Toward a More Modern Application of the "Nexus to the Workplace" Test: Arbitral Considerations in Off-Duty Employee Misconduct Cases

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Labor arbitrators often consider whether to sustain employee discipline for misconduct that occurs away from the job. The traditional test employed by labor arbitrators in that context involves an evaluation of whether the misconduct has a nexus to the workplace. If the off-duty misconduct can be shown to have an impact on the employer's legitimate business interests, then arbitrators generally sustain the discipline under the nexus test. The nexus test, however, must be reexamined to account for how the workplace has changed. This Article analyzes those changes in the modern workplace. Such changes include work-at-home arrangements, employee use of social media, and access to information about employees in the digital age. This Article then suggests new considerations for labor arbitrators in their application of the nexus test to off-duty misconduct cases.

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I. Introduction

Consider the following employment scenarios in unionized workplaces:

- A school bus driver is arrested for possession of marijuana after the marijuana is found in his personal vehicle during a traffic stop. He is charged by the police with a misdemeanor. The school board wants to terminate his employment after parents complain that it may not be safe for their children to ride to school on a bus with a driver who likes to get high.
- A security guard posts racially inflammatory political remarks on Facebook related to supporting police in the shooting of minorities regardless of the circumstances. Although the posts were made when the employee was off-duty, a quick perusal of his Facebook page enables the reader to ascertain where he works and what his job is. The company learns of the posts after co-workers whom he has "friended" complain about having to work with a bigot.
- A male employee is arrested for a domestic violence incident involving an alleged assault on his girlfriend, a co-worker. The alleged crime took place in their shared apartment at a time when both were off-duty. The employees do not work in the same location, but occasionally have to come in contact with each other as part of their respective jobs.
- A delivery company employee tweets that she is getting drunk with her friends and posts a picture of herself in her work uniform with shots of tequila spread out across the table in front of her. The picture was clearly taken after her shift ended on a Friday night. Her employer sees the picture and wants to suspend the employee for her behavior. Her employer gets even more irate when she learns that the tweet was sent from a company phone.

- An IT employee uses his company-issued laptop to access pornography. He views the pornography while off-duty in his home. The company has regularly allowed employees to use their company-issued computers for personal reasons while off-duty.

How should a labor arbitrator consider discipline of employees based on these instances of off-duty misconduct?

The issue of when and under what circumstances a labor arbitrator will sustain discipline for employee misconduct that occurs away from the workplace has vexed arbitrators for decades. As long ago as 1944, one arbitrator described the issue as follows:

> [T]he jurisdictional line which limits the Company's power of discipline is a functional, not a physical line. [The Company] has power to discipline for misconduct directly related to the employment. It has no power to discipline for misconduct not related to the employment.[1]

But what does it mean for employee misconduct to be "directly related" to employment? Where does the workplace end and personal life begin in a modern workplace, where employees respond to texts and e-mails well into the night? Traditionally, arbitrators have followed a rule requiring that employers show that the employee actions on which the discipline is based have a nexus to the workplace—that is, a connection between the misconduct and the employer's legitimate business interests.[2] Stated another way, "[i]n order for management to terminate an employee for off-duty misconduct, such conduct must affect the employer's operations at the employee's place of work."[3]

This Article examines the traditional test employed by arbitrators in employee off-duty misconduct cases and argues that the arbitral considerations in evaluating employer decision-making in this area should be reexamined to account for the realities of the modern workplace. Arbitrators deciding cases involving the modern workplace must consider questions that arbitrators in 1944 did not necessarily need to consider. For example, how should arbitrators define "place of work" in an age when many employees are connected electronically to the workplace at all times, even when off-duty and in

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1. Opinion A-132, Ford Motor Co. (1944) (Shulman, Arb.), *in* OPINIONS OF THE UMPIRE: FORD MOTOR CO. AND UAW-CIO (1946).

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

3. *Id.*

their homes?[4] How should arbitrators weigh the potential effect on the reputation of an employer's business in an age when the slightest off-color comment has the ability to be viewed on social media around the world in a matter of seconds? Can or should employers police the interaction of their employees on social media for disciplinary purposes?[5] How should evolving law surrounding domestic violence episodes impact arbitral consideration of discipline where the violence occurred between co-workers in an intimate relationship?[6] And how should arbitrators consider employee privacy with respect to employees' lives away from their jobs? The workplace of the past is not the same as the workplace of the present day.[7] As the modern workplace continues to evolve, arbitrators are faced with increasingly difficult questions about how to approach discipline for employee actions occurring outside of the physical confines of the employer's premises.

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4. For a discussion of the application of the employee protections of the National Labor Relations Act ("NLRA") in the context of workplace policies allowing employees to use their own phones and tablets for work, *see generally* Patrick J. Beisell, *Something Old and Something New: Balancing "Bring Your Own Device" to Work Programs with the Requirements of the National Labor Relations Act*, 2014 U. ILL. J.L. TECH. & POL'Y 497 (2014) [hereinafter Beisell].

5. For example, in a recent National Labor Relations Board ("NLRB") case, the NLRB considered whether it was illegal for an employer to discharge two employees of a youth program for an off-duty Facebook discussion about their jobs. *See* Richmond Dist. Neighborhood Ctr., 361 N.L.R.B. No. 74, 2–3 (2014). Among other things, the employees discussed teaching kids how to paint graffiti during program activities. *Id.* at 1. The NLRB ultimately ruled that the employer did not violate the NLRA when it discharged the employees because of their insubordinate behavior. *Id.* at 4. For a contrary decision, *see* Triple D, LLC, 361 N.L.R.B. No. 31, 6, 9 (2014) (finding that an employee Facebook post stating that a supervisor was an "asshole" was protected activity under the NLRA).

6. As noted by one commentator recently, the method and manner by which domestic violence incidents are addressed in the legal system continue to evolve:

> Social institutions fail to adequately address or remedy the serious, widespread problem of domestic violence, including and especially the criminal justice system. However, increased concern with domestic violence has led to advocacy for law reform in the criminal justice system, including the definition of new offenses and stricter punishments. Further refinements in the criminal prosecution and punishment of offenders, as valuable as they may be, are nowhere near sufficient to solve all of the problems associated with domestic violence.

Roni A. Elias, *Restorative Justice in Domestic Violence Cases*, 9 DEPAUL J. SOC. JUST. 67, 67 (2015). For a discussion of three cases involving treatment of domestic violence issues in the workplace, *see* Bernard Jacques, *Domestic Violence Comes to Work*, 20 CONN. LAW. 28, 29–33 (2010).

7. *See supra* note 1 for an arbitral decision relating to the workplace of the 1940s. For a discussion of the labor market issues that informed the passage of the NLRA, *see* Michael L. Wachter, *The Striking Success of the National Labor Relations Act*, 37 REG. 20, 20–24 (2014).

As some employers have adjusted to the realities of a workplace that is seemingly without temporal end or spatial boundaries, so too must arbitrators adjust their approaches to deciding when and under what circumstances employees should be held accountable for off-duty misconduct. In assessing such cases, at the very least, arbitrators must begin to expand their definition of the workplace, take into account the ease with which employers' businesses can be harmed by employee misconduct in the Internet age, and consider the effortlessness with which customers can access information about wayward employees in ways that can harm employers. Arbitral law must also account for the increased potential of liability that employers face in the modern workplace. Such considerations must be balanced against the reach of employers into the private sphere of their workers' lives.[8] This Article suggests new considerations for arbitrators confronted with evolving questions regarding when and under what circumstances employees should suffer disciplinary consequences at work for conduct outside the traditional workplace.

