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# ARBITRATION OF HEALTH AND SAFETY ISSUES IN THE WORKPLACE: EMPLOYEES WHO REFUSE WORK ASSIGNMENTS BECAUSE OF FEAR OF AIDS CONTAGION

Madelyn C. Squire\*

## I. INTRODUCTION: THE PROBLEM FROM TWO PERSPECTIVES

*A vacationing couple fears the popcorn they bought at a gas station is contaminated. A woman panics when an employee sneezes while scooping her ice cream. A man wonders if he could be infected by shaking hands. Some worry about using public restrooms or hot tubs or being bitten by mosquitoes.<sup>1</sup>*

Every day the National AIDS Hotline, the world's largest health information telephone service, receives more than 3,000 calls from people with concerns such as these. These queries might seem surprising when one considers that the public has been inundated with information from the medical community on how AIDS is transmitted.<sup>2</sup> However, a survey conducted by the federal government's National Center for Health Statistics (NCHS) found that misperceptions about casual transmission of AIDS persist in one-third of the adult population.<sup>3</sup> NCHS's 1990 survey revealed the following findings:

[T]he percentage of adults who correctly said that it was "very unlikely" or "not possible" to get AIDS or AIDS virus infection from

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The writer wishes to thank Lauren Z. Medlock, J.D., Howard University, 1988, whose research discussion provided the seed for this Article.

1. Cristine Russell, *What Do You Know About AIDS?*, WASHINGTON POST, Feb. 5, 1991, Health, at 7.

2. AIDS was first identified in 1981 and was initially mistaken for Kaposi's sarcoma, a disease to which AIDS victims are particularly susceptible. In 1982 the name "acquired immune deficiency syndrome" was adopted as the broader dimensions of the disease became known. The term AIDS in this Article refers to individuals who have (or are regarded as having) Acquired Immune Deficiency Syndrome ("AIDS") or AIDS related complex ("ARC") or who test positive for AIDS antibodies. Medical evidence indicates that the three primary modes of transmitting the AIDS virus are sexual contact, needle-sharing among intravenous drug users, and *in utero* transmission from infected pregnant women to their fetuses. For a brief introduction to how the AIDS virus can be transmitted, see Jana Howard Carey and Megan M. Arthur, *The Developing Law on AIDS in the Workplace*, 46 MD L REV 284, 284-88 (1987); Robert P. Wasson, Jr., *AIDS Discrimination Under Federal, State, and Local Law After Arline*, 15 FLA. ST U.L. REV. 221, 222-27 (1987); and Arthur S. Leonard, *AIDS and Employment Law Revisited*, 14 HOFSTRA L. REV. 11, 16-20 (1985).

3. Russell, *supra* note 1.

eating in a restaurant with an HIV-infected cook was only 55 percent; from sharing utensils with someone infected, 47 percent; from being coughed or sneezed on by an infected person, 47 percent; from mosquitoes or other insects, 43 percent; and from using public toilets, 61 percent.<sup>4</sup>

Even more interesting is that about three-fourths of those surveyed said AIDS could not be transmitted by working with an infected person.<sup>5</sup> This indicates that a quarter of the adult population, a fairly sizable number, would have some problems working with a person who has AIDS.<sup>6</sup> Fear of contracting a disease generally regarded as fatal, and linked in the minds of many people to negative moral implications accounts for persistent attitudes of unacceptance and distrust of medical information regarding the transmission of the AIDS virus.<sup>7</sup>

If history is any indicator, it has never been the nature of man to be gracious in the face of perceived life-threatening disease epidemics.<sup>8</sup> Carriers of contagious diseases have suffered an unfortunate fate from time immemorial. Leviticus in the Old Testament pronounced a harsh fate for the leper: "The leper, his clothes shall be rent, and his head bare, and he shall put a covering on his upper lip, and shall cry, Unclean, unclean. . . . [H]e shall dwell alone. . . ."<sup>9</sup> Civilized society has not changed much in its treatment of carriers of contagious diseases. AIDS victims can attest to

4. Russell, *supra* note 1. When competing teams of French and American scientists isolated the virus different names were used to identify it. In 1986 an international committee of scientists agreed upon the name Human Immunodeficiency Virus (HIV).

5. *Id.*

6. In another study, the New York Business Group on Health (NYBGH) surveyed 3,460 employees and found that even though the employees were knowledgeable about AIDS transmission, 25 percent to 33 percent surveyed said they would be uncomfortable eating lunch with someone with AIDS. Workers Still Express Fear of Contacting AIDS at Work, 19 O.S.H. Rep. (BNA) No. 19, at 824 (Oct. 11, 1989).

7. See Scott Burris, Comment, *Fear Itself: AIDS, Herpes and Public Health Decisions*, 3 YALE L. & POL'Y REV. 479, 504 & n.136 (1985) (reviewing the law governing state action in assessing and responding to public health threats and evaluating how the law acts to reconcile divergent views, e.g., scientific vs. ill-informed, in matters presenting threats to public health).

8. See Anne C. Roark, *Familiar Pattern; AIDS Adds to History of Epidemics*, LOS ANGELES TIMES, Feb. 23, 1986, at 1, for a historical look at some of the major human disease epidemics (e.g., leprosy, Black Death, and the influenza outbreak of 1918-19). The article posits that:

"[N]early every . . . virulent outbreak of illness seems to carry with it not one but two epidemics: the physical manifestations of the disease itself and society's often predictable reactions to it—denial at first, followed by hysteria, a search for scapegoats, an onrush of commercial exploiters and, finally, though not always, improved health standards and scientific insights that significantly prolong life expectancies."

9. *Id.* (quoting *Leviticus* 13:45-46 (King James)).

this fact. Modern man has proposed legislating restrictions on the activities of AIDS victims,<sup>10</sup> bringing felony charges against AIDS victims if they have had sexual relations with anyone except another AIDS victim, and tattooing the AIDS victim.<sup>11</sup>

Horror stories concerning the abuse suffered by the AIDS victim in the workplace are plentiful. There have been numerous reports about employees who have refused to work with or touch the AIDS worker, or use the same bathroom, telephone, water fountain, or pencil. It was reported that one AIDS victim was not even allowed to use his pregnant co-worker's word processor; she claimed she had once seen him sweat on the keyboard.<sup>12</sup>

Paul Cronan became painfully aware that his employer of twelve years, the New England Telephone Company, had breached his privacy by divulging in large group meetings of employees that he had AIDS. Shortly thereafter, Cronan received calls from co-workers who threatened to lynch him if he returned to work. Cronan sued his employer for breach of privacy and discrimination on the basis of his physical disability.<sup>13</sup> The case was settled out of court. Cronan was reassigned to the company's Needham, Massachusetts facility. In an interview, Ellen Boyd, spokeswoman for the company, described the work atmosphere as one where "fear was rampant among our employees."<sup>14</sup>

The notorious Department of Justice "Cooper memorandum,"<sup>15</sup> written as a response to a request from the Department of Health and Human Services on the applicability of section 504 of the Rehabilitation Act of 1973<sup>16</sup> to AIDS victims, appeared to lend support to this negative workplace atmosphere. The memorandum concluded that an AIDS victim who was otherwise qualified to work would not

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10. *Panic Fuels AIDS Initiative*, UPI, Aug. 4, 1986, available in LEXIS, Nexis library, OMNI file. UPI reported that the Prevent AIDS Now Initiative Committee (PANIC), comprised of supporters of political extremist Lyndon LaRouche, was seeking passage in California of a controversial initiative that would have restricted activities of AIDS victims. Shockingly, the measure received 500,000 valid voter signatures, well above the 394,000 needed to qualify for the ballot.

11. *AIDS Letters Insult Victims Too Sick for Sex*, UPI, Oct. 19, 1985, available in LEXIS, Nexis library, OMNI file.

12. Meryl Davids, *Panic Prevention*, PUB. REL. J., Mar. 1987, at 18.

13. *Cronan v. New England Tel. Co.*, 41 Fair Empl. Prac. Cas. (BNA) 1273 (Mass. Super. Ct. 1986).

14. Joan O'C. Hamilton et al., *The AIDS Epidemic and Business*, BUS WK., Mar. 23, 1987, at 122.

15. Charles J. Cooper, Memo from Assistant Attorney General Cooper on Application of Section 504 of the Rehabilitation Act to Persons with AIDS, Daily Lab. Rep. (BNA) No. 122, at D-1 (June 25, 1986). The opinion was written for the general counsel of the Department of Health and Human Services.

16. 29 U.S.C. § 794 (1988). Section 504 of the Rehabilitation Act of 1973 prohibits recipients of federal financial assistance under any program or activity from discriminating against a handicapped individual solely by reason of his or her handicap, where that individual is "otherwise qualified" to perform the work.

be protected from discrimination motivated by fear of contagion, because the statute prohibited only discrimination motivated solely by reason of the disabling aspects of the disease.

*School Board of Nassau County v. Arline*<sup>17</sup> rescued AIDS victims from a precarious employment future after the Cooper memorandum. Although the plaintiff in *Arline* was afflicted with tuberculosis, the case brought before the Supreme Court the question of whether a person afflicted with a contagious disease came within the protection of section 504 of the Rehabilitation Act of 1973. The Court construed section 504 as not intended to exclude those with contagious diseases who are otherwise qualified to perform the essential functions of the job.<sup>18</sup> *Arline* was a philosophical win for all persons afflicted with contagious diseases. Writing for the Court, Justice William Brennan emphatically rejected the analytical position taken by the Cooper memorandum. Brennan concluded that "[a]llowing discrimination based on the contagious effects of a physical impairment would be inconsistent with the basic purpose of section 504, which is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others."<sup>19</sup>

The specific question of whether AIDS is a handicap within the meaning of section 504 of the Rehabilitation Act of 1973 was given a positive answer in *Chalk v. United States District Court*.<sup>20</sup> Additionally, there is other federal and state legislation that accords protection to AIDS victims.<sup>21</sup> Nevertheless, it may be a hollow victory for the AIDS victim to know that she cannot be fired because of her handicap, or, if fired for that sole reason, that she must be reinstated. Laws alone cannot change a workplace atmosphere where fear of the AIDS victim is present. An employer faces a dilemma when confronted by a worker who refuses an assignment out of fear of contagion from working with an AIDS victim.<sup>22</sup> The AIDS victim

17. 480 U.S. 273 (1987).

18. The Court stated its test: a person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not otherwise eliminate that risk. *Id.* at 287 n.16.

19. *Id.* at 284.

