

## **WHY DO ARBITRATORS UPHOLD DISCIPLINE?: EXAMPLES FROM SEXUAL HARASSMENT GRIEVANCES**

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### **ABSTRACT**

Based on a survey of eighty-three arbitration decisions, the author determined what attributes an arbitrator considers when ruling just cause for discipline exists in grievances involving coworker sexual harassment. Cases were researched to determine what weight, if any, was given to Title VII law, mitigating circumstances, burden of proof and due process rights; examples are provided. Over 50 percent of the decisions upheld discipline imposed by management. Recommendations for an effective sexual harassment employment policy are included, along with alternative dispute resolutions for resolving sexual harassment complaints.

“Sexual harassment is not only against the law, it strikes against the peace and productivity of the workplace. Women in the workplace are hardly a new phenomenon. What is new is society’s appreciation that demeaning sexual stereotypes and offensive behavior dehumanize all of us, not merely women. We have always been repulsed by individuals in positions of power who take advantage of others by reason of their status. Unions were organized in part to stop such oppression in the workplace” [1, at 1319]. Appropriately, unions are protecting their members’ right to work in an environment free of sexual harassment by their supervisors (and other managerial employees). Unfortunately, unions have not been as diligent in protecting this right when the harasser is a coworker who also is a union member. Union leaders are often conflicted when confronted with coworker sexual harassment.

A typical scenario in an arbitration case is that of the male union member disciplined for sexually harassing a female coworker. The union files a grievance

on his behalf stating there was no just cause for discipline. In many cases there is merit to this argument. Unfortunately, unions often arbitrate losers that exacerbate an already adversarial labor-management relationship and pit union members against each other. One such case is *Zia Co.* where a long-term employee was discharged after a court decision found him guilty of sexual assault. The employer also was found guilty of violating the law against sexual harassment at the workplace (Title VII), since this bargaining unit member served as a foreman and the victim feared for her job. In spite of this, the union grieved his discharge, arguing no just cause for discharge existed because of the grievant's unblemished twenty-four-year work record. Not convinced this was a mitigating circumstance due to the seriousness of the offense, the arbitrator upheld the employer's decision in full [2]. Meritless cases not only drain a union's scarce resources but divide its membership. Information on what arbitrators consider just cause to discipline an employee for engaging in sexual harassment may help union leaders and company officials resolve a grievance without resorting to arbitration.

### SEARCH OF ARBITRATION CASES

This article expands on past research by examining arbitration decisions to determine what attributes an arbitrator considers when ruling just cause for discipline exists in grievances involving sexual harassment. Of interest were cases where the grievant was the alleged harasser filing a grievance for being disciplined without just cause. Included are recommendations for developing a labor-management policy on sexual harassment.

Cases researched were published in *Labor Arbitration Reports* (BNA) and references obtained through a computer search using *Lexis-Nexis*. Four additional cases considered relevant were obtained from *Labor Arbitration Awards*. The computer search resulted in a listing of 170 possible cases [3].<sup>1</sup> Many of these were not applicable, as they involved fighting on the job and not sexual harassment. Also, in a few of the sexual harassment cases the grievant was the victim of harassment; these cases were not the focus of this research and were not used. Therefore, this sample consists of eighty-three arbitration decisions, primarily between 1985 and 1995, where the grievant was disciplined for sexually harassing a coworker, customer, or independent contractor [4].

A variety of attributes was considered in all cases. Was the harasser male or female; what was the sex of the victim? Did the relationship involve coworkers, nonbargaining unit employees, or nonemployees? How serious was the harassment: verbal, physical, or written? Under Title VII of the Civil Rights Act of 1991 can the harassment be defined as hostile environment or quid pro quo? Was

<sup>1</sup> All arbitration cases were read and data recorded by the author alone. See Appendix A for a copy of the research form.

discharge or suspension the form of discipline? Did the arbitrator consider the victim's perspective to determine whether harassment had occurred? What standard of proof, if any, was considered? And, how did the arbitrator rule: grievance denied, grievance sustained, or split [5]? Additional attributes were considered based on the type of decision rendered.

## SURVEY RESULTS

Overwhelmingly, the harasser is male and the victim female. Of the eighty-three cases, seventy-nine (95%) of the employees disciplined for engaging in harassment were men [6]. Conversely, women are most likely to be the victims of sexual harassment, as was confirmed in this sample where seventy-five (90%) of those harassed were female. Of the three forms of discipline given, sixty-four (77%) cases involved discharge, sixteen (19%) suspension, and only three (4%) a written reprimand. None was given only a verbal warning, an indication that employers consider sexual harassment a serious offense. Over 50 percent of the grievances were denied and discipline upheld (44), while thirty-nine (47%) were sustained in full or in part. Of these thirty-nine grievances, seventeen (20%) were sustained in full and twenty-two (27%) split. Thus, back pay was awarded in 44 percent (17) of the thirty-nine grievances sustained. However, if we look at all eighty-three arbitrations, these seventeen back pay cases make up only 20 percent of the total. It appears that few arbitrators are comfortable with awarding back pay to grievants accused of sexual harassment.

Employers must prove there was just cause to discipline. In thirty-six (82%) of the forty-four cases won by the employer, arbitrators specifically stated just cause existed for the discipline. The following reasons were cited: legal rights under Title VII were at issue (19 or 43%), hostile environment was proven (19 or 43%), and the company's sexual harassment policy was clearly violated (17 or 39%). In justifying the company's discharge decision, Arbitrator Frank Murphy quoted from Equal Employment Opportunity Commission (EEOC) guidelines on sexual harassment and explicitly referred to external law and court precedence when ruling in favor of the employer [7]. And, the mere threat of a lawsuit was given considerable weight when an arbitrator upheld the discharge of a brewery driver who harassed a bartender at a lounge where he delivered beer for his employer [8].

Additionally, relevant company rules played a factor. In 50 percent (22) of the forty-four discharges upheld, the arbitrator considered that the company had a policy prohibiting sexual harassment and the grievant violated that policy. And, when that policy clearly stated discipline would be forthcoming if employees engaged in sexual harassment, 86 percent of the decisions were in favor of the employer. Furthermore, when that policy incorporated EEOC guidelines against sexual harassment, as fifteen of the eighty-three cases did, 75 percent of the time (in a total of 11 cases) discipline was upheld [9].

How successful is the employer's argument that discipline was administered to comply with Title VII law requiring that an employer provide employees with a harassment-free work environment? In ten out of the eleven cases (91%) where the employer clearly set forth this rationale, arbitrators upheld the discipline! In *Steuben Rural Electric* the arbitrator refused to reinstate a long-term employee stating, "... in the late 1990's, unless Grievant and everyone at the Company were living in a vacuum, they knew or should have known that sexual harassment is unacceptable. State and Federal laws, as well as a clearly understood public policy, forbid sexual harassment in the workplace" [10, at 340]. One may conclude that an employer's attempt to be "legally correct" has a significant influence on the arbitrator.