II. A Place Without Boundaries of Time or Space: The Modern Workplace

Whether described as "virtual" or never-ending, the modern workplace has expanded beyond the traditional definition of the shop floor.[9] Employment has moved away from the traditional workplace, where workers clock in at the start of their shift, perform their duties on a shop floor subject to supervisory observation, and end their day by clocking out as they leave the workplace.[10] Work has moved away from a sole location and expanded into employees' vehicles, houses,

8. As one commentator has stated in discussing the need for employee privacy, "[e]ach employee is a human with private thoughts, private communications, and a private life. These remain as dear to the employee the moment after the employee steps into the workplace as the moment before." Ariana R. Levinson, *Industrial Justice: Privacy Protection for the Employed*, 18 Cornell J. L. & Pub. Pol'y 609, 609 (2009) [hereinafter Levinson].

9. *See, e.g.*, Michelle A. Travis, *Equality in the Virtual Workplace*, 24 Berkeley J. Emp. & Lab. L. 283, 290 (2003) (describing telecommuting as "work that is done by an individual for an organization, outside of the 'normal organizational confines of space and time, for at least some portion of the workweek'") (citation omitted) [hereinafter Travis]. For an interesting discussion of union organization in a modern workplace, *see* Katherine V.W. Stone, *Employee Representation in the Boundaryless Workplace*, 77 Chi.-Kent L. Rev. 773, 785–819 (2002).

10. *See* Robert Sprague, *From Taylorism to the Omnipticon: Expanding Surveillance Beyond the Workplace*, J. Marshall J. Computer & Info. L. 1, 3 (2007) ("As the office has replaced the factory floor, telephones, computers, e-mail and the Internet have become the tools of the modern workplace.") [hereinafter Sprague].

and electronic devices.[11] One commentator has described one potential effect of this change on employee privacy:

> Two decades back, it would be rather unconscionable to contemplate an employer continuously monitoring an employee conversation. On the contrary, a continuous monitoring of an employee's digital keystrokes may be the new norm. This is because a search of an individual's digital footprint in cyberspace would reveal multiple behavioral signatures that might assist an employer in making decisions about the employee's continued viability within an organization. Although a very sensitive area, this phenomenon has implications for both the employer's rights and the employee's rights, because an employer's surveillance opens uncharted legal trajectories with limited precedence.[12]

Much of the legal scholarship surrounding the modern workplace has focused on when and under what circumstances employers are subject to liability where work has spilled over into employees' private time.[13] For example, when employees work in their homes, employers may be subject to liability for workplace safety issues under the Occupational Safety and Health Act of 1970 ("OSHA"),[14] despite having little to no ability to control or police safety hazards in each employee's home.[15] Under the Fair Labor Standards Act of 1938 ("FLSA"),[16] employers may be subject to minimum wage and overtime liability where it is impossible to determine when and under what circumstances employees are working from home.[17] Employers

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11. *Id.*

12. Saby Ghosray, *Employer Surveillance Versus Employee Privacy: The New Reality of Social Media and Workplace Privacy*, 40 N. KY. L. REV. 593, 599 (2013) [hereinafter Ghosray].

13. For a discussion of a new area of potential employer liability, that of Internet Service Providers, *see* Caitlin Garvey, *The New Corporate Dilemma: Avoiding Liability in the Age of Internet Technology*, 25 U. DAYTON L. REV. 133, 139–62 (1999).

14. *See* 29 U.S.C. §§ 651–78 (1970).

15. *See* Kelli L. Dutrow, *Working at Home at Your Own Risk: Employer Liability for Teleworkers under the Occupational Safety and Health Act of 1970*, 18 GA. ST. U. L. REV. 955, 993 (2002) (arguing that "OSHA in the home is unmanageable and does not provide enough advantages to the employee to make it worth the intrusion into their privacy").

16. *See* 29 U.S.C.A. §§ 201–19 (1938).

17. For a discussion of the application of the minimum wage to a virtual work environment, *see generally* Miriam A. Cherry, *Working for (Virtually) Minimum Wage: Applying the Fair Labor Standards Act in Cyberspace*, 60 ALA. L. REV. 1077 (2009). As Professor Cherry notes, "[w]ith modern computers, individuals often perform work on someone else's behalf while sitting at home, using not their employer's factory machinery, but rather a computer they purchased for themselves, as well as their own Internet connection. The work is often engaging and is far more pleasant than operating a drill press of the 1930s." *Id.* at 1078.

in those circumstances do not have a time clock on a shop floor to determine the beginning and end of an employee's shift.[18] How can an employer even begin to police work hours when an employee sends work-related e-mails while sitting on his or her couch at home, watching television and enjoying a beverage? Yet another example of the difficulty posed by applying traditional employment laws to the modern workplace is liability under and application of anti-discrimination laws in non-traditional workspaces.[19]

Brown v. ScriptPro, LLC,[20] a Tenth Circuit case, serves as an example of the quandaries often faced by employers in the modern workplace.[21] In *ScriptPro*, an employee sued his employer for interference and retaliation under the Family and Medical Leave Act ("FMLA"),[22] as well as for lost overtime pay.[23] In particular, the plaintiff's FLSA claim was based in part on his alleged performance of work completed at home.[24] As the court described the plaintiff's allegations, "Mr. Brown filed his FLSA claim . . . in order to receive payment for the eighty hours he allegedly worked from home between approximately July and October 2008."[25] In support of that claim, he provided evidence that included his own and his wife's testimony that he regularly worked while at home.[26] Ultimately, the court rejected the plaintiff's claim, based in part on the plaintiff's own failure to use the employer's system to keep track of his work time.[27] Though vindicating the employer because of the timekeeping systems it had in place, the *ScriptPro* decision demonstrates a dilemma for employers in the modern workplace: employees who work outside a traditional

18. For a discussion of potential employer liability pitfalls under the FLSA, *see* Gilbert M. Roman, *The Fair Labor Standards Act: The Do's and Don'ts and Pitfalls for the Unwary*, 17 PREVENTIVE L. REP. 14, 14–17 (1998).

19. *See* Travis, *supra* note 9, at 331–74, for a discussion of the application of Title VII of the Civil Rights Act of 1964 to non-traditional work arrangements.

20. 700 F.3d 1222 (2012).

21. *Id.* at 1225–26.

22. *Id.* at 1226 (quoting 29 U.S.C. § 2615(a)(1)–(2) (1993)).

23. *Id.* at 1230 (quoting 29 U.S.C. § 207(a) (2010)).

24. *Id.* at 1230.

25. *Id.*

26. *Id.*

27. *Id.* ("It is undisputed that [the employer] keeps accurate records, and employees can even access the timekeeping system from home. Mr. Brown easily could have entered his hours; in fact, he was required to do so.").

workplace bring with them legal risks that may be difficult for employers to manage.[28]

These liability considerations make it difficult to know where and under what circumstances an employer can and should regulate employee conduct that takes place away from an employer's premises. As noted above, the line between the workplace and private life has become indistinct:

> Developments in the nature of work and organization are . . . blurring the boundary between work and home, between public and private. It is becoming more difficult to distinguish clear and unambiguous boundaries between work and private life as people work longer hours, work from home on computers owned by their employer, and work on call.[29]

Some commentators have even suggested that employees' interest in privacy has diminished in favor of public "exuberance" for social media.[30] In any event, the concept of employee privacy outside of the workplace is in conflict with employers' legitimate interests in shielding themselves from liability with respect to employee misconduct in the modern workplace.