20. 840 F.2d 701 (9th Cir. 1987) (teacher sued, claiming that reassignment out of classroom violated § 504; reassignment enjoined on appeal; held error to require that every theoretical possibility of harm be disproved; *id.* at 704-09).

21. A discussion on that issue is beyond the scope of this Article. The following articles are suggested for their coverage of this subject: Bonnie P. Tucker, *The Americans With Disabilities Act: An Overview*, 1989 U. ILL. L. REV. 923; Arthur S. Leonard, *AIDS, Employment and Unemployment*, 49 OHIO ST. L.J. 929 (1989); Carey and Arthur, *supra* note 2; Wasson, *supra* note 2.

22. There are sundry possible fact patterns in which such AIDS-related work situations could arise. See, e.g., *Stepp v. Indiana Empl. Sec. Div.*, 521 N.E.2d 350 (Ind. 1988), in which the employee-laboratory technician refused to perform tests on speci-

cannot be fired but the refusing employee can. The employer is faced with a Hobson's choice, and the refusing employee must go. In many cases the refusing employee is a long-time worker who has performed, at the least, in a satisfactory manner. Even though the employee's fear may appear to others as irrational, to the refusing employee her fear is very real. In many instances, the news media and even the scientific community have played not a small role in inciting the fear.<sup>23</sup>

In the early period, AIDS was thought to be a "gay disease"<sup>24</sup> that posed little or no risk to the general public. Women specifically were supposed to be outside the infection risk, even if they engaged in unprotected sex. By the end of 1984 a new apprehension had taken hold among medical experts—AIDS now was understood to pose a threat to the heterosexual community. What worried the public was that experts had only theories of how heterosexual transmission might occur, but no one knew precisely.<sup>25</sup> Adding to a growing public panic was a study by Masters and Johnson which reported a theoretical possibility of getting the virus from kissing, from contact with blood in a touch football game or on the soccer field, or even from a toilet seat. The two researchers warned of this risk of inadvertent viral infection,<sup>26</sup> a provocative finding that appeared to be supported by scientists' earlier detection of the virus in human tears and saliva.<sup>27</sup>

When the cause of AIDS was discovered in 1984,<sup>28</sup> Margaret Heckler, then Secretary of Health and Human Services, boldly predicted at a Washington press conference that America would produce a vaccine against the ravaging disease within two years.<sup>29</sup> Many members of the public subsequently felt betrayed by medical ex-

mens with AIDS warning labels attached; Minnesota Dep't of Corrections, 85 Lab. Arb. Rep. (BNA) 1185 (1985) (Gallagher, Arb.), where a guard refused to obey an order to conduct a "pat search" after an inmate was diagnosed as having the AIDS virus. This Article's focus is on the work situation where a co-worker refuses an assignment which brings her into contact with a fellow employee-AIDS victim. However, information presented in the Article is applicable to other AIDS-related work situations as well.

23. An employer may also incite an employee's fear. See *infra* text accompanying notes 112-13.

24. The disease was first called gay-related immune deficiency or GRID.

25. Lawrence K. Altman, *Heterosexuals and AIDS: New Data Examined*, N.Y. TIMES, Jan. 22, 1985, at C3.

26. WILLIAM H. MASTERS, VIRGINIA E. JOHNSON AND ROBERT C. KOLODNY, CRISIS HETEROSEXUAL BEHAVIOR IN THE AGE OF AIDS 25, 32, 93-94 (1988).

27. Altman, *supra* note 25.

28. Luc Montagnier and his colleagues at the Pasteur Institute in Paris and Robert C. Gallo and his colleagues at the National Cancer Institute are credited with isolating the Human Immunodeficiency Virus (HIV). For a historical report on the discovery and tracking of the virus, see William L. Heyward and James W. Curran, *The Epidemiology of AIDS in the U.S.*, SCI AM., Oct. 1988, at 72.

29. Laurie Garrett, *The First Faint Omen*, NEWSDAY, June 7, 1988, at 3.

perts, who, failing at the attempt to produce such a vaccine, finally announced the unlikelihood of a vaccine or cure before the year 2000.<sup>30</sup> With no promise of an early vaccine, Americans found that they faced an additional risk of infection from their own health institutions as evidence emerged that the AIDS virus could be transmitted through blood transfusions, organ transplants, and artificial insemination.<sup>31</sup> Moreover, the debate among some members of the scientific community as to whether the AIDS virus could be transmitted by insects alarmed the public. Articles in reputable general-circulation magazines supported such a possibility.<sup>32</sup>

A forecast by the National Academy of Sciences that the next ten years of the AIDS epidemic will be worse and more complex than the first decade has served to intensify public fear.<sup>33</sup> This situation is exacerbated by widespread public frustration and helplessness; although the scientific community has reported substantial progress in learning about the disease, there is also a sense that the disease continues to outrun the gains in medical knowledge.<sup>34</sup>

Morbidity statistics have become the harbinger of an accelerated AIDS epidemic for the 1990s. The Centers for Disease Control (CDC) estimate that 1 million to 1.5 million Americans harbor the AIDS virus and that by this year approximately 365,000 Americans will have been diagnosed as having AIDS, and 263,000 of those with AIDS will have died.<sup>35</sup>

How does all this translate to the workplace? It means more and more employers will be faced with the prospect of conflicting interests between AIDS victims and employees who, because of fear, refuse assignments that will bring them into contact with carriers of the virus. There are legal protections for the AIDS victim. But what, if any, protection does the fearful employee have?

An employee who has been disciplined and discharged for refusing a work assignment because of fear of contagion from an AIDS victim may look to a collective bargaining agreement, or the Occupational Safety and Health Act of 1970 (OSHA),<sup>36</sup> or section 502 of the La-

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30. *Id.*

31. *Australian Women Get AIDS From Artificial Insemination*, Reuters Ltd., July 25, 1985, available in LEXIS, Nexis library, OMNI file.

32. See, e.g., Katie Leishman, *AIDS and Insects*, THE ATLANTIC, Sept. 1987, at 56.

33. Michael Specter, *U.S. Report Predicts Wider Spread of AIDS*, WASHINGTON POST, June 21, 1990, at A3.

34. See Philip J. Hiltz, *3,000 Papers at AIDS Gathering Point to Gains and Frustration*, N.Y. TIMES, June 26, 1990, at C11.

35. DONALD H. J. HERMANN & WILLIAM P. SCHURGIN, THE LEGAL ASPECTS OF AIDS, § 1.03 (1991) (citing Centers for Disease Control, AIDS Weekly Surveillance Report: United States AIDS Program (Mar. 31, 1989)).

36. See 29 U.S.C. § 660(c) (1988) and 29 C.F.R. § 1977.12(b) (1991). OSHA protects the right of an employee to refuse to perform a work assignment where (1) the employee is ordered to work under conditions that the employee reasonably believes pose an imminent risk of death or serious bodily injury, and (2) the employee has

bor Management Relations Act<sup>37</sup> and section 7 of the National Labor Relations Act (NLRA)<sup>38</sup> for protection. Prospects for success under each weigh heavily on evidentiary questions in relation to tests or standards with which the statutes require compliance.

This Article focuses on whether the arbitration provision within a collective bargaining agreement offers viable protection to an employee who is disciplined or discharged<sup>39</sup> for refusing a work assignment with an AIDS victim. Specifically, this Article (1) reviews standards arbitrators apply in refusal-to-work cases involving health and safety issues, (2) evaluates how these standards operate when ap-

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reason to believe that there is not sufficient time or opportunity to seek effective redress from his employer or to apprise OSHA of the danger. See *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 19 (1980). An employee who has been disciplined or discharged for refusing to work with an AIDS victim more than likely will be unsuccessful in a claim against her employer under the OSHA regulation. In view of the extensive coverage and distribution of medical information on AIDS transmission, an employee would encounter evidentiary problems proving "reasonable belief" of the risk of contagion.

37. See Labor Management Relations (Taft-Hartley) Act § 502 (codified at 29 U.S.C. § 143 (1988)). Under section 502 employees do not violate the no-strike clause in their collective bargaining agreement when they refuse, either collectively or individually, to work "in good faith because of abnormally dangerous conditions." Nonetheless, an employee relying on section 502 is confronted with evidentiary problems similar to those in OSHA. A work stoppage under section 502 must be supported by "ascertainable, objective evidence." See *Gateway Coal Co. v. United Mine Workers*, 414 U.S. 368, 387 (1974).

38. See National Labor Relations Act § 7 (codified at 29 U.S.C. § 157 (1988)). Section 7 grants employees the right to engage in concerted activities for the purpose of mutual aid or protection. An employer discharging or disciplining employees engaged in protected concerted refusal to work because of unsafe conditions violates section 8(a)(1) of the Act. An employee covered by a collective bargaining agreement will be accorded section 7 protection if the employee's refusal to perform a work assignment is "based on a reasonable and honest belief" that she has been asked to perform a task not required under the contract. In contradistinction to OSHA and section 502 of the NLRA, section 7 requires a subjective standard of proof or a subjective standard of reasonableness, i.e., a good faith belief. However, under a collective bargaining agreement, the employee's refusal to work may be concerted but unprotected if, for example, the contract includes specific methods for protesting unsafe work conditions or has a no-strike provision. See *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 16-17 (1962); *NLRB v. City Disposal Sys.*, 465 U.S. 822, 837 (1984).

The National Labor Relations Board (NLRB) in defining concerted activity makes an important distinction between employees covered under a collective bargaining agreement and those who are not. Where there is no collective bargaining contract, an employee refusing a work assignment must show support of his actions by fellow employees. In other words, the refusal must be "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Indus. Inc. (Meyers II)*, 281 N.L.R.B. 882, 885 (1986) (quoting *Meyers I*, 268 N.L.R.B. 493, 497 (1984)), *aff'd sub nom. Prill v. N.L.R.B.*, 835 F.2d 1481 (D.C. Cir. 1987). A good faith belief about the risk of AIDS contagion cannot protect the refusing employee acting alone. See *Prill v. NLRB*, 835 F.2d at 1483-84.

39. The terms will be used interchangeably herein, with discipline encompassing discharge.



plied to employees who refuse assignments because of fear of AIDS contagion, (3) assesses whether the standards are realistic and allow arbitrators to fairly balance the conflicting interests of the employer and the refusing employee, (4) concludes that the standards applied are not realistic, and (5) offers a more realistic standard for arbitration of cases involving employees who refuse work assignments with AIDS victims because of fear of contagion.

