

The Impact of A Grievant's Offer of Apology and the Decision-Making Process of Labor Arbitrators: A Case Analysis

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ABSTRACT

This article examines what impact, if any, a grievant's offer of apology has on the decision-making process of labor arbitrations in discipline and discharge cases. In addition, this article will address how an offer of apology changes, influences and impacts arbitral outcomes. Specifically, this study examines whether, and under what circumstances, a grievant's offer of apology (or regret) can serve as the basis for a labor arbitrator to alter or lessen the amount of discipline meted out to grievants in discipline and discharge cases.

CONTENTS

I.	Purpose and Objectives	3
II.	General Significance of Apology from the Perspectives of the Offeror and Recipient	5
	A. Definition, Characteristics, and Elements of an Effective and Sincere Apology	5
	B. Effectiveness and Sincerity of Apology	7
	C. Motivating Factors and Rationale for an Apology	9

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	D. Victim's Acceptance of Apology	11
III.	What are the Legal and Arbitral Implications of Offering an Apology in the Workplace Setting?	13
IV.	What is the General Significance of the Role of Apology in Workplace Disputes?	14
V.	What is the Impact and Significance of Offering an Apology at Various ADR Stages of a Workplace Dispute?	18
	A. Negotiation Stage	18
	B. Mediation Stage	20
	C. Arbitration and Rights-Based Stage	22
VI.	Context Within Which We Are Conducting an Examination of Apology in Arbitration	24
VII.	How Do Arbitrators Define Sincerity?	26
VIII.	What Are the Evidentiary Indicia of Offering a Sincere Apology?	26
	A. To Apologize or Not Apologize: That is the Question	28
	B. The Significant Impact of a Grievant's Offer of Apology	28
	C. The Significant Impact of a Grievant's Offer of Apology	29
	D. Where a Grievant's Offer of Apology Has No Impact	32
IX.	Does the Timing of an Apology Make Any Difference?	35
	A. What Happens When the Grievant Offers an Apology Prior to the Arbitral Hearing?.....	35
	B. What Happens When the Grievant Offers an Apology During the Arbitral Hearing?	40
	C. What Happens When the Timing of an Apology Offer is Unspecified?.....	45
	D. What Happens When the Grievant Offers No Apology?.....	49
X.	What Are the Lessons Learned from Arbitrators Regarding the Impact and Significance of Offers of Apology?	53
XI.	Summary and Conclusions	55
XII.	Future Research	56

I. PURPOSE AND OBJECTIVES

An offer of apology has increasingly become commonplace in U.S. society. On a regular basis, public officials,¹ sports heroes² and celebrities³ make public (and presumably private) apologies for a number of reasons, including attempting to bring the matter at hand to a close and perhaps even obtaining forgiveness.⁴ Interestingly, however, there has been very little research examining offers of apology, remorse, or contrition by individuals in the workplace in either union or non-union settings.⁵

The overarching objective of this article is to reveal under what circumstances and conditions a grievant's sincere offer of apology affects or impacts the decision-making process of labor arbitrators, and

1. One of the more famous political apologies took place on December 11, 1998, shortly after then-President William Jefferson Clinton was impeached by the United States House of Representatives. Emerging from the White House to the Rose Garden, a seemingly contrite Clinton read a statement full of apologetic language. He said he was "profoundly sorry for all I have done wrong in words and deeds," and stated that "mere words cannot fully express the profound remorse I feel for what our country is going through and for what members of both parties in Congress are now forced to deal with." WASH. POST, *Clinton's Rose Garden Statement*, December 11, 1998, at A1; see also PAUL SLANSKY & ARLEEN SORKIN, MY BAD: 25 YEARS OF PUBLIC APOLOGIES AND THE APPALLING BEHAVIOR THAT INSPIRED THEM 178-238 (2006) [hereinafter SLANSKY & SORKIN, MY BAD].

2. Apologies for using performance-enhancing drugs, such as steroids, have been ubiquitous in this respect. See N.Y. TIMES, *Pettitte Admits Using H.G.H. and Apologizes*, December 15, 2007, at A1; L.A. TIMES, *Text of Marion Jones' Letter*, October 6, 2007, at D1. Philadelphia Eagles quarterback Michael Vick is still trying to atone for his role in operating an illegal dog-fighting operation seized in 2007. William C. Rhoden, *Vick's Path to Redemption is Clear*, N.Y. TIMES, August 28, 2009, at D3; see also SLANSKY & SORKIN, MY BAD, *supra* note 1, at 119-47.

3. See, e.g., Eric Zorn, *Explanations Seek Truth, Not Excuses*, CHI. TRIB., Nov. 26, 2006, § 4, at 2 (discussing the incident where former *Seinfeld* star Michael Richards uttered racial epithets at a heckler during a stand-up comedy routine); Virginia Heffernan, *Bewildered-Sounding Man and Bewildering Words*, N.Y. TIMES, Nov. 22, 2006, at E6 (describing Richards's subsequent apology on *The Late Show With David Letterman* as "stumbling"); see also SLANSKY & SORKIN, MY BAD, *supra* note 1, at 114-18.

4. For a general discussion of the reasons people offer and seek forgiveness, see ANI KALAYJIAN & RAYMOND F. PALOUTZIAN, FORGIVENESS AND RECONCILIATION: PSYCHOLOGICAL PATHWAYS TO CONFLICT TRANSFORMATION AND PEACE BUILDING (2009); Norvin Richards, *Forgiveness*, 99 ETHICS 77 (1988).

5. Michelle M. Hoyman, Lamont E. Stallworth & David Kershaw, *The Decision-Making of Labor Arbitrators in Discipline and Discharge Cases Where a Grievant Offers an Apology: A Policy Capturing Study*, 62 PROC. NAT'L ACAD. ARBITRATORS 399 (2009) [hereinafter Hoyman et al., *The Decision-Making of Labor Arbitrators in Discipline and Discharge Cases*].

to what extent labor arbitrators change and reduce the degree of discipline (including discharge) initially imposed by employers.⁶ The answer to these questions will serve to benefit each of the three parties involved in the grievance handling and labor arbitration processes: *i.e.* the management representative, the union representative, and the grievant.⁷

Specifically, a management representative will be able to consider the possible implications of an apology offered by the grievant in deciding whether to settle a grievance prior to arbitration. For instance, an analysis of arbitral awards where grievants' apologies resulted in the lessening of discipline might prompt management to set the grievances. Equipped with this information, the management representative might realize that there is a general tendency for arbitrators to sustain or grant a grievance under similar circumstances where an apology is offered by the grievant. Rather than waste additional employer time and resources,⁸ as well as risk the entire suspension or discharge being overturned,⁹ it may behoove the management representative to settle for a reduced suspension earlier in the grievance-handling process.

Likewise, a union representative may use the information and findings of this article to better assess the grievant's situation. Perhaps it becomes apparent that an apology in certain situations has little substantive impact on the decision-making process of a labor arbitrator. A potential all-or-nothing risk for the grievant may thus be better handled by settling earlier in the grievance-handling process.¹⁰ The grievant will certainly have a say in this matter and will therefore also be better informed and better off if he or she has access to the findings detailed in this article.

6. See DISCIPLINE AND DISCHARGE IN ARBITRATION 87 (Norman Brand ed., 2003) ("An admission of wrongdoing, an expression of remorse, or an offer of apology may lead to a finding that leniency was appropriate.") [hereinafter Brand, DISCIPLINE AND DISCHARGE IN ARBITRATION].

7. These parties generally choose an arbitrator based on the arbitrator's perceived predilections, world views, and decisional styles. *Id.* at 14.

8. Even though arbitration has advantages over litigation (among them: time, expense, specialized expertise of the arbitrator), an employer will usually prefer a quick resolution over taking a grievance to arbitration. ELKOURI & ELKOURI, HOW ARBITRATION WORKS 11 (6th ed.) (Alan M. Ruben ed., 2003) [hereinafter ELKOURI & ELKOURI, HOW ARBITRATION WORKS].

9. Arbitrators may, however, be fearful of being pigeonholed as "the apology arbitrator."

10. Discuss benefits/process of mediation and negotiations. For a discussion on negotiation tactics, see *generally* ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (2d ed.) (Bruce Patton ed., 1991).

For this article, the authors have analyzed some sixty-nine (69) arbitral awards reported in the Bureau of National Affairs (BNA) arbitration reports¹¹ in an attempt to provide some answers. These arbitral awards primarily involve instances of discipline and discharge for various alleged worker wrongdoings.¹² Before analyzing the findings, however, it is important to understand what a “sincere apology” entails and why it may be an important part of a solution for workplace disputes.

II. GENERAL SIGNIFICANCE OF APOLOGY FROM THE PERSPECTIVES OF THE OFFEROR AND RECIPIENT

The impact and significance of an offer of apology, remorse, or contrition may be viewed or ascertained from the perspectives of the offender, the victim (recipient), and the general public. Although scholarship assessing what effects a grievant’s apology may have on labor arbitration outcomes is sparse, there has been significant research on the subject of apology more generally.

A. *Definition, Characteristics, and Elements of an Effective and Sincere Apology*

Daniela Kramer-Moore and Michael Moore have described seven types of apology and discussed the relative sincerity and effectiveness of each.¹³ The authors even investigated the etymologies of typical apology language, with the intent of locating possible patterns among usage and sincerity.¹⁴ Aaron Lazare, a noted apology scholar, starts off with a simpler definition:

11. Admittedly, this is not an exhaustive list of so-called “apology arbitral awards.” The number of published awards is only a small percentage of those that are rendered. Hoyman et al., *The Decision-Making of Labor Arbitrators in Discipline and Discharge Cases*, *supra* note 5, at 403; Dallas L. Jones & Russell A. Smith, *Management and Labor Appraisals and Criticism of the Arbitration Process: A Report with Comments*, 62 MICH. L. REV. 1115, 1152 (1964). Regarding specific topics and subject areas, there can be no assurances that the published reports are a representative sample. *Id.* The editors of the Bureau of National Affairs (BNA) judge the significance of the awards and decide which ones will be published. ELKOURI & ELKOURI, HOW ARBITRATION WORKS, *supra* note 8, at 568 n.1.

12. The BNA, similar to Westlaw and LexisNexis, classifies types of cases and the holdings within them by headnote. Of the sixty-nine (69) arbitral cases examined for this article, nine types of headnotes emerged consistently: (1) assault/violence; (2) profanity; (3) racial harassment; (4) sexual harassment; (5) theft; (6) safety violations; (7) drug/alcohol abuse; (8) insubordination; and (9) violation of work rules.

13. Daniela Kramer-Moore & Michael Moore, *Pardon Me for Breathing: Seven Types of Apology*, 60 ETC: REV. GEN. SEMANTICS 160, 162-165 (2003).

14. *Id.* at 161.

[An apology is] an encounter between two parties in which one party, the offender, acknowledges responsibility for an offense or grievance and expresses regret or remorse to a second party, the aggrieved.¹⁵

Lazare further divides this definition of a sincere apology into four elements:

the acknowledgement of the offense or wrong doing;
 the explanation;
 various attitudes and behaviors including remorse, shame, humility and sincerity;
 and reparations.¹⁶

The importance of each of these elements, claims Dr. Lazare, vary according to factors such as timing and context.¹⁷

Nick Smith expands upon what he calls Lazare's tendency to use "merely descriptive accounts when a prescriptive argument seems necessary."¹⁸ Smith's primary concern is the meaning of apologies, and he argues that, though not all apologies need be categorical, most that are not often leave the recipient or victim of the wrongdoing wanting.¹⁹ After admitting difficulty in confronting a plethora of questions that seemed to contradict his attempts to develop a set of elements, Smith succeeds in clarifying his approach.²⁰ He concludes that it is more beneficial to study the language and speech when attempting to derive the meaning of a person's apology.²¹ Smith is quick to point out that nonverbal apologies are possible; yet he would

15. AARON LAZARE, ON APOLOGY 23 (2004) [hereinafter LAZARE, ON APOLOGY].

16. *Id.* at 35.

17. *Id.* at 22-23, 134-35, 170-79.

18. Nick Smith, *The Categorical Apology*, 36 J. SOC. PHIL. 473, 473 (2005) [hereinafter Smith, *The Categorical Apology*].

19. *Id.* at 474.

20. NICK SMITH, I WAS WRONG: THE MEANING OF APOLOGIES 19-20 (2008). Smith would inevitably find himself contradicting his own lists by asking questions such as: (1) "Is my apology annulled if I commit the same wrong shortly after my heartfelt apology?"; (2) "What if I express remorse for events that I did not cause in any obvious sense, for example the African slave trade or Rwandan genocide?"; (3) "Have I apologized if I admit to causing the harm and provide some compensation, but I fear that I lack the self-restraint to act differently in the future?"; (4) "If I reoffend after uttering heartfelt apologetic words and providing generous redress, do I annul my apology in some sense?"; (5) "Must I experience certain emotions to have apologized properly? If so, which emotions and to what degree of intensity?"; and (6) "If I am too poor to provide commensurate restitution, is an apology beyond my means?" *Id.*

21. Smith, *The Categorical Apology*, *supra* note 18, at 484-85.

not carry the characteristics of apology definitions that provide only elements as their roadmap.²²

The definitions other scholars have given of a “sincere apology” appear to be more similar to those proposed by Dr. Lazare. One article by Richard Roberts in the context of the medical field closely follows Dr. Lazare’s elements but places the apology in the context of deleterious medical outcomes.²³ Dr. Roberts explains that an “apt apology” involves an acknowledgement, explanation, and/or expression of remorse and reparation.²⁴ Dr. Roberts further discusses the inherent risks of apologizing when such a gesture may increase the likelihood of a malpractice claim. He advocates the widespread enactment of “first apology laws,”²⁵ which provide for the banning of the use of an apology in the introduction of evidence designed to show admitted fault.²⁶

B. *Effectiveness and Sincerity of Apology*

Of course, an apology is meaningless, and therefore ineffective, if it lacks or is perceived to lack sincerity.²⁷ Paul Davis points to British Conservative MP John Townend’s apology for calling the British a “mongrel race” as an example of an insincere attempt.²⁸ Townend said that he regretted any offense that his comments may have caused, a common means of dissociating the speaker from his or her words.²⁹ In doing so, the offender essentially says that he or she is sorry for the consequences of the words or actions, as opposed to the decision to state them.³⁰ Essentially, Townend apologized to the British people based on their reaction (i.e. taking offense at Townend’s

22. *Id.*

23. Richard G. Roberts, *The Art of Apology: When and How to Seek Forgiveness*, 14 FAM. PRAC. MGMT. 44, 46-49 (2007) [hereinafter Roberts, *The Art of Apology*].

24. *Id.* at 47.

25. Several of these types of apology laws are already on the books. *See e.g.*, Cal. Evid. Code § 1160 (West Supp. 2008); Colo. Rev. Stat. § 13-25-135 (2008); Fla. Stat. ch. 90.4026 (2008); Mass. Gen. Laws ch. 233, § 23D (2008); Tex. Civ. Prac. & Rem. Code Ann. § 18.061 (Vernon 2008); Wash. Rev. Code § 5.66.010(1) (2008).

26. Roberts, *The Art of Apology*, *supra* note 23, at 48.

27. *See* LAZARE, ON APOLOGY, *supra* note 15, at 117. Absent any of the elements as described by Lazare (i.e. sincerity & acknowledgement), the apology usually has no positive impact. *Id.*

28. Paul Davis, *On Apologies*, 19 J. APPLIED PHIL. 169, 169 (2002) [hereinafter Davis, *On Apologies*].

29. *Id.*

30. *Id.*

comments), rather than acknowledge that the comments were themselves wrong.³¹ Davis further argues that a sincere offering of an apology absent a true feeling of culpability is ineffective.³²

Smith speaks to the consequences of an insincere apology, stating that the initial wrongdoing may be compounded by an equivocal or grudging attempt at apology.³³ Smith also closely follows the reasoning of Davis by denouncing a showing of sympathy rather than accepting causal responsibility. For this example, Smith points to President George W. Bush's comments on the al-Hurra network³⁴ and the al-Arabiya satellite channel regarding the Abu Ghraib prison scandal, where prisoners were abused by American soldiers.³⁵ Mr. Bush stated that he found the abuse "abhorrent" and "that what took place in that prison does not represent the America I know."³⁶ For many, this was not good enough. Amidst a demand for more contrite language, President Bush stated that he was "sorry for the humiliations suffered by the Iraqi prisoners and the humiliations suffered by their families."³⁷ This demonstrates the need for a real showing of sympathy rather than merely a casual acceptance of responsibility.