Only three (4%) of the total eighty-three cases were *quid pro quo* where a superior demanded sexual favors from a subordinate. In general, these cases do not involve a grievant who is a member of the bargaining unit, and thus the case would not be arbitrated; most likely it would end up in the courts. In one case, the grievant was not represented by a union, being outside of the bargaining unit [11]. In another, the grievant, an army instructor, was in a position of authority over his students. His thirty years' seniority and excellent work record landed him a suspension, not discharge, when he was found guilty of touching the breasts of female students [12]. In the one case where the grievant was a foreman and a bargaining unit member, the arbitrator ruled in favor of the employer, recognizing the seriousness of harassing another union member who feared for her job [2]. Thus, as expected, most cases turned on hostile environment (76 or 92%) where one nonsupervisory employee harassed another employee (63 or 76%), most often another union member.

Interestingly, sixteen cases (19%) found a bargaining unit member (male) allegedly harassing a nonemployee. An arbitrator suggested counseling for up to six months for a grievant, employed as a guidance counselor, found guilty of harassing clients [13]. In *Fisher Foods* [14] the grievant, a stockman, touched the breast of a female sales representative employed by the product's distributor. His grievance was denied. Improper behavior was cause for discipline when a credit collector for a public utility made an obscene phone call to a customer's daughter [15]. And, a newspaper distribution representative was suspended for harassing female carriers, who were employed as independent contractors. In the latter case, the union argued that the company's sexual harassment policy uses the term "employees" and the victims were not employed by the company. Therefore, the grievant could not be disciplined for violating a policy against harassing "employees." Apparently, Arbitrator Strasshofer did not agree and denied the grievance [16]. Under EEOC guidelines, employers may be legally liable when an employee harasses a subordinate, coworker, or third party [17].

Few distinctions were found between verbal and physical harassment [18]. Cases heard in the mid-1980s often distinguished between the two types of behavior. When a black janitor forcibly grabbed the arm of a white nurse's aide

and kissed her on the cheek he was discharged. Arguing in favor of reinstatement, the union cited other cases where sexual harassment occurred but discipline was less than discharge: “. . . there is a clear distinction between instances which *DO NOT* involve physical contact and those *THAT DO*. Had there been no physical contact . . . it is unlikely that the discharge penalty could be upheld,” stated the arbitrator [19].

Of the thirty-eight (46%) cases where physical contact was alleged, discharge was the penalty in twenty-nine (76%); the others involved suspensions. Not one incident of physical harassment resulted in only a written or verbal warning. Furthermore, the grievance was fully denied in twenty (53%), while a split decision was rendered in eleven (29%) of these thirty-eight physical contact cases. Only seven decisions (18%) found totally in favor of the grievant. Of these, five were suspensions. The two discharges reversed with back pay involved one where the company did not meet its burden of proof [20], and the other was considered not sexual harassment but disorderly conduct [21]. It appears both employers and arbitrators believe physical contact merits a harsh penalty.

Surprisingly, verbal harassment was not treated more leniently. One isolated incident of “highly repulsive” verbal harassment was considered sufficiently serious for the arbitrator to uphold the discharge [22]. A case involving visual harassment was also treated seriously. The grievant circled pictures of coworkers found in the company magazine and wrote “disgusting” racial and “obscene and lewd” sexual comments underneath. Though he showed this to only three white male coworkers he was nonetheless suspended. His grievance was denied [23].

By a large majority, the grievances involved verbal remarks (56 or 67%). Discharge was the penalty in forty-four (79%), suspension in nine (16%), and written reprimand in three (5%)—figures not largely different than those for physical contact. Interestingly, the arbitrators’ rulings were very similar in these instances to their decisions in physical harassment cases: thirty (53%) of the verbal grievances were denied, fourteen (25%) split, and twelve (21%) sustained. Ten (12%) of the grievances involved visual harassment; letters were the cause in five (6%).

## ARBITRAL STANDARDS—BURDEN OF PROOF

The employer carries the burden of proving that the grievant has engaged in sexual harassment and the discipline given matches the seriousness of the offense. “Management’s burden of proof can be particularly heavy in sexual harassment cases . . .” [24, p. 760], but this survey did not reveal a more stringent standard of proof than required for other types of infractions. Among the arbitrators there was no clear consensus as to the standard of proof required. However, a “preponderance of evidence” is required by the courts in sexual harassment suits, and it is the victim (plaintiff) who bears this burden [25, p. 567].

Over two-fifths of the arbitrators (36 or 43%) did not mention a standard of proof. Additionally, twenty-three (28%) stated there was no dispute over what had occurred; the only issue was the appropriateness of the penalty. In sixteen of these twenty-three no-dispute cases (70%), the arbitrator decided in favor of the employer. Three different standards of proof were considered throughout this sample. Only three (4%) arbitrators cited the most stringent standard of beyond a reasonable doubt. Preponderance of the evidence was used in seven (8%) decisions, and, when a standard was cited, it was most often clear and convincing evidence (14 cases, 17%). For sexual harassment cases, "it is common for arbitrators to move away from preponderance of evidence as the standard of proof and to require convincing and substantial evidence" [26, at 1094]. As in other types of discipline cases, ". . . the more usual and less demanding 'clear and convincing' standard . . . [was] used. Research does not reveal any exceptions or less strict standards that apply in sexual harassment cases" [27, at 319]. These findings are consistent with the earlier survey conducted by Monat and Gomez where they found that in general, arbitrators use a 'preponderance of the evidence' or 'reasonable evidence' standard [28, p. 717]. The trend toward requiring clear and convincing evidence has permitted arbitrators to sustain more discharges than would be possible under a stricter standard of proof, "thereby avoiding scrutiny under the judicial lens of public policy" [29, p. 4]. It should be noted that proof of guilt or innocence must be considered by the arbitrator. When arbitrator John Sands reinstated the grievant with full back pay because the company did not conduct a proper investigation, he admitted he did not consider whether sexual harassment did or did not occur (i.e., was Title VII violated) [30]. The award was vacated on public policy grounds by the Supreme Court and remanded to another arbitrator. "There exists a well-established public policy against sexual harassment in the workplace and the arbitrator's award violated that public policy by ordering reinstatement without a factual finding on the merits of the allegations against the grievant" [31, p. 708]. Labor-management relations do not exist in a vacuum. Accordingly, ". . . arbitration is affected by external law, and if an arbitrator's award is inconsistent with the dictates of 'public policy' as embodied in statutes and administrative regulations, its validity may be challenged through judicial review" [22, at 1167; 32].

### **ARBITRAL STANDARDS— CONSIDERATION OF PERSPECTIVE**

Another category investigated in all eighty-three cases was the perspective used to determine whether conduct constituted sexual harassment. The latest Supreme Court decision pertinent to this issue is *Harris v. Forklift Systems, Inc.* In determining guilt, the justices agreed that the question of whether harassment did or did not occur should be viewed from the perspective of the reasonable person or victim [33]. "A number of courts have apparently adopted a 'victim perspective,'

advocating that the standard for fairness to be used by the trier of fact is the alleged victim's perspective of workplace events. This approach has significant implications for third-party neutrals and triers of fact in diversity-related workforce disputes . . ." [34, p. 30]. On the other hand, arbitrators view the facts from the perspective of the grievant (victimizer). An overwhelming 89 percent (74) of the rulings did not consider the victim's perspective; the issue never arose. The reasonable person perspective was cited in six (7%) of the decisions, while the perspective of the victim, man, or homosexual was quoted once for each. Never was the reasonable woman perspective cited. Court decisions relying on either the "reasonable man" or "reasonable woman" standard were not cited in these arbitration cases. Perhaps it was the arbitrator's perspective that determined whether sexual harassment had indeed taken place [35].