III. Arbitral Law on Just Cause and Off-Duty Employee Misconduct

When considering off-duty misconduct cases involving the modern boundary-less workplace, labor arbitrators must make decisions about how to apply traditional principles of "just cause" to non-traditional workplaces and situations.

A. *The "Just Cause" Standard in Labor Arbitration*

Union employee access to a grievance and arbitration process in collective bargaining agreements is nearly uniform in the United States.[31] Although described in different ways in various labor contracts, arbitration provisions generally require that employers only take disciplinary action if "just cause" exists for the employer to act

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28. For a discussion of the difficulties surrounding the application of unemployment law to telecommuting relationships, *see generally* Beverly Reyes, Note, *Telecommuters and Their Virtual Existence in the Unemployment World*, 33 Hofstra L. Rev. 785 (2004).

29. *See* Sprague, *supra* note 10, at 27 (citation omitted).

30. *See* Ghosray, *supra* note 12, at 626.

31. *See* Mario F. Bognanno et al., *The Conventional Wisdom of Discharge Arbitration Outcomes and Remedies: Fact or Fiction*, 16 Cardozo J. Conflict Resol. 153, 153–54 (2014).

against the employee.[32] Regardless of the terminology used, most collective bargaining agreements do not define just cause, but instead leave its definition to the interpretation of neutral labor arbitrators.[33] One commentator has described the process of interpretation:

> The arbitrators who hear cases are specialists in the field, selected for their neutrality and expertise . . . . [T]he employer and not the worker, bears the burden of proving cause.
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> In addition to these important procedural advantages, unionized workers benefit from a highly conceptualized standard of cause. Arbitrators are charged with considering the "law of the shop" in rendering judgment. Their expertise justifies close scrutiny of employer decision-making. This includes determining not only whether actual cause existed, but whether the employer's response was appropriate in light of the particular situation. Arbitrators consider such factors as whether the employer acted proportionately, whether the employee was adequately warned, and whether, if a rule was violated, the rule itself is fair and consistently enforced.[34]

As Dean Harry Shulman of Yale Law School observed in a lecture in 1955, in deciding employee discipline in just cause cases, the labor arbitrator "is in a position to consider the industrial relations implications of the decision and to become familiar with the parties and their specific needs."[35] Any determination of just cause requires consideration of two separate questions: (1) whether the employee committed the offense with which he or she has been charged and (2) if

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32. *See* Frank Elkouri & Edna A. Elkouri, HOW ARBITRATION WORKS, 15-4 (Kenneth Mays ed., 2012) [hereinafter Elkouri]. As noted by one labor arbitrator, although the term may be described as "just cause," "justifiable cause," "proper cause," "obvious cause," or simply "cause," there is no significant difference between these terms. *See* Worthington Corp., 24 Lab. Arb. Rep. (BNA) 1, 6–7 (1955) (McGoldrick & Sutton, Arbs.).

33. *See* Rachel Arnow-Richman, *Just Notice: Re-Reforming Employment At Will*, 58 UCLA L. REV. 1, 18 (2010).

34. *Id.* Some scholarship has argued that labor arbitrators do not always get the just cause determination right. *See, e.g.*, Roger A Javier, *"You Cannot Choke Your Boss & Hold Your Job Unless You Play in the NBA": The Latrell Sprewell Incident Undermines Disciplinary Authority in the NBA*, 7 VILL. SPORTS & ENT. L.J. 209, 234 (2000). For an interesting discussion concerning the unique issues raised by the discipline of professional athletes, *see* Robert D. Manfredi, Jr., *Labor Law and the Sports Industry*, 17 HOFSTRA LAB. & EMP. L. J. 133, 134–37 (1999). For an analysis of whether just cause principles ought to be applied to employer termination decision outside the collective bargaining agreement context, *see* J. Hoult Verkerke, *An Empirical Perspective on Indefinite Term Employment Contracts: Resolving the Just Cause Debate*, 1995 WIS. L. REV. 837, 869–97 (1995).

35. Julius Getman, Symposium, *Translantic Perspectives on Alternative Dispute Resolution: Was Harry Shulman Right?: The Development of Arbitration in Labor Disputes*, 81 ST. JOHN'S L. REV. 15, 16 (2007).

so, whether the discipline imposed by the employer for the offense is reasonable under the circumstances of the case.[36]

As early labor arbitrators applied just cause provisions in collective bargaining agreements to specific disciplinary scenarios, a common law of just cause arose over time that resulted in some consistency in decision-making for labor arbitrators.[37] Perhaps the most commonly used standard for labor arbitrator decision-making in employee discipline cases involves Arbitrator Carroll Daugherty's seven tests of just cause.[38] If an arbitrator answered "no" to any of Daugherty's questions with respect to a particular disciplinary decision by an employer, then just cause did not exist for the disciplinary action.[39] The seven questions to be asked by labor arbitrators are the following:

> 1. *Notice*: Did the [e]mployer give to the employee forewarning or foreknowledge of the possible or probable consequences of the employee's disciplinary conduct?
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> 2. *Reasonable Rule or Order*: Was the [e]mployer's rule of managerial order reasonably stated to (a) the orderly, efficient, and safe operation of the [e]mployer's business, and (b) the performance that the [e]mployer might properly expect of the employee?
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> 3. *Investigation*: Did the [e]mployer, before administering the discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?
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> 4. *Fair Investigation*: Was the [e]mployer's investigation conducted fairly and objectively?
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> 5. *Proof*: At the investigation, did the [e]mployer obtain substantial evidence or proof that the employee was guilty as charged?

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36. *See* James H. Juliussen, Note, *Compulsive Gambling and Mitigation of Work Place Discipline: A Step Too Far?*, 27 WILLAMETTE L. REV. 711, 712 (1991). In discussing whether arbitrators ought to utilize an employee's compulsive gambling addiction as a mitigating factor in discipline cases, this note summarizes just cause determinations as a question of "whether 'the punishment fit the crime.'" *Id.* at 729 (citation omitted). *See also* Healthcare Servs. Grp., Inc., 132 Lab. Arb. Rep. 830, 833 (BNA) (2013) (Clark, Arb.) (noting that an employer bears the burden of proof in two areas: "the first involves proof of wrongdoing; the second concerns whether the discipline should be upheld or modified").

37. *See, e.g.*, David A. Dilts & James S. Moore, *Do Arbitrators Use Just Cause Standards in Deciding Discharge and Discipline Cases? A Test*, 30 J. LAB. RES. 245, 252 (2009) [hereinafter Dilts & Moore].

38. *See* Enterprise Wire Co., 1966 Lab. Arb. LEXIS 78, *14 (1966) (Daugherty, Arb.).

39. *See* Dilts & Moore, *supra* note 37, at 252.

> 6. *Equal Treatment*: Has the [e]mployer applied its rules, orders, and penalties even handedly and without discrimination to all employees?
> 7. *Penalty*: Was the degree of discipline administered by the [e]mployer in a particular case reasonably related to (a) the seriousness of the employee's proven offense, and (b) the record of the employee in his/her service with the employer? (Were there mitigating circumstances?)[40]

Many labor arbitration decisions, particularly those issued more recently, tend not to apply explicitly the seven tests of just cause in determining the appropriateness of employer discipline.[41] Some labor arbitrators have argued that a rigid application of the seven tests may be "distracting" to arbitral decision-making.[42] Other labor arbitrators have stated that the seven tests should not be applied by labor arbitrators in every situation.[43] Regardless of whether the seven tests are strictly applied, however, the underlying concepts tested by each question constitute proper considerations for arbitrators in evaluating employer disciplinary decisions under a just cause standard.[44] Such considerations are often more difficult to analyze when the discharge is based on employee misconduct that is not directly related to the employee's job or workplace.