Further evidence regarding the substance and manner of the delivery of an apology comes from a study undertaken by John M. Darley and Steven Scher.³⁸ Darley and Scher measured the effects of specific apology speech in the context of four specific strategies: illocutionary force indicating device, expression of responsibility, promise of forbearance and offer of repair.³⁹ They concluded that the

31. *Id.*

32. *Id.*

33. Smith, *The Categorical Apology*, *supra* note 18, at 475.

34. The al-Hurra network is "an Arabic language satellite television network for the Middle East devoted primarily to news and information." The network is funded by the United States Congress and its purpose is to "broaden its viewers' perspectives, enabling them to make more informed decisions." Essentially, it is an attempt to counterbalance what some see as the distortion of events by current Arab media. Its website can be found at <http://www.alhurra.com/index.aspx> (website last visited on Sept. 12, 2010).

35. Smith, *The Categorical Apology*, *supra* note 18, at 477-78; see also Eric Schmitt, *Army Dog Handler is Convicted in Detainee Abuse at Abu Ghraib*, N.Y. TIMES, Mar. 22, 2006, at A1; David S. Cloud, *Private Found Guilty in Abu Ghraib Abuse*, N.Y. TIMES, Sept. 22, 2005, at A12.

36. Smith, *The Categorical Apology*, *supra* note 18, at 477.

37. *Id.*

38. Steven J. Scher & John M. Darley, *How Effective Are the Things People Say to Apologize? Effects of the Realization of the Apology Speech Act*, 26 J. PSYCHOLINGUISTIC RES. 127 (1997).

39. *Id.* at 131.

utilization of these strategies have clear, statistically-significant effects on the judgment of the recipient of the apology *vis à vis* the person who offers the apology.⁴⁰ Furthermore, with the implementation of each additional strategy, these effects multiply.⁴¹ Interestingly – though not surprisingly – the greatest positive effect came from the mere offer of an apology versus no such offer.⁴²

C. *Motivating Factors and Rationale for an Apology*

In addition to the different elements of apology, there are myriad reasons for extending these *mea culpas*. Dr. Lazare believes the motivations for offering an apology are either primarily internal, external or a combination thereof.⁴³ Internal feelings (e.g. guilt, remorse, etc.) lead some people to use apology as a means of clearing their consciences.⁴⁴ External pressures function as the means to repairing a reputation or absolving one of poor perception through a showing of contrition.⁴⁵ Many apologies are a result of a hybrid of the former and latter.⁴⁶ Dr. Lazare is careful to show that external pressures leading to an offer of apology are often more susceptible to insincerity than internal pressures.⁴⁷ Specifically, an internal pressure is of the conscience, whereas an external pressure is often raised within the context of negative consequences for the offender.⁴⁸

A demonstration of the contrast in external and internal pressures can be found in contemporary apology examples. For instance, it is highly unlikely that Senator John Kerry would have apologized for his comments allegedly portraying American soldiers as having less-than-average intelligence⁴⁹ had he not been pressured to do so externally. At the time, Senator Kerry was in the midst of a close presidential campaign where any misstep, perceived or real, could tip the balance of the outcome of the presidential election. As indicated by his initial comments, the senator did not believe that he had said

40. *Id.* at 133-38.

41. *Id.* at 135-36.

42. *Id.* at 137.

43. LAZARE, ON APOLOGY, *supra* note 15, at 134.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 157.

48. *Id.* at 145, 157.

49. David Stout, *Kerry and G.O.P. Spar Over Iraq Remarks*, N.Y. TIMES, Oct. 31, 2006, at A24 (Sen. Kerry had said: “You know, education, if you make the most of it, you study hard, you do your homework and you make an effort to be smart, you can do well. If you don’t, you get stuck in Iraq.”). *Id.*

anything offensive or done anything wrong.⁵⁰ It was only after the story gained considerable traction in the media that Senator Kerry considered it necessary to apologize.

Other literature has attempted to suggest or hypothesize what the motivating factor for an apology is from open-ended questions, through interviews and surveys. One such study by Julie Exline, Lise DeShea and Virginia Todd Holeman found common self-reported motives to include: the restoration of a relationship (51% of respondents); the relief of guilt (39%); and the cessation of the victim's anger (7%).⁵¹ In addition, the authors investigated correlations between these common factors and subsequent regret of the apology. Their findings showed that motives of helping the victim and restoration of a relationship had an inverse relationship with the level of regret ($M = 0.5$, $SD = 0.9$), $t(65) = 3.58$, $p < .01$. However, guilt-based apologies or those intended to assuage anger showed no such relationship ($M = 1.3$, $SD = 1.9$), $t(65) = 1.89$, $p < .06$.⁵²

There is also frequent mention in the literature of reasons for *not* offering an apology. Dr. Lazare recognizes the emotional aspects of humiliation and pride that have long been a deterrent to a showing of remorse and contrition. The reaction of the victim or offended party, which is often hard to predict, may very well instill a fear of the unknown in the offender. Thus, he or she may shy away from apologizing for fear of having that vulnerability shunned, ridiculed or worse. This may result in the victim or offended party completely ignoring the humble act of the offender, or simply refusing to reciprocate humility due to the unwillingness to forgive. The offender might also feel "weak" when having to perform such a humbling act.⁵³

Aside from emotional consequences, an apology may have potential legal liability and consequences. Jonathan Cohen speaks to the relative ambiguity of evidentiary protocol in many state courts, where an apology as hearsay is anything but a settled matter.⁵⁴ It is therefore a potential risk for doctors and other professionals to apologize for their actions, as this might be used as an admission of guilt.⁵⁵ This situation leads to an environment where an apology might have

50. *Id.*

51. Julie Juola Exline, Lise DeShea & Virginia Todd Holeman, *Is Apology Worth the Risk? Predictors, Outcomes, and Ways to Avoid Regret*, 26 J. SOC. & CLINICAL PSYCHOL. 479, 490 (2007) [hereinafter Exline et al., *Is Apology Worth the Risk?*].

52. *Id.*

53. LAZARE, ON APOLOGY, *supra* note 15, at 160-61.

54. Jonathan R. Cohen, *Legislating Apology: The Pros and Cons*, 70 U. CIN. L. REV. 819, 821 (2002) [hereinafter Cohen, *Legislating Apology*].

55. *Id.* at 824.

any number of effects ranging from resolving the situation to opening up the offender to extensive liability or other consequences.⁵⁶ Such a gamble is often not an enticing path to take for these individuals.

D. *Victim's Acceptance of Apology*

While focusing most efforts on the offender, one may forget that the victim still has the discretion of accepting or rejecting the apology. Davis comments on when it is rational to accept an apology, while being careful to note that this does not bind the recipient to do so.⁵⁷ The more comprehensive the apology – based on commonly accepted elements – the more rational its acceptance by the victim is.⁵⁸ In other words, Davis sees an apology that satisfies all elements as effective and proper, thus rendering its acceptance as a rational step.⁵⁹ Conversely, accepting an apology that is lacking any of the elements would be an irrational action on the part of the victim.

Dr. Lazare examines the relationship between apology and forgiveness, and offers four specific scenarios: forgiveness without apology; no forgiveness with or without an apology; forgiveness followed by apology; and apology as a prerequisite for forgiveness.⁶⁰

Regarding the efficacy of the first three scenarios, Dr. Lazare remains skeptical, albeit to varying degrees. First, forgiveness without apology serves the interests of the victim at the outset, but may result in similar future behavior by the offender, as he or she may have been forgiven without being contrite.⁶¹ Thus, the impact of the offending words or action is lessened. Second, no forgiveness, regardless of whether an apology is offered, is void of rational acknowledgement and consideration, as discussed by Davis.⁶² Third, forgiveness followed by apology allows for a preemptive olive branch

56. An article in *The New York Times* speaks to this possibility. In studies undertaken at two academic hospitals, projections of a flood of lawsuits resulting from full disclosure by doctors proved to be without merit. Kevin Sack, *Doctors Say "I'm Sorry" Before "See You in Court,"* N.Y. TIMES, May 18, 2008, at A1. An apology (or at least an acknowledgement of a mistake) was deemed to be a crucial aspect of these findings. *Id.*; see also Genevra Pittman, *Admitting Errors Could Save Money, Study Finds*, CHI. TRIB., August 19, 2010, § 1, at 14.

57. Davis, *On Apologies*, *supra* note 28, at 171.

58. *Id.*

59. *Id.*

60. LAZARE, ON APOLOGY, *supra* note 15, at 232-48.

61. *Id.* at 232-33.

62. *Id.* at 234; see also Davis, *On Apologies*, *supra* note 28, at 171-72.

to be extended by the victim.⁶³ However, such a temporal arrangement may result in a less complete airing of the elements of an apology. Dr. Lazare neither discusses this possibility nor recognizes the irony that such an instance undermines the very elements of an apology that he has outlined. Instead, Dr. Lazare refers to a "suggestion of a causal relationship between forgiveness and apology," but offers no empirical evidence to back his assertion.⁶⁴

These three scenarios, in the context of this article, have no bearing on a conflict in the labor arbitration setting. The first scenario would indicate a favorable outcome absent any apology. While this may indeed happen, it would ignore the possibility of an even *more* favorable outcome had the apology been offered. The second scenario indicates that the outcome would not be favorable, without consideration of whether an apology was given. Again, this outcome is completely plausible, yet has no bearing on the proposition of the impact of a timely apology. The third scenario would involve a favorable outcome followed by an apology. For the purposes of this article, any inference that the apology resulted in the favorable outcome would be a temporal fallacy, as the apology had been given after the outcome was decided.

As for Dr. Lazare's fourth scenario (apology is necessary for forgiveness), he is understandably more optimistic of the ultimate outcome. The psychological nature and makeup of most human beings renders them almost incapable of forgiveness absent an apology or any display of contrition or remorse, according to Dr. Lazare.⁶⁵ A number of empirical studies have generally agreed with this conclusion, whether the studies were undertaken by means of a questionnaire (Exline, et al.),⁶⁶ a focus group in the context of multicultural diversity (Bergman & Kasper),⁶⁷ or an anecdote (Roberts).⁶⁸

Turning again to the labor arbitration setting, Dr. Lazare's fourth scenario coincides precisely with the initial proposition of this article. Substituting a favorable outcome for forgiveness yet again, the fourth scenario would indicate that an apology results in, or is at

63. LAZARE, ON APOLOGY, *supra* note 15, at 235, 240.

64. *Id.* at 237.

65. *Id.* at 241.

66. Exline et al., *Is Apology Worth the Risk?*, *supra* note 51, at 485, 494.

67. Marc L. Bergman & Gabriele Kasper, *Perceptions and Performance in Native and Nonnative Apology*, in INTERLANGUAGE PRAGMATICS 82, 83-84 (Gabriele Kasper & Shoshana Blum-Kulka eds., 1993).

68. Roberts, *The Art of Apology*, *supra* note 23, at 45-46.

least a prerequisite for, a favorable outcome. By this logic, the grievant would be wise to offer a timely and sincere apology as a means of garnering a lesser punishment.

III. WHAT ARE THE LEGAL AND ARBITRAL IMPLICATIONS OF OFFERING AN APOLOGY IN THE WORKPLACE SETTING?

Although an offer of apology, remorse or contrition has become commonplace in U.S. society, there are a number of pros and cons to offering an apology, particularly where there might be legal and monetary consequences and damages involved.⁶⁹ Because of ambiguity as to the admission of an apology in some state courts, doctors, for example are often hesitant to apologize to patients if a medical mishap occurs.⁷⁰ Moreover, many individuals are reluctant to apologize because they feel it is “humiliating” or makes them look “weak.”⁷¹

Notwithstanding these concerns, there are an increasing number of situations where an offer of apology may be appropriate, effective, and indeed encouraged.⁷² Courts, for instance, have actually ordered an offender to apologize under some circumstances.⁷³ However, courts have also overturned such orders – notably in the context of violations of state civil rights statutes – reasoning that the object of forcing someone to apologize is to “humiliate and debase” him, and “will succeed in producing only his resentment. . . .”⁷⁴

69. See Jennifer K. Robbenolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460, 461 (2003) [hereinafter Robbenolt, *Apologies and Legal Settlement*] (discussing defendants' worry that an apology will be interpreted as an admission of fault); Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009, 1010 (1999) [hereinafter Cohen, *Advising Clients to Apologize*] (stating “lawyers rarely advise clients to apologize”).

70. See Cohen, *Legislating Apology*, *supra* note 54, at 842; Cohen, *Advising Clients to Apologize*, *supra* note 69, at 1011.

71. LAZARE, ON APOLOGY, *supra* note 15, at 160-61.

72. Several airlines have gone so far as to hire “Chief Apology Officers,” whose main duties consist of apologizing for flight delays or other unpleasant airline experiences. Terry Maxon, *Bad Flight? Airline Experts Know How to Land an Apology*, CHI. TRIB. August 25, 2010, § 1, at 21.

73. *Imperial Diner v. State Human Rights Appeals Bd.*, 417 N.E.2d 525, 526 (N.Y. 1980) (holding Commission could have reasonably found apology necessary to remedy discrimination); see generally Brent T. White, *Say You're Sorry: Court-Ordered Apologies As a Civil Rights Remedy*, 91 CORNELL L. REV. 1261 (2006).

74. *Minneapolis v. Richardson*, 239 N.W.2d 197, 205-206 (Minn. 1976) (holding state's civil rights statute was a means to remedy existing discrimination and this purpose was not effectuated by compelling letter of apology); See also *Alto-Reste Park Cemetery Ass'n v. Penn. Human Relations Comm'n*, 298 A.2d 619 (Penn. 1972) (holding that ordering a cemetery to tender a public letter of apology was beyond the scope of commission's authority); *State Comm'n for Human Rights v. Lieber*, 277 N.Y.S.2d 589, 591 (App. Div. 1967) (holding that requiring a landlord to apologize for housing

Medical malpractice and apology laws are other ripe areas where courts have demanded or strongly called for an apology in certain situations.⁷⁵ The potential benefits of an apology are not limited to civil cases either; a showing of remorse or acknowledgement of wrongdoing may help an offender receive a lesser sentence in the criminal context.⁷⁶

IV. WHAT IS THE GENERAL SIGNIFICANCE OF THE ROLE OF APOLOGY IN WORKPLACE DISPUTES?

Although there is considerable research and literature regarding the general topic and importance of apology, there is a relative paucity of research regarding the importance and impact of an offer of apology in the workplace.⁷⁷ This is particularly surprising because anecdotal evidence suggest that workers often desire an apology in EEO disputes.⁷⁸ When disputes arise as a result of discipline meted out, there are avenues through which dissatisfied parties may seek redress for any perceived injustices. Alternative Dispute Resolution (ADR), or more specifically, independent investigation, fact-finding, mediation and labor arbitration, is quickly becoming a preferred avenue in union (and some nonunion) settings.⁷⁹ The process plays out

discrimination would be “a useless, vain and meaningless gesture”), *rev'd on other grounds*, State Comm'n for Human Rights v. Lieber, 23 N.Y.2d 253 (1968). For an excellent film describing a woman's difficult quest for redress that takes her “up the ladder of Chinese justice as she enlists ever-higher authorities to help her” right a wrong, see *THE STORY OF QUI JU* (Sony Pictures 1992). Janet Maslin, *Movie Rev., The Story of Qiu Ju*, N.Y. TIMES, Oct. 2, 1992, at C12.

75. See Robbenolt, *Apologies and Legal Settlement*, *supra* note 69, at 461; Cohen, *Advising Clients to Apologize*, *supra* note 69, at 1010.

76. Federal Sentencing Guidelines explicitly say that “[i]f the defendant clearly demonstrates acceptance of responsibility for his defense, decrease the offense level by 2 levels.” 18 U.S.C. app. § 3E1.1(a); see also Cohen, *Legislating Apology*, *supra* note 54, at 822.

77. See generally Hoyman et al., *The Decision-Making of Labor Arbitrators in Discipline and Discharge Cases*, *supra* note 5 and accompanying text.

78. See Suzy Fox & Lamont E. Stallworth, *How Effective Is an Apology In Resolving Workplace Disputes? An Empirical Research Note*, 61-JUL DISP. RESOL. J. 54 (2006) (reporting empirical results suggesting an apology increases the likelihood of a quick and inexpensive resolution to a workplace dispute) [hereinafter Fox & Stallworth, *How Effective Is an Apology In Resolving Workplace Disputes?*]; Elizabeth Latif, *Apologetic Justice: Evaluating Apologies Tailored Toward Legal Solutions*, 81 B.U. L. REV. 289 (2001) (arguing for the incorporation of apologies into workplace dispute resolutions).