## II. REFUSAL TO PERFORM WORK ASSIGNMENTS: WHETHER JUST CAUSE FOR DISCIPLINE OR DISCHARGE?

### A. *Just Cause: Introducing the Standard*

Forty-eight years ago, arbitrator Harry Shulman decided the well-known *Ford Motor Co.*<sup>40</sup> case that set forth the guiding principle uniformly followed in refusal-to-work grievances. In that case, the employer discharged the union committeeman for instructing production employees to refuse to accept temporary assignments to higher job classifications. During the hearing, company and union witnesses agreed that it had been a long established policy that employees could temporarily be assigned to work in lower classifications but not higher job classifications. The union contended that the discharge was without just cause since the employer's assignments to the higher classifications violated the collective bargaining agreement. Shulman firmly disagreed that the violation of the collective bargaining agreement gave reason to disobey the employer's instructions and stated the famous "work first, grieve later" principle:

Some men apparently think that, when a violation of contract seems clear, the employee may refuse to obey and thus resort to self-help rather than the grievance procedure. That is an erroneous point of view. In the first place, what appears to one party to be a clear violation may not seem so at all to the other party. . . . But, in the second place, and more important, the grievance procedure is prescribed in the contract precisely because the parties anticipated that there would be claims of violations which would require adjustment.<sup>41</sup>

The necessity for what appeared to be a harsh principle for employees to live by in the workplace was explained by Shulman:

[A]n industrial plant is not a debating society. Its object is production. When a controversy arises, production cannot wait for exhaustion of grievance procedure. While that procedure is being pursued, production must go on. And someone must have the authority to direct the manner in which it is to go on until the controversy is settled. That authority is vested in supervision. . . . It is

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40. *Ford Motor Co.*, 3 Lab. Arb. Rep. (BNA) 779 (1944) (Shulman, Arb.).

41. *Id.* at 780-81.

fairly vested there because the grievance procedure is capable of adequately recompensing employees for abuse of authority by supervision.<sup>42</sup>

Almost five decades later, arbitrators continue to apply the work first, grieve later principle while quoting the well-recognized and accepted language previously cited. Shulman did provide an exception to the work first, grieve later principle which would only apply "in the rare case where obedience would involve an unusual health hazard or similar sacrifice."<sup>43</sup> This exception has become the decisive factor in refusal-to-work grievances when health and safety of the employee are offered as justification for the refusal. Over the years the exception has become a kaleidoscope of nuances through its application to the sundry fact patterns presented in employees' grievances.

### *B. The Employer's Burden: Proving Just Cause*

An employee who has been disciplined or discharged for refusing a work assignment may ask her union to pursue the grievance through arbitration if the collective bargaining agreement so permits.<sup>44</sup> Management's charge against the employee which precipitates the grievance is insubordination. Generally the issue before the arbitrator is: Whether the employer had just cause to discipline (e.g., suspend) or discharge the grievant, and, if not, what is the appropriate remedy?

The mechanics of proof in arbitrating discipline and discharge cases (which include refusal to obey a work order) have a unique operation. Even though the grievant in actuality is the complaining party, the burden of proving just cause is placed on the employer.<sup>45</sup> Provisions of the bargaining agreement must be proffered by the employer to show (1) management's authority to effectuate the dis-

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42. *Id.* at 781.

43. *Id.* at 782.

44. Prior to arbitration, the aggrieved employee must exhaust informal grievance procedure steps specified in the collective bargaining agreement. Arbitration is the final and formal step of the process which, unlike the informal procedure, surrenders resolution of the dispute to an outsider or third party, i.e., the arbitrator. An arbitration provision that can trigger this dispute resolution process might read:

Should the Employer and the Union fail to arrive at a satisfactory adjustment of the grievance, the matter shall then be referred to arbitration within ten (10) days. The Employer and/or the Union shall file a request to the Federal Mediation and Conciliation Service (FMCS) or American Arbitration Association (AAA) to appoint an Arbitrator. The decision of the Arbitrator shall be final and binding upon the Union and the Employer. The expenses incident to the services of the Arbitrator shall be borne equally by the Employer and the Union.

45. The burden of proof weighs heavily upon the employer who, through retained contractual rights to discharge or discipline, can impose economic punishment on the employee. See Board of County Comm'rs, 83 Lab. Arb. Rep. (BNA) 185, 190 (1984) (Kulkis, Arb.).

cipline or discharge<sup>46</sup> and (2) the employee's conduct which warranted the discipline or discharge.<sup>47</sup>

Just cause under the collective bargaining agreement restricts management's power to discipline.<sup>48</sup> The just cause standard has been described as a "rule of reasonableness" which safeguards workers from disciplinary action that is unjust, arbitrary, capricious or lacks some reasonable foundation for its support.<sup>49</sup> Even where the collective bargaining agreement is devoid of specific just cause language, the arbitrator will find, absent a clear proviso to the contrary,

46. Generally the employer will rely on management rights and discipline and discharge provisions in the collective bargaining agreement along with relevant plant rules as the authority for the action taken against the employee. An example of such provisions and rules follows:

#### MANAGEMENT RIGHTS

*Subject to the provisions of this Agreement* the Union recognizes that the management of the plant and the direction of the working force are vested exclusively in the Employer, which includes, but is not limited to, the right to hire, demote, promote, suspend or discharge for *just cause*.

#### DISCIPLINE

For purposes of this Agreement, disciplinary action shall be defined as oral admonishment, written reprimands, suspensions, and removals.

Discipline is the responsibility and the right of the Employer, and it agrees that such actions shall be based on *just cause* and in accordance with applicable regulation.

The discipline provision would then set forth the procedures that must be adhered to by the employer when imposing the disciplinary action (e.g., notice within a specified time of the offense charged, investigation of the offense, and allowing the employee opportunity to respond to the charge).

#### GENERAL PLANT RULES

Any employee who violates any of the General Company Rules may be suspended or discharged, either after a warning, or immediately, without a warning.

#### INSUBORDINATION

Insubordination is defined as refusal or willful failure to satisfactorily perform a reasonable task or duty or to obey instructions as assigned or directed by a supervisor.

47. Some collective bargaining agreements set forth the type of actions employees may take in refusing a work assignment. An employee who does not comply with such a provision will be found to have *per se* violated the contract. *See, e.g.*, the collective bargaining agreement analyzed in *Jefferson City Cabinet Co.*, 50 Lab. Arb. Rep. (BNA) 213, 215-16 (1968) (Williams, Arb.): "Article XIII, Section 10, of the Agreement, provides as follows: 'If any employee or group of employees feels that any order of a supervisor is unreasonable or unjust, the employee or group of employees affected will comply but may if they choose institute a grievance over the matter.'" However, other contract provisions may bear on such a provision when safety and health issues are involved.

48. *See, e.g.*, the management rights and discipline provisions *supra* note 46.

49. Department of the Air Force, 1990 BNA Unp. Lab. Arb. LEXIS 1267, at \*13 (Neas and Tharp, Arb.), available in LEXIS, BNA library, ALLLA file. [Hereinafter all cites to LEXIS refer to the BNA library, ALLLA file.] *See also* Department of Correctional Servs., 92 Lab. Arb. Rep. (BNA) 1059, 1060 n.1 (1989) (Babiskin, Arb.).

that the just cause standard is implied in the contract.<sup>50</sup>

In *Grief Bros. Cooperage Corp.*,<sup>51</sup> Arbitrator Carroll Daugherty devised a seven-part test for determining whether an employer had just and sufficient cause for disciplining an employee. Daugherty described his test, or seven criteria, as a sort of "common law" of just cause that arbitrators have developed over the years. When the seven criteria are applied to the facts of a case, a "no" answer to any one or more of the criteria normally signifies that just and proper cause did not exist. Daugherty explains: "'[N]o' means that the employer's disciplinary decision contained one or more elements of arbitrary, capricious, unreasonable, and/or discriminatory action to such an extent that said decision constituted an abuse of managerial discretion warranting the arbitrator to substitute his judgment."<sup>52</sup> Arbitrator Daugherty's seven criteria for finding just cause are:

1. Whether the employer forewarned the employee of the possible or probable disciplinary consequences of his conduct.<sup>53</sup>
2. Whether the rule or order violated was reasonably related to the efficient and safe operation of the employer's business.<sup>54</sup>
3. Whether the employer, before disciplining the employee, attempted to discover whether the employee did in fact violate or disobey a rule or order of management.<sup>55</sup>
4. Whether the employer's investigation was fair and objective.
5. Whether the evidence against the employee was substantial.
6. Whether the employer applied its rule, orders, and penalties even-handedly.<sup>56</sup>

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50. See *City of West Frankfort*, 1990 BNA Unp. Lab. Arb. LEXIS 1292, at \*6 (Reilly, Arb.); *Formitex, Inc.*, 1988 BNA Unp. Lab. Arb. LEXIS 3841, at \*11 (Imundo, Arb.).

51. 42 Lab. Arb. Rep. (BNA) 555 (1964) (Daugherty, Arb.).

52. *Id.* at 557. The American Arbitration Association (AAA) has accepted Daugherty's criteria as a guideline for determining just cause in discipline cases. See *Indianapolis Rubber Co.*, 79 Lab. Arb. Rep. (BNA) 529, 534 (1982) (Gibson, Arb.).

53. The employee must have received actual oral or written communication that failure to obey a work order is insubordination and can result in some type of disciplinary action (e.g., suspension or discharge). *Grief Cooperage Corp.*, 42 Lab. Arb. Rep. (BNA) 555, 558 (1964) (Daugherty, Arb.).

54. The Shulman principle and exception are absorbed in criterion two. Arbitrator Daugherty has commented on this criterion:

If an employee believes that [the] said rule or order is unreasonable, he must nevertheless obey same (in which case he may file a grievance thereover) unless he sincerely feels that to obey the rule or order would seriously and immediately jeopardize his personal safety and/or integrity. Given a firm finding to the latter effect, the employee may properly be said to have had justification for his disobedience.