### **ARBITRAL STANDARDS— CONSIDERATION OF THE LAW**

Generally, court cases have been brought by female victims who allege discrimination by male harassers; arbitration cases are filed by unions on behalf of male harassers who allege they were disciplined without just cause. The focus of the two forums differ since courts are concerned with whether conduct constitutes sexual harassment, while arbitrators often do not consider discrimination issues under Title VII but rather whether the behavior complained about constitutes sexual misconduct inappropriate to the workplace and therefore just cause for disciplinary action [36, p. 30]. The law and the contract can be in conflict. An employee may not have *intended* to engage in sexual harassment yet still be held liable under the law. Conversely, *intent* is often a key factor in the arbitrator's determination of whether there was just cause for discipline. The *impact* on the victim is relevant in a Title VII suit but rarely considered by arbitrators [37, at 2]. In *Kiam*, the arbitrator determined it was not the victim's state of mind he was concerned with but the grievant's discharge. "Normal standards of just cause must govern" [38].

Various, very strong, opinions exist as to whether an arbitrator should base a decision solely on contractual language or consider external law: "We have seen that the increased diversity in the workforce requires that arbitrators broaden their concerns for fairness, impartiality, and the appearance of procedural propriety. . . . The evolving nature of workplace disputes will force arbitrators to consider an increasing number of statutory-related issues" [34, p. 37; 39]. Unless the submission agreement or the contract requires consideration of legal rights, they often are excluded. In an earlier arbitration survey, 33 percent (9) of the cases referenced Title VII, legal decisions, or EEOC opinions [24]. Though the present study used a much larger sample, the results are similar: 37 percent (31) of the eighty-three decisions find the arbitrator making reference to Title VII of the Civil Rights Act or EEOC Guidelines. In twenty-four (29%) of those opinions the arbitrator held

that the employer had proved a hostile environment existed due to the grievant's actions. If we consider only those thirty-nine cases where the grievance was sustained or split, we see very different numbers. Title VII was considered in only seven (18%) of the grievances sustained and in five (13%) of those split. It would appear that when arbitrators consider external law, more often than not, the grievance is denied.

### **ARBITRAL STANDARDS— MITIGATING CIRCUMSTANCES**

Guilt is not the only factor considered when an arbitrator renders a decision. Often the grievant is guilty as charged, but other factors are weighed. Mitigating circumstances affect the penalty's extent and magnitude. And, arbitrators are often eager to find some reason to reduce the penalty. When the company discharged a male employee after "mooning" two female coworkers, the decision to uphold in full the company's decision was based in part on the fact that grievant had a poor work record and, therefore, no excuse existed to lessen the penalty [40].

Discharge is not necessarily the appropriate penalty in every sexual harassment case. For the thirty-nine grievances sustained in full or split, mitigating circumstances were cited as reasons for reducing the penalty imposed by the employer. Often, discipline was reduced because the grievant was a long-term employee (29%) with a good work record (23%) who had no prior discipline (23%). (Percentages are based on the thirty-nine cases where the grievance was sustained.) There was no dispute that the grievant pinched the breast of a female coworker and made kissing sounds (there was a credible witness). But, the arbitrator considered discharge too harsh a penalty in light of grievant's twenty-eight-year seniority, good work record, and no prior discipline related to sexual misconduct. Stating, "Grievant's acts were clearly disgraceful. Such sexual advances interfere with the privacy and degrades the dignity of the co-employee," Arbitrator Heinsz nevertheless gave him one last chance, citing an additional, unusual mitigating circumstance: ". . . discharge would be particularly severe in light of the present economic recession and the dim prospects of reemployability of someone with the Grievant's skills at his age" [41, at 21, 22].

Considerable weight is given to the fact that the employer did not provide notice, information that the conduct involved was offensive and would result in discipline (16 cases, 41%). "Before conduct can be punished as sexual harassment, there must be adequate prior warning that the comments are deemed offensive and that discipline will be imposed if the offending parties persist in making such comments" [42, at 261]. Furthermore, in nineteen decisions (49%) discipline was considered necessary, but the penalty too harsh. In an early case related to sexual misconduct an employee was terminated for violating the company's prohibition against engaging in immoral conduct (sexual harassment usually was not spelled out in company policies in the early 1980s). There was no

dispute that the conduct was “distasteful” and that indeed sexual harassment occurred: “Perhaps she was harassed because she is a woman entering employment in what was hitherto a man’s domain. Perhaps it was because she is of stocky build.” However, in spite of the fact that grievant put his finger through the fly of his pants and said “Hey big mama, look what I have for you,” the arbitrator reinstated him (without pay) in part because, due to fear of reprisal (from both the company and the union), the victim did not file a grievance against her coworker. As further justification for reinstatement, Arbitrator Alexander Cocalis admitted, “There is no specific code of conduct governing the industrial relationships of the sexes” [43, at 54-56]. Thus, discharge would be too harsh a penalty. Such substantive considerations often determine the appropriateness of the penalty [44, pp. 209-213]. Under close scrutiny, decisions such as these may run afoul of the law. In a hostile environment case, the court will consider whether the employer’s response was adequate to prevent further harassment, while an arbitrator focuses on the appropriate penalty for the offense. In the same example of sexual harassment, discharge may be the resolution from the court’s perspective, while an arbitrator may determine that corrective discipline requires reinstatement without back pay [45, p. 22].

Few arbitrators considered it a mitigating circumstance when the company had no policy on sexual harassment or no contract language (3%). A common mitigating circumstance in all arbitrations is that the investigation was not handled in a fair manner. However, only five (13%) arbitrators cited this test when reducing the discipline. In *Veterans’ Administration Medical Center*, the arbitrator reinstated the grievant with full back pay since he was never questioned about the incident, not allowed union representation, and his accuser did not appear at the arbitration hearing, allowing the union no chance to cross-examine [46].

Only three (8%) cases turned on the fact no proof existed that the employee was guilty as charged. When an employee ran his finger up a coworker’s buttocks, the arbitrator found “Grievant’s conduct . . . was inexcusable and should not go unpunished.” However, since there was a dispute over what had occurred and contact was minimum, the arbitrator felt reinstatement without back pay was the appropriate remedy [47]. And, a mere four (10%) decisions reduced the discipline based on disparate or unequal treatment. For example, in *King Soopers* [5] discharge was reduced to a twenty-day suspension because the company treated the grievant more harshly than a supervisor who had also engaged in sexual harassment. Additionally, arbitrators often hold the company partially responsible when an employee violates a sexual harassment policy that is not strictly enforced. Though guilty as charged, in *Meijer Inc.*, grievant’s penalty was reduced because the company allowed a sexual atmosphere to pervade the workplace, including graphic sexual displays and horseplay [48]. And, despite the fact that an employee held a “dildo” to his crotch in front of a woman coworker he was reinstated because “sexually suggestive statements and expressions . . . [were] commonplace” [49, at 5996]. It would appear that arbitrators do not treat sexual harassment

cases more seriously than other types of grievances. Just as in other discipline cases, they take care to ensure the seven tests of just cause have been met [50].