B. *The Current Test for Evaluating Whether Just Cause Exists for Off-Duty Discipline*

In labor arbitrations involving discipline for off-duty employee misconduct, labor arbitrators typically will not find that just cause has been established unless the employer can show that "there is a '"nexus" between the conduct and the employer's legitimate business interests.'"[45] A nexus can be established if the off-duty misconduct:

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40. City of El Paso, 124 Lab. Arb. Rep. (BNA) 1583, 1591 (2008) (Jennings, Arb.).

41. *See, e.g.*, Municipality of Penn Hills, 131 Lab. Arb. Rep. (BNA) 114, 121 (2012) (Kobell, Arb.); Sterling Chems., 119 Lab. Arb. Rep. (BNA) 171, 176 (2003) (Goodman, Arb.).

42. Wyandotte Cty., 131 Lab. Arb. Rep. (BNA) 1209, 1216 (2013) (Bonney, Arb.).

43. *See* Sterling Chems., 119 Lab. Arb. Rep. (BNA) 171, 176 (2003); Border Patrol, 115 Lab. Arb. Rep. (BNA) 660, 666–67 (2001) (Goodman, Arb.).

44. For a discussion of the application of just cause standards to discharge decisions in the developing area of zero-tolerance workplace violence policies, *see generally* Daniel V. Johns, *Action Should Follow Words: Assessing the Arbitral Response to Zero-Tolerance Workplace Violence Policies*, 24 OHIO ST. J. ON DISP. RESOL. 263 (2009).

45. *See* Elkouri, *supra* note 32, at 15-11 (quoting Gladys Gershenfeld, *Discipline and Discharge*, *in* THE COMMON LAW OF THE WORKPLACE: THE VIEWS OF ARBITRATORS 180 (Theodore J. St. Antoine ed., 2005)).

- Involves "harm or threats to supervisors, co-workers, customers, or others with an actual or potential business relationship with the employer";
- Seriously damages "an employer's public image";
- "[R]easonably makes it difficult or impossible for supervisors, co-workers, customers, or others with an actual or potential business relationship with the employer to deal with the employee"; or
- Involves "[p]ublic attacks by the employee on the employers, supervisors, or the employer's product."[46]

One arbitrator has summarized the nexus requirement by stating that the employer must prove employee behavior that harms the employer's reputation or product, renders the employee unable to perform his or her duty, or leads to a refusal, reluctance, or inability of other employees to work with the employee.[47]

While sounding relatively straightforward, arbitrators in practice often have difficulty applying the nexus test to hold employees accountable for objectionable behavior even when the employee misconduct involves some connection to the workplace.[48] For example, in Goddard Space Flight Ctr.,[49] an employer discharged an employee for an off-duty incident in which the employee was arrested for attempting to buy cocaine from an undercover police officer.[50] The aborted illegal purchase took place while the employee was off-duty from his job, on a motel's premises.[51] The employee, an electrician who maintained and repaired the electrical power distribution systems at the Goddard Space Flight Center (GSFC), ultimately pled guilty to one count of "possession of cocaine with intent to distribute."[52] When the employer became aware of the conviction, the employer immediately

46. *Id.* at 180–81 (quoting Gladys Gershenfeld, *Discipline and Discharge*, *in* THE COMMON LAW OF THE WORKPLACE: THE VIEWS OF ARBITRATORS 180–81 (Theodore J. St. Antoine ed., 2005)).

47. *See* Monroe Cty. Bd. of Educ., 129 Lab. Arb. Rep. (BNA) 948, 951 (2011) (Wolfson, Arb.).

48. *See* Mollie H. Bowers & E. Patrick McDermott, *Sexual Harassment in the Workplace: How Arbitrators Decide*, 48 CLEV. ST. L. REV. 439, 458 (2000) (noting the difficulty in "establishing the requisite nexus between conduct and interests" in off-duty misconduct cases involving sexual harassment) [hereinafter Bowers and McDermott]. For a discussion of arbitral treatment of off-duty misconduct in sports, *see generally* George Nicolau, *Discipline in Sports*, 17 HOFSTRA LAB. & EMP. L.J. 145 (1999).

49. 91 Lab. Arb. Rep. (BNA) 1105 (1988) (Berkeley, Arb.).

50. *Id.* at 1106, 1109.

51. *Id.* at 1106.

52. *Id.*

instituted an investigation.[53] Based upon that investigation, the employer decided to terminate the employee.[54] In making the decision, the employer specifically found that there was a connection between the employee's behavior and the employer's ability to fulfill its mission:

> The felony crime to which you pled guilty was not only extremely serious, but a crime that required intent and deliberation for personal gain. This cast a shadow over your trustworthiness and your judgment; both factors essential to one in your position.
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> One of the Center's major responsibilities is to provide all NASA with satellite tracking and data acquisition capabilities for near earth missions. These missions include such major programs as the Space Shuttle, Space Station, and the Tracking and Data Relay Satellite System. Failure in the GSFC's support of these programs could cause serious harm to life, equipment, and facilities. Additionally, such a failure could damage the reputation of the GSFC and the entire space program. A significant factor in the Center's ability to perform its mission depends on a safe, secure and uninterrupted electrical operation.
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> Because of your commission of a felony crime involving illegal drugs, the Agency cannot place trust in you to independently perform the duties of your position. You are entrusted with a job which enables you to cause harm and/or embarrassment to NASA and the GSFC, its employees, its on-site contractors, or to the public's confidence in the NASA mission.
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> * * *
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> I considered the seriousness of the charge in light of your position and your past employment with the Center. You were first appointed to the position you occupy on June 11, 1985 about 8 months prior to your arrest. Your performance has been satisfactory for the two year period of your employment with the Center, however technical competence was not an issue in your proposed removal. My concern is what you may, or may not, do in the future when confronted with critical decisions that have direct impact on NASA and the GSFC, as well as the inevitable loss of public confidence in NASA's ability to succeed in the accomplishment of its mission should your future actions lead to public criticism of the Center's operation.
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53. *Id.*
54. *Id.* at 1109.

> Accordingly, I have concluded that (1) the charge against you is supported by the evidence and (2) your removal will promote the efficiency of the Service.[55]

Despite this well-reasoned statement of nexus to the employee's position, the arbitrator sustained the grievance and ordered the employee reinstated to his former position with an award of full back pay for the compensation he lost as a result of the termination decision.[56] The arbitrator's decision was based in part on the employee's job as an electrician.[57] In the arbitrator's words, "[n]o nexus was established between the off-duty criminal misconduct and the efficiency of the service."[58] The arbitrator found it significant that the employee, despite working in a government facility dedicated to space travel and in which his services would assist in keeping safety-critical systems operational, was not in a "unique position of trust or responsibility . . . ."[59] While acknowledging the seriousness of using cocaine, the arbitrator did not find the requisite connection between the employee's misconduct and the employee's job.[60] The arbitrator gave no deference to the employer's statement of loss of trust in the employee and the potential harm to the reputation of NASA based on the employee's actions.[61] In the arbitrator's eyes, the off-duty misconduct, though reprehensible, should not have prevented the employee from performing electrical repairs in the workplace.[62]

In City of Seldovia,[63] the arbitrator was confronted with a different type of off-duty misconduct: domestic abuse.[64] The grievant worked as a maintenance employee for a city in Alaska.[65] One evening, while celebrating at a local establishment, the grievant got into an argument with his fiancé.[66] The grievant's fiancé requested that he drive her home.[67] After doing so, the grievant ran into his fiancé

55. *Id.* at 1108–09.