*Id.*

55. Arbitrator Daugherty instructs that the investigation must normally be made *before* the employer's disciplinary decision is made. *Id.*

56. Daugherty states that a "no" answer to this criterion would warrant negation or modification of the discipline imposed. *Id.*

7. Whether the degree of discipline was reasonably related to the seriousness of the employee's proven offense and the employee's prior employment record.<sup>57</sup>

Even though there is general agreement on the just cause standard, arbitrators do not agree on the quantum of proof required to prove just cause. Arbitrators' evidentiary weighting scales range from "a preponderance" at one end to "beyond a reasonable doubt" at the other.<sup>58</sup> Even so, arbitrators are uniformly guided by the nature of the employee's offense in determining the requisite quantum of proof.<sup>59</sup> Most often, arbitrators require the employer to prove just

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57. *Id.* at 557-59. While many arbitrators apply the Daugherty criteria, some will state a different test or standard. Even so, Daugherty's broad seven-part test can accommodate most of those standards. *See, e.g.,* Fruehauf Trailer Co., 16 Lab. Arb. Rep. (BNA) 666, 670 (1951) (Spaulding, Arb.) (*quoted in* Olin Corp., 90 Lab. Arb. Rep. (BNA) 1206, 1213 (1988) (Fitz-Simmons, Arb.)) ("an arbitrator will not lightly upset a decision reached by competent careful management which acts in the full light of all the facts, and without any evidence of bias, haste or lack of emotional balance."). *City of Los Angeles*, 1988 BNA Unp. Lab. Arb. LEXIS 2982 (Hoh, Arb.), declared that the function of the arbitrator in just cause discipline cases is:

not only to determine whether the employee is guilty of wrong-doing . . .  
but also to protect the interests of the employee by assuring that the causes  
for the imposition of discipline were just and equitable under all of the  
factual circumstances. . . . At minimum, arbitrators may examine the em-  
ployer's actions to determine whether they were arbitrary, capricious, or  
characterized by an abuse of discretion.

*Id.* at \*4. Arbitrator Harry Platt, as evidenced in the much-cited case of *Riley Stoker Corp.*, 7 Lab. Arb. Rep. (BNA) 764, 767 (1947) (Platt, Arb.), would also safeguard the interests of the discharged employee, but would assess whether the discharge was just and equitable by what

[a] reasonable man, mindful of the habits and customs of industrial life and  
of the standards of justice and fair dealing prevalent in the community,  
ought to have done under similar circumstances and in that light to decide  
whether the conduct of the discharged employee was defensible and the  
disciplinary penalty just.

Recent cases are in agreement with Arbitrator Platt's approach. *See, e.g.,* *Lakeside Jubilee Foods*, 95 Lab. Arb. Rep. (BNA) 358 (1990) (Berquist, Arb.); *H.J. Heinz Co.*, 95 Lab. Arb. Rep. (BNA) 82 (1990) (Ellmann, Arb.) (citing Platt's standard but applying Daugherty's test).

58. *Super-Valu Stores, Inc.*, 74 Lab. Arb. Rep. (BNA) 939, 942 (1980) (Evenson, Arb.).

59. Offenses are of two general classes: (1) those which are extremely serious (such as stealing, striking a foreman, or persistent refusal to obey a legitimate order) and call for harsh penalties, and (2) those less serious infractions of plant rules or proper conduct (such as tardiness, absence without permission, careless workmanship, insouciance) which do not call for discharge for the first offense (and may not, under the contract, for the second or third offense) but for some milder penalty aimed at correction. *See* *Department of the Air Force*, 1990 Unp. Lab. Arb. LEXIS 1267, at \*20 (Neas and Tharp, Arb.). Arbitral decisions determining the requisite quantum of proof are generally in accord that discharge for criminal actions, morally reprehensible conduct, or conduct involving moral turpitude should be subjected to the more stringent "beyond a reasonable doubt" criterion. This approach is taken "since the effect of the discharge for any of these reasons often has a far-reaching and lingering

cause by a preponderance of the evidence in refusal-to-obey cases where the employee relies on the Shulman exception.<sup>60</sup> Arbitrators view the term preponderance of the evidence as synonymous with "greater weight of evidence" or "the more valuable and persuasive force of the aggregate evidence on both sides." Because arbitrators frequently must decide between conflicting testimony, preponderance of evidence has also been described as "the more credible or probable evidence . . . [which] overcome[s] opposing presumptions and evidence."<sup>61</sup>

Applying the preponderance of evidence rule to the evidence presented by the employer, the arbitrator can evaluate, using Daugherty's seven criteria as a guide, whether the employer has established a prima facie case against the grievant. If the employer makes out a prima facie case, the burden shifts to the union representing the grievant to produce evidence in rebuttal. In a refusal to obey a work assignment case, the union should present evidence showing (1) that the employer's conduct did not meet the Daugherty criteria and (2) that the grievant comes within Shulman's exception.

### C. *The Employee's Burden: Proving the Shulman Exception*

When a grievant testifies she refused a work assignment because of safety or health hazards, the Shulman exception is introduced into the case along with some burden of proof problems. The question the arbitrator must resolve is which standard of proof should be required for the grievant to show that she comes within the exception. Arbitral standard of proof requirements have ranged from a subjective standard, i.e., whether the employee honestly believed there was a health hazard,<sup>62</sup> to a reasonable person standard, i.e.,

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effect on the life of the grievant far beyond the loss of his job . . . ." Super-Valu Stores, Inc., 74 Lab. Arb. Rep. (BNA) 939, 942 (1980) (Evenson, Arb.). Outside the criminal area a lesser degree of proof is required. See, e.g., Department of the Air Force, 1990 BNA Unp. Lab. Arb. LEXIS 1267, at \*19 (Neas and Tharp, Arbs.), where the grievant was given a ten-day suspension for a two-day unauthorized absence. The arbitrator held that "beyond a reasonable doubt" was an inappropriate standard in a minor discipline case. Cf. Olin Corp., 90 Lab. Arb. Rep. (BNA) 1206, 1212 (1988) (Fitzsimmons, Arb.), where the grievant was terminated for violating a plant rule against fighting or inciting a fight. The arbitrator held that the proof standard was "clear and convincing" since the alleged misconduct also carried a stigma of social disapproval.

60. See, e.g., T & J Indus., Inc., 79 Lab. Arb. Rep. (BNA) 697, 700 (1982) (Clark, Arb.) ("[I]t is the weight of authority that the Company has the burden of persuasively demonstrating by a preponderance of credible evidence that the . . . [discharge] is warranted.")

61. Department of the Air Force, 1990 BNA Unp. Lab. Arb. LEXIS 1267, at \*19 (Neas and Tharp, Arbs.). This opinion offers a helpful summary discussion on the mechanics of burden of proof in discipline cases. See *id.* at \*18-19.

62. See, e.g., West Penn Power Co., 89 Lab. Arb. Rep. (BNA) 1227, 1231 (1987) (Hogler, Arb.): "[E]mployees who refuse to perform unsafe work are [not] guilty of

whether the employee held a reasonable belief about the danger;<sup>63</sup> to an objective standard requiring the showing of actual danger, i.e., whether there was in fact danger or imminent hazard to life and limb.<sup>64</sup> The majority of arbitrators take the middle approach, applying the reasonable person standard.<sup>65</sup>

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insubordination . . . if the employee acts out of a sincere and genuine belief that the work is unreasonably and abnormally dangerous and presents a threat of imminent bodily harm . . . .”

63. See, e.g., *Laclede Gas Co.*, 39 Lab. Arb. Rep. (BNA) 833, 839 (1962) (Bothwell, Arb.):

[A]n employee may refuse to carry out a particular work assignment, if at the time he is given the work assignment, he reasonably believes that by carrying out such work assignment he will endanger his safety or health. . . . [T]he employee . . . also has the burden, if called upon, of showing by appropriate evidence that he had a reasonable basis for his belief.

For recent cases following this approach, see, e.g., *Lancaster Electro Plating, Inc.*, 93 Lab. Arb. Rep. (BNA) 203 (1989) (Bressler, Arb.); *Entenmann's Bakery of Fla., Inc.*, 77 Lab. Arb. Rep. (BNA) 1080 (1981) (Ness, Arb.).

64. See, e.g., *City of Aurora*, 1988 BNA Unp. Lab. Arb. LEXIS 3857, at \*10 (Hill, Arb.) (“Some arbitrators take the position that despite the good-faith belief of the grievant concerning the safety hazard if, in fact, no hazard exists he has acted insubordinately.”) (citing *Griffin Pipe Products Co.*, 72 Lab. Arb. Rep. (BNA) 1033, 1035 (1979) (Doyle, Arb.); *Hercules Inc.*, 48 Lab. Arb. Rep. (BNA) 788, 793 (1967) (Hopson, Arb.); *3M Company*, 80 Lab. Arb. Rep. (BNA) 926, 927 (1983) (Gallagher, Arb.).

65. In their determination of which proof standard to apply, arbitrators selecting the reasonable person standard have noted that their decision was in conformity with those of the majority of arbitrators. See, e.g., *Leland Oil Mill*, 91 Lab. Arb. Rep. (BNA) 905, 907 n.2 (1988) (Nicholas, Arb.) (citing Arbitrator Bothwell as summarizing the prevailing view in setting forth his reasonableness standard in *Laclede Gas Co.*, 39 Lab. Arb. Rep. (BNA) 833 (1962), *supra* note 63; *Northern Automatic Elec. Foundry*, 90 Lab. Arb. Rep. (BNA) 620, 623 (1987) (Poindexter, Arb.) (citing *FRANK ELKOURI & EDNA A. ELKOURI, HOW ARBITRATION WORKS* 713 (4th ed. 1985)); *Indianapolis Power & Light Co.*, 87 Lab. Arb. Rep. (BNA) 559, 562 (1986) (Kates, Arb.).

But see James A. Gross & Patricia A. Greenfield, *Arbitral Value Judgments in Health and Safety Disputes: Management Rights Over Workers' Rights*, 34 *BUFF L REV* 645 (1985), which found that forty-two percent of the arbitrators in the 120 refusal-to-work cases the authors reviewed (743 cases were actually examined for the article) used the objective standard. *Id.* at 650-51. In only twenty-five percent of the cases did the arbitrators apply the reasonable person standard. *Id.* at 653-54. The forty-two percent figure offered support for the article's premise that arbitral value judgments establish the standards of proof and presumptions that shape arbitrators' conceptions of health and safety cases by focusing on management rights rather than workers' rights. Therefore, arbitrators' selection of the objective standard served to place a heavier proof burden on the employee, which in turn helped to maximize an employer's control of employee discipline and, thereby, minimize employee interference with management's freedom to operate the enterprise. However, this Author's research found that the majority of arbitrators apply a reasonableness standard in safety and health cases. What may explain the different results, which this Author thinks important, is that the Gross and Greenfield case study extends from 1945 to 1984. In contrast, this Author specifically focused her case review from 1979 to 1990. Within the almost 40-year span of the Gross and Greenfield study, America's labor-management relations underwent significant changes with the promulgation of labor legislation that focused on balancing the rights of employee and employer, which in

Once the question of what proof standard to apply is settled, the next step of the grievance case, the operation of the exception, becomes more complicated. Shulman's broadly stated exception—that a refusal is proper in those rare cases where obedience would involve an unusual health hazard—has been laden with qualifications. A discussion of how arbitrators apply the exception follows. But remember, the exception operates within the orbit of the predetermined arbitral standard of proof.