Thus, mitigating circumstances play a crucial role in determining the proper penalty an employer may impose on an employee who engages in sexual harassment. As discussed above, various mitigating factors exist. In *Sugardale Foods* the arbitrator split the decision, citing numerous mitigating circumstances: 1) grievant had twenty-five years seniority, 2) harassment occurred for only ten minutes, 3) company had no specific sexual harassment policy, and 4) grievant had no prior allegations of sexual harassment. Even though the arbitrator found clear and convincing evidence that the grievant was guilty of engaging in sexual harassment, he felt that discipline short of discharge is enough to show employees the company is concerned about sexual harassment and a long, extended suspension is adequate to deter the grievant from repeating his offense [51, at 1022]. It is interesting to note that this case was heard the same year (1986) the Supreme Court held employers to be liable for hostile-environment sexual harassment in *Meritor Savings Bank v. Vincent* [52]. After 1986 employers began to deal with this issue more harshly, and many arbitrators took this decision into consideration when ruling on such cases.

### **ARBITRAL STANDARDS— DUE PROCESS CONSIDERATIONS**

Procedural rights established by the collective bargaining agreement or generally recognized arbitration principles (i.e., grievants' right to tell their side of the story) are serious considerations for arbitrators. "Arbitration, guided by the just cause provision of a collective bargaining agreement, may be the only forum that affords an alleged harasser a due process hearing and the presumption of innocence" [53, pp. 119-120]. If the individual rights of a grievant have been violated in the charging, investigation, or administration of the case, a lesser penalty may be imposed. Though finding the grievant guilty of misconduct "so egregious as to be punishable by discharge" (he raised the T-shirt of a female coworker and exposed her bare breasts), consideration was given because the company did not fully investigate prior to discharge. While denying reinstatement, Arbitrator Frank Murphy nonetheless awarded one week's pay to the grievant, stating that his due process rights were violated [7]. A further example to demonstrate the crucial role due process plays can be found in *DeVry Tech*, where a teacher asked female students to model nude, showed nude pictures, and made vulgar remarks. The school gave him a warning letter and immediately fired him. Stating that the grievant was denied his due process, the arbitrator ruled he should have been given progressive discipline and put on notice that further such actions would result in discharge [54].

General principles of due process require an employer to: 1) inform employees of the offense with which they are charged and present evidence, 2) begin and end

investigation within reasonable time frame, and 3) at the conclusion of the investigation, either drop the charges or administer discipline promptly. Additionally, employees cannot be disciplined more than once for the same offense. For example, in *Ohio Cubco* the grievance was resolved short of arbitration when the grievant was transferred to a different shift as the penalty for engaging in sexual harassment. However, after receiving complaints from the victim and her husband that the grievant's punishment was too lenient, he was suspended for five days. Since the case had already been settled through the grievance procedure, the arbitrator found this new discipline constituted double jeopardy [55]. Furthermore, prior infractions cannot be used as a basis for determining guilt. When the company discharged an employee prior to investigation of the charges, basing its decision on earlier incidents for which the employee had been disciplined, the arbitrator reduced the penalty to reinstatement without back pay. Past discipline should be considered only after the employee is found guilty of the current charge, to determine the penalty's magnitude [56]. "The grievance and arbitration procedure enables an alleged harasser to obtain a due process hearing at which to challenge the employer's poor or hasty investigation, mistaken factual or legal conclusions or excess caution or condemnation" [29, p. 3].

### **ARBITRAL STANDARDS— PROGRESSIVE DISCIPLINE**

The concept of progressive discipline requires that the penalty imposed be the minimum necessary to correct misconduct and to rehabilitate the offender. Its major purpose is corrective. "The principles of progressive discipline do not require a lock step approach. Gravity of the offense determines the initial step. . . . In making the determination of the degree of discipline, an employer properly may consider not only the likelihood of correction and rehabilitation the discipline may bring, but also the discipline should fit the gravity of the offense" [57, at 460-461]. Discharge is not corrective, since it removes the employee from the organization. A good work record suggests that corrective discipline will work. Even when the nature of the offense was as serious as exposing private parts to coworkers, the arbitrator reinstated the grievant because "Principles of progressive discipline demand that the minimum penalty necessary to correct unacceptable conduct be applied. . . . In the Arbitrator's opinion, in this case there is insufficient evidence to suggest that the employee was beyond rehabilitation, that with counseling by his supervisor or other management representative he would not have corrected his conduct to acceptable levels" [58, at 15]. Discharge is appropriate only when other attempts at correction have failed [59] or when the nature of the offense is egregious: "Sexual harassment involving unwanted physical contact falls in this category" [44, at 213].

## ARBITRAL STANDARDS—POLICY

Rarely do collective bargaining agreements contain language related to sexual harassment. Most contain antidiscrimination clauses and list types of discrimination covered, such as race, sex, and age. However, few clauses include sexual harassment as a separate form of discrimination. Only three (4%) of the eighty-three contracts involved included sexual harassment in their antidiscrimination clause. So, how is this issue communicated to the workforce? Primarily through a company policy on sexual harassment. However, less than 50 percent of the employers (36) involved in these arbitrations had a company policy explicitly prohibiting sexual harassment at the workplace; others included it in their general antidiscrimination policy. Of the thirty-six that did have a specific policy, only fifteen (42%) incorporated EEOC guidelines into that policy; and, a mere fourteen (39%) of these clearly spelled out what type of discipline employees would receive for engaging in sexual harassment. Considering these figures, many of the employers involved in these arbitration cases would have a difficult time defending themselves against a sexual harassment lawsuit [60].

## DISCUSSION

What is an employer without a comprehensive sexual harassment policy to do? Employment lawyers suggest an impartial individual from outside the company conduct the investigation, or a neutral person inside the company, such as the human resources director. "While there may not be a foolproof method for preventing sexual-harassment complaints from landing in court . . . employers can protect themselves from liability by conducting immediate, thorough, and impartial investigations" [61].

Legally, as interpreted by the courts, employers are responsible for developing and implementing sexual harassment policies and procedures for enforcement. They are also legally required to impose a disciplinary penalty in cases of serious sexual harassment. In a unionized workplace, the employer should work with union leaders and incorporate the policy into the collective bargaining agreement. "The need for employers to develop, adopt, implement, and enforce policies proscribing sexual harassment is particularly well served by collective bargaining . . . the collective bargaining model virtually forces the adoption and enforcement of a formal policy that is one step closer to limiting the employer's legal liability and avoiding fraudulent sexual harassment claims" [62, pp. 38-39].

In *Jacksonville Shipyards* [63] the judges included guidelines for employers to follow in setting up a sexual harassment policy. Begin by implementing a separate sexual harassment policy (cannot be part of a broad antidiscrimination policy) and communicate it to employees (distribute the policy in manner similar to that in which other policies are distributed, e.g., safety policy). Include procedures to encourage victims of harassment to come forward, ". . . many victims are

reluctant to go public. . . . In order to allay fears . . . it is important that the entry point to a complaint process is confidential, informal, and is not intimidating. One answer may be to appoint or delegate staff as counselors, individuals who are able to offer advice and support, and who are available for consultation with no obligation to pursue a complaint” [64, p. 13]. More than one individual must be designated to receive complaints to ensure the victim is not required to report to her/his harasser. The name, title, department, and phone number of these persons should be easily accessible.