56. *Id.* at 1112.

57. *Id.* at 1111.

58. *Id.*

59. *Id.*

60. *Id.* Indeed, the arbitrator specifically noted that "[c]ocaine is a terrible substance and no one, least of all the undersigned, wishes to condone its use." *Id.*

61. *Id.*

62. *Id.*

63. 133 Lab. Arb. Rep. (BNA) 1593 (2014) (Landau, Arb.).

64. *Id.* at 1594.

65. *Id.* at 1593.

66. *Id.* at 1594.

67. *Id.*

with his car.[68] The grievant was arrested for felony assault as a result of the incident.[69] When released on bail, the court imposed a "no-contact" order on the grievant, requiring that he stay away from his fiancé.[70] The grievant's employer suspended him from his job and noted that if he violated any of the conditions of the terms of his release, he would be terminated from his position.[71] Thereafter, apparently having reconciled their issues, the grievant and his fiancé sought to go on a camping trip together.[72] Believing that the "no-contact" order was successfully lifted, the grievant went on the trip.[73] He was arrested for violating the order and eventually pled guilty to that offense to have the felony assault charges dropped.[74] Subsequently, the city terminated his employment.[75]

In considering whether there was just cause for the discharge, an arbitrator addressed the issue of whether there was a nexus between the off-duty misconduct and the employee's job with the city.[76] The arbitrator concluded that "the [c]ity [had] failed to demonstrate any nexus between [the employee's] off-duty conduct and the [c]ity's legitimate business interests."[77] In so holding, the arbitrator relied upon the fact that the charges were ultimately dismissed as to felony assault and that the underlying conduct took place after-hours, away from the grievant's workplace.[78] The arbitrator then downplayed the violation of the "no-contact" order as a misunderstanding and criticized the fact that the city had relied on the criminal investigation, rather than conducting its own.[79] The arbitrator gave several reasons for deciding that the off-duty conduct had no nexus to the workplace: the conduct involved no harm or threat to supervisors, co-workers or customers; the grievant would not have difficulty performing his maintenance duties or working with other city employees as a result of what happened; the events did not receive any publicity or damage the reputation of the city; and the incident did not result in financial

68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.* at 1594–95.
75. *Id.* at 1595.
76. *Id.* at 1598.
77. *Id.*
78. *Id.*
79. *Id.* The decision does not clearly show why or how the city should have performed a duplicate investigation. Given that the grievant had pled guilty to violating the "no-contact" order, the charges seem to have been established definitively.

harm to the city.[80] According to the arbitrator, just cause did not exist to support the termination decision under the collective bargaining agreement.[81]

U.S. Steel Corp. involved a closer connection between an off-duty employee's threatening behavior and the workplace, but the arbitrator in that case still did not find just cause.[82] In that case, an employee was discharged as a result of threatening behavior arising out of a domestic dispute.[83] The incident began with the employee sending the following Facebook message to his mother-in-law:

> You like Billy's new dad? Fuck you, you will get what you deserve at the end. God has been judging you, and you have been helping out an adulterer. IN (sic) the end you will be sent to hell along with the rest of the family. In the end there will only be chaos! Read the police report, if you don't have it, I'l (sic) give it to you. The rest of your days will be a living hell and so will your afterlife, you and the ones you support![84]

A few minutes later, the employee sent another message to his mother-in-law, saying, among other things, that he would see his father-in-law "at the plant" where both the employee and father-in-law worked.[85] He also cautioned her in that message to "watch for [him]."[86] The father-in-law reported the messages to the labor relations department at the plant where they both worked.[87] The grievant's explanation of the behavior was that he was experiencing a "nasty divorce" and did not intend to threaten anyone.[88] He also testified that he believed that his in-laws were merely attempting to get him into trouble "so he could not see his son or be part of his son's life."[89]

The arbitrator overturned the employer's decision to discharge the employee because of his threats.[90] The arbitrator noted that the

80. *Id.*

81. *Id.* at 1599.

82. 130 Lab. Arb. Rep. (BNA) 461, 463 (2011) (Bethel, Arb.).

83. *Id.* at 462.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* The father-in-law perhaps had good reason to be afraid, as his son-in-law had recently been released from a period of 100 days of incarceration as the result of a domestic violence issue involving his daughter. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 463.

second message "was not entirely divorced from the workplace" because it related to a potential confrontation "at the plant."[91] Despite that connection, the arbitrator found that the employee "made no threats at the plant and his messages were not sent on a [c]ompany computer or [c]ompany e-mail system."[92] The arbitrator further found that the first message, sent to the wife of a co-worker (and family member), did "not concern a workplace issue."[93] In finding termination to be too severe of a punishment for the employee's behavior, the arbitrator seemed moved by the employee's apology for the behavior, as well as the fact that the recipients of the threats did not seem as threatened as they might have been if the threat was made in the "heat of an argument."[94] Thus, the arbitrator found that "the off-duty messages were not sufficiently threatening to justify discharge."[95]

Space Gateway Support is another case in which an arbitrator was unable to conclude that off-duty misconduct was related to the workplace, despite attempts to balance employer and employee interests.[96] The arbitrator there was confronted with an employee termination based on arrests that twice involved incidents of potential aggression towards sheriff's deputies.[97] Around the same time, the employee's co-workers complained about the employee's violent behavior, which included kicking chairs and hurling profanities.[98] Based on these incidents, the employer terminated the employee out of a concern for workplace violence.[99] The employer reasoned:

> [The employer] had the right to discharge the [g]rievant to "assure that his apparent uncontrollable anger would not morph into a tragic workplace incident." Co-workers had concerns about safety, violence and unpredictability, especially around nuclear submarines at the Port facility. . . .[100]

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91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* Such a finding ignores the obvious fact that the father-in-law, who had been threatened with at least a confrontation—if not physical violence—at the plant, reported the threats to the labor relations department, who were in the best position to protect him at that location. *Id.* at 462. The finding also ignores the fact that communications on Facebook often are not private and could have been viewed by other co-workers at the plant that he had friended.

95. *Id.* at 463.

96. 118 Lab. Arb. Rep. (BNA) 1633, 1638 (2003) (Abrams, Arb.).

97. *Id.* at 1635.

98. *Id.* at 1634.

99. *Id.* at 1635.