An employee who invokes the exception must state, at the time of her refusal, first, that she believes or fears there is a risk to her safety or health<sup>66</sup> or the safety or health of others if the assignment is performed<sup>67</sup> and second, her reason for believing that such a risk exists.<sup>68</sup> However, arbitrators have on occasion sustained a grievance even though the employee failed to state or articulate clearly her belief of danger where the employer is aware that circumstances could produce such safety hazard. Arbitrator Grupp took this approach in *Tanner Division of New Castle Industries*,<sup>69</sup> when he ruled in favor of two grievants who refused an order to clean their work area while machines they operated were still running. At the time they declined to clean up, grievants only asked who would bear the responsibility for any damage to stock if the machine malfunctioned because the operators were not available to adjust or shut the

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turn may have had some influence on arbitral values. See Madelyn C. Squire, *The Prima Facie Tort Doctrine and a Social Justice Theory: Are They a Response to the Employment At-Will Rule?*, 51 U. PRR. L. REV. 641, 653-54 (1990) (noting that the second quarter of the twentieth century ushered in a change in the unfavorable attitude of the law toward labor with the passage and judicial approval of protective labor legislation). However, the Gross and Greenfield article is informative and interesting reading on their subject.

66. See, e.g., Peabody Coal Co., 87 Lab. Arb. Rep. (BNA) 1002, 1007 (1986) (Volz, Arb.) (holding that the mere statement by an employee that he was exercising his contractual "safety rights" without mention of specific physical conditions he believed to be unusually dangerous was insufficient).

67. See Dauphin County Prison Bd., 1989 BNA Unp. Lab. Arb. LEXIS 2982, at \*12 (Mayer, Arb.) (The exception "appl[ies] as well where the employee asserts that if he were to obey the order the safety or health of others would be in dire jeopardy."). See also Phoenix Transit Sys., 1990 BNA Unp. Lab. Arb. LEXIS 1241 (Wyman, Arb.). This opinion discussed a grievant bus driver's refusal to follow a transit system's signaling policy because of his belief that use of the prescribed signaling would put passengers and the motoring public at risk. Arbitrator Wyman, though denying the grievance, found that extending the Shulman exception to the passengers was contractually correct.

68. See City of Aurora, 1988 BNA Unp. Lab. Arb. LEXIS 3857, at \*10-11 (Hill, Arb.) ("[A]n employee may [not] claim that any task is dangerous and, on this basis alone, safely ignore [the employer's] instructions. The circumstances must appear to furnish a reasonable basis for the claimed apprehension. . . ."). See also Leland Oil Mill, 91 Lab. Arb. Rep. (BNA) 905, 907 (1988) (Nicholas, Arb.) (citing Laclede Gas Co., 39 Lab. Arb. Rep. (BNA) 833, 839 (1962) (Bothwell, Arb.); Northern Automatic Elec. Foundry, 90 Lab. Arb. Rep. (BNA) 620, 625 (1987) (Poindexter, Arb.).

69. 1989 BNA Unp. Lab. Arb. LEXIS 4834 (Grupp, Arb.).



machines down. Even though there appeared to be no expressed concern for personal safety, the arbitrator noted that the grievants were not responding to beginners in the machine shop business—the supervisors knew the danger of leaving a machine unattended. In fact, a similar incident had occurred years earlier where an unattended machine did malfunction and forcefully threw materials in the air of the shop.<sup>70</sup>

The primary, but troublesome, qualification for operation of the exception was stated by Shulman, namely, obedience to the order must subject the employee to an “unusual” health hazard or “similar” sacrifice. Unusual is used in the sense that the perceived danger is beyond the risk inherent in the employee’s job, as in *Peoples Natural Gas Co.*<sup>71</sup> In that case grievants, members of a line crew used to working outside in various weather conditions, refused to install pipeline along a public road because of snow conditions.<sup>72</sup> The arbitrator found persuasive evidence submitted by the union that the location where the crew was to install the line—a two-lane, sloping public road which the grievants had to cross with long sections of pipe weighing 80 to 100 pounds each—in conjunction with driving snow and rain gave reasonable grounds for grievants to believe they were being asked to work under abnormally dangerous conditions.

An extremely dangerous work assignment does not *ipso facto* bring the grievant within the exception. *United States Pipe & Foundry Co.*<sup>73</sup> is a case in point. The foundry’s ten-ton ladle car, which poured molten iron into smaller transfer ladles, would not move. This created an emergency because the iron, if not poured, could quickly solidify. Grievant, the company’s “electrical trouble-shooter,” was instructed by the supervisor to “enter the hole and repair the ladle car.” Grievant asked if iron would be poured from the ten-ton ladle while he worked below. He was told the pouring operation would continue, and Grievant refused to enter the hole. The arbitrator upheld grievant’s suspension. The arbitrator found working around molten iron was an inherent characteristic of foundry work and the precautions taken by the company were safe in terms of a typical foundry operation.<sup>74</sup>

Understanding the operation of Shulman’s exception can become a challenge. Variegated facts presented on the issue of whether the danger was “unusual” have created an analytical mire. *City of Los*

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70. *Id.* at \*5.

71. 1988 BNA Unp. Lab. Arb. LEXIS 3925 (Sherman, Arb.).

72. Their collective bargaining agreement stated that “when practicable, employees may not be required to work out of doors in severe weather conditions,” and required that suspension or discharge be for just cause. The arbitrator applied Shulman’s exception in conjunction with the reasonable person standard to interpret crucial contract terms of “severe” and “just cause.” *Id.* at \*4-7.

73. 84 Lab. Arb. Rep. (BNA) 770 (1985) (Singer, Arb.).

74. *Id.* at 776.

*Angeles*<sup>75</sup> is illustrative. Grievant, a refuse truck operator, would not drive one of the older White trucks because it would overheat and burn the legs of the operator. The overheating problem did not exist with the newer Peterbilt refuse trucks. The arbitrator found there was nothing "unusual or abnormal" about the safety of the White truck because the overheating-burning problem existed uniformly in all of the White trucks. Nor did the arbitrator find an unusual hazard in *Dauphin County Prison Board*<sup>76</sup> when a prison guard refused to wear a "community coat" to patrol the outside grounds out of fear he could take lice home to his pregnant wife. Evidence disclosed employees routinely took showers with a chemical solution for lice and on occasion entire cell blocks had to be deloused. The arbitrator found that exposure to lice, crabs, and scabies was very much inherent in a correctional officer's job.<sup>77</sup>

On the other hand, arbitrators have allowed the exception even though the order directed the grievant to engage in conduct that did not present an unusual or abnormal risk when performed by other employees but would present an unusual safety or health hazard when performed by the grievant. Such a situation can occur where the lack of experience or training of the grievant makes performance of the assigned job unduly hazardous.<sup>78</sup> Another situation is where the health or physical condition of the grievant makes an otherwise not inherently dangerous job abnormally hazardous if performed by the grievant. For example, in *MacDill Air Force Base*<sup>79</sup> the grievant refused to comply with an order to wear steel toe boots designed to protect employees assigned to the carpenter shop from injuries. The arbitrator concluded that wearing the boots would result in "undue exposure to a health hazard" because grievant was a diabetic, and the boots could cause serious damage to grievant's feet. Similarly, in *Kaiser Aluminum & Chemical Corp.*,<sup>80</sup> Arbitrator Corbett held the exception applied where grievant's illness, which was the basis of the refusal, made her unsafe to perform the assigned overtime work and thereby made the inherent risk of the job unreasonable.

Grievants invoking the Shulman exception should be warned: if alternative conduct was available to the employee the exception will not apply. This caveat was aptly expressed by Arbitrator Mayer, who wrote that "the burden falls upon the [grievant] to conclusively show that the imminent danger and/or health hazard was so compelling and opportunities for their correction so hopeless as to require

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75. 1988 BNA Unp. Lab. Arb. LEXIS 2982 (Hoh, Arb.).

76. 1989 BNA Unp. Lab. Arb. LEXIS 2982 (Mayer, Arb.).

77. *Id.* at \*12.

78. See *Hayes-Albion Corp.*, 73 Lab. Arb. Rep. (BNA) 819 (1979) (Foster, Arb.).

79. 1988 BNA Unp. Lab. Arb. LEXIS 4624 (Remington, Arb.).

80. 92 Lab. Arb. Rep. (BNA) 367 (1989) (Corbett, Arb.).

nothing less than a flat refusal to obey a [legitimate] order . . . ."<sup>81</sup>

Once a grievant's evidence has established that there was an unusual or abnormal health and safety hazard which subjected life or limb to risk, an employer, on rebuttal, might show that another employee or a supervisor performed the ordered work without injury. Such proffered evidence by the employer is uniformly rejected by arbitrators, who observe that the employee is "not obligated to attempt to perform the work assignment in order to see what would happen."<sup>82</sup> The question arbitrators are concerned with is not whether the grievant would have suffered injury from an abnormal hazard, but whether the grievant had a justifiable basis for believing so.<sup>83</sup> The question of the adequacy of the justification is to be judged by the facts or conditions existing at the time of grievant's refusal to obey. What the employer must show is that the conditions existing at that time constituted only remote and contingent possibilities of danger to health and safety.<sup>84</sup>

However, arbitrators must cautiously sift through the facts to distinguish "between situations that bring on discomfort and displeasure and those that pose as a significant threat to [the employee's] health and safety."<sup>85</sup> *Northern Automatic Electric Foundry*<sup>86</sup>

81. *Dauphine County Prison Bd.*, 1989 BNA Unp. Lab. Arb. LEXIS 2982, at \*12 (Mayer, Arb.). See also *Iowa Power and Light Co.*, 76 Lab. Arb. Rep. (BNA) 482, 486 (1981) (Gradwohl, Arb.), in which grievant was suspended for refusing to drive a truck he alleged had defective brakes. The suspension was upheld because the arbitrator found that there were "several reasonable alternatives . . . [grievant] was obligated to pursue . . ." Grievant, prior to the suspending event, could have submitted a repair ticket on the vehicle or taken the truck himself to the repair garage. *Id.*

82. *Laclede Gas Co.*, 39 Lab. Arb. Rep. (BNA) 833, 841 (1962) (Bothwell, Arb.).

83. See *City of West Frankfort*, 1990 BNA Unp. Lab. Arb. LEXIS 1292 (Reilly, Arb.); *MacDill Air Force Base*, 1988 BNA Unp. Lab. Arb. LEXIS 4624 (Remington, Arb.); *Peoples Natural Gas Co.*, 1988 BNA Unp. Lab. Arb. LEXIS 3925 (Sherman, Arb.); *Entenmann's Bakery of Fla., Inc.*, 77 Lab. Arb. Rep. (BNA) 1080, 1084 (1981) (Ness, Arb.).