Document all complaints and investigate them promptly by interviewing the victim, alleged harasser, and all witnesses. It is important to have the victim appear at the arbitration hearing to be cross-examined, since contradictory testimony is often involved. Disciplinary action against the harasser should be appropriate, given the nature of the harassment, and taken in a timely manner, as soon as possible after the investigation is concluded. “What constitutes appropriate remedial action necessarily depends upon the facts of the case, the severity and persistence of the harassment, and the effectiveness of any initial remedial steps. . . . Employers may be liable, even after taking remedial steps, if the response is not reasonably calculated to end the harassment” [65, p. 436]. Both parties must be informed of the results of the investigation, even if the employer finds no proof harassment occurred. The “true test of a sexual harassment policy will be whether it is *effective* in preventing sexual harassment” [66, p. 194]. Employer policies that focus on investigation and punishment may be insufficient protection against liability. Determent must be included.

Part of the rationale for overturning a discharge decision and reinstating the grievant in *Hyatt Hotels Palo Alto* was the fact that the company did not have a clear sexual harassment policy that had been reasonably disseminated. Arbitrator Oestreich stated that before just cause to discipline exists, it must be considered whether the sexual harassment policy is written and specific enough so that employees understand what behavior is considered sexual harassment and what consequences result from engaging in this behavior [59]. And, the “Existence of a sexual harassment policy does not automatically confer right of discharge” [38, at 630]. Since the company did not define sexual harassment or provide examples, the arbitrator reduced the discipline to a written reprimand.

Three cases where the arbitrators upheld discipline imposed by the employer turned on the appropriateness of the company’s sexual harassment policy. In *International Paper* [9] and also in *American Protective Services* [67], both companies had clear and unambiguous policies that all employees understood. Additionally, the policies defined and gave examples of harassment, were posted at the facility, and the grievants had signed a form stating they read and understood that policy. Going one step further, the *Eureka Company* had a policy that incorporated EEOC guidelines against sexual harassment, and the contract’s anti-discrimination clause specifically stated that “parties . . . shall comply with provisions of Title VII of the Civil Rights Act of 1964 . . . [68, at 1152].

In summary, an effective policy should contain the following sections: 1) statement of policy, 2) statement of prohibited conduct, 3) schedule of penalties for misconduct, 4) procedures for making, investigating, and resolving complaints, and 5) schedules for education and training of all employees [66, p. 197]. Training should be designed to clarify the company's policy and define sexual harassment and to emphasize that sexual harassment will not be tolerated. Posting the policy on a company bulletin board is insufficient; it must be included in the rule/policy handbook and/or the collective bargaining contract. And, since employers may be held liable for employees who sexually harass nonemployees, it would be wise to include a prohibition against harassing nonemployees as well as coworkers [69].

### ALTERNATIVE DISPUTE RESOLUTION

Though historically organized labor has been male-dominated, it has been active in advocating civil rights, including women's rights [70, p. 237]. Most likely the union will grieve if a supervisor harasses a female union member. But, the grievance procedure is ill-suited to handle cases of coworker sexual harassment. "The union is often faced with a role conflict in deciding what position to take when both the man and the woman involved are members of the bargaining unit" [71, at 39]. On the one hand, union officers are concerned that the male member's right to due process not be jeopardized, while on the other hand, they seek to protect the female's right to work in a hostile-free environment. The union must attempt to balance the interests of both the victim and the grievant. Often, the union is "damned if it does and damned if it doesn't" grieve and argue there was no just cause to discipline.

"The dominance of males in most unionized settings may affect attitudes about sexual harassment and ultimately how the union handles the defense of members so accused" [70, p. 237]. It seems the union may not be giving enough consideration to the victim's interests when choosing how to represent the grievant. In *Superior Coffee & Foods* the union cited previous cases where arbitrators had overturned discharges as to why the grievance should be sustained. In response, the arbitrator said, "I find the cited cases on sexual harassment not in keeping with current arbitral thinking on the subject. They are 1986 and 1987 decisions, and both societal and judicial views on the seriousness of sexual harassment have undergone dramatic changes between then and now" [72, at 613].

Furthermore, in many of these arbitration cases, the union's strategy was to attack the credibility and/or behavior of the victim. The union's role in this process communicates to both male and female members what are appropriate standards of workplace behavior and represents the "translation of labor philosophy into action" [70, p. 241]. If the union continues to deny or use the blame the victim defense, women will be discouraged from filing sexual harassment complaints, and men will not understand that it is a problem. Sexual harassment will be difficult to remove from the workplace. Moreover, it has the potential

to divide and conquer the union! Perhaps an alternate form of dispute resolution would be more appropriate to resolve sexual harassment disputes between coworkers. If the employer and the union are committed to ensuring employees work in a hostile-free environment, they must cooperate to resolve these grievances prior to arbitration. Two options are mediation and fact finding.

Mediation is a process whereby a *neutral* person works with both parties to help them reach an agreement. Whereas the traditional grievance-arbitration procedure focuses on the rights of the parties, resulting in adversarial attitudes, mediation focuses on the interests of the parties and is based on collaboration. Parties must attempt to reframe conflict from one rooted in differing rights (positions) to one rooted in differing interests [73]. Furthermore, while arbitration is a rigid process where the ruling agrees with either the union or management, mediation allows for flexibility and creativity in resolving a dispute. The parties voluntarily agree to resolve a specific grievance and own that resolution. Another positive outcome is that the mediator may help the parties diagnose underlying issues that gave rise to the grievance initially and propose new ways of dealing with the problem. As a result, the labor-management relationship may be improved [74].

The American Arbitration Association has developed a fact-finding program to resolve sexual harassment disputes. A male/female team of arbitrators meet with the parties (usually separately), conduct fact finding, and make recommendations. This differs from mediation where both parties may be present much of the time. This is even less of an adversarial situation than mediation. Whereas an arbitrator can decide only whether discipline was appropriate, the fact finders make recommendations to resolve the dispute. However, unlike the arbitrator, they have no authority to impose a solution [75].

## CONCLUSION

Employers who work with union representatives to develop a comprehensive sexual harassment policy may not only protect themselves from future lawsuits, but enhance the labor-management relationship by providing clear guidelines to follow when a coworker alleges sexual harassment. A policy referred to in the collective bargaining agreement, distributed directly to employees, that describes, with examples, what behaviors constitute sexual harassment along with disciplinary measures to be taken, is the first step toward dealing with hostile environment sexual harassment. The parties may want to include information about what proof is sufficient to determine the employee's guilt, such as a preponderance of the evidence. They also may find it advantageous to limit the arbitrator's authority. For example, many of the arbitration cases surveyed found the arbitrator reducing the penalty imposed by management because research conducted by the arbitrator uncovered similar cases from other companies where the arbitrator imposed a lesser penalty. Their decisions were not based on contract language between the parties involved. Thus, to ensure the arbitrator does not stray from the

“four corners of the contract” the parties should agree, in writing, that arbitrators may not review cases involving other employers to determine the appropriateness of the discipline imposed [45, p. 26].