79. ALBERT FIADJOE, *ALTERNATIVE DISPUTE RESOLUTION: A DEVELOPING WORLD PERSPECTIVE* 1, 154-55 (2004). The U.S. Supreme Court, in three cases collectively called “The Steelworkers Trilogy,” provided arbitration with the legitimacy it had until that time lacked. *Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960);

from initial negotiations or grievance handling, to ultimately final and binding arbitration if an earlier settlement cannot be reached.⁸⁰

The literature on apology in an employment setting, especially at the arbitration stage, is lacking. Brown addresses apology in the context of moving forward with negotiations, though she largely defines an apology and its elements, rather than focusing on the effects it may have on the outcome of grievance settlement discussions or negotiations.⁸¹ In similar fashion, Deborah Levi examines specific conflicts in a mediation setting where an apology might provide an avenue with which labor and management may more easily come to terms.⁸² Levi advocates the employment of this option by mediators but stresses the fact that such a method will not always be helpful.⁸³

Steelworkers v. Am. Mfg. Co., 363 U.S. 564 (1960); see also David A. Hoffman, *The Future of ADR Practice: Three Hopes, Three Fears, and Three Predictions*, 22 NEGOTIATION J. 467 (2006). But see Douglas Yarn, *The Death of ADR: A Cautionary Tale of Isomorphism Through Institutionalization*, 108 PENN ST. L. REV. 929, 1012-15 (2004) (predicting the demise of ADR as a useful tool the closer it becomes wedded to the courts); Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1076 (1984) (arguing that ADR undermines civil litigation because of the inherently unequal bargaining power between the parties).

80. Congress enacted, and President Clinton signed into law, the Alternative Dispute Resolution Act of 1998, 28 U.S.C. §§ 651-658 (2006). Under Section 2 of the ADR Act, the "Findings and Declarations of Policy" state:

Congress finds that –

(1) alternative dispute resolution, when supported by the bench and bar, and utilizing properly trained neutrals in a program adequately administered by the court, has the potential to provide a variety of benefits, including greater satisfaction of the parties, innovative methods of resolving disputes, and greater efficiency in achieving settlements;

(2) certain forms of alternative dispute resolution, including mediation, early neutral evaluation, minitrials, and voluntary arbitration, may have potential to reduce the large backlog of cases now pending in some Federal courts throughout the United States, thereby allowing the courts to process their remaining cases more efficiently; and

(3) the continued growth of Federal appellate court-annexed mediation programs suggests that this form of alternative dispute resolution can be equally effective in resolving disputes in the Federal trial courts; therefore, the district courts should consider including mediation in their local alternative dispute resolution programs.

Pub. L. No. 105-315, 112 Stat. 2993 (codified as amended at 28 U.S.C. § 651 (October 30, 1998)). See also Caroline Harris Crowne, Note, *The Alternative Dispute Resolution Act of 1998: Implementing a New Paradigm of Justice*, 76 N.Y.U. L. REV. 1768 (2001).

81. Jennifer Gerarda Brown, *The Role of Apology in Negotiation*, 87 MARQ. L. REV. 665, 666-69 (2004) [hereinafter Brown, *The Role of Apology in Negotiation*].

82. Deborah L. Levi, Note, *The Role of Apology in Mediation*, 72 N.Y.U. L. REV. 1165, 1179, 1193 (1997) [hereinafter Levi, *The Role of Apology in Mediation*].

83. *Id.*

David Hoffman examines the use of apology and its effects in employment termination situations in the non-union setting.⁸⁴ Hoffman decries the role that cognitive dissonance plays in the willingness of an employee to admit wrongdoing.⁸⁵ He reasons that the employee often becomes so convinced of the merits of his or her position that the ability to grasp and accept evidence to the contrary is nearly impossible.⁸⁶

Hoffman also goes on to outline instances where an apology might not be appropriate.⁸⁷ He gives the general example of a “good faith disagreement” in which two parties disagree over the events that transpired and desire a third-party neutral to render a decision.⁸⁸ Hoffman also cites an insincere apology as ineffective and quite possibly counterproductive.⁸⁹ In either instance, it is clear that saying “sorry” does little to impact the outcome of the dispute. The potential legal and economic liability stemming from the admission of fault when offering an apology is a major concern in the literature as well.⁹⁰

One study on apology and its impact on arbitration disputes uses a survey method in an attempt to examine the impact of an apology on the decision-making process of labor arbitrators.⁹¹ Bi-variate and multivariate correlation analyses of 180 survey responses from members of the National Academy of Arbitrators found clear evidence that an apology, when “sincere,” may indeed impact the outcome of a discipline or discharge case more favorably toward the grievant (i.e. a reduction in the degree of discipline initially meted out or an

84. David A. Hoffman, *The Use of Apology in Employment Cases*, 2 EMP. RTS. Q. 21, 21 (2002).

85. *Id.* at 25. Hoffman defines *cognitive dissonance* as occurring “when a party is so firmly convinced that s/he is right that it becomes difficult, if not impossible, to understand, much less accept, information and conclusions inconsistent with the deeply held belief.” *Id.*

86. *Id.* Hoffman believes that the plaintiff in a given case, almost without exception, expects an apology or display of contrition. *Id.* at 21. This, coupled with the cognitive dissonance of the defendant, nearly ensures a virtual chasm between the two parties before the ADR process even begins. *Id.*

87. An interesting example raised by Hoffman includes the times when the parties may want a judicial resolution of an issue so as to provide direction for other current and future employees. *Id.* at 28.

88. *Id.*

89. *Id.*

90. See, e.g., Roberts, *The Art of Apology*, *supra* note 23, at 48; Cohen, *Legislating Apology*, *supra* note 54, at 842. See generally Robbenolt, *Apologies and Legal Settlement*, *supra* note 69.

91. Hoyman et al., *The Decision-Making of Labor Arbitrators in Discipline and Discharge Cases*, *supra* note 5, at 393.

overturning of a discharge). In addition, the timing of the apology was deemed less important than the issues of seniority and case type.⁹²

Any decision of whether to do an empirical, survey-based study or a case-based study involves the consideration of the pros and cons of each. A survey-based study allows for a wider and scientifically more representative sample of arbitrators to weigh in through relatively easy means. Email and electronic surveys may be distributed to thousands of current and former arbitrators, judges or similarly situated individuals for low cost. Even traditional mailing, though higher in cost, is easily capable of reaching a large sample. In addition, the answers and comments given by those surveyed are taken right from the source, so there is less ambiguity.

However, it is quite possible that the response rate of those asked to take the survey will be low, hindering the overall study and its credibility. This in turn affects what conclusions may be drawn from an empirical study. Some of the potential participants may deem such an exercise as overly simplistic and as failing to take account of myriad factors aside from an apology that could affect the outcome of a case scenario. Likewise, even those who choose to complete the survey may do so haphazardly, impacting the validity of the study's findings.⁹³

Another possible option is using a case-based study approach, which is the chosen method of this article. The case-based study approach allows for an examination of actual relevant arbitral awards and the opinions contained therein, rather than relying on fictional scenarios. There is no need to be concerned with a response rate, as the arbitral awards have already been published and are accessible to the researcher.

However, a case-based study approach also has its downsides. In a survey, the researcher has some control over framing the questions in a way that allows only for an answer that is distinctive and able to be coded. The case-based approach leaves wide open the possibility of ambiguous assessments, as the researcher must attempt to glean the meaning of words uttered or written by the arbitrator and grievant. Rather than being told the thoughts of the key players, the researcher must interpret their meaning. This dilemma is especially relevant when the sincerity of an apology is in question.

92. *Id.* at 406. This finding is contrary to what has been espoused by Dr. Lazare. See LAZARE, ON APOLOGY, *supra* note 15, at 170-79.

93. See DARRELL HUFF, HOW TO LIE WITH STATISTICS 20-24 (1954) (discussing the perils of sample bias).

V. WHAT IS THE IMPACT AND SIGNIFICANCE OF OFFERING AN APOLOGY AT VARIOUS ADR STAGES OF A WORKPLACE DISPUTE?

A. *Negotiation Stage*

Direct negotiations are generally the first stage in any attempt to settle a workplace dispute. In most unionized settings, a multi-step grievance procedure is in place and is designed to help the employer and employee resolve their issue, hopefully settling on a mutually agreed-to outcome.⁹⁴ An apology offered at this stage would likely have a similar effect as in civil cases.⁹⁵ In the situation of a car accident, for instance, the driver who was at fault might apologize to the parents of a young child who sustained moderate injuries as a result of the collision. Let us further assume that the at-fault driver was texting while driving.⁹⁶ Such a careless action will normally tend to exacerbate the already high negative feelings the parents of the victim feel toward the driver.

However, the difference between those parents seeking punitive damages for gross negligence or, alternatively, accepting a negotiated settlement covering the victim's hospital bills, may hinge on whether the at-fault "texting" driver has shown remorse and apologized for her actions. The apology will therefore be "attuned to the effect the apology will have on the recipient" because it is "at least partially motivated by a desire to elicit specific action (concession) on the part of the [victim]".⁹⁷

94. Ronald Turner, *Compulsory Arbitration of Employment Discrimination Claims With Special Reference to the Three A's - Access, Adjudication, and Acceptability*, 31 WAKE FOREST L. REV. 231, 237 (1996) ("Approximately ninety-eight percent of all collective bargaining agreements provide for the arbitration of workplace grievances arising under and requiring the interpretation and application of a labor agreement. . . ."); William R. Casto, *The Steelworkers Trilogy as Rules of Decision Applicable By Analogy to Public Sector Collective Bargaining Agreements: The Tennessee Valley Authority Paradigm*, 26 B.C. L. REV. 1, 2, 11 (1984); Anthony F. Bartlett, *Employment Discrimination and Labor Arbitrators: A Question of Competence*, 85 W. VA. L. REV. 873, 874-76 (1983).

95. See Brown, *The Role of Apology in Negotiation*, *supra* note 81, at 667-68; see also Part III, *supra* notes 69-75, and accompanying text.

96. There are already restrictions in about three-fifths of the states on texting while driving. See, e.g., ELIZABETH VERMETTE, THE GOVERNORS HIGHWAY SAFETY ASSOCIATION, CURBING DISTRACTED DRIVING: 2010 SURVEY OF STATE SAFETY PROGRAMS 48 (2010). Even Oprah Winfrey has gotten in on the act. See Oprah Winfrey, Op-Ed., *Dnt Txt N Drv*, N.Y. TIMES, Apr. 25, 2010, at WK13.

97. Brown, *The Role of Apology in Negotiation*, *supra* note 81, at 668.

At the negotiation stage of an employment dispute, a similar analysis holds true. In the context of this article, a grievant has committed some offense and has been disciplined by her employer. After the filing of the grievance, the disputants have come together in hopes of resolving the dispute before it continues further down the grievance process. An apology might not always be appropriate or helpful at this stage; an apology conferred by one who has reached a number of absences that mandates a previously-defined disciplinary action will accomplish little if the collective bargaining agreement calls for a no-fault attendance policy.⁹⁸

If, however, the grievant was insubordinate, an apology could go a long way under the right circumstances. Let us consider a hypothetical employee, Mary, who has a relatively spotless disciplinary record at a factory she has worked at for nearly five years. Mary's supervisor, Susan, has always been complimentary of Mary's work and the two women have an amicable working relationship. Recently, the factory has experienced an uptick in orders for its product and has directed its lines to increase production accordingly. This rise in workload, without any commensurate increase in hiring, places a strain on both women (as well as the entire factory workforce).

Susan, who has experienced constant orders from headquarters to increase the output of her line, asks Mary one day to "step it up a notch." Mary, having not slept lately because of marital problems and feeling sore from the rapid pace of work over the past few weeks, snaps. She screams at Susan, in front of all of the other employees, saying, "Why don't you get your ass down here and help, then!" Shocked, Susan orders Mary to go home for the day and to meet her in her office first thing the following morning. At the meeting, still angry about Mary's outburst, Susan tells Mary that she is suspended from work for three days for gross insubordination. Though Mary knows that she should not have yelled and cursed at Susan, she is

98. A no-fault attendance policy generally assigns points for each absence, with a larger number of points being assigned to unexcused absences than to excused absences. Brand, DISCIPLINE AND DISCHARGE IN ARBITRATION, *supra* note 6, at 94. Progressive discipline is then applied to defined point levels. *Id.* Failure to adhere to the plan or discriminatory application of its provisions has resulted in discipline being overturned by arbitrators on several occasions. *See, e.g.*, Robertshaw Controls Co., 94 Lab. Arb. Rep. (BNA) 957 (Kilroy, Arb.); All Am. Gourmet Co., 88 Lab. Arb. Rep. (BNA) (1987) 1241 (Zobrak, Arb.) (the discharge of a grievant was improper because the no-fault attendance plan was not administered with proper safeguards to ensure consistent application); Kansas Power & Light Co., 87 Lab. Arb. Rep. (BNA) 867 (1986) (Belcher, Arb.).

shocked at the severity of the punishment and files a grievance with her union.

This scenario is ripe for an apology at the negotiation stage.⁹⁹ Mary knows she cannot curse or yell at a supervisor, especially in front of her coworkers. Susan cannot stand for such blatant insubordination, but she also understands that the last few weeks have been stressful for everyone and may empathize with her line. Moreover, the sole dispute here is the degree of punishment, not whether punishment is appropriate, which means that Mary is not encumbered by the implicit admission of fault accompanied by an apology.

Thus, it would be in the interest of both Mary and Susan if Mary were to apologize at the negotiation stage. This would allow Mary to gain a concession from Susan (in the form of a reduced punishment), and would also allow Susan to save face by reducing what was probably a disproportionately severe disciplinary action given while tempers were still high.¹⁰⁰

What would happen, though, if negotiations between management and the grievant come to an impasse? If there is an issue of whether the grievant ought to be disciplined *at all*, the chances are greater that the dispute will not be resolved at the negotiation stage. Moreover, as the stakes increase for both parties, the effectiveness of an apology by the grievant will become even more fact-specific.

B. *Mediation Stage*

Mediation plays an integral and expanding role under the umbrella of alternative dispute resolution (ADR).¹⁰¹ This growth has taken place in both the private and public sector, and includes mediations arising from contractual, statutory and court-ordered obligations.¹⁰² In most common mediations, a third-party neutral plays a

99. Words will not always be enough, however, because many victims desire remorse to be shown through action. Brown, *The Role of Apology in Negotiation*, at 673. Research in experimental settings has shown that trustworthy actions are more effective at restoring trust and cooperation than apologies. William P. Bottom, Kevin Gibson, Steven E. Daniels & J. Keith Murnighan, *When Talk is Not Cheap: Substantive Penance and Expressions of Intent in Rebuilding Cooperation*, 13 *ORG. SCI.* 497 (2002).

100. Brown, *The Role of Apology in Negotiation*, *supra* note 81, at 668.

101. ELKOURI & ELKOURI, *HOW ARBITRATION WORKS*, *supra* note 8, at 6; *see also* Steven Weller, *Court Enforcement of Mediated Agreements: Should Contract Law Be Applied?*, 31 *JUDGES J.* 13, 13 (1992).

102. Susan T. Mackenzie, *How Mediators View Their Role: A Mediator's View*, in *HOW ADR WORKS* 205, 226 (Norman Brand ed., 2002).

facilitative role and attempts to assist the other two parties in reaching an agreement.¹⁰³ Disputes arising in mediation may be minor, such as neighborhood or minor criminal disputes, or relatively more serious, such as employment or divorce disputes.¹⁰⁴

The effectiveness of an apology to resolve a dispute between the employee and employer peaks when offered at the mediation stage. Whether evaluative or facilitative in nature, mediation calls for the parties themselves to come to an agreement.¹⁰⁵ The mediator, who has no binding authority, is tasked with helping the parties reach an understanding.¹⁰⁶ Thus, an apology offered to a mediator has no effect. However, an offer of apology from the respondent to the initiator might have a significant effect in meeting the needs of the disputants. Often, “[p]ositive references and apologies have proved to be important nonfinancial components of settlements.”¹⁰⁷

After reaching a settlement, “[i]n many instances, the parties exchange words of regret, convey forgiveness, or simply express gratitude that a resolution was reached.”¹⁰⁸ One mediator has said that, “regardless of the actual words exchanged, I sense something else is going on: the parties are obtaining some modicum of closure. Closure, if the parties desire it, is an important goal of mediation, and the mediator should provide an opportunity for the parties to attain it.”¹⁰⁹ Moreover, even though an apology is not likely to be an adequate substitute for monetary compensation,¹¹⁰ it may certainly help to break down psychological barriers that serve as impediments to settling a dispute.¹¹¹

103. ELKOURI & ELKOURI, *HOW ARBITRATION WORKS*, *supra* note 8, at 6.

104. Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 31-32 (1982).

105. Pamela A. Kentra, *Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict For Attorney-Mediators Between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct*, 1997 B.Y.U. L. REV. 715, 718 (1997).