84. See, e.g., *IMC Fertilizer*, 1990 BNA Unp. Lab. Arb. LEXIS 2653 (Mathews, Arb.). In this matter, the grievant refused to install the NEMA-1 junction box which connected the plant's electrical motors and lines. The NEMA-1 was not guaranteed watertight and was to be installed in an area where there was an extreme amount of water. As such, the grievant believed the box would endanger other workers. The arbitrator accepted the company's evidence, which showed that only upon the simultaneous occurrence of at least three unlikely contingent events could there be even a remote or theoretical possibility of an electrical hazard. See also *Fulton Seafood Indus., Inc.*, 74 Lab. Arb. Rep. (BNA) 620, 623 (1980) (Volz, Arb.) ("a reasonable basis for a fear of safety . . . must be predicated upon . . . [existing] facts and not upon a past experience under different conditions . . .").

85. *Leland Oil Mill*, 91 Lab. Arb. Rep. (BNA) 905, 908 (1988) (Nicholas, Arb.). See also *Allied Health Care Products*, 94 Lab. Arb. Rep. (BNA) 178, 183 (1990) (Cipolla, Arb.) (quoting *Chicago Transit Auth.*, 80 Lab. Arb. Rep. (BNA) 1349, 1352 (1983) (Cox, Arb.) ("Employee discomfort is not a safety or health threat which requires an alternate assignment [where the contract allows].")).

86. 90 Lab. Arb. Rep. (BNA) 620 (1987) (Poindexter, Arb.).

presented this problem to Arbitrator Poindexter. Grievant's work assignment required him to lift two 100-pound bags of material to a height of four to five feet above the ground onto a cement-type mixer, break the bag open, put it into the mixer, dump the mixer, shovel the mixture and then start the process over. Grievant contended that he walked off the job because the pace expected could not be maintained by a man of his age. The arbitrator denied the grievance, finding that the "assignment may have been hard" but did not, after only twelve minutes of work by the grievant, rise to the level of being unsafe.<sup>87</sup>

In cases where no unusual or abnormal health hazard is established, a grievant cannot fashion a safety net by showing that at the time of refusal she offered to perform another job. Arbitrators have consistently held that such an offer does not obviate the grievant's responsibility to perform the assigned job.<sup>88</sup>

Shulman's exception has rescued employees engaged in a concerted refusal to work when a no-strike clause had been included in their collective bargaining agreement. Such employees are not in violation of the bargaining contract if they act out of a justifiable belief that the work assigned is abnormally dangerous.<sup>89</sup> Additionally, arbitrators deciding group refusal cases have accepted guidance from the Labor Management Relations Act, and have even recognized or accorded notice to section 7 of the National Labor Relations Act, which grants employees the right to engage in concerted activities for the purpose of mutual aid or protection.<sup>90</sup>

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87. *Id.* at 624. The arbitrator also pointed to facts showing that the grievant left after help had arrived, other employees performed the work without safety complaints, and the work was similar to the grievant's normal duties.

88. *See* Amoco Oil Co., 87 Lab. Arb. Rep. (BNA) 889, 893 (1986) (Schwartz, Arb.). The grievant, even with safety equipment, refused to perform regular duties in an area where asbestos was being removed from plant pipes. The grievant stated that he was concerned about the health risk and requested that his supervisor assign him to another job. His discharge was upheld by the arbitrator.

89. The evidentiary standard applied may require less proof than section 502 of the LMRA. *See, e.g.*, West Penn Power Co., 89 Lab. Arb. Rep. (BNA) 1227 (1987) (Hogler, Arb.), where the bargaining contract accorded the company an "unqualified right to discipline or discharge employees participating in or encouraging" any strike, slowdown, or refusal to carry out work assignments. Even though Arbitrator Hogler found that the evidence did not establish a concerted refusal, he asserted:

[A]ssuming that the line crew had acted by mutual accord in this case, the safety issue remains as an alternate ground of decision. It is a recognized arbitral principle that employees who refuse to perform unsafe work are neither guilty of insubordination nor deemed to be strikers. As a general rule, if the employee acts out of a *sincere and genuine belief* that the work is unreasonably and abnormally dangerous and presents a threat of imminent bodily harm, his conduct is protected against discipline.

*Id.* at 1231 (emphasis supplied). *See supra* note 37 and accompanying text for discussion of section 502.

90. *See* Tanner Div. of New Castle Indus., Inc., 1989 BNA Unp. Lab. Arb. LEXIS

Moreover, arbitrators have also accorded recognition to the Occupational Safety and Health Act (OSHA) and findings of the agency administering that Act. Principles underlying the Act are noted by arbitrators as further support for applying the Shulman exception. OSHA investigative reports or findings on safety conditions at the employer's business can be admitted in arbitration cases. The findings are allowed as additional evidence on whether there was an abnormally dangerous risk.<sup>91</sup>

As illustrated, operation of the Shulman exception can be a challenge and result in defeat for the uninformed.

#### *D. Daugherty's Criteria: Application in Safety and Health Grievances*

Even though a grievant's evidence may fail to establish her entitlement to Shulman's exception, her evidence may establish lack of just cause under Daugherty's seven criteria. Three of the criteria appear to be raised more frequently than others in conjunction with the safety and health hazard defense: (1) absence or insufficiency of forewarning of possible consequences of disobeying a work order, (2) absence or insufficiency of the employer's investigation into the grievant's allegation of an abnormal work hazard, and (3) the discipline or discharge was excessive in relation to the seriousness of the offense. Arbitrator Daugherty states that a "no" answer to one or more of his criteria normally signifies that just cause did not exist.<sup>92</sup>

Daugherty's guideline regarding forewarning of possible consequences has been interpreted by arbitrators as requiring: (1) that very clear and direct instructions be given by the supervisor to the employee and (2) even more explicit warning be given to the employee of the consequences of disobeying the instructions.<sup>93</sup> The function of the direct order is to impress upon the employee the seriousness of her conduct and to give her a final opportunity to obey before disciplinary consequences attach. The direct order supersedes any prior orders relating to the same matter. Typically, a failure to respond to such prior order is overlooked should the direct

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4834, at \*5-6 (Grubb, Arb.) (worker's action was concerted activity protected under § 7 and employees can refuse to comply with orders which would reasonably be inimical to health and safety pursuant to LMRA § 502); Welco Mfg. Co., 80 Lab. Arb. Rep. (BNA) 273, 275 (1983) (Yarowsky, Arb.) (§ 7 protects concerted refusal-to-work protests).

91. See, e.g., United States Pipe and Foundry Co., 84 Lab. Arb. Rep. (BNA) 770, 776 (1985) (Singer, Arb.); Jacksonville Shipyards, Inc., 79 Lab. Arb. Rep. (BNA) 587, 589-90 (1982) (McCollister, Arb.); Hayes-Albion Corp., 73 Lab. Arb. Rep. (BNA) 819, 822 (1979) (Foster, Arb.).

92. See *supra* text accompanying notes 51-57.

93. See T & J Indus., Inc., 79 Lab. Arb. Rep. (BNA) 697, 701 (1982) (Clark, Arb.) (citing Micro Precision Gear & Mach. Corp., 31 Lab. Arb. Rep. (BNA) 575, 579-80 (1958) (Young, Arb.)).

order be properly obeyed. However, disobedience of the direct order constitutes an aggravating circumstance in assessing the penalty.<sup>94</sup> This guideline comes into issue in safety and health hazard cases because the supervisor's response to the refusal is often ambiguous. Grievants have testified that supervisors stated to them, "There is no other work available," or "Go home," without explanation.<sup>95</sup> Such statements are ambiguous. For example, did the supervisor mean that there was no substitute work for the grievant, or did she mean that disciplinary action was being imposed on the grievant at that time?

Daugherty's criteria also place an obligation on the employer to investigate the safety or health hazard complained of, and, if reasonably possible, to remove the hazard by appropriate measures before requiring performance. The employer's failure to investigate the hazard has, at times, been the crucial factor in sustaining a grievance.<sup>96</sup> This was the outcome in *Jacksonville Shipyards*.<sup>97</sup> The arbitrator held that the grievant had just cause to suspect that operating a certain crane might endanger his life; at the same time the arbitrator found that had the employer tested the crane at the time of the grievant's refusal, the grievant would have had little reason to fear for his safety.<sup>98</sup>

Grievants who cannot stand behind the protective shield of Shulman's exception are, of course, subject to imposition of a penalty. As Arbitrator Bressler described the situation in *Lancaster Electro Plating*, the grievant, who took the chance that she could prove she had a reasonable belief that the employer's instructions would endanger her safety and health, "gambled and lost."<sup>99</sup> Having lost, such grievants must persuade the arbitrator that the penalty is ex-

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94. Peabody Coal Co., 87 Lab. Arb. Rep. (BNA) 1002, 1006 (1986) (Voltz, Arb.).

95. See, e.g., City of West Frankfort, 1990 BNA Unp. Lab. Arb. LEXIS 1292, at \*4 (Reilly, Arb.) ("He only heard [the superintendent] tell him to go home."). See also T & J Indus., Inc., 79 Lab. Arb. Rep. (BNA) 697 (1982) (Clark, Arb.) where the grievant alleged that his supervisor did not respond to the grievant's statement that "he was going home if they didn't turn the heat back on." *Id.* at 698. When the furnace was not lit and his work area remained cold the grievant went home. *Id.*

96. Laclede Gas Co., 39 Lab. Arb. Rep. (BNA) 833, 842 (1962) (Bothwell, Arb.) (employer "was obligated to investigate [grievant's] *present* physical condition before suspending him after he had based his refusal to work on [a *previous*] back injury." *Id.* (first emphasis in original, second emphasis supplied)). See also Memphis Dinettes, Inc., 81 Lab. Arb. Rep. (BNA) 486, 488 (1983) (Welch, Arb.) (employer completely ignored grievant's health complaints as to why she could not perform the work, and continued to ignore such complaint even after she produced written medical advice from the employer's doctor).

97. Jacksonville Shipyards, Inc., 79 Lab. Arb. Rep. (BNA) 587 (1982) (McCollister, Arb.).

98. *Id.* at 590.