100. *Id.*

In deciding whether just cause supported the discharge, the arbitrator attempted to balance legitimate concerns over workplace safety with the potential existence of a nexus between the criminal incidents and the employee's workplace.[101] In addition to taking issue with the employer's failure to do its own investigation concerning the arrests, the arbitrator found that there was no nexus between the arrests and the employee's job.[102] The employer's decision to connect violent behavior outside the workplace with protection of its own employees, even though the employee also displayed violent tendencies inside the workplace, was not sufficient to support the discharge.[103] The employee was reinstated to his position with full back pay.[104]

As the foregoing cases illustrate, employers often struggle with showing that off-duty behavior has a nexus to the workplace. In some respects, one might argue that the cases demonstrate that the nexus test has little meaning in the modern workplace. When employers assert the manner in which such concerns might impact the workplace—violent behavior, publicity, etc.—such concerns are rejected as insufficient. In the modern workplace, the nexus test applied by arbitrators must account for the myriad connections that now exist between employees' personal lives and jobs.[105]

IV. Arbitral Considerations for Establishing a Nexus to the Modern Workplace

The general considerations of the historical nexus test applied by arbitrators in off-duty misconduct cases can inform how the test should be applied in the modern workplace.[106] Those considerations include an analysis of whether the misconduct damages an employer's public interest or customer relations, involves threats to coworkers or other individuals the employee will encounter in the workplace, or implicates the employee's ability to continue performing his or her job.[107] In the modern workplace, however, arbitral application of those factors must take into account that off-duty

101. *Id.* at 1636. The standard articulated by the arbitrator about terminations for off-duty misconduct was: "[M]anagement must prove in a convincing fashion that the behavior on the employee's own time has a direct nexus to the workplace and the employer's legitimate business interests." *Id.*

102. *Id.* at 1638.

103. *Id.*

104. *Id.*

105. *See supra* Section II.

106. *See supra* Section III.B.

107. *See* Monroe Cty. Bd. of Educ., *supra* note 47, at 951. *See also* U.S. Customs and Border Protection, Office of Border Patrol, Laredo, Tex. Sector, 135 Lab. Arb.

misconduct can impact employers in a much more significant manner. Arbitrators should consider the following factors in applying the nexus test to off-duty misconduct cases arising out of the modern workplace: ease of access to employee information, ease of dissemination of information about employees and employers, telecommuting and other work-at-home arrangements, and employees' right to privacy.[108]

A. *Ease of Access to Employee Information*

In today's workplace, customers and co-workers can obtain significant amounts of information about an employee simply by typing the person's name into a web search engine.[109] Arrests that at one point would have only been covered in a paragraph blurb in the back of a printed newspaper can be uncovered easily now in court documents at the click of a button. Personal information is also offered to the public by the employees themselves on social media sites such as Facebook and Instagram.[110] Such information can include acquaintances, drug and alcohol use, and even sexual activities.[111] As one commentator has put it:

> Individuals may, however, be publishing too much personal information. . . . [T]he Internet has become a place for people to "air dirty laundry without a thought." Prospective employers are finding that with a quick search on Google, they can discover a candidate's blog, personal Web page, or Facebook profile,

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Rep. (BNA) 1178, 1197–98 (2015) (Simmelkjaer, Arb.) (applying the nexus test in a case in which an employee was arrested for driving under the influence).

108. That arbitral attitudes must change with societal consensus is not a new idea. With respect to the topic of sexual harassment, Bowers and McDermott, *supra* note 48, at 460, have stated that "arbitral perceptions of sexual harassment have mirrored the crosscurrents."

109. *See generally, e.g.*, Caren Myers Morrison, *Can the Jury Trial Survive Google?*, 25 CRIM. JUST. 4 (2011) (discussing the impact of ease of access to information about criminal defendants through Google searches on criminal proceedings). *See also* Madeline Locke, *Who Watches the Jurors? The Changing Limitations on Juries and their Activities Outside of the Courtroom*, 41 NEW ENGLAND J. ON CRIM. & CIV. CONFINEMENT 325, 336 (2015) ("In today's world of Google, Wikipedia, blogs, criminal records databases, social networking pages, and online news sources, it is easier than ever to find information about almost anything.").

110. *See, e.g.*, Rachel E. Lusk, Comment, *Facebook's Newest Friend—Employers: Use of Social Networking in Hiring Challenges U.S. Privacy Constructs*, 42 CAP. U. L. REV. 709, 713–16 (2014) (discussing prevalent use of social media by employees) [hereinafter Lusk].

111. *See* Robert Sprague, *Googling Job Applicants: Incorporating Personal Information into Hiring Decisions*, 23 LAB. LAW. 19, 20 (2007).

> which may contain boasts, for example, of drinking heavily, smoking marijuana, and partying all night long.[112]

Under such circumstances, arbitrators must weigh more heavily both the impact that an arrest might have on a business and how an arrest might impact co-workers' interests in working alongside an individual once details about the misconduct are publicized and available for anyone to review. What once may have been a private matter now has the potential to become public fodder.[113]

B. *Ease of Dissemination of Information about Employees and Employers*

Not only is access to information instantaneous, but so is the ability of individuals to disseminate information around the world in a moment's time.[114] With services such as Twitter, millions of people can become aware of an employee's off-duty misconduct with almost no effort whatsoever.[115] Thus, the risk of harm to an employer's business, just because it employs a particular individual whose off-duty behavior has been exposed online, is particularly acute. Such risk extends to the employee's own dissemination of information online; "[d]erogatory postings about employers or fellow employees or postings that reveal trade secrets or confidential information can reach a wide audience rapidly and can sometimes be attributed to the employer."[116] One tweet or post about employee misconduct can expose employers in ways that never existed before.[117]

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112. *Id.* (citation omitted).

113. *See* Lusk, *supra* note 110, at 711 (arguing that employees should enjoy a new statutory protection for privacy in online communications).

114. *See* Nigel Morris-Cotterill, *Use and Abuse of the Internet in Fraud and Money Laundering*, 13 INT'L REV. L. COMPUTERS & TECH. 211, 216 (1999) ("The Internet is a medium for the rapid dissemination of information.").

115. *See* Adeline A. Allen, *Twibel Retweeted: Twitter Libel and the Single Publication Rule*, 15 J. HIGH TECH. L. 63, 75–76 (2014) (noting the far reach of Twitter in a discussion of the application of the publication requirement for libel claims to Twitter).

116. Diana Bentley, *Employees and Social Networking*, 7 IN-HOUSE PERSP. 19, 20 (2011). *See also* Stephen P. Rosenberg, *Facing Up to Facebook: Social Networking Sites and the Workplace*, 19 CONN. LAW. 16, 18 (2009) ("What if an employee's social networking profile . . . simply airs the company's 'dirty laundry' in public?").

117. *See* Ariana R. Levinson, *What Hath the Twenty First Century Wrought? Issues in the Workplace Arising from New Technologies and How Arbitrators Are Dealing with Them*, 11 TRANSACTIONS TENN. J. BUS. L. 9, 27 (2010) (discussing a labor arbitration case in which an employee had to register as a sex offender such that "the public, customers, and co-workers could all be expected to object to the unsupervised delivery of products by the grievant").

For example, in L'Anse Creuse Pub. Schools,[118] an arbitrator confronted an issue involving salacious pictures taken of a teacher during the summer when school was out of session.[119] The teacher had an excellent performance record in the local public schools.[120] In the summer of 2005, the teacher invited an engaged couple and their friends to a large lake party.[121] The celebration was "a very rowdy occasion with widespread public consumption of alcohol, often to high levels of intoxication, public nudity, and public sexual activity."[122] At the event, the teacher took a shot of alcohol through a tube in a mannequin, which made it seem as if she was performing oral sex on the mannequin.[123] Someone at the party snapped a picture of the teacher and posted it online.[124] Some of the pictures apparently depicted the teacher in sexual poses.[125] At the start of the school year, parents and students across the school district became aware of the photographs.[126] The online photographs were viewed widely enough around the school district that the district ultimately decided to discipline the teacher.[127]

The *L'Anse Creuse* case demonstrates how quickly information about off-duty incidents can be disseminated in a moment's time.[128] With the rest of the world no further away than fingertips on a keyboard, arbitrators must be more mindful of the impact that the publication of off-duty employee misconduct can have on an employer's business and the ability of an employee to work in a productive manner with co-workers and customers. In applying the nexus test, arbitrators must account for the immediate harm that dissemination of information regarding an employee's misconduct can have on the employer's business, even in cases where the employee did not necessarily intend to broadcast the misconduct around the world.