106. *Id.*

107. Susan T. Mackenzie, *How Mediators View Their Role: A Mediator's View*, in *HOW ADR WORKS* 205, 223 (Norman Brand ed., 2002); *see also* Steven Weller, *Court Enforcement of Mediated Agreements: Should Contract Law Be Applied?*, 31 *Judges J.* 13, 13 (1992) (“The [mediation] agreement may cover a wide range of issues, including issues that would not be recognized in a court of law, such as the need for apologies from one party to another and other psychological issues.”).

108. Eric Galton, *How Mediators View Their Role: A Mediator's View*, in *HOW ADR WORKS* 241, 252-253 (Norman Brand ed., 2002).

109. *Id.* at 253.

110. *See* LAZARE, *ON APOLOGY*, *supra* note 15, at 127-33 (discussing the perilous nature of financial reparations in several contexts).

111. Levi, *The Role of Apology in Mediation*, *supra* note 82, at 1167.

C. Arbitration and Rights-Based Stage

Arbitrators consider several factors in deciding whether a particular instance of discipline was too severe.¹¹² These include “the employee’s intent and attitude, the likelihood of rehabilitation or repetition, emotional distress, and the employer’s degree of fault.”¹¹³ Although subject to some constraints, arbitrators generally have wide latitude in assessing whether a particular disciplinary decision was appropriate, and are usually able to modify excessive discipline accordingly.¹¹⁴ Because taking responsibility for one’s actions and showing remorse tend to reflect well on the attitude of an employee, arbitrators are understandably more apt to be lenient in such situations.¹¹⁵

There are certainly situations where an apology might play a role in the decision-making process of a labor arbitrator. This is particularly the case when it comes to the application of the principle called the “Seven Steps of Just Cause,” which were first illustrated by Arbitrator Carroll Daugherty.¹¹⁶ These steps, as outlined by Adolph Koven, Susan Smith and Donald Farwell,¹¹⁷ are often used by arbitrators when evaluating whether an imposition of discipline and discharge was enacted in accordance with the notion of industrial due process.¹¹⁸ The elements of “just cause” are as follows:

1. Notice: Did the Employer give notice of the possible consequences of disciplinary conduct?

112. Brand, DISCIPLINE AND DISCHARGE IN ARBITRATION, *supra* note 6, at 87. The U.S. Supreme Court has expressly held that arbitrators possess the authority to alter employer discipline where the arbitrator deems such discipline to be disproportionate to the offense. *United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29, 41 (1987).

113. *Id.*

114. *Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 596 (1960). However, if a contract specifies certain discipline for designated contact, the arbitrator is bound by that language in most instances. *See id.* at 597 (“[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice.”); *see also* Brand, DISCIPLINE AND DISCHARGE IN ARBITRATION, *supra* note 6, at 86, 369.

115. Brand, DISCIPLINE AND DISCHARGE IN ARBITRATION, *supra* note 6, at 87. *See, e.g.*, *King Soopers, Inc.*, 101 Lab. Arb. Rep. (BNA) 107 (1993) (Snider, Arb.); *Frontier Airlines, Inc.*, 61 Lab. Arb. Rep. (BNA) 304, 314, 319 (1973) (Kahn, Arb.).

116. *Enter. Wire Co.*, 46 Lab. Arb. Rep. (BNA) 359, 362-65 (1966) (Daugherty, Arb.).

117. ADOLPH M. KOVEN, SUSAN L. SMITH & KENNETH MAY, JUST CAUSE: THE SEVEN TESTS (3d. ed. 2006).

118. In the realm of Employment Law, a similar “independent investigation” defense has developed. *See Dana S. Connell & Milton E. Castro, The “Independent Investigation” Defense to Individual Termination Decisions*, 35 EMP. REL. L.J. 62 (2009).

2. Reasonable Rules and Orders: Was the Employer's rule reasonably related to the proper expectations that the Employer may have?
3. Investigation: Did the Employer make an effort to discover whether the Employee did in fact violate a rule?
4. Fair Investigation: Did the Employer conduct the investigation objectively and fairly?
5. Proof: Did the Employer gather sufficient proof or evidence to indicate the Employee was guilty?
6. Equal Treatment: Has the Employer applied its rules and discipline evenly among all of its employees?
7. Penalty: Was the penalty handed down by the Employer reasonable given the nature of the disciplinary conduct and the Employee's overall employment record?

Many of the cases examined in this study, as well as a significant number of arbitral decisions, generally evince arbitrators applying the principle of just cause in discipline and discharge cases.¹¹⁹ However, an examination of the "apology awards" did not indicate whether and how arbitrators expressly recognized the impact or relevance of a grievant's offer of apology and the principle of just cause. The essence of the seven steps of just cause is to determine the overall fairness of the imposed discipline; specifically, whether the discipline meted out and the procedural process leading to that discipline decision was fair and appropriate.¹²⁰ This would not, at first glance, appear to include the factor of a possible mitigating impact of an offer of apology. It is suggested here that the mitigating factors will, after all, temper a punishment absent consideration of fairness anyway.

This, however, is not entirely the case. Consider a scenario similar to the *Pepsi Bottling Group* case,¹²¹ where the grievant apologizes prior to disciplinary action and the offended party accepts that offer. In the seventh step, where the arbitrator considers the appropriateness of the penalty, such a factor would surely be relevant to the fairness and efficacy of the penalty. It could also be reasonably argued

119. ELKOURI & ELKOURI, HOW ARBITRATION WORKS, *supra* note 8, at 930-33; Brand, DISCIPLINE AND DISCHARGE IN ARBITRATION, *supra* note 6, at 29.

120. ELKOURI & ELKOURI, HOW ARBITRATION WORKS, *supra* note 8, at 932 n.7; Brand, DISCIPLINE AND DISCHARGE IN ARBITRATION, *supra* note 6, at 29-30.

121. *Pepsi Bottling Group, Inc.*, 118 Lab. Arb. Rep. (BNA) 299 (2002) (Silver, Arb.).

that a grievant's offer of a "sincere apology" may be considered evidence of the "rehabilitation" of the grievant. One of the recognized purposes of discipline under the just cause principle is that discipline should be rehabilitative, not punitive.¹²² Thus, it would logically follow that a pre-hearing apology would most benefit a grievant when the issue at hand is decided in the context of just cause and the offending worker has made a "full" and "sincere apology." This thinking also closely aligns with the initial hypotheses of this article.

VI. CONTEXT WITHIN WHICH WE ARE CONDUCTING AN EXAMINATION OF APOLOGY IN ARBITRATION

The primary proposition of this article is that an offer of a sincere apology by a grievant will generally have a significant mitigating impact on the decision of a labor arbitrator. Taking the proposition one step further, an apology offered earlier in the grievance handling stage or process (or perhaps before the process even begins) will have a greater mitigating impact than a similar offer at a later stage (i.e. an actual arbitration hearing).

To test this proposition, a compilation of arbitral awards (69 in all) using key words such as "apology," "contrition," "remorse" and "forgiveness" were retrieved from the labor arbitration database of the Bureau of National Affairs. After analyzing each of the "apology arbitral awards," the following information was recorded:

- Nature or type of grievance process or stage (e.g. discipline, discharge or both)
- Nature or type of alleged offense or infraction (e.g. absenteeism, theft, insubordination, etc.)
- Expressed indication of apology; showing of remorse or contrition
- Timing of apology (e.g. before hearing (grievance handling stage) or during hearing) or no apology
- Indication of effect with accompanying language
- Outcome of the grievance (i.e. reduction of discipline and reversal of discharge)

The goal of obtaining this information was to compare and contrast each factual situation and find any generalized patterns. The compilation of these "apology arbitral awards" admittedly is not an

122. See, e.g., Brand, DISCIPLINE AND DISCHARGE IN ARBITRATION, *supra* note 6, at 402; see generally Marvin Hill, *Traditional and Innovative Remedies in Arbitration: Punitive Awards, Interest, and Conditional Remedies*, 11 WHITTIER L. REV. 617 (1989).

entirely representative sample.¹²³ Notwithstanding, the results of this study do provide some interesting insights into the “power” or impact of a grievant’s offer of apology.

While this process is ongoing, there are frequent interactions between management and the grievant (employee) or representatives at the grievance-handling stage. The nature of the process allows for such encounters and also provides opportunities for both disputants to reconsider their respective positions. One might then ask: “What if I were to extend an olive branch?” Most often, this party would be the grievant, as he or she is the person who has allegedly committed the wrong.¹²⁴

A grievant, through his or her union representative, may choose to extend such an offer of apology or remorse during negotiations to management or directly to the person he or she may have wronged. The grievant might also consider apologizing to his employer through a statement at the actual arbitration hearing. Each circumstance has several situational factors. The interest is in discovering the decision-making tendencies of labor arbitrators and patterns related to these factors and, especially, their commensurate outcomes. What can be gained from such knowledge and in what ways could it be utilized to better understand the grievance and labor arbitration process? These and other subsequent inquiries are the driving force behind the desire to further explore the impact of a grievant’s offer of apology.

123. See *supra* note 11 and accompanying text.

124. One important consideration for the grievant is to refrain from dishonesty, especially when he or she has reached the arbitration stage. Professors Hill and Sinicropi explain why:

[O]ne tactic for the union advocate is to advise the grievant to “come clean” if the advocate believes that the company can easily prove the facts that gave rise to the discharge. Rather than offer a totally improbable version to rebut management’s case, the grievant may consider admitting the facts and arguing mitigating circumstances, such as the grievant’s long-term seniority or that the penalty is too severe. *A grievant who does not admit the obvious risks having the arbitrator conclude that he has not expressed “contrition” for his offense.* There is no substitute for the truth, and the grievant may have more to gain by “coming clean” than by offering a story that no person could possibly credit. If the advocate has trouble believing a story, chances are the arbitrator will also have trouble.

Marvin F. Hill, Jr. & Anthony V. Sinicropi, *Improving the Arbitration Process: A Primer for Advocates*, 27 WILLAMETTE L. REV. 463, 496 (1991) (emphasis added) [hereinafter Hill & Sinicropi, *Improving the Arbitration Process*].

Discipline and discharge cases are the most common types of cases heard by arbitrators.¹²⁵ These cases range from those concerning run-of-the-mill violations of workplace rules¹²⁶ to those involving actual violence and harassment against fellow co-workers or even supervisors.¹²⁷

VII. HOW DO ARBITRATORS DEFINE SINCERITY?

One of the primary concerns of employers in this area is whether “any and every grievant” who makes an offer of apology will be able to garner from the arbitrator a reduction in discipline or the overturning of the employer’s discharge decision. This result would seriously undermine the right of employers to impose discipline or discharge even where (1) the grievant had earlier made an offer of apology and the employer rejected the apology, or (2) where the grievant’s apology was an insincere or “pragmatic” apology.¹²⁸ A telling example of this phenomenon is evident in the survey-based article authored by Hoyman, Stallworth and Kershaw, where many arbitrators might not have responded to the survey because they did not want to be viewed as “apology-sensitive” labor arbitrators.¹²⁹

VIII. WHAT ARE THE EVIDENTIARY INDICIA OF OFFERING A SINCERE APOLOGY?

The ultimate purpose of this article is to compile and systematically analyze the impact of offers of apologies from actual arbitral awards in which the grievant offered an apology or an expression of regret or contrition. Additional designs of the research include discovering patterns and trends in the effects that an apology may have on the ultimate outcome.

There has been some scholarship on the possibility of an offer of apology serving as a step toward the “rehabilitation” of an employee. In an article by Roger Abrams, Frances Abrams and Dennis Nolan, the authors speculate as to which aspects of arbitration might make

125. LAURA J. COOPER, DENNIS R. NOLAN & RICHARD A. BALES, *ADR IN THE WORKPLACE* 279 (2d Ed. 2005).

126. *See, e.g.*, Nat’l Air Traffic Controllers Ass’n, 121 Lab. Arb. Rep. (BNA) 769 (2005) (Landau, Arb.) (failure to report possible operational error); Hendrickson Trailer Suspension Systems, Inc., 121 Lab. Arb. Rep. (BNA) 375 (2005) (Ruben, Arb.) (sleeping on the job).

127. *See, e.g.*, H.K. Porter Co., 74 Lab. Arb. Rep. (BNA) 969 (1980) (Finan, Arb.) (finding mitigating circumstances where grievant apologized for assaulting foreman).

128. Hoyman et al., *The Decision-Making of Labor Arbitrators in Discipline and Discharge Cases*, *supra* note 5, at 405-06.

129. *Id.* at 404.

the process therapeutic.¹³⁰ These researchers concluded that there is indeed a "solid basis" for assuming that arbitration has some therapeutic qualities.¹³¹ Moreover, they strongly voice their concern that these benefits may disappear if the unique process of arbitration ever begins to resemble traditional courtrooms in matters of protocol.¹³²

The impact an apology has on the arbitrator's decision-making process may differ due to myriad factors. One study by Patricia Simpson and Joseph Martocchio¹³³ has shown that arbitral decision-making is influenced by such factors as seniority, the performance record, the prior disciplinary record and the prior attendance record of individuals.¹³⁴ Additional scholarship has looked at the race and gender of both the decision-maker (i.e. arbitrator)¹³⁵ and the grievant,¹³⁶ with the goal of determining the degree of influence or impact these factors have on the arbitral outcomes. However, as discussed in the literature review section of this article,¹³⁷ the impact of apology has not yet been examined to date based on an analysis of actual arbitral awards.¹³⁸

130. Roger I. Abrams, Frances E. Abrams & Dennis R. Nolan, *Arbitral Therapy*, 46 RUTGERS L. REV. 1751 (1994). The seven aspects listed as possibilities by the authors are: (1) An Employee-Initiated Process, (2) Arbitrator Selection, (3) The Site of the Arbitration Hearing, (4) An Informal Hearing Not Bound by the Rules of Evidence, (5) The Grievant-Arbitrator Relationship, (6) The Opportunity to Address the Arbitrator, and (7) The Opinion. *Id.* at 1764-80.

131. *Id.* at 1784.

132. *Id.*

133. Patricia A. Simpson & Joseph J. Martocchio, *The Influence of Work History Factors on Arbitration Outcomes*, 50 INDUS. & LAB. REL. REV. 252 (1997). Simpson and Martocchio hypothesized that the arbitrator would be less likely to sustain discharges in cases involving grievants who have seniority, above-average job performance, minor problems with absenteeism and no other types of disciplinary problems, relatively speaking. *Id.* at 254-55. Their subsequent research largely vindicated these hypotheses. *Id.* at 264-65.

134. *Id.* at 264.

135. See, e.g., Steven B. Caudill & Sharon L. Oswald, *A Sequential Selectivity Model of the Decisions of Arbitrators*, 14 MANAGERIAL & DECISION ECON. 261 (1993); Brian Bemmels, *Arbitrator Characteristics and Arbitrator Decisions*, 11 J. LAB. RES. 181 (1990); Richard N. Block & Jack Stieher, *The Impact of Attorneys and Arbitrators on Arbitration Awards*, 40 INDUS. & LAB. REL. REV. 543, 554-55 (1987).

136. See, e.g., David A. Dilts & Hedayah Samavati, *The Arbitration of Gender Discrimination Grievances in the United States*, 12 J. INDIVIDUAL EMP. RTS. 209 (2007); Brian Bemmels, *The Effect of Grievants' Gender on Arbitrators' Decisions*, 41 INDUS. & LAB. REL. REV. 251 (1988); William J. Bigoness & Phillip B. DuBose, *Effects of Gender on Arbitrators' Decisions*, 28 ACAD. MGMT. J. 485 (1985).

137. See Part II, *supra*.

138. See also Hoyman et al., *The Decision-Making of Labor Arbitrators in Discipline and Discharge Cases*, *supra* note 5, at 403

A. *To Apologize or Not Apologize: That is the Question*

What, then, happens when a grievant offers a sincere apology (either to the employer or arbitrator), and what effect might this have on the disposition or outcome of his or her grievance? The apology arbitral awards that serve as the basis for this article were retrieved using the keywords “apology,” “contrition,” “forgiveness,” and “remorse.” There were altogether sixty-nine (69) “apology arbitral awards.” Those arbitration decisions that most clearly outlined specific apology language – and the timing and impact of that language – were used, with the intent of limiting implications and guesswork.

In determining what impact an apology had on the arbitrator, we categorized the awards as follows: (1) awards where an apology had a significant impact, (2) awards where an apology had a moderate impact, and (3) awards where an apology had no discernible impact.

