, Inc., 93-1 Arb. ¶3114 (J. Shearer, arb.) (1992), (CCH); Basin Electric Power Cooperative, 90-1 Arb. ¶8215 (J. Coyle, arb.) (1989); and Zenith Radio Corp. of Iowa, 74-1 Arb. ¶8161 (P. Davis, arb.) (1974), (CCH).
30. The Altoona Hospital, 94-2 Arb. ¶4302 (H. Jones, arb.) (1993), (CCH). See also Miami Industries, 94-1 Arb. ¶4121 (T. High, arb.) (1993), (CCH).
31. Dara Meat Company, 90-1 Arb. ¶8225 (M. Ross, arb.) (1990) at 4106, (CCH). Nevertheless, arbitrator Berger noted that an ". . . arbitrator is not similarly bound to follow the medical recommendations as to the Grievant's fitness for continued employment. Here, the medical recommendations of the doctors must be weighed against the company's retained rights to employ reasonable qualifications in reaching its employment decisions." Lone Star Industries, Inc., 87-2 Arb. ¶8344 (M. Berger, arb.) (1987) at 5233, (CCH). Arbitrator Berger also maintained that an employer is not "hand-cuffed" by doctors' reports as they are not familiar with the workplace and do not have specific knowledge of the physical demands of a job. See also National Standard Company, 85 LA 401, 403 (L. Butler, arb.) (1985), (BNA).



32. See Pulitzer Community Newspapers, Inc., 90-2 Arb. ¶8501 (S. Block, arb.) (1990), (CCH) and Postal & Federal Employees Credit Union of Springfield, Missouri, 90-2 Arb. ¶8526 (F. Hoffmeister, arb.) (1990), (CCH).
33. Ford Motor Company, 90-2 Arb. ¶8318 (B. Brown, arb.) (1989), (CCH).
34. M. S. Ginn Company, 89-2 Arb. ¶8618 (L. Aronin, arb.) (1989), (CCH).
35. The provision stated that seniority was broken if an employee was absent because of illness or nonoccupational injury in excess of one year.
36. Hercules, Inc., 92-2 Arb. ¶8356 (J. Giblin, arb.) (1991), (CCH). See also Mobil Oil Corporation, 88-1 Arb. ¶8217 (A. Allen, arb.) (1987), (CCH) when a termination for expiration of disability benefits was considered to require proper cause.
37. Amerigas, L. P. Gas Division, 88-1 Arb. ¶8038 (J. Duff, arb.) (1987), (CCH).
38. Galliker Dairy Company, 88-1 Arb. ¶8068 (P. Probst, arb.) (1987), (CCH).
39. South Carolina Electric & Gas Company, 92-1 Arb. ¶8081 (W. Haemmel, arb.) (1991), (CCH).
40. See The East Ohio Gas Company, 88-2 Arb. ¶8585 (J. Dworkin, arb.) (1988), (CCH), at 5887; and the Glidden Company, 93-2 Arb. ¶3517 (F. Hewitt, arb.) (1993), (CCH) at 5575. In addition, arbitrators require that employer reliance on medical opinion be reasonable and free from arbitrariness or discrimination. See Vickers, Inc., 91-2 Arb. ¶8397 (J. Bell, arb.) (1991) at 4952, (CCH).
41. Ohio Edison Company, 93-2 Arb. ¶3541 (J. Duff, arb.) (1993) at 5699, (CCH).
42. The Keebler Company, 93-2 Arb. ¶3444 (W. Beckjord, arb.) (1993), (CCH).
43. Angus Chemical Company, 94-1 Arb. ¶4234 (S. Nicholas, arb.) (1994), (CCH).
44. Inland Container Corporation, Custom Papers Group, Inc., 96-2 Arb. ¶6286 (J. Johnson, arb.) (1995), (CCH).
45. Westinghouse Electric Corporation, 92-2 Arb. ¶8572 (R. Talarico, arb.) (1992), (CCH).
46. Ladish Co., Inc., 93-2 Arb. ¶3379 (C. Redel, arb.) (1993), (CCH).
47. Sun Co., Inc. (Refining and Marketing), 92-2 Arb. ¶8537 (W. Daniel, arb.) (1992), (CCH). International Paper Company, Mobile Mill, 90-2 Arb. ¶8414 (F. Mathews, arb.) (1990), (CCH).
48. Barton Brands, Ltd., 89-2 Arb. ¶8614 (W. Harkins, arb.) (1989), (CCH).
49. The inability to perform, standing alone, may not always justify demotion. Management may be required to provide needed instruction, training, etc., before a demotion is warranted. It must also not contribute to the employee's performance difficulties. See e.g., Klauser Corporation (Megafoods), 102 LA 381, 383 (G. McCurdy, arb.) (1994), (BNA).
50. Duquesne Light Company, 48 LA 1108, 1112 (T. McDermott, arb.) (1967), (BNA). Arbitrator McDermott also noted that the parties' collective bargaining agreement provided that the employer had the "right to suspend, to discharge for proper cause and to demote." He stated that: "The latter right is not presented as a form of disciplinary action, but as a separate action along with that [of] promotion, transfer, and lay-off" [at 1112].
51. See e.g., Gilbarco, Inc., 87-2 Arb. ¶8338 (F. Flannagan, arb.) (1986), (CCH).
52. National Refractories and Minerals Corporation, 91-1 Arb. ¶8212 (Canestraight, arb.) (1991), (CCH).
53. See e.g., Wynn's Precision, Inc., Fluid Sealing Division, 95-1 Arb. ¶5110 (D. Nolan, arb.) (1994), (CCH).

