

ABSENTEEISM

Arbitrator Robert Mueller stated in an opinion and award, that “The conduct of an efficient business operation requires that the work force be available and on the job when scheduled. Allowing employees to disrupt this scheduling by their own starting time would be a completely unreasonable position.” *Evert Container Corp.* 30 LA 667, 671 (Mueller, 1958). Other arbitrators add the element of competition, in that “an employer cannot maintain efficiency and the ability to compete if employees cannot be depended upon to work with reasonable regularity. *Martin Electric*, 49 LA 745 (Dworkin, 1967).

Beyond this general principle, arbitrator views diverge. Some arbitrators view the incidence of absenteeism as non-performance rather than misconduct, which presumably carries stronger penalties. The difference may be one of semantics, because the result is the same: removal or corrective discipline. Other arbitrators treat the cases as a straightforward discipline issue, in which any combination of excused and unexcused absences amounts to misconduct.

Excused or Unexcused?

Whether an absence should be excused or unexcused is a question of fact. The employer knows two things: 1) the employee has all of the facts to determine whether he or she should be excused and 2) the employee most often acts in their own interest (as one needs to when the issue is personal health). Like employers, arbitrators prefer doctor’s notes or some other documentation that the employee’s absence was excused. Here is where there are so many possibilities, that it is impossible to list all of the elements of an excused absence. Employers, and at a hearing, arbitrators) have to consider the nature of the illness, the circumstances of a car break-down, the credibility of any other facts presented by the employee, etc.

So much of the evidence on this question goes to the appearance of credibility.” Is the doctors note complete, as to date, illness, treatment. reference to work, etc? Was the doctors note presented in a timely manner? Moreover, arbitrators expect grievants to follow the prescribed reporting procedures. An employee who doesn’t follow reporting-in rules is likely to be subject to stronger discipline because their behavior affects credibility and rehabilitative potential.

Employers who seek to discipline or discharge for unexcused absences rely upon formalized standards because arbitrators do. This principle is best summarized as follows: ‘in general, arbitrators have come to expect that discharge for absenteeism can only be grounded in well-publicized, reasonable rules applied accurately and in a fairly consistent manner [which rules embody] procedures for progressive discipline prior to discharge.’ See Rosenthal. *Arbitral Standards for Absentee Discharges*. Labor Law Journal, Dec. 1979, p. 732.

Excessive Absences Due to Injury or Illness

Arbitrators view excessive absenteeism differently, particularly when the absences are due to injury or illness. A minority of arbitrators treat the absences as a leave that the contract otherwise provides. The majority of arbitrators, however, sustain the discipline when the absences are excessive. Excessive is a non-specific term and determined on a case-by-case basis. What is excessive in one

case may not be in another. Before sustaining a discharge, arbitrators minimally require that the grievant be given notice and an opportunity to reverse the medical condition and return to work; furthermore, arbitrators require that the employer has been fair in evaluating the absentee rate, the frequency and duration of the absences, the history of the illness, the chances of recovery and the employees record. These latter elements are part and parcel of the just cause standard.

Statistical or objective data is helpful to the arbitrator in deciding what is excessive, but it is never conclusive. A just cause standard takes into account all evidence, most of which is not scientifically verifiable.

One arbitrator has written that an employer only has to prove that two elements are present to justify discharge for excessive absences due to illness or injury: 1) that the employee has a high rate of absences from work and 2) that the employee will probably be unable to return to work as a dependable employee in the future. *Kimberly-Clark Corp.*, 62 LA 1119, 1122 (Shieber, 1974). A two-step formula is appealing, but many cases are decided on other issues, including length of service and whether management did an adequate and impartial job of investigating before issuing discipline.

No-Fault Plans

No-fault attendance plans are like no-fault divorces - the reasons for the separation are irrelevant. Anything short of a hospitalization is charged against the employee's record. In other words, if the car breaks down or a family member is in crisis, the absent or tardy employee is given a point. Reach a certain number of points, and discipline automatically applies. Similarly, if the employee is not absent or tardy for certain periods of time, the employee can cleanse his or her record.