B. *The Significant Impact of a Grievant’s Offer of Apology*

Two cases stand out in terms of demonstrating the impact a grievant’s offer of a sincere apology can have on the outcome of his case. In *University of California*,¹³⁹ Arbitrator Staudohar devoted a significant part of his opinion to addressing the remorse and contrition of the grievant for his actions. Staudohar commented:

What the Grievant did was a mistake, and he fully acknowledges his remorse and contrition. There is no indication of problems with the Grievant’s work as a plumber and he seems to warrant another chance. Discharge is just too severe a penalty under the circumstances.¹⁴⁰

While a number of arbitral awards have mentioned an apology or included it as a second thought among other equally mitigating circumstances,¹⁴¹ Arbitrator Staudohar’s discussion and the weight accorded to the grievant’s apology closely mirrors the elements of apology proposed by Dr. Aaron Lazare,¹⁴² including the acknowledgment of wrongdoing, the expression of remorse, and the willingness

139. 98 Lab. Arb. Rep. (BNA) 431 (1991) (Staudohar, Arb.).

140. *Id.* at 438.

141. *See, e.g.*, *City of Evansville*, 106 Lab. Arb. Rep. (BNA) 673, 681 (1995) (Brookins, Arb.) (“[S]everal mitigating factors play a prominent role in th[is] penalty decision, . . .” including the grievant’s “genuine contrition for her misconduct.”).

142. *See* LAZARE, ON APOLOGY, *supra* note 15, at 35.

to make restitution.¹⁴³ In *University of California*, it is fair to conclude that the grievant's offer of a "sincere apology" played a significant role in the arbitrator's decision-making process to reinstate the grievant.

On this same score, in *H.K. Porter*,¹⁴⁴ Arbitrator Finan used specific language to illustrate the degree of impact that the grievant's apology had on his decision-making process in this case. Observing that the apology was not merely an attempt by the grievant to save his job, the arbitrator praised the sincerity of the grievant's apology:

There are mitigating factors in this case. On January 23, when Grievant confronted [the foreman], he was genuinely upset because of his wife's crying. He reacted in anger and has now expressed contrition. He has twice apologized to [the foreman]. His public apology at the Arbitration Hearing was not a grudging apology made to protect his job.¹⁴⁵

Thus, the acts of showing remorse and offering an apology were indeed significant factors in each of these cases and doubtless had a significant impact on the arbitrators' decision-making process – perhaps even job-saving impacts.

C. *The Significant Impact of a Grievant's Offer of Apology*

Several arbitral awards reflected a degree of moderate impact afforded to a grievant's offer of apology. The grievant in the case of *City of Evansville* worked as an emergency dispatcher for the city of Evansville, Indiana.¹⁴⁶ One day, it came to the attention of her supervisor that she had used the telephone lines on numerous occasions to phone her estranged husband, and on one occasion had warned him that he was the subject of a pending arrest.¹⁴⁷ During an investigation, the grievant and her union representative were given the opportunity to answer to the charges. The grievant claimed that termination would amount to disparate treatment, as many other dispatchers engaged in similar conduct (i.e. using company phones for personal matters) but were not severely disciplined.¹⁴⁸ Following the meeting, the grievant was suspended without pay, pending the conclusion of the investigation.¹⁴⁹ Subsequently, the grievant was

143. *Id.*

144. 74 Lab. Arb. Rep. (BNA) 969 (1980) (Finan, Arb.).

145. *Id.* at 972.

146. *City of Evansville*, 105 Lab. Arb. Rep. (BNA) 673 (1995) (Brookins, Arb.).

147. *Id.*

148. *Id.* at 673, 679-80.

149. *Id.* at 673.

terminated for disseminating confidential departmental operating procedures.¹⁵⁰

As a just cause discharge case, Arbitrator Robert Brookins was presented with the issue of whether the employer had meted out disparate discipline among employees.¹⁵¹ Brookins dismissed the grievant's argument as extremely wanting, citing multiple differences in the cases purported to be consistent with the one before him.¹⁵² Arbitrator Brookins further scolded the grievant in his opinion, stating that her actions could have put responding police officers in danger.¹⁵³ Arbitrator Brookins also cited several mitigating factors, including the grievant's extensive experience; lack of a relevant discipline record; and three prior commendations from the department for exemplary service.¹⁵⁴ Brookins also said that the "Grievant has exhibited genuine contrition for her misconduct."¹⁵⁵

In a balance of aggravating versus mitigating factors, the mitigating factors, including the showing of contrition, clearly had more of an impact on the opinion of the labor arbitrator. The discharge was therefore reduced to a 30-day suspension retroactive to the day of termination.¹⁵⁶

In *Pepsi Bottling Group*, a grievant made insensitive comments to two Arab-American store owners shortly after the September 11th terrorist attacks.¹⁵⁷ This incident occurred during a time when there was significant backlash against some Arab-Americans, simply because they shared common religious affiliations or physical characteristics with those who perpetrated the attacks.¹⁵⁸ The grievant had been employed as a customer service representative for Pepsi Bottling Company for three years and had been with the organization for close to twenty years overall.¹⁵⁹

In the first incident, the grievant had a conversation with an Arab-American convenience store owner. The grievant talked about his upcoming vacation and commented on the difficulty of the store

150. *Id.* at 674.

151. *Id.*

152. *Id.* at 680.

153. *Id.* at 681.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Pepsi Bottling Group, Inc.*, 118 Lab. Arb. Rep. at 300.

158. See generally MICHAEL WELCH, *SCAPEGOATS OF SEPTEMBER 11TH: HATE CRIMES & STATE CRIMES IN THE WAR ON TERROR* (2006).

159. *Pepsi Bottling Group, Inc.*, 118 Lab. Arb. Rep. (BNA) at 300.

owner being able to fly in the future.¹⁶⁰ More disturbingly, the grievant hinted at the possible internment of Arab-Americans, similar to that of the Japanese during World War II.¹⁶¹ The store owner was deeply offended by these comments and filed a complaint with Pepsi Bottling Co. A Pepsi Sales Manager contacted the store owner that same day and arranged for a meeting. The convenience store owner said he would be willing to forgive the grievant if he apologized for his behavior.¹⁶² A few days later, the grievant returned to the convenience store and apologized to the owner who then accepted his offer.¹⁶³ The parties then considered the matter closed.

The second incident involved the grievant and a conversation he had with another convenience store owner the same day that he apologized to the owner of the first convenience store.¹⁶⁴ Upon entering the store, the grievant saw a newspaper headline about a Yemeni store owner who had been murdered in what appeared to be a hate crime. The grievant stated, "that [freaking] Arab deserved to die because he must have been talking [stuff]."¹⁶⁵ The owner of the convenience store was appalled by the comment and demanded that the grievant leave the store at once.¹⁶⁶ The store owner then filed a complaint with Pepsi Bottling Co. After the grievant learned of the complaint, he stated that he was merely muttering a comment to himself and meant no harm. He apologized to the store owner, the two shook hands, and the matter was considered closed.¹⁶⁷

A few weeks later, the store owner from the first incident contacted the Pepsi Sales Manager and indicated that he had reconsidered his acceptance of the grievant's apology and would not allow him to come back to his store.¹⁶⁸ Later that day, this store owner heard of the second incident, which further affirmed his decision to reject the grievant's apology. Two days later, the grievant was given a five-day suspension, pending the outcome of an investigation.¹⁶⁹ Subsequently, the grievant was terminated for having been removed from

160. *Id.* at 301.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 302.

168. *Id.*

169. *Id.*

two stores for insensitive remarks and violating Pepsi's EEOC policies.¹⁷⁰ The union grieved the discharge.

In his opinion, Arbitrator Melvyn Silver explained that while the first store owner did decide to retract his acceptance of the apology, this was not "new evidence" as the company claimed.¹⁷¹ However, the arbitrator also noted that the two incidents did not "take place in a vacuum,"¹⁷² meaning the comments must be considered in light of the recent terrorist attacks and the sensitivity of innocent Arab-Americans.¹⁷³ Silver did not consider the two apologies to be particularly sincere, especially when one considers that the second incident happened on the same day as the first apology.¹⁷⁴

Arbitrator Silver did, however, take into consideration the nearly 20 years of service and the previously spotless record of the grievant.¹⁷⁵ Consequently, the arbitrator reduced the termination to a one-year suspension without pay and loss of seniority during that time.¹⁷⁶ Arbitrator Silver made it abundantly clear that the employee's job security was tenuous at best, saying: "The Arbitrator cannot stress too strongly to Grievant the tenuous thread upon which his employment now hangs."¹⁷⁷ Though Arbitrator Silver did not order it, he strongly encouraged sensitivity training as well.¹⁷⁸

D. *Where a Grievant's Offer of Apology Has No Impact*

Arbitral awards also surfaced several times where an offer of apology by the grievant had no impact on the decision-making process of the arbitrator. Similar to the *Hendrickson Trailer Suspension* case,¹⁷⁹ there have been cases where a grievant's offer of apology was considered to be wholly insincere. *City of Country Club Hills* involved two police officers of differing rank and the failure of the subordinate police officer to carry out an assignment handed down to him by his superior.¹⁸⁰ When the ranking officer, a female, asked the grievant why he had neglected to do his duty, he became extremely hostile,

170. *Id.*

171. *Id.*

172. *Id.* at 303.

173. *Id.*; see also Blaine Harden, *Arab-Americans are Finding New Tolerance Amid the Turmoil*, N.Y. TIMES, Sept. 22, 2001, at B1.

174. *Pepsi Bottling Group, Inc.*, 118 Lab. Arb. Rep. (BNA) at 303.

175. *Id.*

176. *Id.* at 304.

177. *Id.* at 303.

178. *Id.*

179. Discussed *infra* at notes 219 - 234.

180. *City of Country Club Hills*, 121 Lab. Arb. Rep. (BNA) 334 (2005) (Nathan, Arb.).

cutting off the ranking officer several times in mid-sentence.¹⁸¹ The subordinate police officer also did not respond to questions in a manner consistent with how a police officer should address his ranking superior. The ranking officer testified that the subordinate police officer said, "You know, I forgot – write me up."¹⁸²

The two officers later had an argument over a separate assignment that the grievant had not carried out.¹⁸³ The superior police officer then demanded to know the reasons behind the grievant's behavior. The grievant apologized and said that he "had a lot going on."¹⁸⁴ However, the insubordination and sarcastic comments by the grievant continued. The Chief of Police was alerted, and he commenced an investigation regarding the totality and seriousness of the grievant's behavior toward his superior. After consideration of alternatives, the Chief decided to suspend the grievant for two days and to remove him from eligibility as an acting shift commander, a lucrative position.¹⁸⁵

In arbitration, the union argued that the grievant was not being disrespectful and that he had apologized for raising his voice.¹⁸⁶ The union also contended that the superior officer had overreacted to what she misinterpreted as wanton sarcasm.¹⁸⁷ The City of Country Club Hills countered with the argument that the grievant did not respect his superior officer and pointed to the grievant's consistent and constant insubordination as evidence.¹⁸⁸

The arbitrator's analysis of these arguments pointedly disagreed with the grievant's characterization of the events.¹⁸⁹ Furthermore, the arbitrator was not satisfied by the grievant's apology.¹⁹⁰ Specifically, the arbitrator stated, "it is difficult to get the sense that the apology was sincere."¹⁹¹ Thus, the two-day suspension was upheld, but the grievant was not barred from serving as an acting shift commander.¹⁹²

181. *Id.* at 336

182. *Id.*

183. *Id.*

184. *Id.* at 337.

185. *Id.*

186. *Id.* at 338.

187. *Id.*

188. *Id.* at 337.

189. *Id.* at 338.

190. *Id.* at 339.

191. *Id.*

192. *Id.*

*County of Sacramento*¹⁹³ is another case where an arbitrator does not afford an equivocal (or perceived insincere) apology any positive weight. In this case, the grievant had been listening to sexually vulgar music within earshot of two female employees. The grievant had also made inappropriate comments of a sexual nature in front of female co-workers on several occasions. When confronted about his actions, the grievant apologized to one of the women by saying, "I'm sorry if I said anything to offend you,"¹⁹⁴ The woman then accepted the apology of the grievant.¹⁹⁵ However, the grievant's conduct did not change until the women filed formal complaints. The grievant claimed there was "collaboration" among the women to get him fired.¹⁹⁶ After an investigation, the grievant was given a ten-day suspension, which he grieved.¹⁹⁷

Arbitrator Bonnie Bogue, relying largely on the credibility of the employer's witnesses in this dispute, found the grievant's innocuous side of the events to be rather suspect.¹⁹⁸ In the arbitrator's opinion, there was a pattern among the witnesses impossible to overlook, and their versions were infinitely more credible.¹⁹⁹ The grievant's equivocal apology did little in the way of swaying Arbitrator Bogue's determination of a credibility gap between the women and the grievant. Accordingly, the arbitrator found that the grievant had been suspended for just cause²⁰⁰ and upheld the ten-day disciplinary suspension.²⁰¹

This apology closely follows a problem outlined by Nick Smith: to wit, a grudging or equivocal offer of apology may often compound the initial mistake.²⁰² The insincerity of the offer, coupled with the inconsistencies of the grievant's statements, led Arbitrator Bogue to find the grievant to be not credible.²⁰³ The use of the phrase "if I offended you" is also reminiscent of New York Yankees pitcher Andy Pettitte's equivocal apology.²⁰⁴

193. *County of Sacramento*, 118 Lab. Arb. Rep. (BNA) 1702 (2003) (Bogue, Arb.).

194. *Id.* at 1704.

195. *Id.*

196. *Id.* at 1706.

197. *Id.* at 1708.

198. *Id.* at 1709

199. *Id.*; see also Hill & Sinicropi, *Improving the Arbitration Process*, *supra* note 124, at 494 (discussing how conflicts in witness testimony negatively affect arbitrator determinations of credibility).

200. *Id.* at 1712

201. *Id.*

202. See Smith, *The Categorical Apology*, *supra* note 18, at 475.

203. *County of Sacramento*, 118 Lab. Arb. Rep. (BNA) at 1709.

204. See *supra* note 2.

IX. DOES THE TIMING OF AN APOLOGY MAKE ANY DIFFERENCE?

It stands to reason that the timing of an apology, whether perceived to be sincere or insincere, would be critical to its acceptance or rejection by an arbitrator.²⁰⁵ An act of remorse or display of contrition might lose its significance and therefore be viewed as “less sincere” if it is offered at the “eleventh hour” or at the “courthouse steps” (e.g. the day of the arbitration).²⁰⁶ The desire for a better outcome is most likely the driving force behind a grievant’s decision to offer an apology.²⁰⁷ However, the closer the pending decision approaches, an apology increasingly appears to be an act of desperation, rather than the thoughtful conveyance of an apology Dr. Lazare²⁰⁸ and others contemplated. In testing this general theory, the authors retrieved arbitral awards where the timing of the offer of apologies by grievants in discipline and discharge cases was at issue. The authors used four specific “timing scenarios”: (1) awards where an apology was offered prior to the arbitral hearing; (2) awards where an apology is offered during the arbitral hearing; (3) awards where the timing was either unspecified or was raised only by the arbitrator in the opinion; and (4) awards where no apology was offered, but the timing of an apology may have had an effect.

A. *What Happens When the Grievant Offers an Apology Prior to the Arbitral Hearing?*

There were several arbitral awards in which grievants made an offer of apology prior to the arbitration hearing. In *Lane County*, for example, a road maintenance worker (the grievant) employed by the Department of Public Works for 16 years went to a company

205. *But see* Hoyman et al., *The Decision-Making of Labor Arbitrators in Discipline and Discharge Cases*, *supra* note 5, at 409-10.

206. This was evident in the trial, conviction and sentencing of former Illinois Governor George Ryan. Ryan was sentenced on September 6, 2006, to 6 ½ years in a federal prison for fraud, racketeering and other corruption charges. Catrin Einhorn, *Ex-Gov. Ryan of Illinois Reports to Prison*, N.Y. TIMES, November 8, 2007, at A31. In a statement given to the jury shortly after his conviction, Ryan stated: “When [the people of Illinois] elected me as the governor of this state, they expected better and I let them down, and for that I apologize.” *Excerpts From Ryan’s Statement*, CHI. TRIB., September 7, 2006, § 1, at 1. However, the prosecution contended that from the moment Ryan was arrested he had shown a “lack of contrition.” *See* John Kass, *Ryan’s Light Sentence Isn’t the Only Joke*, CHI. TRIB., September 7, 2006, § 1, at 2; Eric Zorn, *Ryan’s Simple Rule: If It Feels Right, Now, Do It*, CHI. TRIB., September 7, 2006, § 2, at 1. It was only after he had been convicted that Ryan apologized. *Id.*

207. *See* Hoyman et al., *The Decision-Making of Labor Arbitrators in Discipline and Discharge Cases*, *supra* note 5, at 405; LAZARE, ON APOLOGY, *supra* note 15, at 145, 157.

