ARBITRATION OF JUST CAUSE CLAIMS BENEFITS EMPLOYEES WITH DISABILITIES

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ABSTRACT

Employees with disabilities typically rely on the Americans with Disabilities Act (ADA) for protection against discipline or discharge. Arbitration has been viewed with suspicion by civil rights advocates based on concerns that arbitrators will not adequately protect the rights of employees in disadvantaged groups, including those with disabilities. This review of arbitration awards that determine whether an employer had just cause to discharge or discipline employees with disabilities shows that such suspicion may be unwarranted. Under just cause protection, employers carry the burden of justifying a discharge, as well as providing notice of conduct standards and adhering to past practice. In addition, arbitrators applying a just cause provision will consider other advantageous contractual protections as well as mitigating circumstances in reviewing both the justification for the discharge and the appropriateness of discharge as the employer's response. These characteristics of arbitrating just cause claims can benefit employees with disabilities beyond the relief available under the ADA.

INTRODUCTION

People with disabilities continue to struggle to find and retain employment.[1] Even if a person with a disability is hired, their position in the workforce has been described as "at best, precarious."[2] An employer may not be aware of the disability at the time of hire, or the disability may arise or worsen after hire. Consequently, an employer may find reason to discharge an employee based on biases or stereotypes associated with the disability, or the impact of the impairment on the person's performance, attendance, or workplace safety. Employees typically turn to the Americans with Disabilities Act (ADA) to challenge a discharge based on their disability, which may include invocation of an affirmative obligation to provide reasonable accommodation that may provide an employee with additional protection against discharge. Some have expressed concern that if an employee with a disability is required to arbitrate claims related to her dismissal, she will lose out on protections against discrimination, particularly those included in the ADA. This review of 160 arbitration awards shows that just cause provisions, whether under a collective bargaining agreement or an exception to employment at will, provide employees with disabilities with significantly more protection than the ADA alone provides.

This analysis of the benefits of just cause protection for employees with disabilities is important for several reasons. First, a comparison of these awards to outcomes in analogous ADA decisions helps to answer the question of whether arbitrators are adequately equipped to resolve claims

1. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, TABLE A-6. EMPLOYMENT STATUS OF THE CIVILIAN POPULATION BY SEX, AGE, AND DISABILITY STATUS, NOT SEASONALLY ADJUSTED (2017).

2. Carrie Basas, *A Collective Good: Disability Diversity as a Value in Public Sector Collective Bargaining Agreements*, 87 ST. JOHN'S L. REV. 793, 799, 801 (2013).

that would otherwise arise under the ADA and other non-discrimination statutes. Courts regularly defer to arbitration as the forum to enforce statutory rights as well as contractual rights.[3] This deference is based on the assumptions that arbitrators are "capable of handling the difficult factual and legal issues that might be raised in a discrimination claim," and that arbitration "would not interfere with the fair resolution of employment discrimination claims."[4] In contrast to these assumptions, others have warned that arbitration of statutory claims would result in statutes like the ADA becoming "dead letters for unionized employees."[5] This analysis of just cause claims by employees with disabilities tests the viability of arbitration as an alternative venue to resolve discrimination claims, as compared to just cause claims by employees without disabilities and analogous claims resolved by the courts under the ADA.

Just cause protection can result from the coverage of a collective bargaining agreement or from protections extended by an employer as an exception to employment at will. In either circumstance, just cause protections will likely be first interpreted and applied by an arbitrator. One general advantage of relying on just cause protection rather than the ADA alone stems from the long-recognized dilemma faced by any ADA plaintiff to show that she has a disability, i.e., a substantial limitation of a major life activity, but at the same time remains qualified to perform the essential job duties of her position.[6] Under a just cause provision, a grievant need not prove that she has a disability as defined by the ADA; instead, the employee can simply present evidence showing a lack of just cause by establishing her ability to perform the job if reasonable accommodations are provided.

Some also argue that just cause protection leads employers to avoid hiring "risky" employees, thus adversely affecting people who are protected against but most vulnerable to discrimination.[7] Since this risk aversion behavior could extend to employees with disabilities identified during the hiring process, it is important to examine whether the just cause protection provides a benefit to employees with disabilities that would justify this

3. *14 Penn Plaza v. Pyett*, 556 U.S. 247, 270-74 (2009); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).

4. Sarah Rudolph Cole, *Let the Grand Experiment Begin:* Pyett *Authorizes Arbitration of Unionized Employees' Statutory Discrimination Claims*, 14 LEWIS & CLARK L. REV. 861, 869 (2010).

5. Alan Hyde, *Labor Arbitration of Discrimination Claims After* 14 Penn Plaza v. Pyett*: Letting Discrimination Defendants Decide Whether Plaintiffs May Sue Them*, 25 OHIO ST. J. ON DISP. RESOL. 975, 984 (2010).

6. Miranda Oshige McGowan, *Reconsidering the Americans with Disabilities Act*, 35 GA. L. REV. 27, 102-03 (2000).

7. Julie C. Suk*, Discrimination At Will: Job Security Protections and Equal Employment Opportunity in Conflict*, 60 STAN. L. REV. 73, 97 (2007).

otherwise potentially adverse effect on them during the hiring process.

This review of arbitration awards also demonstrates how some general principles applied to the interpretation of just cause provisions can benefit employees with disabilities. First, the placement of the burden of proving just cause on the employer can have a significant impact on the outcome of the challenge to an employee's discharge. In contrast, an ADA plaintiff carries the burden to establish that she is a person with a disability but that she was also otherwise qualified to perform the duties of the position at the time of her discharge, and that any accommodation is reasonable.

Beyond the burden of proof, certain characteristics inherent in the arbitration of just cause claims can have significant benefits for employees with disabilities. First, general requirements that an employee be provided with notice of required and prohibited behavior as well as an expectation that the discharge should align with the employer's past practice can benefit an employee with a disability. Second, an arbitrator interpreting a just cause provision will consider other contractual obligations on an employer in deciding whether the discharge of an employee with a disability was justified. Beyond specific contractual requirements, an arbitrator may also consider an employer's more general interests or aggravating circumstances that might support a finding of just cause, but an employee with a disability also benefits from an arbitrator's consideration of mitigating circumstances. A showing of just cause may be undermined by the link between the employee's disability and the reason for the discharge, as well as consideration of the employee's other characteristics, such as longevity with the employer.

Lastly, this review of arbitration awards considers the benefits of flexibility in fashioning the remedies in an award interpreting a just cause provision. A court interpreting the ADA is limited to the question of whether the employer discriminated, and if so, whether reinstatement, back pay and other damages should follow.[8] In contrast, an arbitrator applying a just cause provision can change a discharge to a suspension, or award reinstatement without back pay, where the grievant is somewhat at fault but the employer lacked just cause for her discharge. In addition, an arbitrator can order various conditions or requirements on the employee seeking reinstatement, which can help resolve an employer's concerns about the grievant's return to work. Thus, this review demonstrates that arbitration of claims under a just cause standard can benefit employees with disabilities in ways that they would never enjoy under the ADA.

8. For example, EEOC's 2016 report shows $131 million in monetary damages, but does not report on the number of reinstatements or other nonmonetary settlements. U.S. EQUAL EMPL'T OPPORTUNITY COMM'N, AMERICANS WITH DISABILITIES ACT OF 1990 (ADA) CHARGES (CHARGES FILED WITH EEOC) (2016).

I. BARRIERS TO EMPLOYMENT

Over its 25-year span, the ADA has been disappointing in its impact on employment opportunities for people with disabilities. Studies have found that the passage of the ADA led to a decrease in employment of people with disabilities, compared to the employment of nondisabled men.[9] The labor force participation rate for persons with a disability was 21.0% in October 2017, compared to a participation rate of 68.3% for people without a disability;[10] likewise, people with disabilities average an unemployment rate of 11.5%, compared to an unemployment rate of 4.7% among persons with no disability.[11] Labor force participation rates for individuals with certain disabilities, such as mental illness, are even lower.[12] Likewise, the unemployment rates for people with a disability (9.1%) are almost three times higher than unemployment rates (averaging 3.8%) for the non-disabled with similar disparities across all educational attainment groups.[13]

Employers may be reluctant to hire people with disabilities for a variety of reasons, including the expected cost of accommodations, a lack of awareness as to how to deal with employees with disabilities, and the fear of potential litigation by employees who are later disciplined or discharged.[14] Other slightly less common reasons for failing to retain people with disabilities include concerns over the need for more extensive supervision, other additional costs, as well as unreliable performance and attendance.[15] Along with these work-related concerns, attitudes and discrimination are the most frequently reported barriers to inclusion of disabled people in the workplace; in fact, many disability rights advocates believe that negative social attitudes underlie the disproportionate unemployment and under-

9. Daron Acemoglu & Joshua D. Angrist, *Consequences of Employment Protection? The Case of the Americans with Disabilities Act*, 109 J. POL. ECON. 915, 917 (2001); Thomas DeLeire, *The Wage and Employment Effects of the Americans with Disabilities Act*, 35 J. HUM. RESOURCES 693, 694 (2000).

10. U.S. Dep't of Labor Statistics, *supra* note 1.

11. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, TABLE A. EMPLOYMENT STATUS OF THE CIVILIAN AND NONINSTITUTIONAL POPULATION BY DISABILITY STATUS AND AGE, 2015 AND 2016 ANNUAL AVERAGES (2017), available at https://www.bls.gov/news.release/disabl.a.htm [https://perma.cc/2VHB-XW9C].

12. Judith A. Cook, *Employment Barriers for Persons with Psychiatric Disabilities: Update of a Report for the President's Commission*, 57 PSYCHIATRIC SERVICES 1391, 1391-92 (2006).

13. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, USDL-17-0857, PERSONS WITH A DISABILITY: LABOR FORCE CHARACTERISTICS – 2016 (2017).

14. H. Stephen Kaye et al., *Why Don't Employers Hire and Retain Workers with Disabilities?*, 21 J. OCCUPATIONAL REHABILITATION 526, 528-29 (2011).

15. *Id.*

employment of people with disabilities.[16]

The ADA was enacted in large part to improve the labor market participation of people with disabilities and to address some of these barriers to employment.[17] Unfortunately, the ADA has not been particularly successful in achieving these goals. While some have disputed whether the ADA's adoption had a direct negative effect on the employment opportunities of people with disabilities,[18] as outlined above, there is no question that barriers to employment continue to exist for this group. One reason for the ADA's lack of positive impact stems from the fact that plaintiffs have been largely unsuccessful in litigation against employers to enforce their rights under the ADA, with win rates as low as 3%.[19] This lack of success mirrors plaintiffs' difficulty in successfully litigating any employment–related claim, in which only about 5% of claims proceed to trial (as opposed to pre-trial dismissal or settlement), and less than 30% of claims proceeding to trial result in a judgment for the employee.[20] In comparison, employees' win rates in mandatory arbitration are estimated at about 21%.[21] As Justice Harry Edwards has noted, an employee claiming discrimination is better off in arbitration because the process is quicker, less costly, and lacks the procedural barriers of the courts.[22]

For this reason, this paper explores the potential for just cause protection to advance the interests of employees with disabilities. The role of just cause protection for employees with disabilities has received little

16. Sally Lindsay, *Discrimination and Other Barriers to Employment for Teens and Young Adults with Disabilities,* 33 DISABILITY AND REHABILITATION 1340, 1341 (2011).

17. Michael Selmi, *Interpreting the Americans with Disabilities Act: Why the Supreme Court Rewrote the Statute, and Why Congress Did Not Care*, 76 GEO. WASH. L. REV. 522, 522 (2008).

18. Christine Jolls & J.J. Prescott, *Disaggregating Employment Protection: The Case of Disability Discrimination* 3, 20-23 (Harvard Law Sch., Working Paper No. 106, 2005), http://ssrn.com/abstract=580741 [https://perma.cc/DFK4-CA8Y].

19. Amy L. Albright, *2006 Employment Decisions Under the ADA Title I – Survey Update*, 31 MENTAL & PHYSICAL DISABILITY L. REP. 328, 328 (2007); Sharona Hoffman, *Settling the Matter: Does Title I of the ADA Work?*, 59 ALA. L. REV. 305, 306 (2008).

20. Theodore Eisenberg, *Four Decades of Federal Civil Rights Litigation,* 12 *J. EMPIRICAL LEGAL STUDIES* 4, 11 (2015).

21. Katherine V.W. Stone & Alexander J.S. Colvin, THE ARBITRATION EPIDEMIC: MANDATORY ARBITRATION DEPRIVES WORKERS AND CONSUMERS OF THEIR RIGHTS, Economic Policy Institute Briefing Paper #414 (2015), http://www.epi.org/publication/the-arbitration-epidemic/ [https://perma.cc/6KWZ-UBLT]. Mandatory arbitration procedures have become increasingly popular since 1991. *See id.* (listing major corporations using mandatory arbitration procedures).

22. Harry T. Edwards, *Advantages of Arbitration Over Litigation: Reflections of a Judge*, *in* ARBITRATION 1982, CONDUCT OF THE HEARING, PROCEEDINGS OF THE THIRTY-FIFTH ANNUAL MEETING, NAT'L ACAD. OF ARBITRATORS 16, 24 (James L. Stern & Barbara D. Dennis eds., 1983).

attention in literature on arbitration or the advancement of the rights of those employees. For example, in a treatise of over 500 pages on just cause, only five pages are devoted to reasonable accommodations for the employees with disabilities.[23] This paper highlights the role that arbitration of just cause claims can play in advancing the employment opportunities of people with disabilities.

II. JUST CAUSE PROTECTION

The resolution of just cause claims through arbitration has significant potential to benefit employees with disabilities. Compared to a court or a unilateral decision by an employer, an arbitrator arguably can consider the interests of both the employer and the employee with a disability in reviewing both the basis for the discipline and potential changes in the workplace to improve future performance. At the same time, the rights of employees with disabilities could be severely diminished, given the Supreme Court's deference to arbitration, if arbitrators cannot or will not appropriately apply both contractual rights and the ADA to claims invoking just cause protection.

Just cause has been criticized as "difficult for employers to prove," making the resolution process inefficient and vulnerable to second-guessing of the employer's business decisions by the arbitrator.[24] Some have argued that employers spend "large sums of money" to resolve just cause claims in arbitration; in the alternative, employers offer "large, and often undeserved, severance payments" or even retain unproductive employees.[25] Economists have shown that exceptions to employment at-will, including just cause protection, are associated with an increase of labor expenses and have a negative effect on profitability, just as wrongful-discharge laws impose costs on employers.[26]

Without just cause protection, the presumption of employment at-will means that "many truly egregious terminations are left unremedied."[27] The employment-at-will doctrine can result in "substantial levels of uncertainty for employers and employees alike."[28] At-will employees who have been

23. ADOLPH M. KOVEN & SUSAN L. SMITH, JUST CAUSE: THE SEVEN TESTS 421-26 (BNA ed., 3d ed. 2006).

24. Nicole B. Porter, *The Perfect Compromise: Bridging the Gap Between At-Will Employment and Just Cause*, 87 NEB. L. REV. 62, 64 (2008).

25. *Id.*

26. Robert C. Bird & John D. Knopf, *Do Wrongful-Discharge Laws Impair Firm Performance?,* 52 J. L. & ECON. 197, 218 (2009).

27. Porter, *supra* note 25, at 63.

28. Timothy J. Coley, *Contracts, Custom, and the Common Law: Towards a Renewed Prominence for Contract Law in American Wrongful Discharge Jurisprudence*, 24 B.Y.U. J.

discharged are left to rely on anti-discrimination statutes, including the ADA,[29] leading to an over-reliance on these statutes to protect against unjust discharges.[30]

The impact of just cause protection illustrates both its benefits for employees and its role in reducing uncertainty for both employers and employees. These arguments in favor of some form of just cause protection have led to widespread adoption of just cause provisions in collective bargaining agreements (CBAs)[31] as well as some voluntary incorporation of exceptions to employment at-will in employer policies and procedures. Under either a CBA or an employer policy, just cause protection is often accompanied by a mandatory arbitration program.[32] The potential for protecting employees with disabilities under a just clause provision may explain the observation that allegations of disability discrimination are presented in the grievance and arbitration system more often than other forms of discrimination.[33] For this reason, it is important to understand what is meant by just cause and how such protection is adopted as part of a CBA or arises as an exception to employment at-will.

A. *What is Just Cause?*

The just cause standard has been characterized as "inexact,"[34] and at least one arbitrator has noted that it "cannot be seen in an absolute sense."[35] A determination of whether an employer had just cause to discharge an employee depends upon numerous factors related to both the specific event leading to the discharge and the length and quality of the employee's work record, as well as the circumstances surrounding the promulgation and past enforcement of the policy in question.[36] Just cause analysis allows for review of the appropriateness of discharge as the penultimate level of discipline, in that a penalty must not be excessive, and must be corrective or progressive unless the conduct justifies discharge for a first offense.[37]

PUB. L. 193, 194 (2010).

29. Steven E. Abraham, *The Arizona Employment Protection Act: Another "Wrongful Discharge Statute" That Benefits Employers?*, 12 EMP. RTS. & EMP. POL'Y J. 105 (2008).

30. Porter, *supra* note 25, at 76.

31. *See* BUREAU OF NATIONAL AFFAIRS, BASIC PATTERNS IN UNION CONTRACTS, at 7, 127 (14th ed. 1995) (discussing grounds for discharge and prohibitions on discrimination).

32. For further explanation, *see infra* notes 47-61 and accompanying text.

33. KOVEN & SMITH, *supra* note 23, at 423.

34. *Id.* at 4.