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118. 125 Lab. Arb. Rep. (BNA) 527 (2008) (Daniel, Arb.).
119. *Id.* at 527–28.
120. *Id.* at 527.
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.* at 528.
125. *Id.*
126. *Id.*
127. *Id.* at 528–29.
128. *Id.* at 528. The arbitrator denied the grievance on the basis that the school district acted within its power under state law in suspending the teacher for this activity. *Id.* at 530–31.

C. *Telecommuting and Other Work-at-Home Arrangements*

Yet another consideration relevant to arbitral considerations in off-duty misconduct cases is the prevalence of telecommuting arrangements in the modern workplace.[129] Such arrangements have become commonplace in modern work life.[130] Telecommuting involves the "use of computer and communications technology to transport work to the worker as a substitute for physical transportation of the worker to the location of the work."[131] In telecommuting situations, employees are off site, but often utilizing their own electronic equipment to perform their jobs.[132] Such employment schemes raise questions about when an employee's conduct has a nexus to the workplace.[133]

Unlike the typical case where it is obvious that an employee is off-the-clock and off-the-job, telecommuting blurs the line between work and personal life.[134] An employee may send an e-mail for work while waiting to check out in a supermarket line. An employee may have to answer help-line calls while putting their child to bed at night. An employee may have to use their personal computer to edit documents. In such circumstances, the line between what is work and what is not has become indistinct.[135] Thus, a strict application of the nexus test can make it difficult for employers to bring claims successfully in a telecommuting context. Consider the case of Safeway Stores.[136] In that case, an employee was discharged because she submitted expense reimbursements for ink cartridges used on her home

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129. Telecommuting has been defined as "employees doing their current job during regular work hours from home or another location away from the employer's primary work locations." Scott L. Nelson, *Telecommuting*, 35 LITIG. 47, 47 (2009).

130. *See* Michelle A. Travis, *Telecommuting: The Escher Stairway of Work/Family Conflict*, 55 ME. L. REV. 261, 268–70 (2002) (discussing prevalence of telecommuting arrangements in the American workforce).

131. *Id.* at 268 (citing Margrethe H. Olson, *Organizational Barriers to Professional Telework*, *in* HOME WORK: HISTORICAL AND CONTEMPORARY PERSPECTIVES ON PAID LABOR AT HOME 215, 215–16 (Eileen Boris & Cynthia R. Daniels eds., 1989)).

132. *See* Beisell, *supra* note 4, at 500–01.

133. *See, e.g.*, David A. Young, *Telecommuters: The New Horizon for Unpaid Overtime Claims*, 78 CLEV. B.J. 6, 6–7 (2007) (discussing FLSA claims by telecommuters); Dawn R. Swink, *Telecommuter Law: A New Frontier in Legal Liability*, 38 AM. BUS. L.J. 857, 863–72, 891–98 (2001) (discussing telecommuter issues under the Occupational Safety and Health Act and the Americans with Disabilities Act).

134. *See supra* Section II.

135. For a discussion of the legal protections available for employees who work in atypical workplaces, including work at home, *see generally* Katherine V.W. Stone, *Legal Protections for Atypical Employees: Employment Law for Workers without Workplaces and Employees without Employers*, 27 BERKELEY J. EMP. & LAB. L. 251 (2006).

136. 128 Lab. Arb. Rep. (BNA) 257 (2010) (Staudohar, Arb.).

computer.[137] The employee's defense to the charge was that she had used her home computer to print out materials for use at her job.[138] The employer argued that the employee did not have authorization to work from home and had been dishonest in her explanations concerning the submission of the receipts for payment.[139] The employer also questioned what work, if any, had been printed.[140] The arbitrator ultimately found that the employer did not have just cause to discharge the employee.[141] In so finding, the arbitrator appeared to struggle with discerning the line between off- and on-duty misconduct in the context of an employee attempting to work from home.[142]

As it is clear that telecommuting arrangements are here to stay, in the context of off-duty misconduct cases, arbitrators need to be mindful that the home in certain ways has been transformed into an outgrowth of an employer's place of business. Arbitral application of the nexus test in this context should take into account that home can resemble both the personal realm and the workplace when considering employee misconduct there.

D. *Employees' Right to Privacy*

Any discussion of a modernization of the nexus to the workplace test must also reflect the diminution of employee privacy as the result of the blurring of boundaries between the personal and the professional. One commentator has suggested that, in addition to relying on limitations on employee discipline for off-duty misconduct, other safeguards, such as a "reasonable suspicion" standard for employee monitoring, should aim to protect employee privacy directly.[143] Regardless of what such safeguards might look like, a modern nexus test must reflect the fact that employee privacy has waned in many people's eyes:

> That is what makes our law, in comparison, so disturbing, for we permit the creation of near total institutions: Where a person is screened for genetic and psychological acceptability, interviewed, surveyed, and put in interactive groups to instill loyalty and passivity, told how to dress (or put in a uniform), surveilled

137. *Id.* at 258.
138. *Id.*
139. *Id.* at 259–60.
140. *Id.* at 259.
141. *Id.* at 263.
142. *Id.* at 262–63. *See also* Blairsville-Saltsburg Sch. Dist., 136 Lab. Arb. Rep. (BNA) 1384, 1386–91 (2016) (Kobell, Arb.) (considering discipline lodged against employee working at home, whose child spilled a drink on an employer-owned computer).
143. *See* Levinson, *supra* note 8, at 683–84.

> by cameras, monitored by computers, randomly tested for foreign substances, told who not to associate with, what charitable organizations to support, what leisure time activity not to enjoy, and what social messages to display.[144]

If a modern nexus test reflects the expanding workplace, it also must be mindful of employee privacy, including protection of employees disciplined for political protests and speech or other recreational or associational activities not connected in any manner to the workplace.[145]

Outside the context of labor arbitration, many areas of the law also are developing with an eye towards balancing employer interests and employee privacy. For example, with respect to domestic violence in the workplace, some commentators have called for protections of the privacy of victims of violent behavior.[146] With respect to criminal activity in general, many jurisdictions now prevent employers from using criminal convictions to exclude applicants from job interviews.[147] With respect to drug use, employers are struggling to apply traditional workplace policies in an era of legalized marijuana.[148] Some commentators have even begun to look for privacy protections for social media use:

> As the blogging phenomenon continues to grow, one could expect more employees to be fired as a result of the content of their personal blogs. Whether the employees have any recourse—i.e.,

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144. Matthew W. Finkin, *Employee Privacy, American Values, and the Law*, 72 CHI.-KENT L. REV. 221, 269 (1996).

145. *See, e.g.*, Pamela V. Keller, *Balancing Employer Business Interests and Employee Privacy Interests: A Survey of Kansas Intrusion upon Seclusion Cases in the Employment Context*, 61 U. KAN. L. REV. 983, 984 (2013) (discussing balancing of employer and employer interests related to employee privacy in the context of a state law claim for intrusion upon seclusion).