99. Lancaster Electro Plating, 93 Lab. Arb. Rep. (BNA) 203, 206 (1989) (Bressler, Arb.).

cessive. Arbitral authority to modify penalties is well accepted. The source of such authority resides in arbitrators' "power to discipline and . . . finally settle and adjust the disputes before [them]."<sup>100</sup>

Notwithstanding such power, arbitrators refrain from setting aside a penalty imposed by an employer unless the grievant has proven discrimination, unfairness, or capricious and arbitrary action.<sup>101</sup> Arbitrators consider the grievant's work record in determining the fairness of the penalty.<sup>102</sup> Some influential factors are the employee's prior service, length of service, performance, discipline record, and, where relevant, her psychological state, attitude,<sup>103</sup> and possibility of rehabilitation. Previous offenses, although an important factor, are not "used to discover whether [grievant] was guilty of the immediate or latest [infraction]."<sup>104</sup> Other mitigating circumstances arbitrators consider are the employer's past practice and even the attitude and conduct of the charging supervisor.<sup>105</sup> A grievant challenging a penalty may be encouraged to note that arbitrators view the disciplinary system not as authority for meting out punishment, but instead as having a corrective or rehabilitative role.<sup>106</sup>

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100. United Indus., 88 Lab. Arb. Rep. (BNA) 547, 553 (1986) (Baron, Arb.) (quoting Harry H. Platt, *The Arbitration Process in the Settlement of Labor Disputes*, 31 J. AM. JUDICATURE Soc'y 54, 58 (1947)). Arbitrator Baron cites a historical list of arbitration cases in support of this view. However, contract or submission agreements can expressly prohibit an arbitrator from modifying or reducing a penalty if the arbitrator finds that the discipline or discharge was justified. Baron notes that most current agreements do not contain such limiting clauses. *Id.*

101. See Department of the Air Force, 1990 BNA Unp. Lab Arb. LEXIS 1267 at \*13 (Neas and Tharp, Arbs.); United Indus., 88 Lab. Arb. Rep. (BNA) 547, 553 (1986) (Baron, Arb.).

102. See Olin Corp., 90 Lab. Arb. Rep. (BNA) 1206, 1215 (1988) (Fitzsimmons, Arb.) (citing Borg-Warner Corp., 22 Lab. Arb. Rep. (BNA) 589, 596 (1954) (Larkin, Arb.) ("In general . . . the past conduct of the employee in question is of concern to the arbitrator called upon to review management's disciplinary action."); United Indus., 88 Lab. Arb. Rep. (BNA) 547, 549 (1986) (Baron, Arb.).

103. In Hayes-Albion Corp., 73 Lab. Arb. Rep. (BNA) 819, 825 (1979) (Foster, Arb.), the arbitrator's award reinstated the grievants without back pay because they had sincerely believed there was a safety hazard; thus, their refusal was not a deliberate defiance of supervisory authority. A condition of reinstatement was the grievants' agreement to perform the buffing work upon the return to their jobs.

104. See Grief Bros. Cooperage Corp., 42 Lab Arb. Rep. (BNA) 555, 558-59 (1964) (Daugherty, Arb.). See also Department of the Air Force, 1990 BNA Unp. Lab. Arb. LEXIS 1267, at \*21 (Neas and Tharp, Arbs.).

105. The arbitrator in City of Los Angeles, 1988 BNA Unp. Lab. Arb. LEXIS 2982 (Hoh, Arb.), considered grievant's rapid reversal of his initial refusal to work and found the conduct of the supervisor in rejecting grievant's unconditional offer to work an abuse of discretion. Grievant's length of service—twenty years of employment with the city—was also considered. *Id.* at \*6-7.

106. See United Indus., 88 Lab. Arb. Rep. (BNA) 547, 549 (1986) (Baron, Arb.).

### III. THE SHULMAN EXCEPTION: IS IT APPLICABLE TO EMPLOYEES WHO REFUSE TO WORK WITH AIDS VICTIMS?

#### A. Operation of the Exception: Some Problems for Grievants

An employee who is disciplined or discharged for refusing to work with an AIDS victim because of fear of contagion can raise a safety and health issue. This section addresses whether such fear of contagion provides a grievant with a viable defense under the Shulman exception.

A candid response to the question is warranted. The proverbial snowball in Hades would fare better than this grievant in arbitration. To satisfy the exception, the grievant must demonstrate the existence of an unusual health hazard or similar sacrifice. Such proof requires the grievant to state at the time of refusal her reason for believing a risk of contagion from the AIDS virus exists. Pivotal to the grievant's case is that her evidentiary offer meets the arbitral standard of proof on this requirement. As previously discussed, even though there is no uniform standard, arbitrators will use a sliding scale to evaluate a grievant's belief that: (1) she in good faith believed there was a risk, (2) there was a reasonable basis for her belief, or (3) there was, in fact, actual danger of imminent harm.<sup>107</sup>

Two barriers confront the aforementioned grievant in the attempt to establish some basis for her belief that a risk of contagion exists. First, the existence of widespread medical information on the ways AIDS is transmitted<sup>108</sup> tends to discount even a subjective good faith belief.<sup>109</sup> Good faith belief has been defined as "an honest belief . . . and [a] freedom from knowledge of circumstances which ought to put [that person] upon inquiry."<sup>110</sup> With mass media coverage of each new scientific discovery relating to the AIDS virus, the grievant will be hard-pressed to demonstrate an absence of knowledge about the possibilities of casual transmission. Second, in most cases the grievant's belief will have been formulated in the absence of medical information on the health status of the AIDS victim employee, which in turn betrays nothing more than an unsupported emotional reaction to the mere presence of the AIDS victim.

Even though a grievant who refuses a work order because of fear of contagion cannot receive the protection of the Shulman exception, such evidentiary facts may warrant mitigation of the penalty, as they did in *Minnesota Department of Corrections*.<sup>111</sup> Although the grievant's refusal in that case did not involve another employee, the case is important because of the union's strategy of proffering a

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107. See *supra* text accompanying notes 62-65.

108. See *supra* note 2 and accompanying text.

109. A similar problem confronts the employee under the federal labor statutes discussed *supra* note 38 and accompanying text.

110. BLACK'S LAW DICTIONARY 693 (6th ed. 1990).

111. 85 Lab. Arb. Rep. (BNA) 1185 (1985) (Gallagher, Arb.).



subjective belief standard. The grievant, a prison guard, refused to obey an order to conduct a pat search after memoranda informed the prison community that a new inmate had contracted the AIDS virus. Arbitrator Gallagher found that discharge of the grievant would have been appropriate except for two mitigating factors. First, the employer was at least partly responsible for the grievant's exaggerated fear because of statements in the warden's memorandum, "which recommended against the sharing of cigarettes and advised the washing of hands . . ."<sup>112</sup> The memorandum further warned, "'No one really knows all the ways AIDs [sic] is transmitted, so be careful.'"<sup>113</sup> Second, after denying the grievant's request to wear gloves to conduct the pat search, the warden changed his mind and permitted other guards to wear gloves in response to their fear of contamination. As a result, the grievant was awarded reinstatement without back pay.<sup>114</sup> If the union's subjective belief standard had been accepted, the grievant might not have suffered a penalty. A discussion of the union's proffered belief standard follows.

*B. A New Theory: Fashioning a "Realistic Belief" Standard*

The union's strategy in *Minnesota Department of Corrections* is significant because it offers a guide to fashioning a "realistic" belief standard under the Shulman exception when an employee refusing a work assignment raises the fear of AIDS contagion. Aware that the grievant lacked the evidence to meet an objective standard of proof (which would have required a scientific measurement of the risk of contracting AIDS from a pat search), the union pressed for application of a different standard. The union urged not a reasonable good-faith subjective standard, but a standard that used the grievant's perception—as influenced by the employer's conduct—as the measure of the risk. The warden's memorandum was a precipitating force in the grievant's fear. After reading the memorandum, the grievant told his supervisor that he was "scared to death of this virus," and wanted to know "how can it be guaranteed that I'm not going to contract this disease and take it home?"<sup>115</sup> The crux of the union's "realistic belief" standard was that the grievant's perception of the risk should be anchored to the conduct of the employer.

The union's approach would have allowed the grievant the protection of Shulman's exception, resulting in the grievant's reinstatement without penalty. Instead, the arbitrator rejected the union's proffered realistic belief standard, which in turn eliminated the exception. This meant that Daugherty's guidelines for determining just cause continued to operate. As a result, the arbitrator allowed

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112. *Id.* at 1190.

113. *Id.*

114. *Id.*

115. *Id.* at 1186-87.

the evidence of the warden's conduct to be presented as a mitigating factor on the seventh criterion, *viz.*, fairness of the penalty.

This Article posits that a grievant's realistic belief regarding contagiousness of the AIDS virus, as influenced by the employer's conduct, should be the standard applied by arbitrators in AIDS-related refusal-to-work cases. An employer cannot ignite or ignore a work force in panic due to the presence of an AIDS victim and then bring charges against employees who refuse assignments with the victim. The spread of the AIDS crisis to the work force dictates positive employer action to respond to employees' fears. An employer can create a harmonious and sensitive workplace atmosphere in place of pandemonium through promulgating AIDS-related policies and instituting planned programs to educate the workforce about the disease.<sup>116</sup> In *Minnesota Department of Corrections* the union had requested that the employer develop AIDS-related policies affecting the working conditions of the guards. The employer never responded to the union's request.

The role of the arbitrator is straightforward in the case of an employer without a policy or educational program who is confronted with an employee who refuses an assignment with an AIDS victim because of fear of contagion. In this situation, the Shulman exception would be allowed where the grievant's evidence established that the employer's action (whether one of commission or omission) in failing to maintain a rational work atmosphere contributed, at least in part, to a fearful work environment where an AIDS victim is present.

However, where the employer proffers evidence that an AIDS policy statement and educational program had been instituted and the grievant challenges the effectiveness or adequacy of either, the arbitrator must examine the policy and the program. This role of the arbitrator is not unique in health and safety cases where the work site and conditions must be considered in order to assess the justification for a grievant's realistic belief about the risk. In examining the effectiveness of the employer's AIDS-related policy and educational program, the arbitrator might consider the following factors:

1. Whether there is a published statement that clearly sets forth the employer's commitment to providing (a) fair and nondiscriminatory treatment to all employees and (b) a safe workplace that meets

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116. An education would have prevented the AIDS-related work situation which cost the District of Columbia \$20,000 in damages. While interviewing an AIDS victim, a Department of Human Services (DHS) caseworker accused him of "purposely trying to communicate the disease by coughing on her," asked him to move away from her, and held a piece of paper up to her face when he talked. The Commission on Human Rights ordered DHS not only to pay damages, but to provide AIDS education and sensitivity training to 368 workers in the department. Patrice Gaines-Carter, *AIDS Sensitivity Urged for D.C. Welfare Staff*, WASHINGTON POST, May 25, 1991, at B2.

or exceeds federal and state standards.<sup>117</sup>

2. Whether the policy statement was communicated to employees and whether the method of communication illustrated the seriousness of the employer in maintaining a harmonious work environment.