35. Indal Aluminum Gulfport, 84 Lab. Arp. Rep. (BNA) 124, 127 (1985) (Nicholas, Arb.).

36. THE COMMON LAW OF THE WORKPLACE: THE VIEWS OF ARBITRATORS 184-187 (Theodore J. St. Antoine ed., 2d ed. 2005).

37. *Id.*

A review of arbitration awards, which apply just cause provisions and sometimes applicable statutes to employees with disabilities, demonstrates a wide variation in how much the ADA influences how just cause is interpreted. Just cause protections against discipline and discharge are commonly found in collective bargaining agreements (CBAs) as well as some employee handbooks. Arbitration awards apply just cause protections based on traditional contract interpretation principles as well as arbitrators' interpretations of applicable statutes, where the arbitrator has the authority and the inclination to apply them. The outcomes in these awards often compare favorably to judicial outcomes under various nondiscrimination and other protective statutes.

This analysis will help to answer the question of whether barriers to continued employment can be addressed through collective bargaining and arbitration. More broadly, this review will illustrate whether arbitrators are equipped to resolve grievances so as to help remove barriers to continued employment for employees with disabilities and other barriers to employment while still interpreting and applying the collective bargaining agreement between the employer and union.

1. Just Cause in CBAs

Just cause protection against discipline or discharge is one of the most widely recognized benefits of representation by a labor union in the United States.[38] As of 2011, nearly 16.3 million employed workers were covered by CBAs,[39] most of which require just cause for discipline or discharge, and provide for interpretation of that protection through a grievance process and final adjudication before a neutral arbitrator.[40] Such protection creates an important exception to employment at-will for employees who are covered by a CBA. Some arbitrators recognize protection from unjust dismissal even in contracts that do not contain an explicit "just cause" provision, because such protection is so integral to the collective bargaining relationship.[41] One

38. *See* KOVEN & SMITH, *supra* note 23, at 15-17 (describing the role of just cause in collective bargaining relationship).

39. *See* Mario F. Bognanno, et al., *The Conventional Wisdom of Discharge Arbitration Outcomes and Remedies: Fact or Fiction*, 16 CARDOZO J. CONFLICT RESOL. 153, 153-54 (2014) (citing U.S. Bureau of Labor Statistics, available at http://www.bls.gov.proxy2.cl.msu.edu/cps/cpsaat40.htm [https://perma.cc/4HS7-325D]).

40. *See* BUREAU OF NATIONAL AFFAIRS, *supra* note 32, at 7, 127 (discussing discharge procedures and prohibitions on discrimination).

41. FRANK ELKOURI & EDNA ASPER ELKOURI, HOW ARBITRATION WORKS (The Bureau of National Affairs, Inc., 5th ed. 1997) at 886-87; *see, e.g.*, J & J Maint., 121 Lab. Arb. Rep. (BNA) 847, 855 (2005) (Henderson, Arb.) (showing presence of an arbitration clause is an important event pointing toward implicit "just cause" protection); Superior Prods., 116 Lab. Arb. Rep. (BNA) 1623, 1626 (2002) (Hockenberry, Arb.); Jefferson Smurfit Corp., 114 Lab.

arbitrator went so far as to state that a failure to recognize an implied just cause protection would be "unconscionable," even where the employer has reserved discretion to impose discipline; without it, employers would hold "an unlimited right to decide any issue concerning employees' job security without a challenge," thereby compromising "the integrity of the bargaining unit," and would "nullify the seniority and arbitration provisions, and, of course, make a mockery of the no strike clause."[42]

Despite the importance of just cause protection, employers can sometimes preserve the employment at-will relationship with "clear contract language" or based on "unequivocal bargaining history or past practice, . . . [or] the special nature of employment" demonstrating the intent of the parties.[43] Only such "high degree of assurance about intent" will cause an arbitrator to "bypass the fairness doctrines associated with the just-cause principle."[44] Thus, despite its commonality, just cause protection will not be implied where the contract language specifically preserves the at-will employment relationship.[45]

The widespread inclusion of just cause protection in CBAs suggests that both employers and unions value its role. Such protection produces an economically efficient outcome if unionized employees are more willing to pay for such protection than employers are willing to pay for an at-will relationship.[46] The efficiency and overall attractiveness of just cause protection for an employer and union may depend upon the composition of

Arb. Rep. (BNA) 358, 358 (2000) (Kaufman, Arb.) (demonstrating that an employer must prove that it had just cause to discharge non-probationary employees); Van Waters & Rogers, Inc., 102 Lab. Arb. Rep.(BNA) 609, 611 (1993) (Feldman, Arb.) (noting arbitrators overwhelmingly imply cause or just cause in the absence of clear and unambiguous language that such a standard is not to be considered); Zellerbach Paper Co., 73 Lab. Arb. Rep.(BNA) 1140, 1142 (1979) (Sabo, Arb.) ("[E]ven where a contract fails to include any general limitations as to the right to [d]ischarge, [a]rbitrators have concluded that a just cause restriction is implied in modern Collective Bargaining Agreements . . . ."); Gary Minda & Katie R. Raab, *Time For an Unjust Dismissal Statute in New York,* 54 BROOK. L. REV. 1137, 1192-93 (1989) ("[I]f a just cause clause is missing from the agreement, the arbitrator infers its existence from the seniority clause or grievance and arbitration provision."); Kenneth A. Sprang, *Beware the Toothless Tiger: A Critique of the Model Employment Termination Act,* 43 AM. U. L. REV. 849, 910 (1994) ("[M]any arbitrators have inferred the existence of a just-cause standard in agreements that did not expressly state such a standard.").

42. *See* Theole Asphalt, 129 Lab. Arb. Rep. (BNA) 953, 957 (2011) (Baroni, Arb.) (explaining that just cause for discipline is an integral part of agreements, unless specifically disclaimed).

43. J & J Maint., 121 Lab. Arb. Rep. (BNA) at 855.

44. *Id.*

45. *See, e.g.*, Fed. Express Corp., 136 Lab. Arb. Rep. (BNA) 1117, 1123 (2016) (Baroni, Arb.) (refusing to imply just cause protection where contract language specifically preserved the at-will employment relationship).

46. Jeffrey M. Hirsch, *The Law of Termination: Doing More With Less*, 68 MD. L. REV. 89, 89, 95 (2008).

the workforce and the sense of whether statutory protections are sufficient for those employees. The value of just cause protection highlights the important role that labor unions can take in advancing the interests of workers with disabilities in particular, by bargaining for and arbitrating just cause challenges to discharges and other forms of discipline.[47]

2. Just Cause as Employment At Will Exception

Just cause protections can be seen as an exception to the general presumption that employees in the U.S. are "at-will," meaning that the relationship can be terminated by either party at any time for any reason or no reason.[48] This means that employees are "vulnerable to arbitrary and sudden dismissal."[49] In large part because the employment contract is typically governed by state law, standards related to discharge have been characterized as "numerous, complex, and unnecessarily confusing."[50] This makes compliance and enforcement difficult for employers, which is troubling given the importance of discharges for both employers and employees.[51] This variability and instability arguably has introduced "a considerable measure of ambiguity and inefficiency into the American labor market, both for employers and employees," which is only exacerbated by higher levels of discharges as in a recession.[52]

Employers can create an exception to employment at will via a CBA or through its own policies by including just cause protection.[53] Most states will enforce promises in an employee handbook that create an exception to employment at will,[54] with only six states failing to recognize any such

47. *See* Stacy A. Hickox, *Bargaining for Accommodations*, 19 U. PA. J. BUS. L. 147, 195-203 (2016) for further discussion of the benefits of addressing accommodation in contract negotiations.

48. Katherine V.W. Stone, *Revisiting the At-Will Employment Doctrine: Imposed Terms, Implied Terms, and the Normative World of the Workplace*, 36 INDUS. L. J. 84, 84 (2007).

49. *Id.*

50. Hirsch, *supra* note 47, at 95.

51. *Id.*

52. Coley, *supra* note 29, at 196.

53. Stone, *supra* note 49, at 89. *See, e.g.*, Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880, 892 (Mich. 1980) ("[W]here an employer chooses to establish [personnel] policies and practices and makes them known to its employees, the employment relationship is presumably enhanced.").

54. Bloomberg BNA Individual Employment Rights Law (Analysis), State Rulings Chart, http://laborandemploymentlaw.bna.com.proxy2.cl.msu.edu/lerc/2441/split_display.adp?fedfid=2161694&vname=leiermana&fcn=1&wsn=500060000&fn=2161694&split=0; *see, e.g.*, Aiello v. United Air Lines, Inc., 818 F.2d 1196, 1199-1200 (5th Cir. 1987) (finding that the employment at-will principle did not apply when the company had issued a detailed employee handbook containing specific grievance procedures).

exception.[55] To be enforceable, courts typically require that language offering just cause protection must be specific, clear and unequivocal.[56] Of course a disclaimer or other language in an employee handbook can negate the binding effect of a just cause provision.[57]

55. Heideck v. Kent Gen. Hosp., Inc., 446 A.2d 1095 (Del. 1982); McConnell v. E. Air Lines, Inc., 499 So. 2d 68 (Fla. Dist. Ct. App. 1987); Burgess v. Decatur Fed. Sav. & Loan Ass'n, 345 S.E.2d 45 (Ga. Ct. App. 1986); Shaw v. S.S. Kresge Co., 328 N.E.2d 775 (Ind. Ct. App. 1975); Stanton v. Tulane Univ. of La., 777 So. 2d 1242 (La. Ct. App. 2001); Johnson v. McDonnell Douglas Corp., 745 S.W.2d 661 (Mo. 1988).

56. *See generally* Conley v. Bd. of Trs. of Grenada Cty. Hosp., 707 F.2d 175 (5th Cir. 1983); Zavadil v. Alcoa Extrusions Inc., 363 F. Supp. 2d 1187 (D.S.D. 2005); Smith v. Heritage Salmon, Inc., 180 F. Supp. 2d 208 (D. Me. 2002); Caucci v. Prison Health Servs., Inc., 153 F. Supp. 2d 605 (E.D. Pa. 2001); Hoerner v. Metro. Life Ins. Co., No. 98 Civ. 4210, 2001 U.S. Dist. LEXIS 2914 (S.D.N.Y. 2001); Hines v. Elf Atochem N. Am., Inc., 813 F. Supp. 550 (W.D. Ky. 1993); Milroy v. K-G Retail Stores, 819 F. Supp. 857 (D. Neb. 1993); Hoffmann-LaRoche v. Campbell, 512 So. 2d 725 (Ala. 1987); Jones v. Cent. Peninsula Gen. Hosp., 779 P.2d 783 (Alaska 1989); DeMasse v. ITT Corp., 984 P.2d 1138 (Ariz. 1999); Gladden v. Ark. Children's Hosp., 728 S.W.2d 501 (Ark. 1987); Guz v. Bechtel Nat'l, Inc., 100 Cal. Rptr. 2d 352 (Cal. 2000); Churchey v. Adolph Coors Co., 759 P.2d 1336 (Colo. 1988); Finley v. Aetna Life & Cas. Co., 499 A.2d 64 (Conn. Ct. App. 1985), *rev'd on other grounds*, 520 A.2d 208 (Conn. 1987); Sisco v. GSA Nat'l Capital Fed. Credit Union, 689 A.2d 52 (D.C. 1997); Kinoshita v. Can. Pac. Airlines, 724 P.2d 110 (Haw. 1986); Watson v. Idaho Falls Consol. Hosp., Inc., 720 P.2d 632 (Idaho 1986); Janda v. U.S. Cellular Corp., 961 N.E.2d 425, 440 (Ill. App. Ct. 2011); Vaughn v. Ag Processing, Inc., 459 N.W.2d 627 (Iowa 1990); Brown v. United Methodist Homes for the Aged, 815 P.2d 72 (Kan. 1991); Dahl v. Brunswick Corp., 356 A.2d 221 (Md. 1976); Hobson v. McLean Hosp. Corp., 522 N.E.2d 975 (Mass. 1988); Toussaint v. Blue Cross & Blue Shield of Mich., 292 N.W.2d 880 (Mich. 1980); Martens v. Minn. Mining & Mfg. Co., 616 N.W.2d 732 (Minn. 2000); Martin v. Sears, Roebuck & Co., 899 P.2d 551 (Nev. 1995); Butler v. Walker Power, Inc., 629 A.2d 91 (N.H. 1993); Nicosia v. Wakefern Food Corp., 643 A.2d 554 (N.J. 1994); Forrester v. Parker, 606 P.2d 191 (N.M. 1980); Trought v. Richardson, 338 S.E.2d 617 (N.C. Ct. App. 1986); Osterman-Levitt v. MedQuest, Inc., 513 N.W.2d 70 (N.D. 1994); Mers v. Dispatch Printing Co., 19 Ohio St. 3d 100 (Ohio 1985); Russell v. Bd. of Cty. Comm'rs, 952 P.2d 492 (Okla. 1997); Frazier v. Minn. Mining & Mfg. Co., 728 P.2d 87 (Or. Ct. App. 1986); King v. PYA/Monarch, 453 S.E.2d 885 (S.C. 1995); Smith v. Morris, 778 S.W.2d 857 (Tenn. Ct. App. 1988); City of Odessa v. Barton, 967 S.W.2d 834 (Tex. 1998); Francisconi v. Union Pac. R.R., 36 P.3d 999 (Utah Ct. App. 2001); Taylor v. Nat'l Life Ins. Co., 652 A.2d 466 (Vt. 1993); Ludwig v. T2 Med., Inc., 34 Va. Cir. 65 (Va. Cir. Ct. 1994); Thompson v. St. Regis Paper Co., 685 P.2d 1081 (Wash. 1984); Cook v. Heck's, Inc., 342 S.E.2d 453 (W. Va. 1986); Garvey v. Buhler, 430 N.W.2d 616 (Wis. 1988); Alexander v. Phillips Oil Co., 707 P.2d 1385 (Wyo. 1985).

57. *See, e.g.*, S.C. CODE ANN. § 41-1-110 (2017) ("It is the public policy of this State that a handbook . . . shall not create an express or implied contract of employment if it is conspicuously disclaimed."); Aberle v. City of Aberdeen, 718 N.W.2d 615, 622-23 (S.D. 2006) (finding "an explicit contractual reservation of the statutory power to terminate an employee at will" when the employment contract states that an employer has the right to terminate employment at any time); Johnson v. Morton Thiokol, Inc., 818 P.2d 997, 1003 (Utah 1991) (finding against the employee when the manual in question contains clear and conspicuous language stating the employer's intent to maintain an at-will relationship); Suter v. Harsco Corp., 403 S.E.2d 751, 754 (W. Va. 1991) ("[T]he court made it clear that

Some states' legislation has recognized the enforceability of a contract creating an exception to employment at will,[58] and Montana has legislated good cause protection for all employees not covered by a CBA or a term contract.[59] However, even Montana's statute requiring a "legitimate business reason" for discharge has been defined broadly to include "a reason that is neither false, whimsical, arbitrary or capricious, and [has] . . . some logical relationship to the needs of the business."[60]

An employer may indirectly provide its employees with just cause protection by its adoption of an employment arbitration program.[61] Employment arbitration clauses have become increasingly common.[62] A mandate to arbitrate disputes between the employer and employee can be viewed as an exception to employment at will.[63] Some employment arbitrators, when hearing claims by individual employees, have found an implied just cause test where the employer has provided an arbitration system to resolve employment disputes.[64] Thus, if an employment agreement includes a just cause protection against discipline or discharge, that agreement may be enforceable through an arbitration system. If, however, the employer has explicitly preserved its right to discharge employees without cause, an arbitrator will be unlikely to imply a just cause requirement.[65]

Even if an employer incorporates some just cause provision into its employment contracts, its effectiveness in protecting the interests of

employers could protect themselves by requiring prospective employees to acknowledge that they served at the will and the pleasure of the employer."); Davis v. Wyo. Med. Ctr., 934 P.2d 1246 (Wyo. 1997).

58. ARIZ. REV. STAT. § 23-1501 (LexisNexis 2017) (establishing the enforceability of contract clauses expressly restricting the right of either party to terminate the employment relationship).

59. Mont. Code Ann. § 39-2-902 (2017).

60. Buck v. Billings Mont. Chevrolet, Inc., 811 P.2d 537, 538, 540 (Mont. 1991).

61. Koven & Smith, *supra* note 23, at 31-32.

62. *See supra* note 21 and accompanying text.

63. Stone, *supra* note 49, at 85.

64. *See, e.g.*, Essroc Materials, 99 Lab. Arb. Rep. (BNA) 664, 668 (1992) (Murphy, Arb.) ("[I]t is reasonable to imply into the text of [a] special procedure [for discharge] that the Employer had 'just cause' in order to justify its decision to discharge."); Alfred M. Lewis, Inc., 81 Lab. Arb. Rep. (BNA) 621, 624 (1983) (Sabo, Arb.) ("Arbitrators have concluded that a Just Cause restriction is implied in modern Collective Bargaining Agreements in the absence of a provision to the contrary.").

65. KOVEN & SMITH, *supra* note 23, at 31. *See, e.g.*, Raymond James Fin. Servs. v. Bishop, 596 F.3d 183, 194-95 (4th Cir. 2010) (holding that an arbitration agreement retains employer's ability to discharge at will when expressly stated); Local Union 1393 v. Utils. Dist. of W. Ind. Rural Elec. Membership Coop., 167 F.3d 1181, 1185 (7th Cir. 1999) (finding no implied just cause requirement when the CBA expressly provides the employer with the sole discretion and final authority to terminate).

employees may be limited if left to the courts for interpretation. For example, a Wisconsin court determined that even though a hospital had agreed to discharge an employee only if the discharge was in the hospital's best interest, the court would not delve into the reasonableness of the decision or whether the reasons existed in fact, but limited itself to the question of whether the hospital believed that the discharge was in its own interest.[66] As outlined immediately below, courts also show significant deference to arbitrators' interpretations of just cause provisions.

