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ISSUES AND STANDARDS IN ARBITRAL APPROACHES TO SEXUAL HARASSMENT CASES

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ABSTRACT

This study, based on 122 published arbitration awards, covering the years 1980 to 1996, is concerned with arbitral rather than court standards used in sexual harassment cases. Arbitrators deal almost exclusively with hostile environment harassment cases as *quid pro quo* sexual harassment must be carried out by a supervisor. Supervisors are not typically covered by collective bargaining agreements. Hostile environment sexual harassment takes the form of verbal, physical, written, and visual harassment. Arbitrators, aware that their decisions may be reversed in the courts on public policy grounds, are less likely to reverse an employer's penalty imposed for an alleged sexual harassment violation. Indeed, an employer may not even be required to have a sexual harassment policy in order to discipline/discharge for such misconduct.

> Sexual harassment often has more to do with the exploitation of one's power than with sex or harassment *per se* [1].

Sexual harassment cases appear to be on the increase. For example, the number of sexual harassment cases filed with the Equal Employment Opportunity Commission (EEOC) grew from 4,400 in 1986 to 15,342 in 1996 [2]. Roughly paralleling this increase in EEOC sexual harassment cases were those published arbitration awards reported by the Bureau of National Affairs (BNA) and Commerce Clearing House (CCH), e.g., two such cases in 1980, but nine reported cases in 1996 [3]. This article is concerned solely with the arbitral approach to resolving sexual harassment cases. While arbitrators are no doubt cognizant of judicial approaches to sexual harassment matters, their primary responsibility is to

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determine whether "just cause" exists to discipline or discharge an employee, pursuant to the parties' collective agreement. Arbitrators deal almost exclusively with hostile environment cases because the collective agreement applies to bargaining unit employees, not members of management. Thus, the grist of arbitral sexual harassment cases involves situations when one employee allegedly harasses another employee, a bargaining unit member harasses a customer's employee, etc., but not when a supervisor harasses a subordinate (*quid pro quo* harassment) [4].

To obtain information relative to arbitral approaches in sexual harassment cases, all published arbitration decisions for a period of sixteen years, covering 1980 to 1996, were reviewed, utilizing the Bureau of National Affairs and Commerce Clearing House sources for such cases. The BNA cases were found in the *Labor Arbitration Reports* (LA), and the CCH's cases are available in the *Labor Arbitration Awards* (ARB). A total of 122 arbitration cases were used in this study.

FORMS OF SEXUAL HARASSMENT

As previously noted, almost all arbitration awards deal with so-called hostile environment sexual harassment [5]. There are four common forms such harassment may take in arbitration, including:

1. verbal or oral—including comments, jokes, suggestions with respect to sexual favors or behavior;
2. physical—such as unwanted touching, feeling, groping, etc.;
3. written—such as communication suggesting or inviting sexual contact; and
4. visual—such as indecent exposure, distribution of pornographic pictures, or too much visual attention of a continuous nature toward certain areas of an individual's anatomy, causing embarrassment [6, at 4159].

Arbitrator Baroni explained when a hostile environment occurs in the workplace:

> The so called "hostile environment" type of harassment is created when persons are subjected to unsolicited and unwanted sexual advances involving physical contact, sexually suggestive comments, and/or situations which are such that they alter the aggrieved employee's conditions of employment [7, at 957, 959].

The standards used for judging the existence of a hostile or offensive working environment include:

- the frequency of the conduct;
- its severity;

- whether physically threatening or humiliating or a mere offensive utterance; and
- whether it unreasonably interferes with an employee's work performance [8, at 4338].

VERBAL SEXUAL HARASSMENT

Verbal sexual harassment may take the form of offensive sounds, jokes, sexual comments, suggestions, etc. Because this form of sexual harassment is normally deemed less serious than the physical forms, arbitrators look to the pervasiveness of the activity, i.e., its severity and duration. It is often difficult for arbitrators to identify verbal misconduct that may be construed to create a hostile environment because:

> [w]hat may be innocuous in one set of circumstances, can be very offensive and objectionable under another set of relevant circumstances [9, at 4708].

For example, discharge was held to be too severe for an employee who made kissing sounds over the telephone to a female coworker while she was at home [8]. He made fifty-six such calls between August 16, 1993 and October 12, 1993. The arbitrator reduced the discharge to a written warning as he noted that her work performance was not adversely affected by his conduct as she was at home whenever he called [8].

Moreover, in another case, a male employee repeated an off-color, sexual joke to a female coworker [10]. The woman told the joke to her father, a minister, and asked him to explain it to her. The father called the company to complain. Arbitrator Kaufman did not find the joke, standing alone [11], sufficient to constitute sexual harassment, as the joke was not personally related to the female employee and the test is whether or not *she* found it offensive. On the other hand, a fifteen-year male employee was held to be properly discharged after he had created a hostile environment by telling sexual jokes and propositioning female coworkers over a period of a year and one half [12, at 4435].