146. *See* Lea B. Vaughn, *Victimized Twice—The Intersection of Domestic Violence and the Workplace: Legal Reform through Curriculum Development*, 47 LOY. L. REV. 231, 234–38 (2001); Deborah A. Widiss, *Domestic Violence and the Workplace: The Explosion of State Legislation and the Need for a Comprehensive Strategy*, 35 FLA. ST. U. L. REV. 669, 689–727 (2008).

147. *See, e.g.*, Rebecca J. Wolfe, *The Safest Port in the Storm: The Case for a Ban the Box Law in South Carolina*, 9 CHARLESTON L. REV. 503, 506–07 (2015) (discussing explosion of "ban the box" laws around the country). For an interesting discussion of "ban the box" laws in the higher education context, *see generally* H.S. Albert Jung, Note, *"Ban the Box" in College Applications: A Balanced Approach*, 26 CORNELL J. L. & PUB. POL'Y 171 (2016).

148. *See, e.g.*, Crystal Kennedy, Note, *Sifting through the Weed: Why Employers and Employees Need Guidance on Massachusetts' Medical Marijuana Laws*, 48 NEW ENGLAND L. REV. ON REMAND 97, 107–10 (2014) (arguing for direction to be given employers and employees applying workplace policies where marijuana has been legalized).

> whether the employer faces liability for wrongful discharge—depends on a variety of state and federal laws, both common and legislative.[149]

The potential for employers to face liability for discharging employees based on inappropriate blogging activities demonstrates one way in which employers' interests and employee privacy are in conflict.[150] Surveillance of employees represents another conflict. One commentator has argued for measures to be instituted to protect employees from electronic monitoring activities.[151]

In today's world, "our lives are open books" and the line between what is work and what is personal has become blurred.[152] Arbitrators, then, must be mindful of the developing thought around the societal balancing of employer interests and employee privacy in the application of the nexus test to off-duty misconduct cases.[153] The nexus test should not be used to allow employers to regulate the private lives of their employees where the employer cannot show any potential impact to its legitimate interests.

V. Arbitral Examples of a Modern Nexus Test

Some arbitration decisions already have begun to reflect a more modern understanding of the nexus test. One example is Archer Daniels Midland Co.[154] In that case, an employer discharged an employee for off-duty misconduct involving a road rage incident.[155] After a series of traffic run-ins with another driver, the employee stopped his car, began to fight the driver, and stabbed him in the leg.[156] After

149. Robert Sprague, *Fired for Blogging: Are There Legal Protections for Employees who Blog?*, 9 U. Pa. J. Lab. & Emp. L. 355, 385 (2007).

150. For a discussion of the application of just cause principles to social networking, *see* William A. Herbert & Alicia McNally, *Just Cause Discipline for Social Networking in the New Gilded Age: Will the Law Look the Other Way?*, 54 U. Louisville L. Rev. 381, 413–31 (2016).

151. *See* Karin Mika, *Privacy in the Workplace: Are Collective Bargaining Agreements a Place to Start Formulating More Uniform Standards?*, 49 Willamette L. Rev. 251, 253 (2012).

152. *Id.* at 252. For a discussion of employer monitoring of employee activities under Canadian law, *see generally* Chris Hunt & Corinn Bell, *Employer Monitoring of Employee Online Activities outside the Workplace: Not Taking Privacy Seriously?*, 18 Canadian Lab. & Emp. L.J. 411 (2015).

153. They also must be mindful of the fact that many of these barriers are becoming blurred, not because of actions of the employer, but instead because employees themselves choose to expose their lives online for the world to see.

154. 135 Lab. Arb. Rep. (BNA) 1392 (2015) (Fitzsimmons, Arb.).

155. *Id.* at 1393–96.

156. *Id.* at 1394.

viewing intense media coverage of the incident, the employer investigated the situation and ultimately discharged the employee.[157] The employer reasoned that the misconduct, though off-duty, implicated the workplace violence policy and made other employees feel unsafe around the employee at work.[158] In arbitration, the union asserted that the termination violated the nexus test, arguing that the employee "was off duty and off [c]ompany premises and [the] employer was not identified in the media coverage of the incident."[159]

Despite the union's arguments, the arbitrator sustained the discharge under the nexus test.[160] Although not finding any direct impact on the employer's business, the arbitrator found compelling the fact that information concerning the employee's arrest spread quickly around the shop floor by virtue of media reports.[161] The information was disseminated widely enough that the employee quickly acquired the nickname "Blade Runner."[162] The arbitrator found a nexus to the job by virtue of the publicity's effect on the employee's ability to work alongside his co-workers.[163] The arbitrator concluded that a nexus to the workplace existed, since the incident "was highly publicized in local newspapers and on the [I]nternet so it [didn't] take much of a jump in logic to conclude that many other [c]ompany employees [knew] of [the employee's] anger and inclination to violence."[164]

Likewise, in Dakota Cty.,[165] an arbitrator reviewed a decision to terminate a probation officer based not on her own off-duty misconduct, but instead on the misconduct and subsequent arrest of her husband.[166] The probation officer's son from a previous marriage reported that the officer's husband was smoking marijuana.[167] A police investigation revealed that the employee's husband had a large bag of marijuana on his bedroom dresser where he and the employee slept.[168] The bag contained 198.1 grams of marijuana, five times the felony threshold for possession of marijuana.[169] As a result of her

157. *Id.* at 1396.
158. *Id.* at 1397–98.
159. *Id.* at 1393.
160. *Id.* at 1398.
161. *Id.* at 1396.
162. *Id.*
163. *Id.* at 1397.
164. *Id.*
165. 131 Lab. Arb. Rep. (BNA) 1776 (2013) (Jacobs, Arb.).
166. *Id.* at 1776, 1781–82.
167. *Id.* at 1781.
168. *Id.*
169. *Id.*

husband's behavior, the employee was terminated from her job as a probation officer.[170]

At arbitration, the evidence offered concerning the termination presented a classic off-duty misconduct issue.[171] The union argued that no nexus existed between the employee's "job duties and her off duty conduct."[172] The employer, on the other hand, noted that "the grievant [was] in a similar position to any law enforcement officer and that if a law enforcement officer engaged in this type of conduct[,] even [if] off duty[, he or she] would certainly be subject to discipline or discharge."[173] Ultimately, the arbitrator accepted the employer's argument about nexus to the workplace, finding both that the publicity surrounding the incident and the employee's job in the criminal justice field would make it difficult for co-workers and others in the law enforcement system to work with her on job-related issues.[174] The arbitrator recognized that the dissemination of information about the incident in the media could undermine the employee's professional relationships as a probation officer.[175]

VI. Conclusion

The scenarios set forth in the introduction to this Article reflect the fact that the nexus test used by arbitrators in determining questions of just cause for discipline in off-duty misconduct cases must be reexamined.[176] Simply analyzing whether an action was on- or off-the-clock or whether any co-workers were directly involved with an incident is not sufficient to determine whether a nexus to the modern workplace exists. The ever-evolving world of social media, work-from-home arrangements, electronic tools for the virtual workplace, and modern communications technologies all make the nexus test more difficult for labor arbitrators to apply with force. Arbitrator application of the nexus test must evolve to account for new realities in the modern workplace.

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170. *Id.* at 1783. In the same time frame, the employee participated in a television interview with her husband, wherein he admitted to his use of marijuana, with his wife at his side. *Id.* at 1782.
171. *Id.* at 1776.
172. *Id.* at 1783.
173. *Id.*
174. *Id.* at 1782.
175. *Id.*
176. *See supra* Section I.