208. LAZARE, ON APOLOGY, *supra* note 15, at 35.

mechanic to check on the status of some repairs on his tractor.²⁰⁹ When the grievant inquired as to how those repairs were coming along, the mechanic stated that he was not sure but would check on it momentarily. The grievant then let out a profanity-laced tirade, which was witnessed by several nearby employees.²¹⁰ One of those witnesses filed a complaint with the manager and an investigation ensued.²¹¹

Within one or two days of the incident, the grievant approached the mechanic and apologized.²¹² The grievant explained that the obscenities were not personally directed at the mechanic, but were instead a result of frustrations arising from the continuous problems the grievant had experienced with this particular tractor.²¹³ The grievant was given a one-day suspension, which was grieved by the union and subsequently submitted to arbitration.²¹⁴

In Arbitrator Mark Downing's written opinion, he mentioned several factors central to his decision. Seniority at the Department of Public Works and a previously spotless discipline record certainly worked in the grievant's favor.²¹⁵ The arbitrator also mentioned that "the grievant realized that it was inappropriate for him to have taken his frustrations out on [the mechanic] and he apologized."²¹⁶ After considering these mitigating factors, the arbitrator sustained the grievance.²¹⁷ The suspension was changed to a written warning and the employer was ordered to make the grievant whole.²¹⁸

Another case, *Hendrickson Trailer Suspension*,²¹⁹ provides for an excellent example of the "non-apology apology." Similar in its lack of sincerity to a 2004 apology offered by Senator John Kerry,²²⁰ the grievant in this case used the words "if. . . I offended you, I apologize and if I struck you, I apologize."²²¹ This, of course, does not meet the

209. Lane County, 111 Lab. Arb. Rep. (BNA) 481, 482 (1998) (Downing, Arb.).

210. *Id.*

211. *Id.* at 482-83.

212. *Id.* at 482.

213. *Id.*

214. *Id.* at 483.

215. *Id.* at 486-87.

216. *Id.* at 486.

217. *Id.* at 487.

218. *Id.*

219. *Hendrickson Trailer Suspension Systems, Inc.*, 121 Lab. Arb. Rep. (BNA) 375 (2005) (Ruben, Arb.).

220. *See supra* notes 49-50 and accompanying text.

221. *Hendrickson Trailer Suspension Systems, Inc.*, 121 Lab. Arb. Rep. (BNA) at 378 (emphasis added). *Accord Davis, On Apologies, supra* notes 28-31 and accompanying text.

criteria of an apology under any commonly accepted definition because there is no direct acknowledgement of the offense.²²²

In *Hendrickson Trailer Suspension*, the grievant was caught sleeping during a work meeting.²²³ When awoken, he struck a manager (the intention of doing so in dispute) and swore at him. The grievant was suspended pending an investigation.²²⁴ The testimony from other workers indicated that the grievant was boasting that he had put the manager "in her place."²²⁵

At a subsequent disciplinary hearing, the grievant offered the aforementioned self-described "heart-felt apology."²²⁶ The manager who was struck and Plant Manager Donald E. Hayes believed the apology to be inadequate.²²⁷ Shortly thereafter, citing the lack of remorse shown by the grievant, Mr. Hayes decided to terminate the grievant's employment.²²⁸

At arbitration, the union argued that the entire incident was an accident stemming from a misinterpretation of a "flinch" by the grievant and stated that he had indeed shown remorse, pointing to the apology he offered.²²⁹ The company countered with the statements given by coworkers, contending that the grievant was actually proud of what he had done. The company also pointed out that, even if the physical contact was unintentional, the grievant still directed profanity at the manager after the incident happened.²³⁰

Arbitrator Alan Ruben was conflicted as to whether the contact was intentional and gave the grievant the benefit of the doubt, citing his seniority and the fact that he had been nudged awake by the manager.²³¹ However, Ruben agreed with the company that the grievant actually took "pride in his conduct" and pointed to his lack of remorse as a troubling sign.²³² This led the arbitrator to deny back

222. See LAZARE, ON APOLOGY, *supra* note 15, at 23; Smith, *The Categorical Apology*, *supra* note 18, at 473; NICHOLAS TAVUCHIS, MEA CULPA: A SOCIOLOGY OF APOLOGY AND RECONCILIATION 16-17 (1991).

223. *Hendrickson Trailer Suspension Systems, Inc.*, 121 Lab. Arb. Rep. (BNA) at 377.

224. *Id.* at 378.

225. *Id.* at 377.

226. *Id.* at 378.

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.* at 380.

231. *Id.* at 381-83.

232. *Id.* at 383.

pay and to reinstate the grievant only under a strict "last chance agreement."²³³

It is therefore apparent that Arbitrator Ruben disagreed with the grievant's characterization of his apology as "heart-felt." Arbitrator Ruben was given plenty of additional indicators of the grievant's lack of remorse, including the profanity directed at his supervisor shortly after the physical contact.²³⁴ However, the failure of the grievant to even acknowledge that he had committed an offense loomed large in the decision of Arbitrator Ruben. If a grievant does not even recognize his wrongdoing, an apology will always ring hollow.

The facts involved in the case of *University of California*²³⁵ were quite interesting and tailor-made for this article. A plumber (the grievant) for the University of California at Berkeley (University) received an emergency call late one evening and traveled via taxi to the site to fix the problem. The grievant did not own an automobile but was planning to purchase one the next day. When he returned to the shop where he kept his tools after finishing the job, he realized he had lost his wallet. Since the grievant did not have cash or a credit card to take a cab, he attempted, to no avail, to call family and friends. By this time, he had been gone from his home for almost three hours and felt he needed to get back to his four small children. Consequently, the grievant decided to drive the University-owned truck back to his house.²³⁶

The grievant checked on the truck periodically throughout the evening. When he looked out of his window the next morning, however, the truck was gone. He phoned a supervisor and also filed a theft report with the local police. The following day, the grievant returned to work. Subsequently that same day, the truck was located and returned. The University-owned truck had sustained damage in excess of \$3500.²³⁷

After performing a routine check on the licenses of all of the University's plumbers, it was discovered that the grievant's license had

233. *Id.* at 383-84. A last chance agreement is a "written contract that is used to 'salvage a recalcitrant employee,' specifically, an employee who has already been discharged or for whom termination is imminent." Peter A. Bamberger & Linda H. Donahue, *Employee Discharge and Reinstatement: Moral Hazards and the Mixed Consequences of Last Chance Agreements*, 53 INDUS. & LAB. REL. REV. 3, 3 (1999).

234. *Hendrickson Trailer Suspension Sys., Inc.*, 121 Lab. Arb. Rep. (BNA) at 382.

235. *Univ. of Cal. at Berkley*, 98 Lab. Arb. Rep. (BNA) 434 (1991) (Staudohar, Arb.).

236. *Id.* at 434-35.

237. *Id.*

expired nearly six months prior to the incident.²³⁸ Eleven days after the truck had been stolen, the grievant was placed on unpaid leave for driving without a valid driver's license.²³⁹ The grievant was discharged shortly thereafter for the unauthorized use of a University vehicle and failure to report an accident involving a University vehicle.²⁴⁰

At the arbitration hearing, both the union and the University acknowledged the remorse shown by the grievant for his actions.²⁴¹ Arbitrator Paul Staudohar cited unusual mitigating circumstances (*i.e.* the plumber's four children were home alone) as a viable reason for the grievant to drive the University's truck back to his residence.²⁴² Staudohar also expressly noted the satisfactory overall performance of the grievant.²⁴³

Most importantly, Arbitrator Staudohar made specific mention of the grievant's acknowledgement that he made a mistake, his expression of remorse, and his offer to make restitution:

What the Grievant did was a mistake, and he fully acknowledges his remorse and contrition. There is no indication of problems with the Grievant's work as a plumber and he seems to warrant another chance. Discharge is just too severe a penalty under the circumstances.²⁴⁴

In recognizing these factors, Arbitrator Staudohar was adamant that the grievant's overall record did not warrant such a harsh punishment.²⁴⁵ Accordingly, the grievant was reinstated without back pay and ordered to compensate the University for the damages the truck sustained.²⁴⁶ The grievant was also ordered to obtain a valid license.²⁴⁷

This case succinctly shows how the utilization of the elements of a sincere apology, as suggested by Lazare,²⁴⁸ can affect the decision-making process of a labor arbitrator. It also serves as an indication of

238. *Id.* at 435.

239. *Id.*

240. *Id.*

241. *Id.* at 436-37.

242. *Id.* at 437.

243. *Id.* at 438.

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. See LAZARE, ON APOLOGY, *supra* note 15, at 35.

whether the offender has learned a lesson or arguably been rehabilitated.²⁴⁹ The timing of the apology, in this instance, also played an important role. Arbitrator Staudohar, in citing the genuine remorse of the grievant, implicitly acknowledged that this action was not an “eleventh-hour attempt” on the part of the grievant to save his job.

B. *What Happens When the Grievant Offers an Apology During the Arbitral Hearing?*

Several arbitral awards in which grievants made an offer of apology during the arbitration hearing were also noteworthy. In *Hubbell-Tyner, Inc.*, the grievant was given a six-month suspension for refusing a reassignment from his employer.²⁵⁰ As an employee at the Hubbell-Tyner Corporation, the grievant was asked to tear down a second convention trade show after he and other employees had already taken one down. The grievant felt that this reassignment was actually additional work and therefore violated the collective bargaining agreement of his union.²⁵¹

As word of the reassignment reached other employees, dissension began to fester among them. A heated argument between the grievant and the Union steward erupted and a Hubbell-Tyner client came over to find out the basis for the argument.²⁵² In total, nine employees refused the reassignment and eight of those nine were suspended for three months.²⁵³ The grievant, who had used profanity and lashed out at the Union steward within listening range of the client, was suspended for six months.²⁵⁴

At the arbitration hearing, the grievant acknowledged that his response to the reassignment was uncalled for, and he “expressed his

249. Another helpful case was the decision of *Douglas v. Veterans Admin.*, 5 M.S.P.B. 313, 331-32 (1981), which established the so-called “Douglas Factors.” Many decisions have invoked the “Douglas Factors” when deciding the appropriate penalty for an employee in a disciplinary situation. Matthew E. Terry, *When Procedure Moonlights as Reason, There is Nothing Left to Abuse*, 2009 J. DISP. RESOL. 547, 549 n.28 (2009). For a discussion of these twelve factors in the context of federal employees, see Edward H. Passman & Bryan J. Schwartz, *In the Name of Security, Insecurity: The Trend to Diminish Federal Employees’ Rights*, 21 LAB. LAW. 57, 72 (2005).

250. *Hubbell-Tyner, Inc.*, 115 Lab. Arb. Rep. (BNA) 114 (2000) (Berger, Arb.).

251. *Id.* at 115-16.

252. *Id.* at 116.

253. *Id.* This action is known as an insubordinate refusal to work. The general rule is that an employee should “work now, grieve later,” unless safety is a major concern. Therefore, if an employee has been given an assignment that she feels is not covered by her job description, she should follow orders anyway, then grieve to her union after her shift is through. Brand, *DISCIPLINE AND DISCHARGE IN ARBITRATION*, *supra* note 6, at 169.

254. *Hubbell-Tyner, Inc.*, 115 Lab. Arb. Rep. (BNA) at 116.

sorrow for what had happened.”²⁵⁵ However, the grievant maintained that the reassignment violated the current collective bargaining agreement.²⁵⁶ When making this claim, he cited his past position as Union President and his 19-plus years as an employee of Hubbell-Tyner with intimate knowledge of contract negotiations.²⁵⁷

Arbitrator Mark Berger disagreed, however, citing the most logical interpretation of the language of the contract as contrary to the grievant's assertions.²⁵⁸ Berger said the company's request was reasonable, based on the knowledge that the two assignments were to be carried out so closely together and that finding enough employees to do the jobs separately was not a feasible option.²⁵⁹ Arbitrator Berger further explained that this incident was a classic example of the “obey now, grieve later” principle.²⁶⁰ This industrial relations principle says employees “must obey orders and carry out their job assignments, even when they believe those assignments are in violation of the [collective bargaining agreement], and then turn to the grievance procedure for relief.”²⁶¹

Notwithstanding, Arbitrator Berger did find that the punishment given to the grievant was excessive relative to the other eight workers who also willfully refused the assignment.²⁶² Though some

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.* at 118-19.

259. *Id.*

260. *Id.* at 119. Arbitrator Mark Berger stated:

View[ing] [the issue of refusal of assignment] as a just cause question, however, does nothing to change the ultimate outcome in this case. Because I have concluded that the Company had the right to make the reassignment at issue in this arbitration, and due to the fact that the employees offered no justification for their refusal to work on the S.I.F.E. tear down, just cause for punishment was established. Further support for this result is reflected in the well accepted principle of labor arbitration that employees should not use self help in the context of contract disputes. Often this is known as the “obey now, grieve later” principle. It is supported by numerous arbitration decisions which are referred to in *How Arbitration Works*. There are limited exceptions to this principle, as where the Company commands a criminal act or requires the performance of dangerous tasks, as well as some other unique circumstances. However, none of the exceptions are applicable to the instant case. Moreover, . . . the Grievants cannot rely on any provision of the labor agreement which grants them the right to reject the assignment, nor was there anything unusual about the work they were asked to do.

Id.

261. ELKOURI & ELKOURI, *HOW ARBITRATION WORKS*, *supra* note 8, at 262. *See also id.* at 1023-24.

262. *Hubbell-Tyner, Inc.*, 115 Lab. Arb. Rep. (BNA) at 120.

additional discipline was in order in light of the grievant's use of profanity, a doubling of suspension was an "unreasonable response to the events in question," the arbitrator reasoned.²⁶³ Thus, the suspension was reduced to four months, which was also the time from termination until the decision was rendered.²⁶⁴ The grievant's earlier expression of sorrow, although included in the facts of the case,²⁶⁵ was not explicitly acknowledged as having an impact on Berger's decision.

In *H.K. Porter*, the apology offered by the grievant had a considerable impact on Arbitrator John Finan.²⁶⁶ The grievant, a production worker, would often hear complaints from his wife (also an H.K. Porter employee) that she had been treated poorly or suffered discrimination by a foreman in her department. One day, the wife was crying and told her husband that she had been written up by the foreman.²⁶⁷ The grievant then drove around the plant parking lot looking for this foreman, whom he eventually found.

When confronted by the grievant, the foreman declined to listen or discuss the situation. When the foreman then turned to walk away, the grievant restrained him.²⁶⁸ There were conflicting statements as to whether the foreman was struck or merely stopped from leaving. Nevertheless, a complaint was filed with the Manufacturing Manager.²⁶⁹

A meeting to discuss the incident was set for the following morning.²⁷⁰ The grievant was asked whether the foreman had responded to the grievant's actions with any physical force.²⁷¹ After denying that he had, the grievant stated that "if he had, he would have been on the ground."²⁷² The grievant was subsequently terminated from his position, and the Company let it be known that great weight was given to the grievant's statement at the meeting.²⁷³

263. *Id.*

264. *Id.*

265. *Id.* at 116.

266. *H.K. Porter Co.*, 74 Lab. Arb. Rep. (BNA) 969 (1980) (Finan, Arb.).

267. *Id.* at 970.

268. *Id.*

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.*

At the arbitration hearing, the grievant offered a public apology.²⁷⁴ Arbitrator Finan cited the offer of apology as a mitigating factor.²⁷⁵ Specifically, Finan opined:

There are mitigating factors in this case. On January 23, when Grievant confronted [the foreman], he was genuinely upset because of his wife's crying. He reacted in anger and has now expressed contrition. He has twice apologized to [the foreman]. His public apology at the Arbitration Hearing was not a grudging apology made to protect his job.²⁷⁶

The arbitrator also stated, in reflecting upon his duty to "judge the demeanor of the witnesses," that he was "impressed with the sincerity of the apology."²⁷⁷ As such, the grievance was granted in part, and the grievant was reinstated without back pay.²⁷⁸

A similar outcome occurred in *New Jersey Transit*, a case in which the facts were never in dispute.²⁷⁹ An employee at New Jersey Transit Bus Operations went to speak with other employees during a shift change. While talking to these co-workers, the grievant noticed an old friend approaching. The grievant proceeded to pull his pants down and moon (display his bare bottom) to this old friend.²⁸⁰ The maintenance foreman on duty observed this action and noted that the two employees, the old friend and the grievant, were both laughing.²⁸¹ No comments or complaints were registered by any person on site when the incident occurred.²⁸²

The foreman wrote an incident report and forwarded it to his supervisor, who then passed it up the managerial chain.²⁸³ A disciplinary hearing was called where the grievant and a union steward

274. *Id.* at 971.

275. *Id.* at 972.

276. *Id.* Arbitrator Finan therefore believes that this apology was not a "utilitarian" apology, as defined by Fox and Stallworth. Fox & Stallworth, *How Effective Is an Apology In Resolving Workplace Disputes?*, *supra* note 78, at 55.