Many of the eighty-three cases read should never have been arbitrated. Reputations were ruined, relationships severed, and good employees terminated. Both the company and the union suffer when employees must work in a hostile environment. Productivity declines when employees fear for their safety at work; they are less efficient and absent more often. Union solidarity erodes when member is pitted against member and the union must choose one to defend. Fears of lawsuits compel employers to deal harshly with alleged harassers, often not conducting proper investigations. Discharge should not be the first form of discipline unless harassment is severe, continues for a long period of time, and prior discipline has been ineffective. Progressive discipline should be imposed. Emotions run high where sexual harassment is involved. Questions of credibility exist. Sides are taken. Unless the employer and union can work through these cases in a cooperative manner, meritless cases will be arbitrated. Conversely, arbitrators may reinstate employees who engage in egregious acts of harassment because due process was denied. Though the grievant returns to work, the union has not won. In such cases there are no winners.

**APPENDIX A**  
**Arbitration Cases—Discipline and Sexual Harassment**

**Case Citation:** \_\_\_\_\_ LA \_\_\_\_\_ Arbitrator: \_\_\_\_\_

**Case Title:** \_\_\_\_\_ **Date:** \_\_\_\_\_

**Harasser:** \_\_\_ Male \_\_\_ Female; **Victim:** \_\_\_ Female \_\_\_ Male

**Relationship:** \_\_\_ Coworkers \_\_\_ union/nonunion member \_\_\_ nonemployee

**Case Involved** (check all that apply):

\_\_\_ Verbal/Oral \_\_\_ Physical Contact \_\_\_ Visual \_\_\_ Written

**Type of Harassment** (check all that apply):

\_\_\_ Hostile Environment  
\_\_\_ Quid Pro Quo  
\_\_\_ Other \_\_\_\_\_

**Type of Discipline:**

\_\_\_ Discharge \_\_\_ Suspension \_\_\_ Written Warning \_\_\_ Oral Warning

**Standard Used by Arbitrator:**

\_\_\_ None \_\_\_ Reasonable Person \_\_\_ Woman \_\_\_ Man \_\_\_ Victim \_\_\_ Homosexual

**Arbitral Standard of Proof:**

- No Dispute over What Occurred
- Beyond Reasonable Doubt
- Preponderance of Evidence
- Clear & Convincing Evidence
- Sufficient to Convince a Reasonable Mind
- None Cited
- Just Cause Standard Met by Employer

**Arbitrator's Decision:**  Grievance Denied  Sustained  Split

**Arbitrator considered the following (check all that apply):**

- Legal rights under Title VII
- Hostile Environment Proven
- Sex Harassment Policy was clearly violated
- Other (explain): \_\_\_\_\_

**Relevant Company Rules or Contract Issue:**

- Company Policy exists prohibiting sex harassment
- Title VII cited as reason for giving discipline
- Policy includes EEOC guidelines
- Discipline clearly stated for engaging in sex har.:  contract  policy
- Immoral conduct rule violated
- Nondiscrimination clause includes sex harassment
- Other: \_\_\_\_\_

**For grievances sustained in full or split, mitigating circumstances cited (check all that apply):**

- no company policy on SH  no contract language
- behavior not severe/not considered sex harassment
- atmosphere included sexual jokes, pictures, references
- disparate/unequal treatment  discrimination involved
- no prior discipline  long-term employee  good work record
- no warning conduct is offensive/possible discipline
- no fair investigation  no proof of employee's guilt
- victim not a credible witness/not credible story
- penalty too harsh  employee had drug/alcohol problem
- Other (explain): \_\_\_\_\_

**For grievances sustained, did arbitrator (check all that apply):**

- award back pay  no back pay
- remove reprimand;  suggest or  require counseling
- Other (explain): \_\_\_\_\_

Other comments: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

\* \* \*

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### ENDNOTES

1. *Vernitron Piezoelectric*, 84 Lab. Arb. (BNA) 1315 (R. Abrams, Arb. 7/03/85).
2. *Zia Co.*, 82 Lab. Arb. (BNA) 640 (D. Daughton, Arb. 3/14/84). The company deferred discipline until after the U.S. District Court for the District of New Mexico found both the grievant and the company guilty of violating the law.
3. *Labor Arbitration Reports* (Lab. Arb.) is published by the Bureau of National Affairs (BNA) and *Labor Arbitration Awards* (Lab. Arb. Awards) is published by Commerce Clearinghouse (CCH).
4. For additional articles related to arbitration rulings and sexual harassment see: William Nowlin, "Sexual Harassment in the Workplace: How Arbitrators Rule," *Arbitration Journal*, Vol. 43, No. 4 (December 1988), pp. 31-39; Jonathan Monat and Angel Gomez, "Decisional Standards Used by Arbitrators in Sexual Harassment Cases," *Labor Law Journal*, Vol. 37, No. 10 (October 1986), pp. 712-718; Michael Marmo, "Arbitrating Sexual Harassment Cases," *Arbitration Journal*, Vol. 35, No. 1 (March 1980), pp. 35-40; Marcia Greenbaum and Bruce Fraser, "Sex Harassment in the Workplace," *Arbitration Journal*, Vol. 36, No. 4 (December 1981), pp. 30-41; William S. Rule, "Arbitral Standards in Sexual Harassment Cases," *Industrial Relations Law Journal*, Vol. 10, No. 1 (1988), pp. 12-18; Vern Hauck and Thomas Pearce, "Sexual Harassment and Arbitration," *Labor Law Journal*, Vol. 43, No. 1 (January 1992), pp. 31-39; Cynthia F. Cohen and Murray E. Cohen, "Defending Your Life: When Women Complain about Sexual Harassment," *Employee Responsibilities and Rights Journal*, Vol. 7, No. 3 (1994), pp. 235-246; and David Hames, "Disciplining Sexual Harassers: What's Fair?" *Employee Responsibilities and Rights Journal*, Vol. 7, No. 3 (1994), pp. 207-217.
5. A split decision was defined as reinstatement without back pay. However, there is one exception where a split decision involved back pay. In *King Soopers, Inc.*, 101 Lab. Arb. (BNA) 107 (M. Snider, Arb. 4/6/93), the discharge was reduced to a twenty-day suspension with back pay after that time. At issue here was disparate treatment, and the

arbitrator felt some punishment for engaging in sexual harassment was necessary, but that full back pay was inappropriate.