B. *Judicial Deference to Arbitration Awards*

When considering the role of arbitration in supporting the rights of employees with disabilities, it is important to consider the longstanding limitations of the courts in reviewing arbitrators' awards. Judicial deference to arbitration awards occurs in determinations as to whether the employer had just cause to impose discipline or discharge under either a CBA[67] or an individual arbitration agreement.[68]

Judicial deference extends to an arbitrator's determination that an arbitration agreement suggests an implied just cause standard. An

66. Hale v. Stoughton Hosp. Ass'n, 376 N.W.2d 89 (Wis. Ct. App. 1985).

67. Int'l Bhd. of Teamsters Local Union No. 682 v. Thoele Asphalt Paving, Inc., 508 Fed. Appx. 583, 583 (8th Cir. 2013); SFIC Properties, Inc. v. Machinists, Dist. Lodge 94, 103 F.3d 923, 925 (9th Cir. 1996) (finding that just cause requirements are inferred from all modern day CBA's which do not contain an express provision); Truck Drivers Local 705 v. Schrider Tank Lines, 958 F.2d 171, 175 (7th Cir. 1992) (finding that an arbitration clause implies a just cause requirement); Smith v. Kerrville Bus Co., 709 F.2d 914, 917 (5th Cir. 1983) ("In 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."); Shearson Hayden Stone, Inc., v. Liang, 653 F.2d 310, 312 (7th Cir. 1981) ("It has been held repeatedly that an agreement to arbitrate disputes about employee discharges implies a requirement that discharges be only for 'just cause.'"); McCall v. Sw. Airlines Co., No. 3:08-cv-2000-M, 2010 U.S. Dist. LEXIS 2522 at *30 (N.D. Tex. Jan. 12, 2010) ("[T]he fact that the CBA allows arbitration of employee terminations implies a requirement that discharges be only for 'just cause.'"); United Food and Commercial Workers Int'l v. Gold Star Sausage, 487 F. Supp. 596 (D.C. 1980) (finding that the arbitrator is allowed to find that the CBA implied a just cause requirement); *see also* Minda & Raab, *supra* note 42, at 1192-93 ("[I]f a just cause clause is missing from the agreement, the arbitrator infers its existence from the seniority clause or grievance and arbitration provision."); Clyde Summers, *Individual Protection Against Unjust Dismissal: Time For A Statute*, 62 VA. L. REV. 481, 499-500 (1976) (noting that arbitrators typically infer just cause protections from seniority clauses or grievance and arbitration procedures).

68. PaineWebber, Inc. v. Agron, 49 F.3d 347, 352 (8th Cir. 1995) (upholding the arbitrator's ruling that discharge was unjustified even though employee was at-will under state law); Deluca v. Bear Stearns & Co., 175 F. Supp. 2d 102, 111 (D. Mass. 2001) (finding that the arbitrator could find just cause requirement based on arbitration agreement, employee handbook, practices and statements by management).

arbitrator's implication of just cause as part of an arbitration agreement has been upheld even in an "at will" state, because the use of arbitration to settle employment-related disputes "necessarily alters the employment relationship from at-will to something else — some standard of discernable cause is inherently required in this context where an arbitration panel is called on to interpret the employment relationship."[69] The Eight Circuit explained that if the arbitration procedure did not change the employee's at-will status, "the arbitration procedure designed to interpret that employment relationship would serve no identifiable purpose."[70]

Even though an employer, a union or an individual employee can seek to negate an arbitrator's award in court, the Federal Arbitration Act limits judicial review of arbitration awards to instances "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."[71] A court will not "reconsider the merits of an award[,] even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract[,]"[72] and a court will not overturn an arbitrator's fact findings.[73] A manifest disregard of the law, not merely an error in determination or application of law, is required to vacate the arbitrator's award.[74]

The Supreme Court has supported lower courts' reluctance to second guess arbitrators' decisions on fact or law.[75] As long an arbitrator is acting within his or her authority, courts typically refuse to reverse an award even if an arbitrator commits "serious error."[76] This deference to an arbitrator's award has included upholding an arbitrator's opinion that a CBA requires just cause for discharges, where the agreement does not explicitly restrict the arbitrator's authority to review discharges to determine whether the employer had cause.[77]

69. *PaineWebber*, 49 F.3d at 352. *But see* Raymond James Fin. Servs. v. Bishop, 596 F.3d 183, 195 n.16 (4th Cir. 2010) (distinguishing role of arbitration under agreements providing expressly that employees are at will).

70. *PaineWebber*, 49 F.3d at 352.

71. 9 U.S.C. § 10(a)(4).

72. United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc., 484 U.S. 29, 36 (1987).

73. Entergy Operations, Inc. v. United Gov't Sec. Officers, 856 F.3d 561, 565 (8th Cir. 2017) (citing Iowa Elec. Light & Power Co. v. Local Union 204 of the Int'l Bhd. of Elec. Workers, 834 F.2d 1424, 1427 (8th Cir. 1987)).

74. Saxis Steamship Co. v. Multifacs Int'l Traders, Inc., 375 F.2d 577, 582 (2d Cir. 1967).

75. W.R. Grace and Co. v. Local Union 759, 461 U.S. 757, 765 (1983).

76. E. Associated Coal Corp. v. United Mine Workers, Dist. 17, 531 U.S. 57, 62 (2000).

77. *See, e.g.*, Kensington Cmty. Corp. for Individual Dignity v. Nat'l Union of Hosp. & Health Care Emps., No. 15-2942, 2016 U.S. Dist. LEXIS 85058 at *21 (E.D. Pa. June 28, 2016) ("As nothing in the agreement . . . explicitly restricts the arbitrator's authority to review whether there was cause for discharge . . . the Arbitrator's reading is logical.").

Following this direction from the Supreme Court, a court will not reverse a labor arbitration award so long as "the arbitrator's award draws its essence from the collective bargaining agreement, and is not merely [the arbitrator's] own brand of industrial justice . . . ."[78] "An award draws its essence from a collective bargaining agreement if its interpretation can *in any rational way* be derived from the agreement, viewed in light of its language, its context, and any other indicia of the parties' intention."[79] This deference allows an arbitrator to base a decision on "the industrial common law — the practices of the industry and the shop."[80] For example, an arbitrator's interpretation of a CBA's just cause provision drew its essence from the agreement, even though the award required reinstatement of a chronically absent employee, because the award was not "entirely unsupported by the record" or in manifest disregard of the CBA.[81] This decision echoes that court's earlier determination that because the term "cause" in a CBA is ambiguous, "it is within the province of the arbitrator to interpret the ambiguous phrase."[82] Even if a CBA allows management to adopt policies or rules unilaterally, an arbitrator still retains the authority to interpret any applicable just cause protection in the CBA.[83]

An award may be challenged if it conflicts with public policy, but only based on a "well defined and dominant" public policy arising from "laws and legal precedents and not from general considerations of supposed public interests."[84] The Supreme Court rejected public-policy based challenges to

78. *Id.* at *8; *see also* PPG Indus., Inc. v. Local 45C, Int'l Chem. Workers Union Council, 587 F.3d 648, 652 (4th Cir. 2009) (mentioning that an arbitrator cannot "'ignore the plain language of the contract' to impose his 'own notions of industrial justice'"); Mountaineer Gas Co. v. Oil, Chem. & Atomic Workers Int'l Union, 76 F.3d 606, 608 (4th Cir. 1996) (holding that the court must overturn an arbitration award which "fails to draw its essence from the collective bargaining agreement or reflects the arbitrator's own notions of right and wrong").

79. Brentwood Med. Assocs. v. United Mine Workers of Am., 396 F.3d 237, 241 (3d Cir. 2005) (emphasis in original).

80. United Steelworkers of Am. v. Warrior & Gulf Nav. Co., 363 U.S. 574, 581-82 (1960).

81. Dauphin Precision Tool v. United Steelworkers of Am., 338 Fed. App. 219, 223 (3d Cir. 2009).

82. Exxon Shipping Co. v. Exxon Seaman's Union, 73 F.3d 1287, 1295-96 (3d Cir. 1996); *see also* Inter-Con Sec. Sys., Inc. v. Sec., Police & Fire Prof'ls, No. 1:15-cv-01327-JCC-IDD (E.D. Va. May 5, 2016) (finding employer's policy supporting allegation of just cause did not require discharge for grievant's action, so arbitrator empowered to interpret "just cause"); Sch. Dist. of Phila. v. Commonwealth Ass'n of Sch. Adm'rs, Teamsters Local 502, 160 A.3d 928, 931-32 (Pa. Commw. Ct. 2017) (holding that the trial court erred to extent that it held that arbitrator misinterpreted contract to require "just cause").

83. Boehringer Ingelheim Vetmedica, Inc. v. Food & Commercial Workers, 739 F.3d 1136, 1141 (8th Cir. 2014); Breckenridge O'Fallon, Inc. v. Teamsters Union Local No. 682, 664 F.3d 1230, 1234, 1234 n.2 (8th Cir. 2012).

84. W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber, Cork,

arbitral awards reinstating a truck driver who tested positive for drugs,[85] and an operator of dangerous machinery found sitting alone in a car in the company parking lot with a marijuana cigarette burning in the ashtray.[86]

The reluctance to reverse arbitration awards on public policy grounds is exemplified by the Supreme Court's decision that even well-founded civil rights protections did not warrant the reversal of an arbitral award on public policy grounds, even though the award enforced male employees' contractual seniority over the equal-employment rights of female employees.[87] In making such a determination, a court must not "second-guess[] the arbitrator's fact-finding," especially where a reversal based on public policy would require a court to draw factual inferences that were not made by the arbitrator.[88] Therefore, an award reversing a discharge decision will only be overturned if a grievant's reinstatement would violate a clear public policy; conversely, an award in the employer's favor will stand unless the failure to reinstate would violate public policy.[89]

This limited judicial review of arbitration awards heightens the importance of determining whether arbitrators' interpretations of just cause protections provide adequate protection for the interests of people with disabilities. If the arbitrator addresses the ADA rights of the employee along with a just cause determination, the employee may be left without any judicial recourse beyond this limited review of the arbitration award, even though she might otherwise have a claim under the ADA.

III. EFFECTIVENESS OF JUST CAUSE IN RETAINING EMPLOYMENT FOR PEOPLE WITH DISABILITIES

Just cause provisions offer protection for employees with disabilities who face discharge for a variety of reasons, including misconduct, absenteeism, or an inability to otherwise perform their job duties. This inability to perform, as well as some forms of misconduct or absenteeism, often arise when the employer has not provided sufficient accommodation for an employee's disability. An employee with a disability may incorporate a claim for accommodation in a just cause claim to get the issue before an arbitrator who is otherwise reluctant to apply the ADA.[90] Several aspects of

Linoleum & Plastic Workers, 461 U.S. 757, 766 (1983). *See, e.g.*, Iowa Elec. Light & Power Co. v. Local Union 204, 834 F.2d 1424, 1427 (8th Cir. 1987) (finding that "there is a well defined and dominant national policy requiring strict adherence to nuclear safety rules").

85. *E. Associated Coal Corp.*, 531 U.S. at 62-67.

86. *Misco, Inc.*, 484 U.S. at 33, 42-45.

87. *W.R. Grace and Co.*, 461 U.S. at 764-70.

88. U.S. Postal Serv. v. Nat'l Ass'n of Letter Carriers, 839 F.2d 146, 148 (3d Cir. 1988).

89. *E. Associated Coal Corp.*, 531 U.S. at 62-63.

90. Daniel B. Moar, *Arbitrating Hate: Why Binding Arbitration of Discrimination*

arbitration are important to understand to determine whether arbitration provides a viable forum for people with disabilities to protect themselves against unwarranted discharge. While these aspects do not always benefit the employee with a disability, she is often treated more favorably under the arbitrator's analysis than she would be under judicial application of the ADA.

First, placement of the burden of proof on the employer in arbitration claims concerning just cause protection will benefit the employee with a disability, who would carry the burden of proving discriminatory intent or disparate impact in an ADA claim. Secondly, the application of just cause principles can be beneficial for employees with disabilities for several reasons, taking advantage of some of the basic principles requiring notice to the employee of expected standards as well as consideration of the employer's past practice in enforcing such standards. In addition, employees with disabilities can benefit from an arbitrator's application of other contractual rights as well as mitigating circumstances related to the basis for the discharge, although an arbitrator may also consider the employer's interests in discharging the employee. Lastly, an arbitrator will determine whether the employer had just cause to impose discharge, as opposed to some lesser punishment, which can benefit an employee who might otherwise fail to convince a court that an employer lacked a legitimate reason for the discharge in an ADA claim if the employee engaged in some type of bad behavior.

A. *Burden of Proof*

The discharge of an employee with a disability raises some interesting issues of contract interpretation for an arbitrator. Placement of the burden of proof on the employer can be particularly important in determining whether the employee cannot perform essential job duties, because that employer must then establish this negative fact. In addition, claims that turn on medical evidence may be resolved in favor of the employee if the employer cannot carry its burden of proving a critical medical fact regarding the employee's impairment as it relates to essential job duties.

In contrast to an ADA plaintiff's burden of proof, the employer typically carries the burden of proof in establishing that it had just cause to discipline or discharge a grievant.[91] At least some arbitrators take the

Claims is Appropriate for Union Members, 10 DUQ. BUS. L. J. 47, 62 (2008).

91. Laura J. Cooper, et al., *How and Why Labor Arbitrators Decide Discipline and Discharge Cases. An Empirical Examination*, PROCEEDINGS OF THE 60TH ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS 420, 451-52 (2007); Arnold M. Zack, *How Arbitrators Decide Cases: An Arbitrator's View*, in HOW ADR WORKS 515, 522 (Norman

position that the burden of proof remains with the employer even if a grievant raises statutory protections which would otherwise place the burden of proof on the plaintiff-employee.[92] Claims by employees with disabilities often turn on what duties are essential and whether the employee can perform those duties.[93] The resolution of these factual questions often turns on the arbitrator's application of the burden of proof, when presented as a question of just cause. In situations where the grievant also invokes contractual rights, such as a right to take leave or transfer to another position as an alternative to discharge, the burden would be on the union or the employee to establish a violation of that contractual right.[94]

If a grievant has invoked just cause protection, the applicable standard of proof in discharge cases usually requires that the employer prove both that the employee committed the offense for which she was discharged and that the offense warranted the degree of discipline imposed.[95] Typically the employer must demonstrate by a preponderance of the evidence that its action was justified.[96] Some arbitrators adhere to the proposition that "the more serious the charge against an employee the higher the level of proof is required to make the case."[97] In one study of 2,055 awards, it was determined that over 88% of the arbitrators applied the preponderance standard.[98] Another study of 1,432 awards concerning discharges found that 9.9% articulated the burden of proof at preponderance of the evidence and 12.2% required proof of just cause by clear and convincing evidence (making proof of just cause significantly more difficult), whereas 76% of the awards did not identify an applicable quantum standard.[99]

Under the burden to produce a preponderance of evidence to support

Brand, ed., BNA: Washington, D.C. 2002); *see, e.g.,* Waste Corp. of Mo., 131 Lab. Arb. Rep. (BNA) 1654, 1655 (2013) (Fizsimmons, Arb.) (holding that in discharge cases, the arbitrator must determine whether the employer had just cause to terminate the grievant's employment); Atl. Se. Airlines, 101 Lab. Arb. Rep. (BNA) 515, 521 (1993) (Nolan, Arb.) ("By long and well-recognized custom in labor arbitration, employers bear the burden of proof in disciplinary cases.").

92. Zack, *supra* note 92, at 522.

93. *See* discussion *infra* at notes 105-120 and accompanying text.

94. Zack, *supra* note 92, at 519-20.

95. *See, e.g.,* Farmland Foods, Inc., 130 Lab. Arb. Rep. (BNA) 745, 748 (2012) (Bonney, Arb.) ("In order to shoulder its burden, the employer must prove both that the employee committed the offense for which she was discharged and that the offense warranted the degree of discipline imposed.").

96. Cooper, *supra* note 92, at 452. *See, e.g.,* Meridian Med. Techs., 115 Lab. Arb. Rep. (BNA) 1564, 1567 (2001) (King, Arb.) ("Generally, the employer meets this burden if it shows, by a preponderance of evidence, that its action was justified.").

97. Mercy St. Vincent Med. Ctr., 135 Lab. Arb. Rep. (BNA) 705, 723 (2015) (Imundo, Arb.).

98. Cooper, *supra* note 92, at 453.

99. Bognanno, *supra* note 40, at 174-77.

the employer's action, circumstantial evidence can be used to establish the elements of a particular action, but the evidence must "do more than give rise to mere suspicion,"[100] and should be "based on a reasonable probability and not on mere speculation."[101] Such words of caution are particularly appropriate for decisions involving the discharge of employees with disabilities because the employer assumes that they cannot perform the duties of the position, pose a direct threat, or will not be available to return to work in a reasonable amount of time. Thus, placing the burden of proof on the employer may by itself provide protection for employees with disabilities that they would not enjoy under the ADA alone.

1. Proof of What Duties are Essential

Arbitration can play several roles with respect to the ability to perform the essential duties of the position, including making factual determinations regarding the grievant's abilities or the essential nature of the job duties which she cannot perform. An employee with a disability often faces discharge based on an employer's belief that she can no longer perform the job duties. This employee will benefit from just cause protection if the employer cannot establish by a preponderance of the evidence that her disability prevents her from performing an essential job duty.[102] For example, an employer could not establish that the grievant was discharged for a "job-related reason" based on his inability to lift over fifty pounds, where the employee continued to work successfully for several months under these restrictions before his discharge.[103]

Arbitrators often give considerable deference to an employer's

100. Mich. Milk Producers Ass'n, 114 Lab. Arb. Rep. (BNA) 1024, 1029 (2000) (McDonald, Arb.).

101. Dietrich Indus., Inc., 83 Lab. Arb. Rep. (BNA) 287, 289 (1984) (Abrams, Arb.).

102. *See, e.g.*, Noranda Aluminum, 119 Lab. Arb. Rep. (BNA) 217, 221 (2003) (Gordon, Arb.) ("In sum, Grievant's discharge lacked just cause because it was based on medical evaluation that, under the circumstances, should have been more extensive.").