277. *H.K. Porter Co.*, 74 Lab. Arb. Rep. (BNA) at 972; *see also* MARVIN F. HILL, JR. & ANTHONY V. SINICROPI, *EVIDENCE IN ARBITRATION* 108-28 (2d. ed. 1987) (discussing credibility of witness testimony in arbitration hearings).

278. *H.K. Porter Co.*, 74 Lab. Arb. Rep. (BNA) at 972.

279. *New Jersey Transit Bus Operations, Inc.*, 119 Lab. Arb. Rep. (BNA) 724 (2003) (Gudenberg, McDaid & Sullivan, Arbs.).

280. *Id.* at 724. Similar indecency circumstances are part of an important case that dealt with "employment at-will" and public policy conflicts. *Wagenseller v. Scottsdale Mem'l Hosp.*, 710 P.2d 1025 (Ariz. 1985).

281. *New Jersey Transit Bus Operations, Inc.*, 119 Lab. Arb. Rep. (BNA) at 724.

282. *Id.*

283. *Id.*

were present.²⁸⁴ The grievant acknowledged his mistake and admitted that it was a “stupid” action.²⁸⁵

At the conclusion of the hearing, the supervisor notified the grievant that he was being discharged for gross misconduct and violation of company policy.²⁸⁶ As called for in the collective bargaining agreement, there was a second hearing held by the Maintenance Director.²⁸⁷ At this discipline grievance hearing, the grievant repeated his acknowledgement that he had made a mistake and apologized for his actions.²⁸⁸ The grievant also drafted a letter of apology to be delivered to the employees of the facility.²⁸⁹ Notwithstanding, the discharge of the grievant was upheld by the management.²⁹⁰

At the arbitration hearing, this letter of apology was formally given to management and the Union argued that, while the grievant’s actions were completely inappropriate, they were not meant to be sexual in nature and therefore did not rise to a level warranting immediate discharge.²⁹¹ Moreover, the grievant had a spotless record, and the Union put forth this clean record as an additional mitigating effect.²⁹² The Company countered with the notion that the grievant’s conduct could very well be interpreted as creating an unlawful sexual hostile work environment and stated that it could be held liable for such actions.²⁹³ According to the Company, the only proper action under the Company’s policy was discharge.²⁹⁴

Arbitrators Harry Gudenberg, David McDaid and Joseph Sullivan conceded that the grievant had indeed committed a serious mistake and that strict discipline was certainly appropriate.²⁹⁵ However,

284. *Id.* at 724-25. Under what are known as “Weingarten rights,” an employee has the right to have a union representative present during an investigatory interview. *NLRB v. Weingarten*, 420 U.S. 251 (1975).

285. *New Jersey Transit Bus Operations, Inc.*, 119 Lab. Arb. Rep. (BNA) at 725-26.

286. *Id.* at 725.

287. *Id.*

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.* at 726. In other words, the Union argued the actions were *malum prohibitum* (“[a]n act that is [wrong] merely because it is prohibited by statute”) as opposed to *malum in se* (“an act that is inherently immoral”). BLACK’S LAW DICTIONARY 444 (3d pocket ed.) (Bryan A. Garner, ed., 2006); see also ELKOURI & ELKOURI, HOW ARBITRATION WORKS, *supra* note 8, at 964-67.

292. *New Jersey Transit Bus Operations, Inc.*, 119 Lab. Arb. Rep. (BNA) at 726.

293. *Id.* at 725-26. See also *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

294. *Id.* at 726.

295. *Id.*

the arbitrators did not believe that the Company's zero tolerance argument was convincing.²⁹⁶ They stated that the policy the Company interpreted to leave no recourse aside from termination was in fact much less rigid.²⁹⁷ The arbitrators read the policy as giving an option "up to and including termination."²⁹⁸ The arbitrators also noted that not one person complained about the actions and that even the direct witnesses were laughing.²⁹⁹ Gudenberg, et al. seemed to give this revelation considerable impact when making the final decision. Consequently, the grievant was reinstated with full back pay.³⁰⁰ The acknowledgement of the public apology was given brief mention in the facts of the case, but Gudenberg, et al., seemed to be swayed more by the overreaction on the part of the Company than any other factor.

C. *What Happens When the Timing of an Apology Offer is Unspecified?*³⁰¹

There are also incidents wherein the timing of the grievants' offer of apology is not indicated in the arbitral award. *City of Alton* involves several incidents of insubordination by a police officer employed by the city of Alton, Illinois.³⁰² Among these transgressions were instances of leaving work early, refusing to assist another officer when ordered to do so, and using profane language when describing a fellow officer.³⁰³ Each time, the grievant/officer was suspended for varying lengths of time.³⁰⁴ However, the grievant always

296. *Id.*; cf. ELKOURI & ELKOURI, HOW ARBITRATION WORKS, *supra* note 8, at 1010-12, 1015.

297. *New Jersey Transit Bus Operations, Inc.*, 119 Lab. Arb. Rep. (BNA) at 726.

298. *Id.*

299. *Id.*

300. *Id.* at 727.

301. There were several cases where an apology was clearly given by the grievant and acknowledged by the arbitrator, but it was impossible to decipher whether the apology was offered prior to or during arbitration. *See, e.g.*, U.S. Steel Corp., Great Lakes Works, 121 Lab. Arb. Rep. (BNA) 417 (2005) (Das, Arb.); Bryan Foods, Inc., 109 Lab. Arb. Rep. (BNA) 633 (1997) (Baroni, Arb.). The "Timing of Apology Offer is Unspecified" section is therefore used to encompass those cases where the apology was clearly a factor in the decision/opinion of the arbitrator, but not discussed in the context of its timing.

302. *City of Alton*, 121 Lab. Arb. Rep. (BNA) 1288 (2005) (Pratte, Arb.).

303. *Id.* at 1290.

304. *Id.*

apologized, sometimes verbally and other times through written communication.³⁰⁵ The suspensions were usually then reduced as a result of what supervisors and fellow officers alike deemed to be sincere displays of remorse and contrition.³⁰⁶

The grievant was eventually ordered to undergo a psychological evaluation with follow-up sessions.³⁰⁷ His doctor prescribed medicines for him and the grievant took them faithfully. However, the grievant did not show up to a few of his appointments and his prescriptions were held until he went to see his psychologist.³⁰⁸ After complaining, the grievant was given a seven-day prescription refill and an appointment was scheduled within the week. When the grievant went to pick up his medication, it was not ready and he was told to return later. Though the grievant felt agitated, he decided that he could still report to work that day.³⁰⁹

The grievant arrived at work expecting to be released from his shift early because he had previously put in a request. His immediate supervisor had not received the grievant's request, however, and a more senior officer had been granted a request to leave early prior to that shift anyway.³¹⁰ This resulted in an argument between the supervising sergeant and the grievant.³¹¹ This argument escalated throughout the day, culminating in the grievant saying that he would just take sick time.³¹² When the sergeant said that the grievant must actually be sick to take sick time, the grievant began to remove his duty gear and said, "[Screw] you, I'll take sick time."³¹³ The sergeant told the officer to report to the Chief's office the following day.³¹⁴

The Chief called for an investigation and placed the officer on administrative leave.³¹⁵ After taking a look at the officer's discipline record, work history and past apologies for improper conduct, the Chief decided that the grievant's behavior was not going to change.³¹⁶ At the final disciplinary hearing, the Chief discharged the officer, who then filed a grievance over his termination.³¹⁷

305. *Id.*

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.* at 1291.

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.*

316. *Id.*

317. *Id.* at 1292.

In sum, the police department argued that it had gone above and beyond what was asked of it in terms of offering progressive discipline, to no avail.³¹⁸ The union contended that discharge of the grievant was too severe a punishment for what it termed “minor” acts of insubordination.³¹⁹ The union also contended that the grievant was a victim of disparate treatment, reasoning that far worse indiscretions had been committed by other officers who were punished much less severely.³²⁰

The arbitrator rejected the arguments of the union, stating that prior disciplinary and work records for those officers were not on the record, thus rendering the juxtaposition incomparable.³²¹ Arbitrator Geoffrey Pratte agreed with the police department’s assessment of the unacceptable behavioral tendencies and anger management issues of the grievant.³²² Arbitrator Pratte went on to address the many apologies that the grievant had previously offered: “The Grievant has had his chances, and his written apologies, which aided him in the past, now only serve to show that his offensive behavior has run its course and the termination is proper.”³²³ Thus, the grievance was denied and the discharge upheld.³²⁴

Interestingly, the grievant seemed to be aware of the beneficial aspects of offering an apology. In fact, as noted by Arbitrator Pratte, the grievant apologized multiple times prior to this discharge for various offenses.³²⁵ Each time, the punishment was either reduced or retracted altogether.³²⁶ This pattern would surely indicate a lack of sincerity by the grievant, rendering the continuous offers of apology as ineffective.³²⁷ Arbitrator Pratte clearly came to a similar conclusion when drafting his opinion.

Another case, *Children’s Hospital*, is another example of an arbitrator citing an apology for mitigation. Here, a heated meeting between a hospital employee and a human resources representative ended with an ambiguous remark, uttered by the employee, telling the human resources representative to “be careful.”³²⁸ The argument

318. *Id.* at 1292-93.

319. *Id.* at 1293.

320. *Id.*

321. *Id.* at 1295.

322. *Id.* at 1293-94.

323. *Id.* at 1295.

324. *Id.* at 1296.

325. *Id.* at 1290-91.

326. *Id.*

327. See LAZARE, ON APOLOGY, *supra* note 15, at 117.

328. *Children’s Hosp.*, 110 Lab. Arb. Rep. (BNA) 471 (1998) (Feigenbaum, Arb.).

at the meeting began after the human resources representative informed the employee that his position was to be eliminated in a month.³²⁹ The employee became extremely agitated and persisted in arguing about whether he would remain as a part-time or full-time employee in some other capacity.³³⁰ At the conclusion of the meeting, the hospital employee told the human resources representative that she should "be careful this weekend,"³³¹ referring to Memorial Day weekend. This resulted in the employee's termination, as the human resources representative considered the remark to be a threat.³³²

The dispute largely resides on the intent of the remark "be careful this weekend."³³³ The grievant contended that he meant the remark as a genuine warning, not a threat.³³⁴ According to the grievant, he believed that holiday weekends could be especially dangerous.³³⁵ The human resource representative, along with another witness, took the remark to be a physical threat, especially in the context of the somewhat heated exchange the two had just engaged in moments earlier.³³⁶ The hospital supported the interpretation of the human resources representative and immediately terminated the grievant, relying on its policy of immediate discharge for any verbal threat toward a supervisor.³³⁷

Arbitrator Charles Feigenbaum was presented with the task of interpreting the intent of the grievant's warning and looked to the grievant's past in doing so. According to the arbitrator, two prior incidents showed what appeared to be the grievant's tendency to lose his temper. One incident involved another employee, and the other incident involved the mother of a patient.³³⁸ In both cases, the grievant apologized, and in this latter incident, the grievant had acknowledged a lack of professionalism.³³⁹ The grievant was not formally disciplined for either incident³⁴⁰

329. *Id.* at 473.

330. *Id.*

331. *Id.*

332. *Id.* at 474.

333. *Id.* at 473.

334. *Id.* at 475.

335. *Id.*

336. *Id.* at 474.

337. *Id.* For an extensive listing of a variety of circumstances where the arbitrator felt summary discharge was warranted, see ELKOURI & ELKOURI, HOW ARBITRATION WORKS, *supra* note 8, at 965-66 ns.192-97.

338. *Children's Hosp.*, 110 Lab. Arb. Rep. (BNA) at 475.

339. *Id.*

340. *Id.*

As to the incident at hand, Arbitrator Feigenbaum found that there was not just cause for the grievant's termination.³⁴¹ The analysis stated that, while the remark was arguably not a "friendly expression of concern"³⁴² and very likely not extended as an "olive branch,"³⁴³ it was nevertheless a general statement and ambiguous in nature.³⁴⁴ Arbitrator Feigenbaum further cited the grievant's immediate explanation and retraction as a sign of the innocuous intent, when the grievant was asked if the remark had been meant as a threat.³⁴⁵ The arbitrator felt that the grievant realized he had made a mistake.³⁴⁶ Accordingly, the grievance was granted in full, and the grievant was reinstated with full back pay and seniority.³⁴⁷

D. *What Happens When the Grievant Offers No Apology?*³⁴⁸

In *Koppers Industries, Inc.*,³⁴⁹ the employer made the decision to terminate one of its employees after he recklessly drove his forklift into the back of another employee's forklift. This act caused significant injuries and rendered the victim unable to work for a full month.³⁵⁰ The grievant in this matter had apparently been trying to pass the victim on a one-lane road when the accident occurred. At the arbitration hearing, the grievant stated that the victim had earlier bumped his forklift and directed racially derogatory words toward

341. *Id.*

342. *Id.* at 471.

343. *Id.* at 475.

344. *Id.*

345. *Id.*

346. *Id.* Arbitrator Feigenbaum's exact words:

The Grievant's words to Ms. Melton were inappropriate. It was a foolish remark made in a stressful situation, from which the Grievant immediately retreated. He did this verbally, by his attempt to explain the remark in a non-threatening way, and also non-verbally, when he stepped back when Ms. Melton asked him what he had said. I think it important that, as soon as confronted, the Grievant backed away (literally and figuratively) from an interpretation of his words that could be construed as a threat, and tried to give them an entirely innocuous meaning. He realized, as Ms. Melton surmised, that he had made a mistake and then attempted to repair the damage that had been done.

Id.

347. *Id.*

348. The inclusion of those cases found by using keywords such as "apology," "contrition," "remorse" and "sorrow," but without an apology offered by the grievant, still hold relevance to this study. Aside from the empirical examination of the hypothesis that such cases will be less likely to end in a grievant's favor, these cases also include suggestions and opinions of the arbitrators that an offer of apology most likely would have benefited the grievant in each case.

349. *Koppers Indus., Inc.*, 122 Lab. Arb. Rep. (BNA) 259 (2006) (Halter, Arb.).

350. *Id.* at 261.

him.³⁵¹ On behalf of the grievant, the union requested reinstatement and full back pay with all previous rights restored.³⁵²

The company argued that, in light of this being the first incident at the plant where an employee willfully used his forklift to injure another employee, there was just cause to discharge the grievant.³⁵³ The employer also pointed out that the grievant had just returned from a three-day suspension stemming from an unrelated incident³⁵⁴ and that the grievant initially denied this previous mistake, only to equivocate on the facts of it and eventually take responsibility for his role in this incident.³⁵⁵ Thus, the employer argued that the grievant's explanations for the forklift incident could not be credibly relied upon.³⁵⁶

Regarding the components of proper and effective progressive discipline,³⁵⁷ Arbitrator Patrick Halter wrote that, "[f]or progressive discipline to be corrective there must be some awareness by an employee of errant behavior."³⁵⁸

Arbitrator Halter further opined, in not-so-subtle terms, the benefits that such an acknowledgement and subsequent apology may have had on the grievant's overall contention in this matter:

Sometimes last chance remorse surfaces at a hearing such that it redeems an employee and sways the arbitrator to find that the discharge is not proportional to the misconduct and a lesser penalty with reinstatement is rewarded. An admission of error, an expression of regret, or an offer of an apology contributes to a conclusion that leniency is appropriate. By contrast where an employee avoids responsibility for his actions an arbitrator may be less inclined to overturn a serious penalty.³⁵⁹

This is an instance where an arbitrator requested an apology but did not receive it. Had the union representative advised the grievant to offer an apology for his actions, Arbitrator Halter would have assuredly looked favorably upon that gesture and most likely would have opted for a lesser penalty than discharge. Unfortunately, the

351. *Id.*

352. *Id.*

353. *Id.* at 260.

354. *Id.*

355. *Id.*

356. *Id.*

357. The principle of progressive discipline generally applies in discipline and discharge cases. One possible exception might be in incidents involving theft. *See, e.g.*, Cynthia Horvath Garbutt & Lamont E. Stallworth, *Theft in the Workplace: An Arbitrator's Perspective on Employee Discipline*, 44 ARB. J. 21, 22 (1989).

358. *Koppers Indus., Inc.*, 122 Lab. Arb. Rep. (BNA) at 262.