6. Percentages were rounded off, thus they may not equal 100 percent. In the four cases where the female was the harasser, the grievance was denied in two and sustained in two. However, in one of the cases denied, both harasser and victim were women; in the other three the victims were men.
7. *Livers Bronze Co.*, 90-1 Lab. Arb. Awards (CCH) § 8223 (F. Murphy, Arb. 9/18/89).
8. *Lohr Distributors*, 101 Lab. Arb. (BNA) 1217 (G. Fowler, Arb. 11/23/93).
9. Only fourteen cases included an employer that had a policy stating what the discipline would be for violating sexual harassment policy. Of those fourteen decisions, twelve were in favor of the employer. For cases citing sexual harassment policy see: *International Paper Co.*, 101 Lab. Arb. (BNA) 1106 (D. C. Yancy, Arb. 12/4/93) and *Hughes Aircraft*, 102 Lab. Arb. (BNA) 353, (M. Bickner, Arb. 12/15/93).
10. *Steuben Rural Electric*, 98 Lab. Arb. (BNA) 337 (J. LaManna, Arb. 10/8/91).
11. *University of Missouri*, 78 Lab. Arb. (BNA) 417 (S. Yarowsky, Arb. 2/16/82).
12. *U.S. Army Signal Center*, 78 Lab. Arb. (BNA) 120 (M. Hall, Arb. 1/9/82).
13. *County of Ramsey*, 86 Lab. Arb. (BNA) 249 (T. Gallagher, Arb. 11/24/86).
14. *Fisher Foods*, 80 Lab. Arb. (BNA) 133 (R. Abrams, Arb. 1/13/83). The grievant was suspended and not discharged only because there was a three-month delay in the victim's reporting the incident.
15. *Pepco*, 83 Lab. Arb. (BNA) 449 (R. Kaplan, Arb. 10/5/84).
16. *Dayton Newspapers*, 100 Lab. Arb. (BNA) 48 (R. Strasshofer, Arb. 10/3/92).
17. *EEOC Guidelines*, 20 CFR 1604.11(a) (1990). Under certain circumstances, harassment by nonemployees (customers, clients, salespersons, contractors) can be a Title VII violation. Extent of liability depends on extent of employer's control over non-employees. For information on handling employee complaints of sexual harassment by customers, see Robert Aalberts and Lorne Seidman, "Sexual Harassment by Clients, Customers, and Suppliers: How Employers Should Handle an Emerging Legal Problem," *Employee Relations Law Journal*, Vol. 20, No. 1 (Summer 1994), pp. 85-100 and Robert Shearer, "Sexual Harassment by Nonemployees: Employer Liability for Conduct of Third Parties," *Journal of Individual Employment Rights*, Vol. 3, No. 1 (1994-95), pp. 75-84.
18. Physical, verbal, visual, and written harassment were recorded. Some cases involved one or more of these attributes.
19. *Care Inns*, 81 Lab. Arb. (BNA) 687 (F. J. Taylor, Arb. 9/22/83).
20. *King Soopers, Inc.*, 100 Lab. Arb. (BNA) 900 (J. Sass, Arb. 3/3/93); victim was not credible.
21. *Nuclear Fuel Service*, 93 Lab. Arb. (BNA) 1204 (J. Clarke, Arb. 10/10/89).
22. *Fry Food Stores of Arizona*, 99 Lab. Arb. (BNA) 1161 (R. Hogler, Arb. 10/20/92).
23. *Kraft Sealtest Foods*, 89 Lab. Arb. (BNA) 27 (E. Goldstein, Arb. 3/27/87).
24. Ken Jennings and Melissa Clapp, "A Managerial Tightrope: Balancing Harassed and Harassing Employees' Rights in Sexual Discrimination Cases," *Labor Law Journal*, Vol. 40, No. 12 (December 1989), pp. 756-764.
25. For courts, the victim must prove: 1) she was subjected to sexual harassment within relevant time period, 2) the conduct was unwelcome, and 3) the conduct permeated the

- workplace and was sufficiently severe or pervasive to alter conditions of employment and create an abusive working environment as viewed by a reasonable person. See Barbara Berish Brown and Intra Germanis, "Hostile Environment Sexual Harassment: Has Harris Really Changed Things?" *Employee Relations Law Journal*, Vol. 19, No. 4 (Spring 1994), pp. 567-578.
26. *GTE Florida*, 92 Lab. Arb. (BNA) 1090 (C. Cohen, Arb. 4/8/89). The author did not attempt to interpret the arbitrator's standard. Thus, burden of proof was recorded only where the arbitrator explicitly relied on a standard of proof.
  27. *Duke University*, 100 Lab. Arb. (BNA) 316 (H. Hooper, Arb. 1/25/93).
  28. Jonathan Monat and Angel Gomez, "Decisional Standards Used by Arbitrators in Sexual Harassment Cases," *Labor Law Journal*, Vol. 37, No. 10 (October 1986), pp. 712-718. See also, William S. Rule, "Arbitral Standards in Sexual Harassment Cases," *Industrial Relations Law Journal*, Vol. 10, No. 1 (1988), pp. 12-18.
  29. Lisa Salkovitz Kohn, "Sexual Harassment Issues in Labor Arbitration: Old Tensions and New Challenges," *The Illinois Public Employee Relations Report*, Vol. 1, No. 4 (Autumn 1993), pp. 1-5.
  30. *Stroehmann Bakeries*, 98 Lab. Arb. (BNA) 873 (J. Sands, Arb. 6/18/90).
  31. Christie Roszkowski and Robert Wayland, "Arbitration Review: Is the Public Policy Against Sexual Harassment Sufficient Cause for Vacating an Arbitration Award?" *Labor Law Journal*, Vol. 44, No. 11 (November 1993), pp. 707-716. See *Stroehman Bakeries* 969 F.2d 1442 (CA-3, 1992).
  32. Though grievant violated the rule against using profane and abusive language, in upholding the discharge, the arbitrator considered the public policy issue and discussed arbitration decisions vacated by the courts.
  33. *Harris v. Forklift Systems, Inc.*, 114 S. Ct. 367 (1993). The Supreme Court failed to adopt the "reasonable woman" standard and left intact the "reasonable person" or victim standard.
  34. Lamont Stallworth and Martin Malin, "Workforce Diversity," *Dispute Resolution Journal*, Vol. 49, No. 2 (June 1994), pp. 27-39.
  35. For additional information on what perspective arbitrators should use, see: Dirk Thomas and Donald McPherson, "Hostile Environment Sexual Harassment: From What Perspective Should Arbitrators Judge?" *Industrial Relations Research Association Series: Proceedings of the Forty-Second Annual Meeting* (December 28-30, 1989, Atlanta), pp. 492-506. For an interesting argument against using the reasonable woman standard from a feminist perspective, see Kathleen A. Kenealy, "Sexual Harassment and the Reasonable Woman Standard," *The Labor Lawyer*, Vol. 8, No. 2 (Spring 1992), pp. 203-210.
  36. Marcia Greenbaum and Bruce Fraser, "Sex Harassment in the Workplace," *Arbitration Journal*, Vol. 36, No. 4 (December 1981), pp. 30-41.
  37. See *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991).
  38. *Kiam*, 97 Lab. Arb. (BNA) 617 (H. Bard, Arb. 9/11/91). In addition to verbal and physical abuse, harassment includes sexually oriented jokes and pictures and demands for sex.