103. Coreslab Structures, 129 Lab. Arb. Rep. (BNA) 329, 332 (2011) (Pratte, Arb.); *see also* Bowater, 120 Lab. Arb. Rep. (BNA) 129, 137 (2004) (Harris, Arb.) (finding sufficient medical evidence to establish grievant's ability to perform job duties); Super Value, 119 Lab. Arb. Rep. (BNA) 1377, 1382-83 (2004) (Daly, Arb.) (finding no just cause to discharge a maintenance mechanic with glaucoma who could still "drive slow-moving man-lift vehicles in the . . . warehouse"); Beef Prods., 117 Lab. Arb. Rep. (BNA) 1308, 1311-12 (2002) (Allen, Arb.) (ruling that an employer violated CBA by discharging grievant who was not totally disabled according to medical evidence); Davis Wire Corp., 114 Lab. Arb. Rep. (BNA) 1345, 1350 (2000) (Olson, Arb.) (overturning refusal to return grievant to work based on physician's general recommendation); Eastwood Printing Co., 99 Lab. Arb. Rep. (BNA) 957, 963 (1992) (Winwood, Arb.) (finding no just cause because employer failed to investigate employee's ability to use arm to perform duties).

definition of which duties are essential, as they do in ADA decisions.[104] Despite this deference, placement of the burden of proof on the employer may make such deference less automatic. One arbitrator explained that an employer can establish just cause related to an inability to perform one's job duties based on its "objective evaluation of medical evidence, a fair evaluation of the physical requirements of the essential functions to be performed and the ability to provide work within the employee's restrictions."[105] In contrast to arbitrators' typical deference to past practice to interpret ambiguous contractual obligations, duties may still be deemed essential even if the employer's past practice has not included assignment of the duties in question over a long period of time.[106]

Under the ADA, the duty to accommodate turns on whether the proposed accommodation would enable the employee with a disability to perform the duties of the position.[107] Arbitrators follow this same line of logic. If an employee cannot perform any work available with the employer, then the employer has just cause to discharge her.[108] For example, an employer had just cause to discharge a material handler who could not stand, kneel and climb as required of his position.[109] The duties could not be performed even if he was allowed to take the number of breaks recommended by his doctor, notably more than allowed for other employees.[110]

In contrast, an employer may lack just cause despite an employee's inability to perform the duties of a position, if accommodation would have enabled her to do so. For example, GTE lacked just cause to discharge a technician who could perform his work even though he could not climb ladders, where technicians typically chose their specific jobs and he could choose jobs which did not require ladder work.[111] Thus, without specifically invoking the ADA's protections, this grievant was reinstated because the employer failed to prove that the duties he could not perform were not essential to his position.

104. 42 U.S.C. §12111(8); *see, e.g.*, Gardenhire v. Manville, No. 15-cv-4914-DDC-KGS, 2017 U.S. Dist. LEXIS 15348 at *15-16 (Feb. 2, 2017) (referring to job description as evidence of essential functions).

105. Premier Mfg. Support Svcs., 2005 Lab. Arb. Rep. (BNA) Supp. 111197 (2005) (Hetrick, Arb.).

106. 148147-AAA, 2013 Lab. Arb. Rep. (BNA) Supp. 148147 (2013) (Daly, Arb.) (noting that fire suppression duties were essential for the firefighter dispatch job, even though the duty was not assigned to dispatchers over 36 years).

107. Lucas v. W. W. Grainger, Inc., 257 F.3d 1249, 1259 (11th Cir. 2001); LaChance v. Duffer's Draft House, Inc., 146 F.3d 832, 835 (11th Cir. 1998).

108. CH2M-WG Idaho, 134 Lab. Arb. Rep. (BNA) 876, 885-86 (2014) (DiFalco, Arb.).

109. Case Corp., 113 Lab. Arb. Rep. (BNA) 1, 3-4 (1999) (Thornell, Arb.).

110. *Id.*

111. GTE North, 113 Lab. Arb. Rep. (BNA) 1047, 1049-50, 1052 (1999) (Daniel, Arb.).

In a more complex example, an employer demonstrated just cause to discharge a driver with a mental illness, without accommodating him, where the arbitrator concluded that the chances for rehabilitation were "remote" so as to enable the employee to perform the job duties.[112] Under a clear and convincing evidence standard, this arbitrator concluded that the employer established just cause to discharge an employee with "psychiatric problems" based on "poor job performance and extraordinary actions" which included wearing a Halloween costume to work.[113] Even though the CBA incorporated the duty to accommodate under the ADA, the arbitrator emphasized that the "primary controlling factor in this arbitration case is the [a]greement between the parties, specifically the just cause requirement for discharge."[114] The arbitrator concluded that the employer had just cause to discharge the driver based in large part on his doctor's statement that he lacked control over his aggression and hostility and the driver's failure to take his prescribed medication.[115]

These arbitration awards illustrate how an employee with a disability can benefit from the placement of the burden of proof on the employer to establish her inability to perform the essential duties of the position. In contrast, under the ADA, the employee carries the burden of proof to establish discrimination, which includes not only the existence of their disability, but also the fact that she is otherwise qualified to perform the duties of the position.[116] In situations where the employer controls the information regarding the nature of the plaintiff's work as well as the duties of other employees, this burden can be a difficult one to meet.[117]

2. Medical Evidence

Like their judicial counterparts, arbitrators will consistently find just cause for the discharge of an employee based on factual determinations that the grievant's impairment prevents their performance of the duties or required work hours of the position.[118] Generally, employers are entitled to

112. Interstate Brands Corp., 113 Lab. Arb. Rep. (BNA) 161, 168-69 (1999) (Howell, Arb.).

113. *Id.* at 166, 168-69.

114. *Id.* at 168.

115. *Id.*

116. 42 U.S.C. § 12111(8); Cleveland v. Policy Mgmt. Sys. Corp., 526 U.S. 795, 806 (1999).

117. *See, e.g.*, Hawkins v. Schwan's Home Serv., Inc., 778 F.3d 877, 890-91 (10th Cir. 2015) (requiring the plaintiff to prove ability to perform essential duties of the position).

118. Dairy Fresh of Ala., 130 Lab. Arb. Rep. (BNA) 137 (2011) (Moreland, Arb.) (holding that the employer had just cause to discharge employee with manic depression unable to perform duties per independent medical examiner); Union Tank Car Co., 130 Lab. Arb. Rep. (BNA) 62, 66-67 (2011) (Fullmer, Arb.) (finding that one of four doctor's reports

rely on their medical advisors "where there is no reason to doubt their accuracy or good faith . . . ."[119] However, that evidence must be reliable enough to support a finding of just cause.[120] For example, after finding that the grievant was not a person with a disability under the ADA, one award held that the employer had just cause to discharge an employee with a lifting restriction which prevented him from performing common duties of his position without any accommodation.[121]

The just cause standard has been relied upon to deny grievances of employees with disabilities based on medical evidence related to the grievants' ability to perform the duties of their positions.[122] For example, an employer showed just cause to discharge a janitor based on the employer's conclusion that the grievant's medical restrictions did not justify his refusal to perform his job duties.[123] At the same time, an arbitrator may require that an employer engage in the interactive process, as contemplated by the ADA,[124] to determine whether the grievant is able to perform the duties of her position.[125]

As with the question of which duties are essential, placement of the burden of proof on the employer requires the production of reliable medical

justified employer's refusal to allow grievant to return to work under burden on grievant to show lack of just cause); Techneglass Inc., 120 Lab. Arb. Rep. (BNA) 722, 726-27 (2004) (Dean, Arb.) (ruling that just cause was shown by grievant's inability to perform duties); United Refining Co., 2003 Lab. Arb. Rep. (BNA) Supp. 110488 (2003) (Miller, Arb.) (ruling that just cause was shown where grievant was unable to work eight hour day indefinitely and no part-time jobs were available); Empire Coke Co., 2001 Lab. Arb. Rep. (BNA) Supp. 109273 (2001) (Giblin, Arb.) (finding proper cause for discharge where impairment from on the job injury prevented performance of duties); City of St. Paul, 1996 Lab. Arb. Rep. (BNA) Supp. 117294 (1996) (Berquist, Arb.) (finding just cause to discharge employee who could not perform duties in timely manner); Meier Metal Servicenters, 100 Lab. Arb. Rep. (BNA) 816, 819 (1993) (Morgan, Arb.).

119. DENNIS R. NOLAN & RICHARD A. BALES, LABOR AND EMPLOYMENT ARBITRATION IN A NUTSHELL 259 (3d ed. 2017).

120. KOVEN & SMITH, *supra* note 23, at 425.

121. City of Minneapolis, 125 Lab. Arb. Rep. (BNA) 558, 562 (2008) (Chernos, Arb.).

122. *See, e.g.*, Rock-Tenn Servs., 131 Lab. Arb. Rep. (BNA) 1468, 1487-88 (2013) (Kossoff, Arb.); Rochdale Vill., 125 Lab. Arb. Rep. (BNA) 196, 198-99 (2008) (Gregory, Arb.); Bradford White Corp., 113 Lab. Arb. Rep. (BNA) 114, 117-18 (1999) (Allen, Arb.) (ruling that employer could rely on doctor's statement that grievant could return to work); *see also* Westinghouse Hanford Co., 101 Lab. Arb. Rep. (BNA) 46, 51-52 (1993) (Nelson, Arb.) (ruling that employer could rely on medical evaluation showing inability to work).

123. U.S. Steel Corp., 120 Lab. Arb. Rep. (BNA) 1801, 1805 (2005) (Peterson, Arb.).

124. 29 C.F.R. § 1630.2 (2017); Amadio v. Ford Motor Co., 238 F.3d 919, 929 (7th Cir. 2001); *see also* Bultemeyer v. Fort Wayne Cmty. Sch., 100 F.3d 1281, 1284-86 (7th Cir. 1996) (noting that an employer cannot assume inability to perform without engaging in the interactive process).

125. Milwaukee Transp. Servs., 2009 Lab. Arb. Rep. (BNA) Supp. 119548 (2009) (Vernon, Arb.); Minn. Mining & Mfg., 112 Lab. Arb. Rep. (BNA) 1055, 1059-60 (1999) (Bankston, Arb.).

evidence that the employee cannot perform the essential job duties of the position, or that the employee poses a direct threat even with accommodation.[126] For example, an arbitrator reinstated an employee whose doctors stated that he could safely return to work because his manic depression was in remission, despite his employer's desire for a guarantee that the employee would not suffer another attack.[127] In contrast, under the ADA the employee would carry the burden of producing medical evidence establishing her ability to perform the duties of the position, either with or without reasonable accommodation.[128] Given the potential uncertainty surrounding medical diagnoses as well as ambiguity regarding job duties, this burden often proves to be too difficult for an ADA plaintiff to meet.[129] Thus, any ambiguity works in favor of a grievant with a disability where the employer carries the burden of establishing just cause.

B. *Application of Just Cause Principles in Arbitration*

Employees with disabilities may benefit from an arbitrator's incorporation of a duty to accommodate into interpretations of just cause protection in CBA's. One arbitrator explained that reasonable accommodation "has long been recognized as an element of just cause by arbitrators[,]" in part based on the broader societal value of the right of persons with disabilities to "hold jobs they can perform . . . ."[130] To fulfill that value, the arbitrator stated that while he could not determine whether the employer violated the ADA, he could look to the ADA for guidance as to whether the employer's decision to discharge the grievant based on absences

126. Hatter v. WMATA, 244 F. Supp. 3d 132, 136-37 (D.D.C. 2017) (employer failed to present evidence of inability to perform essential functions of job); Osborne v. Baxter Haealthcare Corp., 798 F.3d 1260, 1268-69 (10th Cir. 2015) (burden on employer to establish direct threat with reasonable accommodation).

127. Sw. Bell Tel. Co., 98 Lab. Arb. Rep. (BNA) 1199, 1202 (1992) (Nolan, Arb.).

128. *See, e.g.,* Mole v. Buckhorn Rubber Prods., Inc., 165 F.3d 1212, 1217 (8th Cir. 1999) (finding that employee with multiple sclerosis and depression failed to prove ability to perform duties).

129. *See, e.g.*, Bratten v. SSI Servs., 185 F.3d 625, 635 (6th Cir. 1999) (finding physician's testimony insufficient to establish that employee was otherwise qualified).

130. Thermo King, 102 Lab. Arb. Rep. (BNA) 612, 615 (1993) (Dworkin, Arb.); *see also* GTE N. Inc., 113 Lab. Arb. Rep. (BNA) 665, 672 (1999) (Brodsky, Arb.) (concluding that incorporation of reasonable accommodation into just cause determination was appropriate based on CBA's inclusion of both general nondiscrimination clause and conflict with law provision); Nat'l Linen Supply, 107 Lab. Arb. Rep. (BNA) 4, 8 (1996) (Ross, Arb.); Beckett Paper Co., 106 Lab. Arb. Rep. (BNA) 1135, 1139 (1996) (Goggin, Arb.) (holding that just cause requirement requires reasonable accommodation as alternative to discharge from position that employee cannot otherwise perform); Meijer Inc., 103 Lab. Arb. Rep. (BNA) 834, 840 (1994) (Daniel, Arb.) (noting that rights established by law must be taken into consideration in determining whether just cause exists).

and tardiness related to his disability and "beyond his control" was "just and fair."[131]

Under this approach, an arbitrator should consider an employer's duty to accommodate when determining whether the employer had just cause to discharge an employee who was not accommodated.[132] Incorporation of reasonable accommodation into a just cause determination can be appropriate based on the CBA's inclusion of both a general nondiscrimination clause and a conflict with law provision.[133] Even a non-discrimination provision alone has been interpreted as sufficient to consider the ADA's requirements.[134]

In 1966, Arbitrator Carroll R. Daugherty set forth seven tests for determining just cause; a "no" response to any of these questions would result in a finding of a lack of just cause:[135]

1. Did the company give to the employee forewarning or foreknowledge of the possible or probably [sic] disciplinary consequences of the employee's conduct?
2. Was the company's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the company's business and (b) the performance that the company might properly expect of the employee?
3. Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?
4. Was the company's investigation conducted fairly and objectively?
5. At the investigation, did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?
6. Has the company applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?
7. Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the company?

These seven tests have been characterized as "the most specifically articulated analysis of the just cause standard as well as an extremely

131. 102 Lab. Arb. Rep. (BNA) at 615.

132. Ariana R. Levinson, *What the Awards Tell Us About Labor Arbitration of Employment-Discrimination Claims*, 46 U. MICH. J.L. REFORM 789 (2013).

133. *GTE N. Inc.*, 113 Lab. Arb. Rep. at 665.

134. Perfection Bakeries, Inc., 110 Lab. Arb. Rep. (BNA) 1043 (1997) (Stallworth, Arb.); Champion Int'l Corp., 106 Lab. Arb. Rep. (BNA) 1024 (1996) (Howell, Arb.); *see also* Fairweather's PRACTICE AND PROCEDURE IN LABOR ARBITRATION 578 (Ray J. Schoonhoven ed., 4th ed. 1999).

135. Enter. Wire Co., 46 Lab. Arb. Rep. (BNA) 359, 363-64 (1966) (Daugherty, Arb.)

practical approach"[136] and, perhaps for this reason, have been used routinely for over fifty years.[137] This test has been described as "the single most definitive statement of just cause"[138] and "undeniably influential."[139] Others have described this test as enjoying "'widespread acceptance.'"[140] Some have said that these tests have "helped to improve the fairness of disciplinary processes . . . ."[141] One court characterized the test as providing a "helpful and familiar rubric by which an arbitrator can assess whether good cause for discipline exists in a particular circumstance."[142] Despite its apparent widespread acceptance, one study found that only 9.4% of 1,432 arbitration awards concerning employee discharges explicitly utilized the just cause rubric,[143] but this study may not have captured the unstated influence of the rule.

These principles for applying a just cause clause to a particular employee's discharge benefit employees with disabilities for several reasons, including the employer's general obligation to provide notice of any policies for which the employee might be disciplined and to treat similarly situated employees comparably. In addition, an employee with a disability will at least sometimes benefit from other contractual protections that may be interpreted jointly with a just cause provision or separately to the employee's benefit. Employees with disabilities will also often benefit from an arbitrator's consideration of mitigating circumstances in determining whether the employer had just cause to discharge them, including the role of the person's impairment in the discharge decision as well as the appropriateness of discharge as the level of discipline.

1. Notice & Past Practice

The principles of just cause suggest that an employee must be aware of the rule or other criteria relied upon by the employer in making the decision

136. KOVEN & SMITH, *supra* note 23, at 27.

137. *See* Summit Cty. Children Servs. Bd. v. Commc'n Workers of Am., Local 4546, 865 N.E.2d 31, 31-36 (Ohio 2007); *see e.g.*, KOVEN & SMITH, *supra* note 23, at 2 and n.1, 24-25, and n.59 and 60.

138. CHRISTINE D. VER PLOEG, *Investigatory Due Process and Arbitration, in* ARBITRATION 1992: IMPROVING ARBITRAL AND ADVOCACY SKILLS, PROCEEDINGS OF THE 45TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 220, 223–24 (Gruenberg ed., 1993).

139. JAMES OLDHAM, *Due Process in Discipline and Discharge: §6.12 Due Process in General*, THE COMMON LAW OF THE WORKPLACE: THE VIEWS OF ARBITRATORS 201, 202 cmt.(a)(3) (Theodore J. St. Antoine ed., 2d ed. 2005).

140. Bognanno, *supra* note 40, at 158.

141. KOVEN & SMITH, *supra* note 32, at 29.

142. *Summit Cty.*, 865 N.E.2d at 36.