No-fault plans are intended to take authority away from the arbitrator by limiting the arbitrator to deciding whether the employee was absent under the plan. If the employee was absent as alleged, and the plan dictates the discipline/discharge, the case is closed. The arbitrator is precluded from deciding whether the employer acted with just cause, including whether the penalty was reasonable under the circumstances. Very few arbitrators have overruled no-fault plans. They expect the plan to be reasonable, period.

There have been occasions when even a reasonable plan has dictated a perverse result. In those few cases, the arbitrator has overruled the discipline. This rare situation is best summarized by Arbitrator George Roumell who ruled in one case, that "the Company owed this Grievant [27 years of service. 58 years-old] more than just a mechanical application of its policy. *Menasha Corp.*, 71 LA 658 (Roumell, 1978).

No-fault plans were specifically created so management and unions would not have to evaluate the myriad of excuses. Thus, some arbitrators do not look outside the plan. Arbitrator Jonathan Dworkin upheld discipline in which the employees were late to work after auto accidents. The union argued that state law required the employees to remain at the accident scene until the police completed the investigation. Arb. Dworkin dismissed the argument: "The laws of the state have no more influence on an employees attendance than the laws of God, nature or chance. Why should an attendance variation be excusable when caused by one law and inexcusable when caused by others.?" *P.H.*

Glatfelter Co. 103 LA 16 (Dworkin, 1993). Another respected arbitrator reached the opposite conclusion when in his case, the Civil Rights Act of 1964 obligated the employer to excuse an employee. *Alabama By-Products Corp.*, 79 LA 1320 (Clarke, 1982).

Two distinguished arbitrators have criticized the no-fault plan that excludes a just cause analysis. They feel that there must be some built-in protections for employees with low absentee rates and when an employee can “jump” from a written warning to discharge. In short, they argue that in a no-fault case, the arbitrator must be free to apply just cause principles to safeguard against perverse applications of the policy. Block & Mittenthal, *Arbitration and the Absent Employee*. Proceedings of the 37th Annual Meeting of the National Academy of Arbitrators, 77 (1985).

Is it a numerical exercise?

The question in no-fault and standard absenteeism cases is whether the numbers are persuasive. Stated another way, where is the line drawn between reasonable and excessive absences? Statistical comparisons among workers in a department or plant are useful since one would expect employees in the same place and performing the same work to have similar attendance records. But arbitrators recognize that managers seldom act on the basis of absentee rates alone. They also look at the reasons behind the absences and the individual employee.

It is important to note that even if management is able to show “numerical” accuracy in the application of discipline, the results may appear inequitable to an arbitrator. Arbitrators Block and Mittenthal give this scenario and judgment:

Consider, for instance, four employees with a 10 percent absentee rate. “H” was absent due to family problems which required his personal attention. “I” was absent due to chronic illness. “J” was absent because of a number of minor ailments all of which were verified by doctor’s slips. “K” was absent because of a claimed sickness for which he sought not medical help on account of his religious convictions. If only “H” or “K” is disciplined, can management successfully resist a union claim of disparate treatment?

Unfortunately, there is no simple formula for achieving consistency. All that can be expected is an objective investigation of the relevant facts and a reasonable exercise of discretion. Anyone who has struggled with absentee cases knows that rigid uniformity in the application of discipline is not a realistic or desirable goal. However, that does not justify a random imposition of disciplinary penalties. What is important, as Ben Aaron has stressed, is consistent purposes rather than uniform penalties. (Aaron, *The Use of the Past in Arbitration, in Arbitration Today*, Proceedings of the Eighth Annual Meeting of the National Academy of Arbitrators, BNA, 1955, p. 11) The humane exercise of discretion in individual cases may justify different responses to situations with a surface similarity. Block and Mittenthal. *ibid.* p 88.