39. See also, Martin Malin and Lamont Stallworth, "Affirmative Action Issues and the Role of External Law in Labor Arbitration," *Seton Hall Law Review*, Vol. 20, No. 4 (1990), pp. 745-785.
40. *South Central Bell Telephone*, 80 Lab. Arb. (BNA) 891 (S. Nicholas, Jr., Arb. 4/1/83). See also *Container Corporation of America*, 100 Lab. Arb. (BNA) 568 (L. Byers, Arb. 1/29/93) where a short-term employee violated the company's EEO policy and the arbitrator could find no mitigating circumstances to lessen the penalty.
41. *Dayton Power and Light*, 80 Lab. Arb. (BNA) 19 (T. Heinsz, Arb. 12/27/82).
42. *King Soopers*, 86 Lab. Arb. (BNA) 254 (J. Sass, Arb. 8/12/85).
43. *Powermatic-Houdaille*, 71 Lab. Arb. (BNA) 54 (A. Cocalis, Arb. 6/15/78).
44. Substantive considerations require the employer to prove the grievant was guilty and the evidence to show the penalty was appropriate for the crime, in contrast to procedural factors such as prior notice, a clear statement of charges, and conducting a fair investigation. See David Hames, "Disciplining Sexual Harassers: What's Fair?" *Employee Responsibilities and Rights Journal*, Vol. 7, No. 3 (1994), pp. 207-217.
45. Leslye M. Fraser, "Sexual Harassment in the Workplace: Conflicts Employers May Face Between Title VII's Reasonable Woman Standard and Arbitration Principles," *Review of Law and Social Change*, Vol. XX, No. 1 (1992-93), pp. 1-40.
46. *Veterans' Administration Medical Center*, 82 Lab. Arb. (BNA) 25 (S. Dallas, Arb. 1/8/84). See also [42, at 261]: company must make every effort to conduct fair and thorough investigation so that it will have all the information it needs to make sound judgments.
47. *Boy's Market Inc.*, 88 Lab. Arb. (BNA) 1304 (H. Wilmoth, Arb. 1/7/87); see also [20], where there was no proof grievant engaged in sexual harassment; the victim was not at all credible. Therefore the grievance was sustained in full.
48. *Meijer Inc.*, 83 Lab. Arb. (BNA) 570 (E. Ellmann, Arb. 8/16/84).
49. *Von's Grocery*, 88-2 Lab. Arb. Awards (CCH) § 8611 (M. Prihar, Arb. 8/17/87).
50. In *Enterprise Wire Co.*, 46 Lab. Arb. (BNA) 359 (C. Daugherty, Arb. 1966) guidelines, in the form of seven tests, were established to determine whether or not discipline was meted out for just cause. One of these tests, the *penalty is too harsh*, was often cited by arbitrators in this study to reduce the penalty imposed by management. Employers may be concerned about lawsuits brought by the victim when sexual harassment is involved, so discipline is either suspension or discharge. When the employer discharged an employee for engaging in horseplay, the arbitrator reduced the penalty to suspension, stating that the seven tests of just cause had not been met, *Eagle-Picher Ind.*, 101 Lab. Arb. (BNA) 473 (P. Staudohar, Arb. 8/2/93). For an overview of the importance of these tests, see Arjun Aggarwal, "Arbitral Review of Sexual Harassment in the Canadian Workplace," *Arbitration Journal*, Vol. 46, No. 4 (1991), pp. 15-16 and [45].
51. *Sugardale Foods*, 86 Lab. Arb. (BNA) 1017 (N. Duda, Jr., Arb. 5/12/86).
52. *Meritor Savings Bank v. Vinson*, 477 US 57 (1986): Title VII is violated when an employee is required to work in a discriminatorily hostile or abusive environment.

53. Tim Bornstein, "Arbitration of Sexual Harassment," *Arbitration 91: The Changing Face of Arbitration in Theory and Practice*, in Proceedings of the 44th Annual Meeting of the National Academy of Arbitrators (1992), pp. 109-142.
54. *DeVry Ind. Tech.*, 87 LA 1149 (H. Berman, Arb. 9/8/86).
55. *Ohio Cubco*, 88-1 Lab. Arb. Awards (CCH) § 8394 (S. Savage, Arb. 5/25/88).
56. *Weber Aircraft, Division of Kidde, Inc.*, 86-1 Lab. Arb. Awards (CCH) § 3852 (J. D. Dunn, Arb. 9/18/85).
57. *Social Security Administration*, 81 Lab. Arb. (BNA) 459 (J. Cox, Arb. 9/9/83). See also [26] at 1094] "except where the incident is 'particularly egregious,' some form of progressive discipline and/or rehabilitation is warranted."
58. *Hyatt Hotels Palo Alto*, 85 Lab. Arb. (BNA) 11 (H. Oestreich, Arb. 6/6/85).
59. *United Electric Supply*, 82 Lab. Arb. (BNA) 921 (S. Madden, Arb. 3/20/84) and *Stanley Flagg & Co.*, 90 Lab. Arb. (BNA) 1176 (J. Shearer, Arb. 2/11/88).
60. See: Dawn Bennett-Alexander, "Hostile Environment Sexual Harassment: A Clearer View," *Labor Law Journal*, Vol. 42, No. 3 (March 1991), pp. 131-143, and William Woerner and Sharon Oswald, "Sexual Harassment in the Workplace: A View Through the Eyes of the Courts," *Labor Law Journal*, Vol. 41, No. 11 (1990), pp. 786-793.
61. *Wall Street Journal*, 5/17/95, p. B1.
62. Vern Hauck and Thomas Pearce, "Sexual Harassment and Arbitration," *Labor Law Journal*, Vol. 43, No. 1 (January 1992), pp. 31-39.
63. *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486 (Fla 1991); 57 FEP Cases 971.
64. John Kremer and Jenny Marks, "Sexual Harassment: The response of management and trade unions," *Journal of Occupational and Organizational Psychology*, Vol. 65 (1992), pp. 5-15.
65. David Hames, "An Actionable Condition of Work-Related Sexual Harassment," *Labor Law Journal*, Vol. 43, No. 7 (July 1992), pp. 430-439.
66. Dana Connell, "Effective Sexual Harassment Policies: Unexpected Lessons from Jacksonville Shipyards," *Employee Relations Law Journal*, Vol. 17, No. 2 (1991), pp. 191-206.
67. *American Protective Services*, 102 Lab. Arb. (BNA) 161 (J. Gentile, Arb. 2/10/94).
68. *Eureka Co.*, 101 Lab. Arb. (BNA) 1151 (D. Traynor, Arb. 11/15/93).
69. See *Plain Dealer Publications*, 99 Lab. Arb. (BNA) 969 (J. Fullmer, Arb. 11/10/92) (also see [16]). For more information on developing a sexual harassment policy, see James Oh, "Internal Sexual Harassment Complaints: Investigating to Win," *Employee Relations Law Journal*, Vol. 18, No. 2 (Autumn 1992), pp. 230-231 and [46].
70. Cynthia F. Cohen and Murray E. Cohen, "Defending Your Life: When Women Complain about Sexual Harassment," *Employee Responsibilities and Rights Journal*, Vol. 7, No. 3 (1994), pp. 235-246.
71. Michael Marmo, "Arbitrating Sexual Harassment Cases," *Arbitration Journal*, Vol. 35, No. 1 (March 1980), pp. 35-40.
72. *Superior Coffee & Foods*, 103 Lab. Arb. (BNA) 609 (R. Alleyne, Arb. 6/21/94).
73. Donald McPherson and David Morand, "Reframing the Grievance Procedure as Interest-Based Negotiation," paper presented at 47th Annual Meeting of the Industrial Relations Research Association: Washington, D.C. (January 1995).

74. Peter Feuille and Deborah Kolb, "Waiting in the Wings: Mediation's Role in Grievance Resolution," *Negotiation Journal*, Vol. 10 (July 1994), pp. 249-264.
75. Susan Meredith, "Using Fact Finders to Probe Workplace Claims of Sexual Harassment," *Arbitration Journal*, Vol. 47, No. 4 (December 1992), pp. 61-65.

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