54. See e.g., *The Board of Education of the Morgan County Schools*, 90-1 Arb. ¶8247 (J. Murphy, arb.) (1990), (CCH).
55. *Department of Transportation, Federal Aviation Administration, Kansas City Air Route Traffic Control Center, Central Region*, 93-1 Arb. ¶3145 (G. Gruenberg, arb.) (1992), (CCH).
56. *Archer, Daniels, Midland Processing Company, Decatur West Soybean Plant*, 91 LA 9, 14 (J. Cerone, arb.) (1988). See also *Thompson Bros. Boat Mfg. Co., Inc.*, 55 LA 69 (R. Moberly, arb.) (1970), (BNA) for a case involving an employee's work attitudes in a disciplinary demotion situation.
57. *Servus Rubber Company, Inc.*, 88-1 Arb. ¶8173 (A. Cook, arb.) (1987), (CCH).
58. *Appalachian Power Company*, 88-2 Arb. ¶8507 (L. Aronin, arb.) (1988), (CCH).
59. *Carson City Sheriff's Department*, 93-2 Arb. ¶3387 (A. Knowlton, arb.) (1993), (CCH).
60. *Aerolit Extrusion Company*, 93-2 Arb. ¶3336 (W. Richard, arb.) (1993), (CCH).
61. *ATACO Steel Products Corporation*, 86-1 Arb. ¶8219 (Grenig, arb.) (1986), (CCH).
62. *Package Products, Inc.*, 83 LA 86 (C. Duff, arb.) (1984), (BNA).
63. *American National Can Co., Foster Forbes Glass Container Division*, 91-1 Arb. ¶8171 (D. Borland, arb.) (1991), (CCH).
64. See *Southwest Petro-Chem, Inc., Division of Witco Corp.*, 90-2 Arb. ¶8323 (M. Berger, arb.) (1988), (CCH). In another case, an employee was given a choice between a demotion and termination based on the outcome of an investigation that showed he had falsified employer records. There was no evidence that he was coerced into accepting the demotion as his choice was reasonable and he was given time to weigh his options (*Ramsey County, Minnesota*, 86-2 Arb. ¶8584 (M. Bognanno, arb.) (1986), (CCH).
65. *Mason & Honger*, 91-1 Arb. ¶8302 (R. Anthony, arb.) (1991), (CCH).
66. *The City of Key West, Florida*, 96-2 Arb. ¶6304 (J. Wolfson, arb.) (1996), (CCH).
67. *Putnam County Sheriff's Department*, 96-2 Arb. ¶6306 (N. Nelson, arb.) (1996), (CCH).
68. *City of Pullman*, 96-1 Arb. ¶6199 (F. Rosenberry, arb.) (1995), (CCH).
69. *Iowa Power, Inc.*, 97 LA 1029 (J. Thornell, arb.) (1991), (BNA).
70. *Stanford Division, Man Roland Inc.*, 97 LA 175 (B. Speroff, arb.) (1991), (BNA).
71. The grievant had never previously received a warning regarding his job performance, injury history, or weight.

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