143. Bognanno, *supra* note 40, at 174.

to discharge her.[144] Progressive discipline, at least for certain offenses, may also be implied as part of just cause.[145] Despite this notice requirement, some actions may be so commonly acknowledged as wrong by society, such as theft, or in the workplace, such as falling asleep on the job, as to obviate the need for prior notice.[146]

Notice to employees that discharge can result as a penalty for certain behavior may also be required.[147] The just cause principle of providing a warning may benefit a grievant who allegedly has engaged in misconduct, as in the employee who was not warned that he could be discharged if he did not take his medication for depression and the employee who was not warned against sleeping during a break.[148]

Arbitration decisions have long recognized the right of a company to impose a non-disciplinary discharge, including discharge based on the employee's inability to perform the work.[149] This right is not absolute, however, as the employer may have an obligation to warn and work with the employee[150] and provide adequate training,[151] in a way that is "calculated to address the particular employee . . . ."[152] For example, a power company lacked just cause to discharge an employee with a learning disability, despite his failing a mandatory hazardous materials handling course, based on its failure to tailor its instruction to his disability.[153]

Like the notice requirement, consideration of an employer's past practice can be beneficial for an employee asserting a lack of just cause. If a contract term is vague or ambiguous, the arbitrator will turn to past practice to help interpret that right.[154] Past practice can be used to supplement the actual contractual language that applies, but only if such a practice is established by mutual acceptance by the parties of a clear and consistent practice over a significant period of time.[155] Past practice can be particularly

144. KOVEN & SMITH, *supra* note 23, at 35-39.

145. *Id.* at 70-75.

146. *Id.* at 39-46.

147. *Id.* at 47-50.

148. Laidlaw Transit Inc., 104 Lab. Arb. Rep. (BNA) 302, 306 (1995) (Concepcion, Arb.); EG & G Mound Applied Techs., 102 Lab. Arb. Rep. (BNA) 60, 63-64 (1993) (Heekin, Arb.) ("[B]efore disciplinary action can be taken, the subject employee must previously have been aware, or should have been aware, of the conduct expected.").

149. Florsheim Shoe Co., 74 Lab. Arb. Rep. (BNA) 705, 708-09 (1980) (Roberts, Arb.).

150. *Id.* at 709.

151. Bell Helicopter Textron, 74 Lab. Arb. Rep. (BNA) 1139, 1141 (1980) (Shearer, Arb.).

152. Iowa Elec. Light & Power Co., 100 Lab. Arb. Rep. (BNA) 393, 399 (1993) (Pelofsky, Arb.).

153. *Id.*

154. Zack, *supra* note 93, at 520.

155. NOLAN & BALES, *supra* note 120, at 248-49.

helpful to guard against the influence of implicit biases against employees with disabilities, since an employer is expected to apply standards consistently across all similarly situated employees.

Past practice involves the comparison of the treatment of the grievant to how the employer has dealt with other employees in the past.[156] Of course the grievant must establish that her conduct is similar enough to the conduct of another employee to benefit from the employer's past practice of excusing that behavior.[157]

If a grievant with a disability has been treated more harshly than other employees, consideration of past practice can support an arbitrator's finding of a lack of just cause in favor of an employee with a disability. For example, an arbitrator relied on the just cause provision of a CBA to sustain the grievance of an employee with a disability who was discharged after being absent for more than six months after being injured on job.[158] The arbitrator engaged in typical just cause analysis, finding that the employer's policy of discharging all employees who are absent for over six months had not been applied consistently, and that the CBA allowed for a leave of absence "for good cause," defined to include accidental injury.[159]

Similarly, a driver's grievance was sustained under the CBA's just cause standard where the employer failed to warn him that he would be discharged if he did not take his medication, and the employer had tolerated his condition for a long time.[160] This award relied on basic principles of just cause – the failure to warn employees and employer's past acceptance of behavior as minimizing factors.[161] Neither of these employees would have been guaranteed success in an ADA claim, because both absenteeism and insubordination can constitute legitimate business reasons for discharge. These awards illustrate the benefit of a CBA's just cause provision to push an employer to provide accommodations, regardless of whether the employer had a duty to accommodate under the ADA.

Grievants with disabilities may fail in challenging a discharge where other employees with similar characteristics have been treated similarly.[162] Under just cause analysis, arbitrators similarly consider the nature of the

156. KOVEN & SMITH, *supra* note 23, at 20.

157. *Id.* at 375.

158. Magnolia Mktg. Co., 107 Lab. Arb. Rep. (BNA) 102, 109 (1996) (Chumley, Arb.).

159. *Id.*

160. *Laidlaw Transit, Inc.*, 104 Lab. Arb. Rep. (BNA) at 305-06.

161. *Id.* at 306.

162. *See, e.g.*, Safeway Corp., 2008 Lab. Arb. Supp. 119039 (Wages, Arb. 2008) (holding that the grievant was treated consistently with past practice of assigning injured employees to different work). *But see* Dept. of Commerce, 1999 Lab. Arb. Supp. (BNA) 107763 (finding that an employer is obligated to accommodate employee where similar employees had been accommodated in the past).

threat posed by the employee who has been discharged.[163] An employer had just cause to discharge an employee with schizophrenia, for example, where coworkers felt threatened by the employee's comment, "'[n]o wonder people bring guns to work[,]'" made in response to harassment by coworkers.[164] Analogizing to the dismissal of an ADA claim by an employee who threatened to kill a coworker,[165] the arbitrator found that the employer had discharged other employees whose actions were "provocative, hostile, threatening and could easily rise to a level of violence."[166]

Under just cause analysis, employees who allegedly pose a direct threat may benefit from the principle of considering how other similarly situated employees have been treated. In upholding the grievance against Walt Disney, for example, the arbitrator noted that just cause protection applies regardless of the employee's seniority, where an employee with more seniority had not been discharged for engaging in assaultive behavior.[167]

Past practice analysis can also benefit a grievant who has been discharged for his absenteeism if the employer has not discharged similarly situated employees in the past, so as to put him on notice that he could be discharged based on his absenteeism.[168] Conversely, an employer's consistent enforcement of an absenteeism policy will help establish just cause to discharge a grievant with a similar record.[169]

Following this line of logic, an employer's past practice of providing a transfer to another position, including light duty, can help sustain the grievance of a similarly situated employee with a disability who seeks a similar transfer.[170] In contrast, other arbitrators have found that an employer need not create a light duty position for a grievant.[171] These seemingly inconsistent awards are consistent with court analysis under the ADA, which

163. *See, e.g.*, CH2M-WG Idaho, 134 LAB. ARB. REP. (BNA) 876, 883-84 (Difalco, Arb. 2014) (finding plaintiff's exposure at work posed a direct threat to her health).

164. Anchor Hocking, 125 Lab. Arb. Rep. (BNA) 312, 318-20 (2008) (Cohen, Arb.).

165. Palmer v. Cir. Ct. of Cook Cty., 117 F.3d 351, 352 (7th Cir. 1997).

166. *Anchor Hocking*, 125 Lab. Arb. Rep. (BNA) at 319.

167. Walt Disney World, 127 Lab. Arb. Rep. (BNA) 353, 356-57 (2010) (Abrams, Arb.).

168. Phx. Newspapers Inc., 120 Lab. Arb. Rep. (BNA) 771, 774-75 (2004) (Rothstein, Arb.).

169. Allied Healthcare Prods., 120 Lab. Arb. Rep. (BNA) 890, 894 (2004) (Fitzsimmons, Arb.).

170. Sherwin-Williams Co., 113 Lab. Arb. Rep. (BNA) 1184, 1191 (2000) (Statham, Arb.); *see also* Exxon Co., 110 Lab. Arb. Rep. (BNA) 534, 539-40 (1998) (Allen, Arb.) (explaining how transferring away stress-causing coworkers is warranted where similarly-situated others had been transferred).

171. Ga. Pac., Lab. Arb. Rep. Supp. (BNA) 104307, at 13 (1999) (Duda, Arb.); *see also* Altoona Hosp., 102 Lab. Arb. Rep. (BNA) 650, 652 (1993) (Jones, Arb.) (finding no requirement in CBA to create light duty position, without mention of ADA); Ogden Maint. Co., 101 Lab. Arb. Rep. (BNA) 467, 470 (1993) (Harr, Arb.) (noting the lack of contractual obligation to create light duty job).

typically does not require the creation of a position, but may require placement of an employee with a disability in an available light duty position.[172]

These arbitration awards demonstrate that an employee with a disability may benefit from an employer's more lenient or favorable treatment of other employees who are not disabled, engaged in similar conduct, but did not suffer the same consequences. In contrast, under the ADA, an employer's past provision of an accommodation does not necessarily establish that the accommodation requested by an employee with a disability is reasonable or does not impose an undue hardship.[173]

2. Supplemental Contractual Rights

Employees' just cause protections may be supplemented or supplanted by other contractual rights. Contractual provisions, or the lack thereof, can be significant in determining whether the employer had just cause to discharge an employee with a disability based on their inability to perform the job duties, their unavailability for work, or misconduct. In addition, just cause analysis can be affected significantly by the omission of an obligation to follow the ADA in a CBA. One award, for example, held that the employer had just cause to discharge an employee whose impairment prevented performance of his job duties, without offering any accommodation, because the CBA did not specifically incorporate the ADA.[174]

In line with this reasoning, some arbitrators have refused to look beyond the language of the applicable CBA in resolving grievances, even if filed by a person with a disability as defined by the ADA, who might benefit from the application of the ADA.[175] This can result in a finding of just cause to discharge an employee with a disability without reaching the question of reasonable accommodation. For example, one arbitrator found just cause to discharge an employee who became involved in altercations with co-workers without considering the possible need for accommodations which would

172. Stacy A. Hickox, *Transfer as an Accommodation: Standards from Discrimination Cases and Theory*, 62 ARK. L. REV. 195, 206-14 (2009).

173. *See, e.g.*, Walton v. Mental Health Ass'n, 168 F.3d 661, 671 (3d Cir. 1999) (finding that plaintiff's employer was not required to allow continued leave to plaintiff even though the employer had granted it before because continued leave would have created an undue burden on the employer).

174. Jefferson-Smurfit Corp., 103 Lab. Arb. Rep. (BNA) 1041, 1048 (1994) (Canestraight, Arb).

175. *See id.* (finding no contractual duty to transfer employee with disability); *see also Altoona Hosp.*, 102 Lab. Arb. Rep. (BNA) at 652 (explaining that an arbitrator was not empowered to interpret the ADA).

have addressed the perceived harassment the grievant experienced which led to the altercations.[176] In contrast, some arbitrators look to the ADA to help define a contractual obligation to provide accommodations to employees with disabilities.[177]

Some arbitrators may not apply a just cause analysis, but still consistently find that the employer was empowered to discharge an employee who could no longer perform her job duties.[178] In contrast to CBAs which are silent on an employer's obligations to reassign duties or the employee who cannot perform, contractual requirements may create such an obligation. Under a just cause provision, for example, an employer lacked just cause to discharge a grievant who could not perform all of the expected duties of her chicken processing plant position because of her work-related impairment which was known to the employer.[179]

Despite its benefits, just cause may not provide protection for an employee who engages in clear misconduct, particularly when prohibited by specific language in a CBA or employer policy. For example, two different employers had just cause to discharge employees who left their workplaces without permission, despite claims that the grievants needed to leave to seek medical treatment and could not perform the assigned duties, respectively.[180] One of these awards was based on clear language in the CBA that leaving

176. *Beckett Paper Co.*, 106 Lab. Arb. Rep. (BNA) at 1138-39.

177. *See, e.g.,* Multi-Clean, Inc., 102 Lab. Arb. Rep. (BNA) 463, 467 (1993) (Miller, Arb.).

178. Rock Tenn Co., 133 Lab. Arb. Rep. (BNA) 1182, 1191-92 (2014) (Miles, Arb.) (denying grievance because no job was available consistent with restrictions); Nashville Symphony Ass'n, 132 Lab. Arb. Rep. (BNA) 174, 189-90 (2013) (Ruben, Arb.) (relying on employer's opinion that employee with disability had not recovered musical skills, distinguished from artistic incompetence or misbehavior); Anchor Hocking, 129 Lab. Arb. Rep. (BNA) 1619, 1623 (2011) (Murphy, Arb.) (accepting employer's argument that legitimate business interests prevented allowing grievant to work four-hour day); Bobcat Co., 121 Lab. Arb. Rep. (BNA) 535, 538 (2005) (Jacobowski, Arb.) (finding no contractual right to return to work when no part time positions available) City of Roswell, 109 Lab. Arb. Rep. (BNA) 1153, 1159 (1998) (Wyman, Arb.) (denying grievance as grievant continued to be medically incapable of performing driver duties); City of Tampa, 111 Lab. Arb. Rep. (BNA) 65, 72-76 (1998) (Hoffman, Arb.) (examining lifting and movement restrictions that prevented performance of job duties); Perfection Bakeries, 110 Lab. Arb. Rep. (BNA) 1043, 1159 (1997) (Stallworth, Arb.) (allowing non-disciplinary discharge based on grievant's inability to perform job due to injury); Frito-Lay, 103 Lab. Arb. Rep. (BNA) 993, 995 (1994) (Bittel, Arb.) (agreeing that progressive discipline followed in addressing sales deficiencies fulfilled obligation to reasonably accommodate grievant); Ogden Maint. Co., 101 Lab. Arb. Rep. (BNA) at 470 (finding that employer had implied authority to discharge employee who cannot perform duties).

179. ConAgra Poultry Co., 116 Lab. Arb. Rep. (BNA) 1029, 1034 (2001) (Eisenmenger, Arb.).

180. Monongalia Cty. Coal Co., 136 Lab. Arb. Rep. (BNA) 131, 134-35 (2015) (Nicholas, Arb.); NAES Corp., 135 Lab. Arb. Rep. (BNA) 1702, 1707-09 (2015) (Riker, Arb.).

work without permission warranted discharge, and the potential harm his actions could have caused the employer and its customers.[181] Similarly, two different employers had just cause to discharge grievants who refused to abide by mandatory referrals to employee assistance programs.[182]

Arbitrators' review of claims by employees in need of leave can produce very different results than would occur under the ADA, depending on which contractual provisions apply. Under the ADA, leave can be considered a reasonable accommodation, but at the same time, courts have consistently held that an employee who engages in erratic attendance or does not properly inform her employer about impending absences is not otherwise qualified for employment.[183] Likewise, under the ADA, employers typically need not accommodate employees who cannot predict when they will be able to return to work or whose leave has exceeded the amount of leave provided by a CBA or an employer's policy, without considering whether than policy provides adequate accommodation.[184]

Like these courts, arbitrators considering questions of leave usage and absenteeism look to contractual provisions as well as sometimes considering the duty to accommodate under the ADA. Generally, "[t]he right to terminate employees for excessive absences, even where they are caused by illness, is generally recognized by arbitrators."[185] Questions of attendance may or may not be addressed by a just cause provision of a CBA or an employee handbook. If the just cause provision applies to any discharge, or at least discharges which are not voluntary or layoffs, then the employee will be protected by that provision.[186] For example, two different employers lacked just cause to discipline grievants whose absences were allegedly unsupported by medical documentation, where the grievants followed the procedures required by the parties' CBA and the employer's absenteeism policy.[187]

Even with just cause protection, however, excessive absences[188] or the

181. *NAES Corp.*, 135 Lab. Arb. Rep. (BNA) at 1707-08.

182. Raytheon Aircraft Co., 105 Lab. Arb. Rep. (BNA) 1081, 1083 (1996) (Thornell, Arb.); Boise Cascade Corp., 104 Lab. Arb. Rep. (BNA) 289, 293-94 (1994) (Lundberg, Arb.).

183. *See, e.g.*, Greer v. Emerson Elec. Co., 185 F.3d 917, 921-22 (8th Cir. 1999).

184. Stacy Hickox & Joseph Guzman, *Leave as an Accommodation: When is Enough, Enough?*, 62 CLEVELAND ST. L. REV. 437, 457-71 (2014).

185. Elkouri & Elkouri, *supra* note 42, at 796.

186. S. Peninsula Hosp., 120 Lab. Arb. Rep. (BNA) 673, 676, 678 (2004) (Landau, Arb.).

187. Tecumseh Prods. Co., 106 Lab. Arb. Rep. (BNA) 369, 371 (1996) (Flaten, Arb.); Rollyson Aluminum Prods. Inc., 103 Lab. Arb. Rep. (BNA) 588, 590-91 (1994) (Heekin, Arb.) (finding that the employer failed to establish that grievant's absences were not medically excused, but denying back pay based on grievant's attitude).

188. *Medco Health Sols.*, 128 Lab. Arb. Rep. (BNA) at 1739-40 (finding just cause where grievant was so unreliable as to be of "no value"); Armstrong World Indus., 114 Lab. Arb. Rep. (BNA) 540, 547 (2000) (Chumley, Arb.) (finding just cause based on 57% attendance

length of the leave alone[189] have been sufficient to provide employers with justification for discharge, often without any consideration of the ADA's specific parameters for an alternative schedule or leave as an accommodation. Even if the absenteeism is related to an impairment, where the threshold of "excessive" is reached, non-disciplinary termination is proper.[190] When employees on leave are unlikely to ever be able to return to work[191] or show an improvement in attendance,[192] arbitrators have found that the employers had just cause to discharge them. Just cause may also be based on the grievant's failure to follow the employer's procedures associated with taking time off.[193] Regardless of just cause protection, a grievant may fail to successfully challenge his discharge if his leave exceeded the amount provided by the CBA.[194]

In contrast to these awards, an employee may benefit from specific

violations, previous issues, presumed failure to take medication, attitude, and problems for co-workers); Cont'l Cement Co., 107 Lab. Arb. Rep. (BNA) 829, 836 (1996) (Hilgert, Arb.) (explaining just cause under absenteeism policy).