3. Whether the employer, prior to the AIDS-related work refusal, implemented a credible educational or counseling program to provide information and to answer employees' questions on the AIDS virus.

4. Whether employees knew of the educational or counseling program and whether the program included understandable medical facts concerning how the disease is and is not transmitted and legal issues concerning the rights of the AIDS victim and co-workers.

5. Whether there was an established plan to respond to an AIDS-related problem in the workplace.<sup>118</sup>

### C. *The Rationale for Adopting a "Realistic Belief" Standard*

In October 1986 the Surgeon General of the United States issued a public report on AIDS acknowledging a disease epidemic that "has killed thousands of people [and] . . . brought fear to the hearts of most Americans."<sup>119</sup> The Surgeon General's report urged labor and management to prepare for AIDS so that misinformation about the disease is kept to a minimum and recommended that "[o]ffices, factories, and other work sites . . . have a plan in operation for education of the work force and accommodation of AIDS or ARC [AIDS-

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117. Of course, there can be no specific rules as to the required language of a policy statement. Nevertheless, most companies will take one of three approaches in drafting a policy statement: (1) The life-threatening illness approach, which treats AIDS no differently than any other terminal illness; (2) The AIDS-specific approach which sets forth a company's commitment to deal with AIDS in the workplace in a humanitarian fashion; (3) The deliberate no-policy approach, where the employer views AIDS as an illness which is covered under the company's health and disability policies. The third approach calls for close scrutiny by the arbitrator to determine whether the company has shared in an effective way with employees a clear and well-articulated view of the safety of employees working with an AIDS victim, and conveyed that discrimination against the AIDS victim will not be tolerated. Three references that may be useful in designing policy statements are VICTOR SCHACHTER & THOMAS E. GEIDT, *WHEN AN EMPLOYEE HAS AIDS* (1989); SAM B. PUCKETT & ALAN R. EMERY, *MANAGING AIDS IN THE WORKPLACE* (1988); RICHARD H. WEXLER, *AIDS IN THE WORKPLACE: A MANAGER'S GUIDE* (Focus: Prentice-Hall Personnel Management Series, Dec. 1987).

118. In addition to the in-house educational or counseling program, the employer may, on having a worker diagnosed with AIDS, provide in-house professional counseling to help employees cope with emotions in working with a fellow worker whose physical condition is terminal and deteriorates before their eyes.

119. C. EVERETT KOOP, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, SURGEON GENERAL'S REPORT ON ACQUIRED IMMUNE DEFICIENCY SYNDROME 3 (1986).

related complex] patients *before* the first such case appears at the work site."<sup>120</sup>

In spite of the Surgeon General's report, many employers have been slow to respond to this creeping workplace crisis.<sup>121</sup> Responsible surveys reveal that business leaders' knowledge and attitudes about AIDS are no better than the general public's. One study found that almost forty percent of the companies surveyed would limit contact between employees with AIDS and co-workers, sixteen percent would encourage workers with AIDS or with HIV (human immunodeficiency virus—the AIDS virus) to resign, and thirty percent would tell co-workers confidential information about workers with AIDS without consent.<sup>122</sup> A growing segment of company administrators has urged businesses to institute educational programs as a fundamental vehicle for communicating to the work force factual information about the disease. Supporters of these programs point out they would "help to clarify perceptions of a worker's own risk behavior, demystify the disease, and manage unwarranted fears."<sup>123</sup> Nonetheless, a survey of businesses located in cities with a high population density reveals that a disappointingly low number of companies have instituted formal policies regarding the disease. For example, in Chicago ninety-six percent of the 255 businesses responding stated they did not have a formal AIDS policy and eighty-nine percent had no plans to institute one in the near future; in New York ninety-two percent of 120 companies responding had no formal policy and eighty-three percent plan none; ninety-four percent of the 263 respondents in Detroit had no formal policy and eighty percent plan none; and in the Cleveland area eighty-eight percent of 96 responding had no formal policy and ninety-five percent plan none.<sup>124</sup>

Management and labor in the federal sector have made greater progress than their private-sector counterparts in confronting the impending workforce crisis. The Office of Personnel Management (OPM) has issued AIDS guidelines or policies for federal employers that are designed to assist federal agencies in establishing effective

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120. *Id.* at 32.

121. Mead Corporation's employee relations director characterized the growing epidemic in workplace terms, stating "[i]t's not a question of whether . . . companies will have a problem—it's a question of when." *Business Gets An Outline for AIDS Response*, CHICAGO TRIBUNE, Dec. 11, 1988, Jobs, at 1. A study of 151 Fortune 500 companies found thirty-three percent had reported cases of employees with AIDS, and another fifty percent believed they would encounter the disease in the near future. WEXLER, *supra* note 117, at 5.

122. Ira D. Singer, *AIDS Concerns for Business*, NATION'S BUSINESS, June 1989, at 75.

123. *Id.* See also Linda Saslow, *AIDS on the Job: Businesses Fight Fears and Prejudices*, N.Y. TIMES, Jan. 8, 1989, § 12LI, at 1; *Business Gets an Outline for AIDS Response*, CHICAGO TRIBUNE, Dec. 11, 1988, Jobs, at 1.

124. Shuara Wilson, *Poll: AIDS Worries at Firms Don't Lead to Formal Policies*, CRAINS CLEVELAND BUSINESS, Mar. 20, 1989, at 1.

AIDS education programs and in handling AIDS-related personnel situations in the workplace.<sup>125</sup> Agencies are encouraged to institute such education programs prior to an AIDS-related problem situation because the level of employee receptivity to accurate information is higher at that point. OPM's guidelines specifically address the workplace situation where co-workers express reluctance or threaten refusal to work with an AIDS victim:

OPM recognizes that the presence of [employees'] fears, if unaddressed in an appropriate and timely manner, can be disruptive to an organization. Usually an agency will be able to deal effectively with such situations through information, counseling, and other means. However, in situations where such measures do not solve the problem and where management determines that an employee's unwarranted threat or refusal to work with an HIV-infected employee is impeding or disrupting the organization's work, it should consider appropriate corrective or disciplinary action against the threatening or disruptive employee(s).<sup>126</sup>

Noteworthy is the fact that OPM recommends corrective or disciplinary action only after the threatening or disruptive employee has had an opportunity to participate in a planned educational or informational program about the disease.

On the federal labor side, the National Treasury Employees Union (NTEU) has instructed its locals to work with agency management to implement workshops and other programs "to reduce or prevent irrational actions and attitudes" about AIDS contagion. Moreover, NTEU has set forth a clear and firm policy on the issue of AIDS-related workplace problems: NTEU will not defend co-workers who refuse to work with an AIDS victim-employee based on fear of contagion, nor will NTEU support efforts by a co-worker to be removed from an environment in which a person with AIDS works.

OPM's and NTEU's hard-line position in dealing with disobedient co-workers is fair. Their policies or guidelines offer a balanced approach which ensures management's authority to maintain discipline for effective operation of the business (government) and advocates preventive measures in order that employees' fear of contagion is addressed before it produces a problem situation.

One writer has described vividly what the workplace environment of a business would be where an AIDS policy and a planned educational program have not been implemented:

Being unprepared for dealing with employees who contract AIDS can have a devastating effect on morale and productivity in the workplace. . . . As co-workers watch an individual become increas-

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125. *OPM's AIDS Guidelines for Federal Employers*, Daily Lab. Rep. (BNA) No. 56, at D-1 (Mar. 23, 1988).

126. *Id.*

ingly ill from complications of AIDS, they may be emotionally affected as they rarely have been before. It's a heavy burden for concerned co-workers to know that the individual's chance of survival is less than 50% over an 18-month period and that there is little they can do but sympathize. Depression, anxiety, and a host of other intense emotions will certainly affect the workplace in ways unprepared managers can hardly imagine. The problems become intensified because, unlike many other terminal illnesses, concern will be generated among employees that AIDS disease can somehow be transmitted to them or to their families. The emotional drain on co-workers, sympathy for the people with AIDS will be complicated with a fear for their own safety.<sup>127</sup>

Avoidance of AIDS-related workplace problems comes only through preplanning. Lawyers must advise their corporate clients or employers to undertake such preplanning and can offer the rationale presented in this Article. In addition, the employer must be advised to confer with union representatives when fashioning an AIDS policy statement and educational program. These efforts of labor and management will insure that the new policies and programs are consistent with the collective bargaining contract and succeed in winning employees' acceptance. Consequently, arbitrators will be able to rule on these health and safety grievances in a way that best balances the rights and obligations of the parties to the agreements.

#### IV. CONCLUSION: FAIRNESS AND AN IMPENDING CRISIS DICTATE POSITIVE WORKPLACE ACTION

Fairness to employees requires workplace educational programs and policies addressing AIDS to (1) ensure that proper signals are sent to employees from supervisors' conduct in relating to AIDS victims, and (2) offset and counteract sensationalized news coverage with current scientific information. When employees are aware of news reports such as those that tell of a new strain of the AIDS virus (HIV-2) which lingers in the body for twenty years;<sup>128</sup> or a worldwide tuberculosis epidemic fueled by the virus,<sup>129</sup> or patients being infected with AIDS by their dentist,<sup>130</sup> one must question whether the employees' fears, when not addressed through a planned educational program, are really irrational.

Where an employer has not instituted a policy and an educational program to address AIDS-related problem situations prior to their occurrence or has contributed to the situation, fairness to the em-

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127. WEXLER, *supra* note 117, at 7-8.

128. Amy Goldstein, *Maryland Finds Rare Form of AIDS Virus in 4*, WASHINGTON POST, Aug. 3, 1991, at B3.

129. Richard A. Knox, *AIDS Linked to Tuberculosis Epidemic*, BOSTON GLOBE, May 21, 1990, at 1.

130. Michael Kinsley, *Doctors, AIDS and A Costly Long Shot*, WASHINGTON POST, July 25, 1991, at A17.

ployee dictates that such evidence be allowed to establish the requisite belief about the risk of contagion under the Shulman exception. Evidence of the employer's conduct—in particular, a failure to institute an educational program and policy to neutralize employees' fear—should not be relegated to an element of penalty mitigation. When the standard of proof for the belief requirement is measured by the employee's perception anchored to the employer's conduct, the workplace will grow to more realistically reflect a workforce contending with the arrival of a deadly disease epidemic.