359. *Id.*

grievant chose only to make excuses for his behavior. Accordingly, Arbitrator Halter denied the grievance in its entirety and the discharge was upheld.³⁶⁰

Another case, *Gogebic County Road Commission*, also demonstrates an arbitrator's desire for a grievant to show remorse.³⁶¹ In this case, the grievant was suspended in 2004 for theft from the company. The employer then argued that this suspension, coupled with a prior 1992 criminal theft conviction, was grounds for a just cause termination of the grievant.³⁶² The employer attempted this action despite the fact that the grievant was not employed at Gogebic at the time of the 1992 incident. The union argued that such a conviction constituted double jeopardy (i.e. two punishments imposed for the same wrongdoing) and therefore, the discharge was without just cause and should be overturned.³⁶³

The employer argued that the employee "expressed no contrition or remorse such that the employer would be able to expect that the conduct, or similar conduct, would not be repeated in the future."³⁶⁴ As such, the employer saw no other alternative but to discharge the employee.³⁶⁵

There was considerable disagreement as to whether a double jeopardy defense was even plausible under these particular circumstances. Specifically, the company argued that this defense must be distinguished from an arbitrator's authority to consider prior misconduct of an employee.³⁶⁶ The employer relied on a 1963 arbitration decision by Arbitrator Alexander B. Porter to support its position.³⁶⁷

Arbitrator David Poindexter, however, disagreed with the company's reasoning. Poindexter thought it was hardly plausible that a conviction wholly unrelated to the current employer, which had taken place over twelve years ago, would reflect poorly on the employer.³⁶⁸

360. *Id.*

361. *Gogebic County Rd. Comm'n*, 121 Lab. Arb. Rep. (BNA) 929 (2005) (Poindexter, Arb.).

362. *Id.* at 935.

363. *Id.* at 936-37.

364. *Id.* at 935.

365. *Id.*

366. *Id.* at 935-36.

367. *Id.*; see *Bethlehem Steel Co.*, 41 Lab. Arb. Rep. (BNA) 890, 892 (1963) (Porter Arb.). Porter chided such a double jeopardy claim as having "no application" in arbitration proceedings. *Id.* He pointed out the inconsistency of the Union, exclaiming that "the Union would be the first to claim that [the employee's record] should be considered as a mitigating circumstance in setting a penalty" if it were good. *Bethlehem Steel Co.*, 41 Lab. Arb. Rep. (BNA) at 892.

368. *Gogebic County Rd. Comm'n*, 121 Lab. Arb. Rep. (BNA) at 937-38.

Arbitrator Poindexter further reasoned that the characterization of the grievant's actions as "scandalous" and "disgraceful" by the current employer was not persuasive.³⁶⁹ The arbitrator also pointed out this act of theft did not even result in company discipline at the time by the grievant's previous employer.³⁷⁰

While having no qualms with the 30-day suspension handed down for the 2004 theft of company property, and agreeing that the lack of remorse was troubling, Arbitrator Poindexter nevertheless found the grievant's claim of double jeopardy to have merit.³⁷¹ The grievance was therefore granted and the employee was reinstated with full back pay and benefits.³⁷²

The interesting part of this opinion is that the arbitrator went out of his way to mention the lack of remorse shown by the grievant.³⁷³ It is obvious that Arbitrator Poindexter did not accept the employer's argument. However, Poindexter was troubled enough by the grievant's failure to apologize for the theft that he felt the need to put it in the record, even though it was not relevant to the question of double jeopardy.

In the case of *American Safety Razor*, a male employee (the grievant) sexually assaulted and battered a female co-worker.³⁷⁴ Specifically, the grievant placed his hand under the blouse of a female employee, touched her breasts, and put his hands down her pants. The grievant was discharged following an investigation.³⁷⁵

The union argued that the investigation was flawed and that the grievant was treated disparately, as another employee who had been accused of similar behavior had only been given a two-week suspension.³⁷⁶

There was considerable disagreement on the facts of what had actually occurred in this matter. A classical "he said, she said" case of consensual versus nonconsensual sexual advances had to be sorted out by the arbitrator. Arbitrator Earle Hockenberry found the female employee and her witnesses to be more credible than the grievant

369. *Id.* at 938.

370. *Id.*

371. *Id.*

372. *Id.*

373. *Id.*

374. *Am. Safety Razor Co.*, 110 Lab. Arb. Rep. (BNA) 737 (1998) (Hockenberry, Arb.).

375. *Id.* at 739-40.

376. *Id.* at 738-39. See also ELKOURI & ELKOURI, HOW ARBITRATION WORKS, *supra* note 8, at 1144-47 (describing a range on penalties imposed for sexual harassment).

and ruled that termination was indeed an appropriate punishment.³⁷⁷ Hockenberry further distinguished between the incidents of sexual harassment before him and the incident put forth by the union as evidence of disparate treatment.³⁷⁸ The two-week suspension was given to an employee who engaged in sexual harassment, but whose conduct was plainly of a lesser degree than that of the grievant's. Arbitrator Hockenberry buttressed this reasoning by pointing out that the punishment was never challenged by the company or victim, and added that the sexual harasser had apologized for his conduct.³⁷⁹ The arbitrator noted that, in stark contrast, "there was no inadvertence on the part of the Grievant, nor [any] apology offered."³⁸⁰

In the written opinion, the grievant's conduct was described as "particularly egregious, without remorse."³⁸¹ Thus, the grievance was denied and the discharge was upheld.³⁸² This is yet another instance where an arbitrator hints at the need for an apology by the grievant. Despite the seriousness of the actions, Hockenberry still seemed willing to give the grievant a second chance. A stiff punishment would doubtless still have applied due to the seriousness of the offense. However, the grievant chose not to show remorse for his actions, nor did the union representative appear to advise the grievant to apologize. Rather, the union representative chose to downplay the gravity of the conduct and attempted to portray the grievant as a victim of disparate treatment. Needless to say, these tactics did not impress Arbitrator Hockenberry.

X. WHAT ARE THE LESSONS LEARNED FROM ARBITRATORS REGARDING THE IMPACT AND SIGNIFICANCE OF OFFERS OF APOLOGY?

Upon the examination of some sixty-nine (69) "apology arbitral awards" found by using the key words of "apology," "contrition," "remorse" and/or "forgiveness," some interesting observations can be made. These "apology awards" were examined and coded within the context of: (1) the timing of the grievant's apology; (2) the impact of that apology; and (3) the outcome of the grievance. Of the 69 awards examined and analyzed, an apology was offered in 30 cases (43.5%), and no apology was offered in 37 cases (53.6%). The two remaining

377. *Am. Safety Razor Co.*, 110 Lab. Arb. Rep. (BNA) at 745-46.

378. *Id.* at 740, 746.

379. *Id.*

380. *Id.* at 746.

381. *Id.* at 747.

382. *Id.*

cases resulted in the labor arbitrator imposing, as a remedy, the mandating of a written apology by either the grievant or employer.³⁸³

Within the group of 30 arbitral cases where the grievants offered an apology, an offer of apology was made: (1) prior to the actual holding of the arbitral hearing in 20 cases (66.7%); (2) during the hearing in 5 cases (16.7%); and (3) at an unspecified time in 5 cases (16.7%). A grievant who apologized had his or her grievance sustained or partially sustained: (1) in 85% of the apology cases where the offer took place prior to the actual arbitral hearing; (2) in 80% of cases where the offer of apology took place during the arbitral hearing; and (3) in 60% of cases where the timing of the offer was unspecified

A grievants' offer of apology had a mitigating impact on the decision-making process of the labor arbitrator in 12 of these cases (40%), but did not have a mitigating impact in 7 of the cases (23.3%). In the remaining 11 cases, there was no indication given by the arbitrator regarding the weight afforded or impact of the grievant's offer of apology.

An examination of the outcomes of all sixty-nine (69) "apology arbitral awards" reveals that 25 cases were sustained (36.2%), 26 cases were denied (37.7%), and 18 were sustained in part and denied in part (26.1%). Of the 30 "apology arbitration" cases in which an apology was offered, 14 of the grievances were sustained (46.7%), 6 grievances were denied outright (20%), and 10 of the grievances were sustained in part and denied in part (33.3%). Moreover, out of 25 total sustained grievances, 14 involved situations where an offer of apology was made (56%). In those 26 cases where the grievance was denied, 6 cases involved an apology offered by the grievant (23.1%). Lastly, an examination of the 18 "apology arbitral awards" where the arbitrator sustained in part and denied in part the grievance, 10 involved an apology by the grievant (55.6%).

It is worth noting that when "sustained" grievances (56% of which contained an apology) and "sustained in part and denied in part" grievances (55.6% of which contained an apology) are observed together, the result is remarkably consistent. Thus, where an arbitrator either sustained or partially sustained a grievance, 55.8% (24 of 43) of those cases saw a grievant offering an apology. Another way of stating this finding would be that an apology was given in only 23.1% of cases that resulted in a denial of the grievance, whereas an apology

383. See Dep't of the Navy, Indian Head Div., 111 Lab. Arb. Rep. (BNA) 193 (1998) (Hockenberry, Arb.); Leatherback Indus., 109 Lab. Arb. Rep. (BNA) 1202 (1998) (Allen, Jr., Arb.).

was offered in 55.8% of the cases where the grievance was either partially or fully granted.

XI. SUMMARY AND CONCLUSIONS

The purpose of this article was to determine what impact and significance, if any, a grievant's offer of apology has on the decision-making process and the outcome of labor arbitration in discipline and discharge cases.

Based solely on the findings of the authors, an offer of apology by the grievant does enhance the likelihood of a sustained or partially sustained grievance (80% of the time) versus a denied grievance (20%) in discipline and discharge cases. This finding suggests that a union representative has a strong incentive to advise the grievant to apologize or show remorse for his or her conduct or wrongdoing. In addition, the management representative should be aware of the impact and significance of a grievant's sincere offer of apology. For instance, it would be prudent and pragmatic for management to weigh the benefits and costs of further pursuing a disciplinary action in the arbitration forum, rather than striving to reach a settlement before (i.e. during negotiations/mediation). If the grievant has offered a sincere apology, management should be aware that labor arbitrators tend to treat this offer favorably when weighing mitigating factors for punishment of the grievant.

A much weaker relationship is evident from the timing of a sincere apology. The arbitral awards where a grievant offered an apology resulted in a sustained or partially sustained grievance in 85% of cases where the offer took place prior to the arbitral hearing, in 80% of cases where the offer took place during the arbitral hearing, and in 60% of cases where the timing of the offer was unspecified.

Examining only those apologies offered either prior to or during the actual arbitral hearing, no significant difference in the impact of those apologies is readily apparent. Therefore, in the context of this study and article, there is little merit to the proposition that the earlier the apology is offered, the more likely a favorable outcome for the grievant (sustained or partially sustained) will take place.³⁸⁴

However, it is not possible to draw a definitive conclusion from this finding. Unlike the instances when an apology was offered by the

384. This finding is consistent with the results of the Hoyman, Stallworth & Kershaw survey, which found that "the timing of an apology does not affect the arbitral outcome." Hoyman et al., *The Decision-Making of Labor Arbitrators in Discipline and Discharge Cases*, *supra* note 5, at 410.

grievant prior to the arbitral hearing (20 in all), there were only five (5) instances where an apology was offered during the arbitral hearing or at an unspecified time. The sample of relevant arbitral awards is simply too small to draw a strong distinction among the timing categories. Rather, it would be more accurate to conclude that most of the grievants who chose to apologize did so at an earlier time. Thus, it may be reasonably inferred that the impact of the *act of a grievant offering* an apology is more important than the actual *timing* of that offer of apology, whether sincere or insincere.³⁸⁵

All three parties involved in the grievance handling stage and labor arbitration process (the management representative, the union representative, and the grievant), could therefore draw the following conclusions from the study:

- A grievant has a greater chance of having his or her grievance sustained or partially sustained when he or she offers a sincere apology.
- The timing of a sincere apology does not appear to have a significant impact on the decision-making process of an arbitrator.
- A union representative, knowing that a sincere offer of apology enhances the ability of the grievant to gain a favorable outcome, should encourage his or her grievant to offer that apology.

A management representative should always be cognizant of the impact and significance a sincere offer of apology by a grievant can have on the decision-making process of a labor arbitrator. Processing this knowledge, the management representative should therefore weigh the costs and benefits or pros and cons of advancing a disciplinary action and discharge through final binding arbitration, as opposed to reaching a settlement at an earlier stage of a discipline or discharge grievance dispute.

XII. FUTURE RESEARCH

As previously discussed, the choice of whether to conduct an empirical, survey-based study or a case-based study involves the careful consideration of the pros and cons of each. The case-based method, which forms the basis for this article, provides two important benefits:

385. See *id.* at 409-10.

- It allows for an examination of actual “apology arbitral awards” and the opinions contained therein, rather than relying on fictional scenarios used in recent empirical studies.
- There is no need to be concerned with a response rate, as the arbitral awards have already been published and are accessible to the researcher.

However, a case-based approach also has its downfalls:

- The case-based approach leaves wide open the possibility of ambiguous assessments, as the researcher must attempt to glean the meaning of words uttered or written by the arbitrator and grievant.
- Rather than being told the thoughts of the key players, the researcher must interpret their meaning. This dilemma is especially relevant when the sincerity of an apology is in question.

It is necessary then to discuss the utility of empirical, survey-based studies. A couple of benefits of survey-based studies include:

- The ability to gain a wide and representative sample of arbitrators to weigh in through relatively easy means.
- The answers and comments given by those surveyed are taken right from the source, so there is less ambiguity.

Drawbacks from choosing survey-based studies include:

- The possibility that the response rate of those asked to take the survey will be low, hindering the overall study and its credibility.
- The possibility that those who choose to complete the survey may do so haphazardly, impacting the validity of the study's findings.

The Hoyman, Stallworth and Kershaw policy-capturing study uses the empirical, survey-based method of scientifically examining the impact of a grievant's offer of apology on the decision-making process of the labor arbitrator.³⁸⁶ According to Joseph Martocchio, Jane Webster and Charles Baker, the utility of policy-capturing is in the importance of gaining insight from individuals' choices.³⁸⁷ “Policy capturing represents a method for measuring the relative importance of decision variables, or factors, to a decision maker's choice among

386. Hoyman et al., *The Decision-Making of Labor Arbitrators in Discipline and Discharge Cases*, *supra* note 5, at 403.

387. Joseph J. Martocchio, Jane Webster & Charles R. Baker, *Decision-Making in Management Information Systems Research: The Utility of Policy Capturing Methodology*, 12 BEHAVIOUR & INFO. TECH. 238, 238 (1993).

alternatives. Rather than analysing [sic] decision-making policies across subjects, this method examines policies within subjects.”³⁸⁸

Hoyman, Stallworth and Kershaw are therefore interested in what specific factors influence a grievant’s success rate in arbitration (i.e. obtaining a favorable decision). The authors found the overall success rate of the grievants to be 21.4%.³⁸⁹ The data also suggest that seniority has a very significant impact on the success rates of grievants.³⁹⁰

When Hoyman, et al., look at rates of success when an apology is offered under various circumstances, there are some interesting findings. Grievance success rates (i.e. obtaining a decision that either reduces the degree of discipline or overturns a discharge) are as follows:

- 34% in early sincere cases
- 31% in late sincere cases
- 15% in early insincere cases
- 13.2% in late insincere cases³⁹¹

Therefore, the results of Hoyman and Stallworth are much in line with the findings of this article. Specifically, a sincere offer of an apology by the grievant positively impacts a grievant’s likelihood of success when the decision is reached. Though this article did not specifically measure “sincere” versus “insincere” offers of apology, the impact of this distinction was discussed in the form of examining and discussing several cases where the apology was offered grudgingly or perceived to be insincere.³⁹²

Hoyman, et al., similarly found the timing of the apology to be relatively insignificant. While an early apology did increase the success rates of grievants, Hoyman, et al., determined these upticks were quite small (+3% for sincere apologies and +1.8% for insincere apologies).³⁹³

Further study in the area of “workplace apology” may include avenues of protection for those workers who wish to apologize for their actions. Perhaps one possibility would be a study to determine if laws

388. *Id.* at 239.

389. Hoyman et al., *The Decision-Making of Labor Arbitrators in Discipline and Discharge Cases*, *supra* note 5, at 405.

390. *Id.* at 407-08.

391. *Id.* at 406.

392. See, e.g., *City of Alton*, 121 Lab. Arb. Rep. (BNA) 1288 (2005) (Pratte, Arb.). The inability to decipher from the opinions whether the arbitrator believed an apology was sincere is an example of the drawbacks of a case-based study.

393. Hoyman et al., *The Decision-Making of Labor Arbitrators in Discipline and Discharge Cases*, *supra* note 5, at 406 (Table 1).

that permit or create a “safe harbor” for workers and employers to offer an apology are necessary to ensure that such expressions may not later be used as “an admission against interest” or guilt.³⁹⁴ As offers of apology have become more commonplace in our society, they may serve to “heal or repair relationships,” save money, and decrease litigation of all types.

394. See Robbenolt, *Apologies and Legal Settlement*, *supra* note 69, at 461; Cohen, *Legislating Apology*, *supra* note 54, at 821.