189. 148147-AAA, 2013 Lab. Arb. Rep. (BNA) Supp. 148147 (2013) (Daly, Arb.); *see also* Titan Tire Corp., 135 Lab. Arb. Rep. (BNA) 235, 237, 254-55 (2015) (Szuter, Arb.) (finding that the CBA stated that employee loses rights after 24 months of leave); Cooper-Standard Auto. Grp., 129 Lab. Arb. Rep. (BNA) 1700, 1704 (2011) (Dilts, Arb.) (noting that the CBA provides for loss of seniority after two years on leave); Delta Nat'l Kraft, 123 Lab. Arb. Rep. (BNA) 858, 861 (2007) (Finston, Arb.) (finding just cause to discharge an employee whose leave exceeded the one year provided under CBA); AT&T Corp., 2005 Lab. Arb. Rep. (BNA) Supp. 115056 (2005) (Goldstein, Arb.) (finding just cause to discharge employee who had been accommodated but still with significant absences over a two year period); Case Corp., 120 Lab. Arb. Rep. (BNA) 449, 451 (2004) (Neigh, Arb.) (finding no violation based on discharge after thirty months of leave provided in CBA); CenterPoint Energy, 119 Lab. Arb. Rep. (BNA) 102 (2003) (Bognanno, Arb.) (holding employer did not violate CBA by discharging grievant after two years of long term disability); Sys. Sensor, 111 Lab. Arb. Rep. (BNA) 1186, 1191 (1999) (Cohen, Arb.) (finding that a 50% absence rate justified discharge); Hous. Auth. of Louisville, 111 Lab. Arb. Rep. (BNA) 121 (1998) (Heekin, Arb.) (enforcing one year leave provision in CBA based on consistent past enforcement); Cty. of Sacramento, 109 Lab. Arb. Rep. (BNA) 440, 445 (1997) (Gentile, Arb.) (finding that absences totaling 60% of work time over past year justified discharge); *Altoona Hosp.*, 102 Lab. Arb. Rep. (BNA) at 652 (finding that CBA required return to work after 12 months of leave).

190. Medco Health Sols., 128 Lab. Arb. Rep. (BNA) 1734, 1739 (2010) (Watkins, Arb.); Husky Oil Co., 65 Lab. Arb. Rep. (BNA) 47, 50 (1975) (Richardson, Arb.) (basing conclusion on review of 50 awards).

191. *See, e.g.*, *Meier Metal Servicenters, Inc.*, 100 Lab. Arb. Rep. (BNA) at 819 (explaining physical condition making employee unable to work can constitute just cause); Papercraft Corp., 85 Lab. Arb. Rep. (BNA) 962 (1985) (Hales, Arb.) (holding that employer was allowed to discharge where nature of employee's illness rendered him, perhaps forever, unable to perform work duties for which he was hired).

192. *Thermo King*, 102 Lab. Arb. Rep. (BNA) at 616-17 (explaining that the ADA does not require allowing an employee to be late or miss work whenever impairment "makes it uncomfortable for him to meet his schedule").

193. H. S. Auto., 102 Lab. Arb. Rep. (BNA) 172, 174-75 (1993) (Heekin, Arb.).

194. ATC/Vancom of Cal., 120 Lab. Arb. Rep. (BNA) 615, 618 (2004) (McKay, Arb.).

contractual provisions providing for some period of leave or a specific absenteeism policy. A discharge violated a CBA, for example, where an employee on long-term disability was discharged under a CBA that failed to provide that seniority is lost to employees on long-term disability, and no employees on long-term disability had been discharged in the past.[195] Similarly, reinstatement was required by a CBA which provided for personal leave of absence of an unlimited duration for "good and sufficient cause."[196] This arbitrator explained that "good and sufficient cause" should be based on "any absence that precedes the request, the duration of the employee's expected absence, the likelihood that he will be able to resume his duties on his return, and the business needs of the Employer."[197] Without any mention of the ADA, this analysis parallels an undue hardship analysis under that statute.[198]

Like claims involving a leave of absence, a grievant may benefit from a specific contractual provision regarding absenteeism. For example, an employer violated a CBA with a specific absenteeism policy when it attempted to unilaterally change how that policy was applied.[199] Similarly, a CBA which includes a specific absenteeism policy could not be unilaterally changed by an employer to the detriment of an employee who failed to follow the revised policy.[200]

Likewise, just cause analysis has benefitted grievants who failed to follow required processes connected with their use of leave. For example, an arbitrator relied on just cause analysis to reinstate an employee who notified human resources but not the employer's FMLA administrator that he needed to miss work due to his disability.[201] The arbitrator considered the grievant's years of service and the symptoms of his disability that interfered with his ability to report his need for time off. It should be noted, however, that the arbitrator did impose a ninety-day suspension for which the grievant would not receive back pay.[202]

Similarly, other grievants have benefitted from just cause analysis applied to their alleged failure to provide their employers with sufficient

195. Dynergy Midwest Generation, 131 Lab. Arb. Rep. (BNA) 1529, 1534-35 (2013) (Dichter, Arb.).

196. Mills Co., 120 Lab. Arb. Rep. (BNA) 1723, 1726-28 (2005) (Franckiewicz, Arb.).

197. *Id.* at 1728.

198. 42 U.S.C. § 12111(10)(A) (2017). *See, e.g.*, Cehrs v. Ne. Ohio Alzheimer's Research Ctr., 155 F.3d 775, 782 (6th Cir. 1998) (holding that the burden is on the employer to show undue hardship).

199. Avery Dennison Corp., 119 Lab. Arb. Rep. (BNA) 1170, 1182-84 (2004) (Imundo, Arb.).

200. Ga.-Pac. Corp., 108 Lab. Arb. Rep. (BNA) 90, 92-93 (1996) (Frost, Arb.).

201. Steelcraft Mfg., 136 Lab. Arb. Rep. (BNA) 1798, 1801-02 (2016) (Miles, Arb.).

202. *Id.*

medical documentation.[203] Even though one employer's policy requiring certain documentation was reasonable, the arbitrator found a lack of just cause based on the specific circumstances regarding his access to medical care and the employer's failure to give him a date certain when documentation would be necessary to avoid discharge.[204] The award reinstated the grievant effective the date he was able to return to work. But where a grievant has clearly failed to follow the requisite procedures related to use of leave, a just cause protection in a CBA will not save him.[205] These employees likely would have failed to succeed in a similar claim under the ADA or FMLA because their failure to adhere to procedural requirements would have constituted legitimate reasons for their discharges.

In line with these more employee-beneficial awards, several arbitrators have sustained grievances of employees seeking a transfer as an accommodation under contractual rights to seek such a transfer.[206] For example, an employer was required to reinstate an employee whose impairment prevented the performance of his normal duties because the CBA allowed for termination of the seniority of an employee out on injury after 36 months.[207] The arbitrator concluded that the same period of time should apply to the employer's contractual obligation to provide light duty work.[208]

Contractual obligations can also help to sustain a grievance, albeit not for a lack of just cause. For example, an arbitrator sustained the grievance of an employee whose partial incapacity prevented his performance of his previous position because the employer failed to justify its refusal to place him in another position under a CBA provision requiring "retrogression."[209]

203. Employer[Ohio] & UFCW, 200581-AAA, 136 Lab. Arb. Rep. (BNA) 1841 (2016) (Goldberg, Arb.); Interstate Brands Corp., 128 Lab. Arb. Rep. (BNA) 428, 431 (2010) (Fitzsimmons, Arb.).

204. Employer[Ohio] & UFCW, 200581-AAA, 136 Lab. Arb. Rep. (BNA) at 1847. *But see* Citgo, 133 Lab. Arb. Rep. (BNA) 114, 132-33 (2014) (Jennings, Arb.) (finding just cause for discharging employee who failed to provide medical documentation regarding his ability to return to work).

205. Whirlpool Corp., 122 Lab. Arb. Rep. (BNA) 1569, 1573 (2006) (Petersen, Arb.) (finding no reason for employee's failure to follow process).

206. S.F. Unified Sch. Dist., 114 Lab. Arb. Rep. (BNA) 140, 145 (2000) (Riker, Arb.); L.A. Cmty. Coll. Dist., 112 Lab. Arb. Rep. (BNA) 733, 739-40 (1999) (Kaufman, Arb.) (approving transfer to a position occupied by part time employee); Johns Hopkins Bayview Med. Ctr., 105 Lab. Arb. Rep. (BNA) 193, 198 (1995) (Bowers, Arb.) (explaining that reassignment for on-the-job training would have been reasonable accommodation in lieu of discharge); Kenai Borough Emps. Assoc., 1995 LA Supp. 116269 (1995) (Landau, Arb.); Cleveland Elec. Illuminating Co., 100 Lab. Arb. Rep. (BNA) 1039, 1044 (1993) (Lipson, Arb.) (deciding employee to be placed at "any work he can do").

207. Tecumseh Box Co., 113 Lab. Arb. Rep. (BNA) 94 (1999) (Duff, Arb.).

208. *Id.* at 96.

209. Penelec First Energy Co., 133 Lab. Arb. Rep. (BNA) 1238 (2014) (Miles, Arb.); *see also Techneglass, Inc.*, 120 Lab. Arb. Rep. at 727-28 (explaining that CBA required

The arbitrator did not treat this situation as a discharge for cause, but instead analyzed the employer's contractual obligation to continue the employment of anyone who is partially incapacitated and for whom a vacancy does not exist.[210] This grievant clearly benefitted not from just cause protection, but from specific contractual language which had been applied to other employees in the past.[211] Of note is one arbitrator's comment that the contractual requirement to find suitable work for an employee whose disability prevents performance of his previous duties was a "broader obligation" than required by the ADA.[212]

The weakness of arbitration as a means to advance the rights of employees with disabilities arises when the employee cannot rely on any contractual language to support her request for an accommodation which would have prevented the discharge. For example, where a CBA does not require transfer, arbitrators often dismiss grievances on behalf of employees who are no longer able to perform their work, without requiring that the employer consider a transfer as an accommodation.[213] In one case, the arbitrator allowed the employer to justify her discharge because the employee could no longer perform the essential duties of her previous position, but failed to require that the employer consider a transfer before discharging for just cause.[214] Similarly, a second arbitrator relied on the ADA's limitation on the duty to transfer to vacant positions[215] to conclude that an employer was not obligated to bump employees with less seniority who held positions that the grievant could perform, where the CBA's seniority provision only applied to layoffs.[216] A third arbitrator explained that the employer had just cause to discharge an employee who failed to return to a position he could no longer perform, despite the existence of a "job vacancy request" program, because the grievant had failed to initiate a

placement of employee with impairment "on other work if possible").

210. *Penelec First Energy Co.*, 133 Lab. Arb. Rep. (BNA) at 1245-46.

211. *Id.* at 1246-47; *see also* Warren, Ohio Sheriff's Office, 128 Lab. Arb. Rep. (BNA) 787, 800 (2010) (Bell, Arb.) (finding grievant entitled to light duty assignment under the CBA).

212. *Techneglass*, 120 Lab. Arb. Rep. at 728.

213. U.S. Steel Corp., 134 Lab. Arb. Rep. (BNA) 1759, 1766 (2015) (Das, Arb.); Parkersburg Bedding, 118 Lab. Arb. Rep. (BNA) 1788, 1792 (2003) (Zobrak, Arb.).

214. *Jefferson-Smurfit Corp.*, 103 Lab. Arb. Rep. at 1048.

215. *See, e.g.*, White v. York Int'l Corp., 45 F.3d 357, 362 (10th Cir. 1995) (explaining that the ADA does not require an employer to promote, reassign, or create a new position for a disabled employee).

216. Flamingo Hilton-Laughlin, 108 Lab. Arb. Rep. (BNA) 545, 555-56 (1997) (Weckstein, Arb.); *see also* Henkel Corp., 110 Lab. Arb. Rep. (BNA) 1121, 1126 (1998) (West, Arb.) (requiring a transfer in violation of the seniority rights of others could impose undue hardship).

request for a transfer as required by the CBA.[217] The arbitrator dismissed any implication that the employer was responsible for initiating a transfer as an accommodation,[218] in contrast to some ADA decisions which place some obligation on the employer to provide access to transfers as an accommodation if the employer is aware that the employee with a disability can no longer perform the duties of his previous position.[219]

Some arbitrators do not reach the question of a statutory duty to accommodate where the employee has been discharged or kept on leave based on an inability to perform the duties of her previous position. For example, an arbitrator dismissed the grievance of a Red Cross employee who could no longer work around certain equipment, where the CBA included no duty to accommodate by transferring her to another position.[220] At the same time, the arbitrator noted that the employer still had "an obligation to act reasonably and to afford a work accommodation if this can be accomplished within the Collective Bargaining Agreement and with the past practice of the parties."[221]

Similarly, an employer had just cause to discharge an employee after disability leave of 24 months (provided under the CBA), without considering him for a transfer to a position he could perform, because the CBA did not "demand" such a transfer, without any consideration of the ADA's duty to accommodate.[222] It is interesting to note that a transfer to a position outside of its bargaining unit could be viewed as an unreasonable accommodation. One arbitrator failed to support a union's argument to this effect,[223] and a second determined that such a transfer would be a reasonable accommodation because the grievant could perform the duties.[224]

These awards demonstrate that where the CBA limits the authority of the arbitrator to an interpretation of the CBA, an arbitrator may rely on general principles to resolve the dispute. Where a specific contract provision applies to an employee's conduct, however, the arbitrator is likely to apply that provision without consideration of any additional rights available under the ADA. While this approach might appear to undermine employees' rights under the ADA, the outcome is consistent with ADA decisions which deny accommodations based on deference to an employer's policies, such as a seniority system which can override a request for a transfer as an

217. AT&T Sw. Bell Tel. Co., 135 Lab. Arb. Rep. (BNA) 275, 276-77, 281 (2015) (Nicholas, Arb.).
218. *Id.* at 281.
219. Hickox, *supra* note 170, at 206-10.
220. Am. Red Cross, 122 Lab. Arb. Rep. (BNA) 1441, 1445 (2006) (McDonald, Arb.).
221. *Id.*
222. Safeway Corp., 2008 Lab. Arb. Rep. Supp. (BNA) 119039 (2008) (Wages, Arb.).
223. *Id.*
224. Maint. & Indus. Servs., 116 Lab. Arb. Rep. (BNA) 293, 299 (2001) (Hart, Arb.).

accommodation[225] or an employer's leave policies.[226]

3. Employer's Interests

Even if a CBA or employer policy does not specifically address an employer's interests in discharging an employee, the second principle of just analysis asks whether the company's rule or managerial order is 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.[227] This approach allows an arbitrator to consider an employer's overall best interests in reviewing a discharge, even if the employee has not violated a specific policy of provision of a CBA.

One could argue that if the prohibition has not been adopted in policy or negotiated as part of a CBA, then an employer should not benefit from such a general presumption in its favor. But one can also argue that this general recognition of employers' interests is balanced by the countervailing recognition of mitigating circumstances which can result in the reversal of an employee's discharge, as discussed in the following section.

Issues of ability to perform often raise the question of what accommodations are reasonable or required by contract. For example, a hospital was not required to accommodate one employee by using a different disinfectant because of the potential adverse effects on other employees and patients, as well as ease of use and overall cost.[228] It should be noted that findings of just cause based on the duties of the position may be inconsistent with the ADA's obligation to remove unessential job duties[229] or transfer into a vacant position as reasonable accommodations, discussed below.[230]

Arbitrators commonly uphold an employer's determination that an employee can no longer perform her job duties, and that removal of those duties should not be required.[231] Experts have noted that an arbitrator balances the right of an employee with a disability to work and "the employer's right to manage the business efficiently."[232] An employer is not required under the ADA to remove essential job duties from a position, or

225. U.S. Airways v. Barnett, 535 U.S. 391, 406 (2002).

226. Hickox & Guzman, *supra* note 182, at 467-70.

227. *Enter. Wire Co.*, 46 Lab. Arb. Rep. (BNA) at 363.

228. S. Peninsula Hosp., 120 Lab. Arb. Rep. (BNA) 673, 679-80 (2004) (Landau, Arb.).

229. *See, e.g.*, Stone v. City of Mount Vernon, 118 F.3d 92, 100 (2d Cir. 1997) (holding that a firefighter's fire suppression duties were not essential for all other positions in the fire department).

230. Hickox, *supra* note 170, at 197-200.

231. KOVEN & SMITH, *supra* note 23, at 425-26.

232. *Id.* at 426.

assign another person to perform those duties as an accommodation.[233] Relying on both regulations and case law under the ADA, an arbitrator refused to require that Bowater remove duties involving certain tools which the grievant could not use, because removal of essential duties is not required under the ADA.[234]

On the question of reasonableness and undue hardship, the employer's temporary reassignment of essential duties does not establish that such a reassignment is a reasonable accommodation under the ADA,[235] because employers should not be "punished" by requiring as accommodation some change that it undertook voluntarily.[236] The Bowater arbitrator relied on such reasoning to find that the employer had just cause to discharge the employee who had been excused from performing certain essential duties on a temporary basis.[237]

Arbitrators have declined to require removal of essential duties even without relying on the ADA. For example, an employer demonstrated just cause to discharge an employee with a lifting restriction who could not performed regularly assigned duties without assistance, despite his argument that the lifting duties were "few and infrequent."[238] Instead, the arbitrator accepted without question the employer's position that lifting was an essential part of that position, particularly where the grievant was offered

233. 29 C.F.R. § 1630.2 (2016); *see, e.g.*, Basith v. Cook Cty., 241 F.3d 919, 929 (7th Cir. 2001) (holding that the employer did not discriminate against the grievant by not assigning essential job functions to other employees); Frazier v. Simmons, 254 F.3d 1247, 1260 (10th Cir. 2001) (recognizing that the mere fact others could do an employee's work does not show that work is nonessential); Smith v. Blue Cross Blue Shield of Kan., Inc., 102 F.3d 1075, 1076 (10th Cir. 1996) (noting that an accommodation eliminating the essential functions of a job is not reasonable); Milton v. Scrivner, Inc., 53 F.3d 1118, 1124 (10th Cir. 1995) (finding that the employer was not required to reallocate job duties so as to change the content, nature, or functions of the job).

234. Bowater, 116 Lab. Arb. Rep. (BNA) 382, 386-87 (2001) (Harris, Arb.); *see also* Flamingo Hilton-Laughlin, *108 Lab. Arb. Rep. (BNA)* at 555 (holding that an engineer's essential job functions, requiring kneeling, bending, and lifting, did not need to be adjusted by the employer).

235. *See* Lucas v. W. W. Grainger, Inc., 257 F.3d 1249, 1256 (11th Cir. 2001) (holding that the employer was not required to reassign employee to another position to reasonably accommodate the employee's injury); *see also* Terrell v. U.S. Air, 132 F.3d 621, 625 (11th Cir. 1998) (finding that the employer had no duty to create light duty positions to accommodate an employee's disability).

236. *See Basith*, 241 F.3d at 929-30 (citing Vande Zande v. State of Wis. Dep't of Admin., 44 F.3d 538, 545 (7th Cir. 1995)) (holding that employers must not be punished for accommodations); *see also* Sieberns v. Wal-Mart Stores, Inc., 125 F.3d 1019, 1023 (7th Cir. 1997) (observing that employers should not be discouraged from doing more than ADA requires).

237. *Bowater*, *116 Lab. Arb. Rep. (BNA)* at 389.

238. *Maint. & Indus. Servs.*, 116 Lab. Arb. Rep. (BNA) at 298.

help with lifting in another position.[239] The arbitrator also concluded that "redesign[ing]" positions was not a reasonable accommodation.[240]

Arbitrators have likewise recognized general employer interests in addressing the claims of employees who were discharged because they posed a threat in the workplace. One arbitrator, for example, concluded that an employer had just cause for the discharge of an employee who only threatened to become violent, reasoning that "[n]o employer is required to wait until the level of violence is reached," because "the co-workers' quality of life was seriously impacted as was the productivity of the plant."[241]

Arbitrators have been criticized in their responses to employees who engage in workplace violence, under the reasoning that employers should have the right to decide that they will not tolerate any threatening or violent employee behavior in the workplace.[242] Just cause analysis can be applied to undermine discipline for violence if committed as an act of self-defense, the grievant lacked knowledge of employers' policies which prohibited his behavior, or the subsequent investigation was flawed.[243] Consequently, some grievants with disabilities may benefit from careful just cause analysis despite an employer's assertion that she poses a threat. For example, one employer lacked just cause to discharge an employee who repeatedly contacted a coworker outside of work after a psychotic break.[244] Relying heavily on the need for nexus between the conduct and the work to rely on off duty conduct as the basis for discharge, the employer failed to establish that the grievant's actions had any effect on the employer.[245] The arbitrator explained that "[m]ere surmise, conjecture or speculation as to the adverse effect upon its operations or its business because of the nature *per se* of the

239. *Id.* at 299.

240. *Id.*

241. *See Anchor Hocking*, 125 Lab. Arb. Rep. (BNA) at 319-20 (holding that an employer's discharge of a schizophrenic employee who threatened co-workers did not violate the ADA); *see also* E.B. Eddy Paper, 121 Lab. Arb. Rep. (BNA) 1821, 1824 (2006) (Allen, Arb.) (finding employer had just cause to discharge employee who told the supervisor "I wish I had a gun with unlimited bullets to start dropping people one by one."); Anchorage Sch. Dist., 119 Lab. Arb. Rep. (BNA) 1313, 1320-21 (2004) (DiFalco, Arb.) (upholding the discharge of a grievant who was a "time bomb" ready to go off after threatening to kill others); San Diego Trolley, 112 Lab. Arb. Rep. (BNA) 323, 327 (1999) (Prayzich, Arb.) (holding that the employer had just cause to discharge grievant who possessed a gun in his locker in violation of a no weapons rule to protect safety of employees).

242. *See* Daniel V. Johns, *Action Should Follow Words: Assessing the Arbitral Response to Zero-Tolerance Workplace Violence Policies*, 24 OHIO ST. J. ON DISP. RESOL. 263, 264-65 (2009) (arguing that an employer's zero-tolerance workplace violence policy should be given deference by arbitrators to address the serious issue of workplace violence).

243. *Id.* at 271-72, 274, 279.

244. Chevron Prods. Co., 135 Lab. Arb. Rep. (BNA) 649, 652 (2015) (Riker, Arb.).

245. *Id.*

alleged misconduct, is insufficient" to establish just cause.[246]

Arbitrators show some inclination to require actual harm to justify the discharge of an employee with a disability. For example, an employer lacked just cause to discharge an employee with paranoid schizophrenia who had told his psychiatrist that he had thoughts of hurting people at work, but never threatened anyone at work in his twelve years of service there.[247] The arbitrator reinstated the employee and allowed him to remain on leave until the time that a medical professional determined it was safe for him to return to work.[248] Similarly, Walt Disney World lacked just cause to discharge an employee for threatening a co-worker via voice-mail under its zero tolerance policy, where mitigating circumstances were not considered.[249]

Arbitrators will also respect the resolution of previous incidents of discipline which the employer has negotiated to its future advantage. For example, an arbitrator enforced a last chance agreement when an employee with a disability reported to work two hours late when she overslept because of her prescribed medication.[250] The arbitrator concluded that the grievant need not be offered the opportunity to use vacation time to cover the absence, where she had not formally requested an accommodation related to her previous absences that had resulted in the last chance agreement, even though use of her vacation time would have been an excused absence.[251] The arbitrator concluded that, where a last chance agreement is in place, the only question is whether the grievant violated that agreement.[252]

These decisions demonstrate that while some arbitrators may recognize some broader employer interests in applying just cause principles, the employer may still need to establish some logical or concrete basis for its discharge of a particular grievant. These outcomes may reflect the underlying burden on the employer to establish just cause, even where some broad employer interest may support its decision to discharge.

246. *Id.* (citing KOVEN & SMITH, *supra* note 23, at 149); *see also* City of Indianapolis, 118 Lab. Arb. Rep. (BNA) 357, 362 (2003) (Kohn, Arb.) (holding that the employer lacked just cause to discharge the grievant based on an anonymous phone call accusing the employee of smoking marijuana in a city vehicle because, in part, "mere suspicion is not enough to justify a discharge").

247. Save Mart Supermarkets, 126 Lab. Arb. Rep. (BNA) 1018, 1022 (2009) (Riker, Arb.).

248. *Id.*

249. *Walt Disney World*, 127 Lab. Arb. Rep. (BNA) at 354-55.

250. Mylan Pharm., Inc., 136 Lab. Arb. Rep. (BNA) 895, 899 (2016) (Miles, Arb.).

251. *Id.* at 903-04.

252. *Id.* at 904.

4. Mitigating Circumstances

Arbitrators typically consider a variety of mitigating factors related to the individual grievant when considering whether the employer's decision to discharge was justified.[253] In claims by employees with disabilities, mitigating factors can include the person's disability, which may have contributed to the behavior that provided the reason for the discharge. Related to the person's disability, an arbitrator may consider the potential for improvement in the employee's condition or progress in rehabilitation. In addition, arbitrators consider other individual factors which mitigate against the employee's discharge, such as longevity and a good performance record. This consideration of the surrounding circumstances and the positive characteristics of the employee with a disability contrasts starkly with ADA analysis, which only considers whether the employee was otherwise qualified for the position or provided the employer with a legitimate reason for the discharge.[254]

An individual grievant's past performance often results in a finding that an employer lacked just cause for a discharge. Insubordination, while a common reason for discharge, may not be sufficient to justify a discharge, particularly where the grievant had no prior misconduct over a long tenure with the employer, and the conduct was related to an illness or impairment.[255] For example, a grocery store failed to show just cause to discharge a bagger with bipolar disorder who was accused of using profanity toward his manager[256] The discharge was not fair and reasonable under the "proper cause" clause of the CBA, based on the grievant's potential for rehabilitation, his 14 years of employment there, and the absence of any threat to safety of employees or customers.[257]

Mitigating measures also may be considered in determining whether an employer had just cause to discharge an employee based on his inability to meet performance expectations. For example, repeated errors justified the suspension, but not the discharge, of a grievant with a long job tenure who suffered from post-traumatic stress disorder related to his military service and was the victim of workplace harassment.[258] Similarly, an employer lacked good cause to discharge a 20-year employee whose performance issues were caused at least in part by a lack of training and his impairment

253. KOVEN & SMITH, *supra* note 23, at 496-500.

254. *See, e.g.,* Newell v. Alden Vill. Health Facility for Children & Young Adults, 651 F.App'x. 556, 559 (7th Cir. 2016) (holding that plaintiff was not qualified to perform essential job duties because she could not perform the essential functions of the position).

255. Polar Tank Trailer, 130 Lab. Arb. Rep. (BNA) 406, 410 (2012) (Fitzsimmons, Arb.).

256. Schnucks Mkts., 131 Lab. Arb. Rep. (BNA) 1087 (2012) (Gear, Arb.).

257. *Id.* at 1089-90.

258. Lafarge Corp., 115 Lab. Arb. Rep. (BNA) 1188, 1192 (2000) (Liebowitz, Arb.).

that warranted his assignment to light duty.[259]

An employee with health issues may benefit from mitigating circumstances even where that employee has engaged in some misconduct. For example, three different employers lacked just cause to discharge employees who unintentionally fell asleep on the job.[260] The first arbitrator relied on a finding of no just cause in favor of another grievant who fell asleep on the job when suffering from anxiety attacks.[261] One arbitrator considered the grievant's record of very little past discipline over thirty-one years with the employer,[262] while another considered the grievant's eighteen years without discipline and the post-discharge diagnosis connected to falling asleep.[263]

Similarly, arbitrators will sometimes consider mitigating factors to conclude that the employer lacked just cause for a discharge based on attendance. One arbitrator opined that the justification for discharging an employee after some period of leave depended upon several factors, including his tenure, whether the leave was caused by a workplace injury or illness, the "cost of the employee's absence . . . to the employer (in terms of dollars and efficiency)," as well as the past and anticipated length of the absence.[264] Under these criteria, the arbitrator reinstated the grievant with an opportunity to establish his ability to work within four weeks, based on his twenty-two years of service and overall good performance.[265]

A disability may be viewed as a mitigating factor for a grievant who engages in misconduct, such as two different grievants with depression who were given the opportunity for reinstatement despite becoming violent with coworkers,[266] a grievant who could not be terminated for insubordinate

259. Johnson Controls Battery Grp., 113 Lab. Arb. Rep. (BNA) 769, 773-74 (1999) (Cantor, Arb.).

260. Ga. Power Co., 129 Lab. Arb. Rep. (BNA) 481, 491-93 (Smith, Arb. 2010); Union Tank Car Co., 123 Lab. Arb. Rep. (BNA) 1473 (2007) (Dilts, Arb.); Sponge Cushion, Inc., 114 Lab. Arb. Rep. (BNA) 467, 470-471 (2000) (Gordinier, Arb.); *see also,* U.S. Foodservice, 120 Lab. Arb. Rep. (BNA) 737 (2004) (Scholtz, Arb.) (finding a lack of just cause to discharge based on DUI while on leave).

261. *Sponge Cushion, Inc.*, 114 Lab. Arb. Rep. (BNA) at 470-471.

262. *Georgia Power Co.*, 129 Lab. Arb. Rep. (BNA) at 491-93.

263. *Union Tank Car Co.*, 123 Lab. Arb. Rep. (BNA) at 1477-78 (modifying discharge to suspension without pay for nine and one-half months); *see also* SMG, 118 Lab. Arb. Rep. (BNA) 1239, 1242 (2003) (Goldberg, Arb.) (reinstating grievant without back pay based on medical condition contributing to misconduct, citing his long and successful tenure); Health Plus Inc., 110 Lab. Arb. Rep. (BNA) 618, 621 (1998) (Duff, Arb.) (finding no just cause to suspend employee of twenty-three years based on taking break related to impairment).

264. 148860-AAA, Lab. Arb. Rep. (BNA) Supp. 148860 (2012) (Grossman, Arb.); *see also Hous. Auth. of Louisville*, 111 Lab. Arb. Rep. (BNA) at 124 (finding no duty to keep position open indefinitely under "arbitral law").

265. *148860-AAA*, *supra* note 262.

266. Am. Nat'l Can Co., 106 Lab. Arb. Rep. (BNA) 289, 292 (1995) (Giblin, Arb.)

behavior because behavior was due to depression,[267] and the grievant whose threat to take unjustified medical leave was "probably" a manifestation of her mental illness.[268] Similarly, a grievant's undiagnosed herniated disc was treated as a mitigating factor to reduce his discharge to a thirty day suspension based on some unsafe behavior and his use of profanity at work.[269] The arbitrator recognized that pain can cause "temporary personality changes" and that the employer's failure to refer the grievant for a medical examination before the incident was at least a partial cause of the outburst.[270]

Similarly, three different employers lacked just cause to discharge employees for absenteeism which was directly linked to their mental illnesses, based on medical evidence presented to establish the connection between the impairments and the absences.[271] Some arbitrators may even accept evidence from non-medical sources to justify a grievant's absence.[272] As with one's inability to perform job duties, an impairment may only be a mitigating factor with regard to absenteeism if the employer has knowledge of it before imposing discipline.[273]

Just cause analysis can likewise benefit an employee discharged for tardiness or absenteeism.[274] Recognizing an employer's right to discharge for failure to meet essential job duties, including regular attendance, one

(highlighting that employer lacked all the facts); Bethlehem Structural Prods. Corp., 106 Lab. Arb. Rep. (BNA) 452, 455-56 (1995) (Witt, Arb.) (finding that the assault was the result of grievant's depression).

267. *Laidlaw Transit Inc.*, 104 Lab. Arb. Rep. (BNA) at 305-06 (finding that employee who was not warned he must continue treatment for depression to stay employed cannot be terminated for insubordinate behavior due to his untreated disability).

268. Carrier Corp., 134 Lab. Arb. Rep. (BNA) 308, 311-12 (2014) (Heekin, Arb.).

269. Gaylord Container Corp., 107 Lab. Arb. Rep. (BNA) 431, 435 (1996) (Henner, Arb.).

270. *Id.*

271. Interstate Power & Light Co., 121 Lab. Arb. Rep. (BNA) 307, 311 (2005) (Daly, Arb.); LTV Steel Mining Co., 110 Lab. Arb. Rep. (BNA) 283, 288 (1997) (Doepken, Arb.) (finding no just cause to discharge grievant on last chance agreement where absenteeism was due to change in medication, and ordering grievant's return to active employment "upon presentation of satisfactory evidence that he is medically fit to return to work"); USS, 104 Lab. Arb. Rep. (BNA) 82, 85-86 (1994) (Dybeck, Arb.) (finding no just cause for discharge where grievant missed work to attend appointment with psychologist, despite last chance agreement).

272. Cumberland Coal, 136 Lab. Arb. Rep. (BNA) 988, 993-94 (2016) (Miles, Arb.) (citing prior arbitration awards).

273. OmniSource Corp., 129 Lab. Arb. Rep. (BNA) 818, 821 (2011) (Coyne, Arb.).

274. *See, e.g.*, Kautex Textron, 125 Lab. Arb. Rep. (BNA) 746, 749 (2007) (Brunner, Arb.) (finding that employer lacked just cause where attendance didn't justify discharge under employer's policy); Am. Airlines, 121 Lab. Arb. Rep. (BNA) 545 (2005) (Abrams, Arb.) (finding that grievant's illness undercut finding that grievant was either unwilling or unable to meet attendance obligations).

arbitrator found a lack of just cause under a requirement that the employee must be either unwilling or unable to meet attendance obligations in the future.[275] Thus, absences related to the symptoms of an employee's medical impairment may not show just cause.[276]

Conversely, arbitrators may consider but are not necessarily persuaded by a grievant's illness or injury as a mitigating factor, such as the grievant whose illness was aggravated by the stress he encountered at work on the day he left without permission.[277] Likewise, the personality disorders which admittedly contributed to the misconduct of three different grievants' misconduct at work did not undermine the employers' just cause for discharging them.[278] One of those arbitrators explained that "[a]n employer is not required to keep in its employ a worker who is so disabled as to demonstrate incapacity to consistently carry out required job."[279]

A disability also may not be a mitigating factor if it is not linked to the grievant's misconduct. For example, an arbitrator considered but was not persuaded by a grievant's disability in finding just cause for her discharge because her use of racially offensive terms in an e-mail was not a "spontaneous outburst" associated with her bi-polar disorder, particularly where she had been warned against engaging in such behavior.[280] A grievant may be limited in relying on an impairment as a mitigating factor if the employer was not so informed prior to imposing the discipline.[281]

Arbitrators also have the flexibility to consider mitigating factors related to an employee's misconduct, even if those facts were unknown to the employer at the time of the discharge. For example, the arbitrator for the grievance of an employee who experienced a psychotic break considered his mental state as a mitigating factor, and concluded that "[i]f a full investigation had been undertaken by the Employer this matter may well have enlightened management of the fact that the Grievant was a tormented human being who needed help."[282] The grievant was reinstated but under a

275. *Am. Airlines*, 121 Lab. Arb. Rep. (BNA) at 549.

276. *Id.* at 550.

277. *NAES Corp.*, 135 Lab. Arb. Rep. at 1709.

278. *Beckett Paper Co.*, 106 Lab. Arb. Rep. (BNA) at 1139; Nat'l Linen Supply, 107 Lab. Arb. Rep. (BNA) 4, 9 (1996) (Ross, Arb.); Rohm & Haas, 104 Lab. Arb. Rep. (BNA) 974, 977-78 (1995) (Koenig, Arb.).

279. *Nat'l Linen Supply*, 107 Lab. Arb. Rep. (BNA) at 9.

280. M T Detroit, 118 Lab. Arb. Rep. (BNA) 1777, 1782 (2003) (Allen, Arb.).

281. *Monongalia Cty. Coal Co.*, 136 Lab. Arb. Rep. (BNA) at 135.

282. *Chevron Prods. Co.*, 135 Lab. Arb. Rep. (BNA) at 653 (citing Elkouri & Elkouri, *supra* note 42, at 814-15); *see also* Growmark Inc., 100 Lab. Arb. Rep. (BNA) 785, 788 (1993) (Ver Ploeg, Arb.) (holding that grievant's hospitalization for psychiatric counseling explained failure to request leave); Pepsi-Cola Gen. Bottlers, 98 Lab. Arb. Rep. (BNA) 112, 116 (1991) (Madden, Arb.) (finding no just cause where grievant could not perform duties because of his health); Norman Brand & Melissa Biren, DISCIPLINE AND DISCHARGE IN

last chance agreement with several conditions to guard against any further inappropriate contact with the coworker.[283]

In contrast to these awards in which a grievant's disability may work in her favor to disprove just cause, a court reviewing an ADA challenge to a discharge will limit its analysis to whether the employer had a legitimate reason for the discharge and whether that reason was a pretext for discrimination.[284] This requires a plaintiff to present evidence which contradicts the facts relied upon by the employer,[285] and to avoid a motion for summary judgment, the court must find that a reasonable jury could disbelieve the employer's articulated non-discriminatory reason.[286] Nowhere in this analysis does the court require that an employer consider other circumstances or characteristics of the employee that would weigh against the decision to discharge. Instead, courts have consistently refused to act as "super-personnel departments" to prevent employers from discharging people with disabilities even for reasons related to their disability.[287]

Grievants who allegedly pose a direct threat also benefit in arbitration from evidence of a lessening of the symptoms of their impairment or rehabilitation following their discharge. Experts have noted that rehabilitation can be a persuasive, if not determinative, factor mitigating against discharge as the appropriate response to the conduct of an employee with a disability.[288] For example, a grievant with a mental illness was reinstated, despite her employer's claims that she posed a direct threat, where her behavior improved substantially, due to successful therapy, after discharge. [289] That arbitrator noted "numerous" awards, some preceding the passage of the ADA, in which arbitrators considered the post-discharge improvement of the grievant's mental state as a mitigating factor in favor of awarding reinstatement.[290] As a condition of her reinstatement on a

ARBITRATION (BNA, 2nd ed. 2008).

283. *Chevron Prods. Co.*, 135 Lab. Arb. Rep. (BNA) at 654.

284. *See, e.g.*, St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506 (1993) (finding that once the employer had supplied legitimate non-discriminatory reasons for demotion and discharge, the presumption of discrimination had been rebutted and the burden shifted to the employee to ultimately prove that reasoning was pretext for discrimination); Fuentes v. Perskie, 32 F.3d 759, 763-64 (3d Cir. 1994) (finding that employee had failed to show that both the employer's given reasons for non-discriminatory action were untrue and that discrimination was true reason behind action).

285. Tomasso v. Boeing Co., 445 F.3d 702, 706 (3d Cir. 2006).

286. Burton v. Teleflex Inc., 707 F.3d 417, 430 (3d Cir. 2013).

287. Ramona L. Paetzold, *How Courts, Employers, and the ADA Disable Persons with Bipolar Disorder*, 9 EMPL. RTS. & EMPLOY. POL'Y J. 293, 373-374 (2005).

288. KOVEN & SMITH, *supra* note 23, at 424-25.

289. AAFES Distribution, 107 Lab. Arb. Rep. (BNA) 290, 296 (1996) (Marcus, Arb.).

290. *Id.* (citing *USS*, 104 Lab. Arb. Rep. (BNA) 82; *Meijer, Inc.*, 103 Lab. Arb. Rep.

probationary basis, the grievant was ordered to continue with her treatment and agree to a release of her treatment records to the employer.[291] In contrast, a grievant's failure to demonstrate rehabilitation may undermine his grievance. For example, an arbitrator refused to reinstate an employee discharged for alcoholism, in part because the employee had failed to continue with regular counseling and took a job as a bartender after his discharge.[292]

Arbitrators have also been criticized for considering other mitigating factors when determining whether a grievant posed a direct threat in the workplace.[293] For example, an employee who had slapped a coworker was reinstated based on his supervisor's provision of a positive reference letter and a request that he work extra hours after the incident took place.[294]

Decisions under the ADA concerning whether an employee poses a direct threat only consider whether the employer reasonably believed that the plaintiff posed a direct threat in the workplace at the time of the discharge; proof of an actual threat is unnecessary.[295] An employee will only survive a motion for summary judgment if he can produce evidence that raises questions of fact as to whether he posed a threat at the time of the discharge.[296] In contrast, arbitrators often consider subsequent facts or circumstances that might undermine the employer's determination that the employee did pose a direct threat.

5. Flexibility in Remedies

A significant difference between arbitration and litigation under the ADA is the availability of a variety of remedies. Arbitrators typically follow

(BNA) 834; Duquesne Light Co., 90 Lab. Arb. Rep. (BNA) 696 (1988) (Probst, Arb.); UC Agric. Prods. Co., Inc., 89 Lab. Arb. Rep. (BNA) 432 (1987) (Anderson, Arb.)).

291. *Id.* at 297.

292. Keystone Steel & Wire Co. 114 Lab. Arb. Rep. (BNA) 1466, 1472 (2000) (Goldstein, Arb.); *see also* Packaging Corp. of Am., 105 Lab. Arb. Rep. (BNA) 591, 594-95 (1995) (Hewitt, Arb.) (finding that an employee with delayed stress reaction could not establish that the problem that caused misconduct was corrected).

293. Johns, *supra* note 240, at 280-81.

294. Sodexho Mgmt., Inc., 123 Lab. Arb. Rep. (BNA) 1643, 1647-48 (2007) (Kaufman, Arb.).

295. *See, e.g.*, Jarvis v. Potter, 500 F.3d 1113, 1122 (10th Cir. 2007) (finding that an employer reasonably believed there was a direct threat posed by an employee with worsening symptoms of Post-Traumatic Stress Disorder given the nature and severity of the potential risk, the likelihood that the potential harm would occur, and the imminence of the potential harm).

296. *See, e.g.*, McFadden v. Wash. Metro. Area Transit Auth., 204 F. Supp. 3d 134, 145-47 (D.D.C. 2016) (explaining the procedural standard for responding to a motion for summary judgment).

the tenet that one should not substitute his judgment regarding discipline for that of management unless the penalty of discharge was excessive, unreasonable or that management abused its discretion.[297] At the same time, if an employer's policy does not go further and state which circumstances might justify discipline less than a discharge, or even no discipline, an arbitrator must apply common sense, past practice, company and industry standards, and societal standards to determine whether and to what extent a particular disciplinary decision is justified.[298]

The penalty imposed by an arbitrator can depend on the employer's past practice, including the discharge of the grievant as compared to how the employer has previously punished other employees.[299] In one study of over 2,000 discipline and discharge arbitration awards between 1982 and 2005, almost 30% were classified as "split decisions," including reinstatement with partial or no back pay, or entitlement to a future vacancy.[300] Four hundred and fifty-four awards reduced the level of discipline under just cause analysis, based on one or more mitigating factors.[301] The most common mitigating factors relied upon were the punishment being too severe for the offense, a good work record, a lack of progressive discipline, and length of service.[302]

Under the limited judicial review of arbitration awards discussed earlier, an arbitrator is free to reduce the punishment imposed, despite some violation of a clear employer policy, if employees were not previously aware that discharge could result from a violation of that policy.[303] As one court explained, "the general practice among arbitrators is to consider just cause when assessing the degree of discipline imposed."[304] This support for finding an implied just cause requirement extends to the degree of discipline imposed by the employer.[305]

Reinstatement without full back pay is common where the grievant is somehow deemed to be "at fault" even though the employer lacked just cause for discharge.[306] For example, an employer lacked just cause to discharge an

297. Franz Food Prods., 28 Lab. Arb. Rep. (BNA) 543, 548 (1953) (Bothwell, Arb.).

298. ST. ANTOINE, *supra* note 37, at 185.

299. KOVEN & SMITH, *supra* note 23, at 20.

300. Cooper, *supra* note 92, at 429.

301. *Id.* at 420.

302. *Id.* at 420.

303. *See, e.g.*, Gloucester Terminals, LLC v. Teamsters Local Union 929, No. 16-5322, 2017 U.S. Dist. LEXIS 77486 at *13-19 (E.D. Pa. May 22, 2017).

304. *SFIC Props.*, 103 F.3d at 925.

305. Charter Commc's, LLC v. Int'l Bro. of Elec. Workers, 602 F.App'x 654, 655 (9th Cir. 2015).

306. *See, e.g.*, Hilltop Basic Res., 101 Lab. Arb. Rep. (BNA) 861, 864-65 (1993) (Krislov, Arb.) (holding that grievant's suspension was justified in part by his failure to obtain physician's certificate allowing return to work).

employee who fell asleep during his paid break, but the arbitrator still denied back pay because the grievant had failed to get treatment for his condition which led to the incident.[307]

Similarly, a Meijer cashier was reinstated to a position without customer contact after making rude statements to a customer, which were attributed to his bipolar disorder.[308] Although the mental illness did contribute to the misconduct, the arbitrator found some cause for discipline because the grievant's failure to seek treatment caused the misconduct, and that failure could not have been accommodated. This conclusion failed to consider a potential duty to provide leave as an accommodation under the ADA, as the union had suggested. Even so, the arbitrator reinstated the grievant (without back pay) based on his determination that the penalty of discharge was inappropriate, given the employer's knowledge of the disability and the relationship between the disability and the misconduct, as well as his long years of service.[309] Thus, in essence, the award provided the employee with a period of unpaid leave as a quasi-accommodation for the period of time in which he failed to seek treatment. This outcome likely placed the employee in a better position than he would have been in under the ADA, since his failure to receive treatment likely would have rendered him unqualified at the time of the discharge,[310] thereby undermining the ADA claim.

Unlike courts, arbitrators can dictate prospective relief that can result in the grievant's reinstatement while still addressing employers' concerns. For example, one arbitrator reinstated an employee with bipolar disorder who had engaged in misconduct, but imposed a suspension without pay until the employee met certain conditions indicating his readiness to return to work with his behavior under control.[311] Similarly, employers of grievants with mental illnesses have been allowed by the arbitrator to condition future employment on receipt of treatment and/or the taking of medication (which in one case was found to have contributed to alleged insubordination).[312] Similarly, an award reinstating the grievant still gave the employer the opportunity to require assurance from the grievant's doctor that he was on

307. EG & G Mound Applied Techs., 102 Lab. Arb. Rep. (BNA) 60, 64 (1993) (Heekin, Arb.); *see also* Hosp. Klean of Tex., 119 Lab. Arb. Rep. (BNA) 985, 994 (2004) (Howell, Arb.) (denying back pay for grievant who used impairment as excuse to avoid working).

308. *Meijer Inc.*, 103 Lab. Arb. Rep. (BNA) at 839-40.

309. *Id.* at 840.

310. *See, e.g.*, Green v. Burton Rubber Processing, Inc., 30 F. App'x 466, 468-70 (6th Cir. 2002) (ruling that an employee who left treatment facility after making threats was not qualified for position).

311. Schnucks Mkts., 131 Lab. Arb. Rep. (BNA) at 1090-91.

312. *Laidlaw Transit Inc.*, 104 Lab. Arb. Rep. (BNA) at 306; Gen. Elec. Co., 103 Lab. Arb. Rep. (BNA) 214, 218-19 (1994) (Cabe, Arb.).

proper medication to control his panic attacks.[313] An arbitrator's flexibility likewise is demonstrated by remedies that include requiring an independent, neutral medical evaluation of a grievant to determine his ability to meet the physical demands of the position in question.[314]

Unlike an ADA court, an arbitrator has the flexibility to condition a remedy on information only available in the future. For example, reinstatement as a remedy can be conditioned on the results of a future medical examination to determine whether the grievant is fit to return to work.[315] Other arbitrators have ordered the parties to meet and discuss a grievant's ability to return to work, with the availability of future arbitration if they are unable to agree.[316] One arbitrator explained that the grievant should only be returned to work if the parties agreed on a "solid basis on which to conclude that his medical condition no longer poses an unreasonable risk of harm to others."[317]

An even more extensive remedy was created by an arbitrator upon hearing the grievance of a discharged government employee whose assault on a coworker was closely connected to the symptoms of his disability.[318] In addition to converting the discharge to a suspension of no more than ninety days with the associated back pay, the award allowed the employer to place the grievant on a last chance agreement (despite EEOC concerns regarding last chance agreements as accommodations), access his relevant medical records and agree to a treatment plan based on the recommendations of the grievant's doctor (including monitoring to ensure adherence to medication regimen), as well as reassigning him to a different unit to avoid stressors and "for personnel relations reasons."[319]

Like employees who engage in misconduct, a just cause provision may benefit a person with a disability who cannot meet her employer's performance expectations. For example, an employer lacked just cause to discharge an employee with diabetes that contributed to his low productivity.[320] While the performance standards were reasonable and

313. *Ga. Power Co.*, 129 Lab. Arb. Rep. (BNA) at 494; *see also* Cross Oil Refining Co., 111 Lab. Arb. Rep. (BNA) 1013, 1024 (1999) (Bumpass, Arb.) (stating that an employer can require either proof of mental and emotional fitness by psychologist or psychiatrist or retraining with counselor).

314. *Noranda Aluminum*, 119 Lab. Arb. Rep. (BNA) at 222; *see also* The Ohio Moulding Corp., 1996 Lab. Arb. Rep. (BNA) Supp. 117047 (Klein, Arb.) (explaining that the discharge lacks just cause if medical opinion finds that grievant could perform the vacant position).

315. *Am. Nat'l Can Co.*, 106 Lab. Arb. Rep. (BNA) at 292.

316. *Bethlehem Structural Prods. Corp.*, 106 Lab. Arb. Rep. (BNA) at 456.

317. *Id.* at 456.

318. Dept. of Commerce, Patent & Trademark Office, 1999 Lab. Arb. Rep. (BNA) Supp. 107763 (Moore, Arb.).

319. *Id.*

320. Sysco Food Servs., 130 Lab. Arb. Rep. (BNA) 1724 (2012) (Paolucci, Arb.).

allowed under the CBA's management rights clause, the employer should have taken the employee's disability into account in determining what level of discipline should have been imposed.[321] This arbitrator returned the grievant to work with no loss of seniority, but without back pay because of "his own culpability" in failing to treat his condition and advise his supervisors of his impairment's impact on his productivity.[322] At the same time, back pay may be denied for employees who have engaged in some misconduct for which the arbitrator finds suspension or some other loss of pay to be appropriate.[323]

In contrast to these arbitration awards, which provide employees with alternatives to discharge, a court reviewing an ADA claim will only determine whether or not the discharge constituted discrimination; if not, no remedy is awarded. An arbitrator's flexibility in considering mitigating factors and fashioning remedies for employees with disabilities who have been discharged may be the single most important factor in their regaining employment. Such flexibility allows the arbitrator to recognize the interests of the employer in imposing some type of discipline, such as a suspension without pay, while allowing for the reinstatement of employees whose discharge may be the result of an impairment over which she has little control or which may not continue to affect performance or behavior in the future.

CONCLUSION

This analysis of the benefits of just cause protection for employees with disabilities demonstrates that arbitrators, if empowered to do so, can fully and fairly resolve claims that would otherwise arise under the ADA. This analysis supports courts' deference to arbitration as the forum to enforce statutory rights as well as contractual rights,[324] despite warnings that arbitration of statutory claims would result in the evisceration of rights under statutes like the ADA.[325] Thus, arbitration of just cause claims by employees with disabilities shows the viability of arbitration as an alternative venue to

321. *Id.* at 1738.

322. *Id.* at 1739; *see also Walt Disney World*, 127 Lab. Arb. Rep. (BNA) at 357 (allowing an employee to be reinstated after alleged threatening of coworker but denying back pay because he "did wrong that day"); *Am. Airlines*, 121 Lab. Arb. Rep. (BNA) at 550 (2005) (reinstating an employee who was absent due to symptoms of impairment but without back pay, because he was partially at fault for circumstances including failure to file FMLA paperwork); *Sherwin-Williams Co.*, 113 Lab. Arb. Rep. (BNA) at 1192 (reinstating an employee who should have been offered transfer as accommodation without back pay, pending agreement re: placement).

323. *See, e.g.*, Albertson's Inc., 1993 LAB. ARB. SUPP. (BNA) 102592 (Sherman, Arb. 1993) (holding that leave without pay was justified).

324. *14 Penn Plaza*, 556 U.S. at 270-74.

325. Hyde, *supra* note 5, at 984.

resolve discrimination claims. Grievants with disabilities appear to fare at least as well, if not better, compared to analogous claims resolved by the courts under the ADA.

Just cause protection places on the employer the burden of proving some legitimate reason for the employee's discharge, which can carry serious advantages for an employee with a disability who may lack access to concrete information to support her claim under the ADA. But beyond the burden of proof, arbitration of just cause claims incorporates the requirement that an employee be provided with notice of required and prohibited behavior, and provides the benefit (or the burden) of an employer's past practice in enforcing such policies. An employee with a disability can also take advantage of other contractual obligations on an employer in deciding whether her discharge was justified. While some courts applying the ADA consider related contractual rights, they are not directly obligated to do so.

Beyond specific contractual requirements, an arbitrator often considers mitigating circumstances which can benefit the employee with a disability, particularly if those circumstances demonstrate that the employee was not "at fault" in her conduct. An arbitrator's flexibility in fashioning the remedies in an award interpreting a just cause provision can also benefit employees with disabilities. As an alternative to discharge, a suspension without pay or even an obligation to provide additional medical information may be a welcome outcome.

Arbitration may not be perfect, and outcomes often depend on the authority an arbitrator is given under a collective bargaining agreement. Even so, this forum provides an opportunity for employees with disabilities to challenge employer assumptions about their value in the workplace. They may gain reinstatement, even in situations which would not result in a similar outcome in ADA litigation. With proper oversight of the arbitration process and vigorous representation by the employee's union or outside counsel, just cause protection may be the best route to improving the participation and retention of employees with disabilities in the workplace.