A ten-day suspension was sustained when a male employee, upset with comments that his [female] supervisor had written in a report regarding a vehicular accident, said to coworkers: "Oh, she just needs to get laid, that's all." Arbitrator Marino opined that ". . . his choice of words were so obscene and demeaning that he created a hostile environment" [12, at 5198]. Similarly, a seven-day suspension was appropriate for an employee who made sexually suggestive comments regarding a female coworker [13]. He said he would ". . . love to have her climb a pole upside down" [13]. On another occasion he said he would "pay her to climb a tree upside down" and that he would "be any animal in the tree and jump right in that nest" [13]. Arbitrator Landau found no mitigation in the fact that the

comments were not made in the presence of the coworker. Discharge was appropriate for an employee who sent out a message over an intercom addressed to a female coworker, saying "fuck me" or "blow me" [14]. These comments were heard throughout the plant and, of course, created a hostile and intimidating work environment.

PHYSICAL SEXUAL HARASSMENT

Arbitrator Koven pointed out that the severity of penalties imposed in sexual harassment cases are usually proportional to the seriousness of the offense. He observed that discharge and/or long suspensions are normally associated with misconduct involving physical behaviors such as pinching, fondling, forcible kissing, embracing, etc. [15]. Indeed, some arbitrators equate physical sexual harassment with assault and battery. Such a conclusion was reached by arbitrator Teple in a case when three male employees were discharged because they grabbed a female employee and lifted her from the floor and pulled at her clothing [16]. Teple observed that the men may have thought it was a joke, but the victim was calling for help and cried after the incident ended [and then, only after a female coworker witnessed the situation]. The discharges were upheld, even in the absence of a "clear" sexual harassment policy, because of the assault and battery on the part of the men. Arbitrator Bernstein also considered it a battery when a male employee grabbed a coworker's breasts on several occasions and also grabbed her buttocks on another occasion [17]. He noted:

> Such a touching is a battery of a most offensive character, and is at least as serious as an unprovoked punch to the mouth [17, at 3191].

Discharge was, accordingly, upheld [17].

Sexual harassment of any kind, much less physical harassment, becomes even more egregious if done to an employer's customers. For example, an employee of a public utility was properly discharged, based on the sexual harassment of a female customer while he was on a service call at her home [18]. He grabbed her buttocks and said: "You've got a nice tight ass" and also stated he wanted to see her again. The woman was so upset because of this incident that she called a friend to come over to stay with her. Similarly, just cause existed to discharge a newspaper distribution manager who sexually harassed a female gas station clerk [19]. He grabbed her breasts and said he would like to have an affair with her. He also touched her on the inside of her thigh and spread her legs and said that he "would eat her out." The grievant's defense was that the company's sexual harassment policy stated that it applied to "any employee" and the clerk was an employee of a customer. Arbitrator Fullmer rejected this notion, observing that it was "common sense" that one should not harass a customer's employees [the gas station carried the employer's papers] [19].

However, it was not considered sexual harassment when a male employee struck a female employee on the buttocks with a flimsy cardboard box [20]. He also touched the woman between her shoulder blades in the context of a conversation when she had told him that she was experiencing pain in her back [20].

Moreover, not all cases involving physical sexual harassment are committed by males. A female utility laborer was found to be properly discharged for violating the company's policy regarding sexual harassment, after she had admitted that she had touched male employees in a sexual manner, asked a coworker about the genitalia of another male employee, and talked to a coworker regarding abnormal sexual acts [21].

WRITTEN SEXUAL HARASSMENT

The typical situation involving written sexual harassment is when one employee sends another "letters of affection" or writes an obscene note to a coworker. For example, there was just cause to terminate a female employee who had sent nine perfumed letters containing expressions of love and also sexual content [22-23][1] She also made telephone calls to the coworker at home. Discharge was also warranted for a maintenance employee who entered his employer's administrative offices and left an obscene note addressed to the executive director's secretary [24]. A forensic examiner stated at the arbitration hearing that he [grievant] probably wrote the note. The maintenance man had access to the master key as well as key-making equipment. When he turned in his keys following his termination, it was discovered that he had nine master keys, none of which he was authorized to have [24].

However, written sexual harassment may also take the form of a retaliatory note or letter used to discredit a coworker or some other employee. Arbitrator Wyman found just cause to sustain the dismissal of a female union steward who had written anonymous notes left in the female employees' locker room, and who also mailed them to a coworker's husband. The notes accused her of sexual infidelity with her supervisor. A handwriting expert confirmed the grievant as the author. The grievant's actions were designed to destroy the female employee's relationship with her husband, family, and coworkers, and created a psychologically repressive working environment. Thirty-two years of service and an otherwise unblemished work record were not sufficient to excuse the steward's conduct [25].

Moreover, in another case [1], a fourteen-year female employee was dismissed after complaining that her supervisor had sexually harassed her, sent a handwritten letter to the supervisor's wife describing his alleged sexual comments,

[1] See also [23], when a male employee wrote letters, sent flowers, and other gifts to a female coworker.

and placed copies of her handwritten letter in the plant [1, at 183].[2] The arbitrator found the letter was vulgar, childish, disgusting, and possibly libelous. He also found it constituted sexual harassment as well as insubordination because it represented self-help instead of properly using the grievance procedure [1].

Another potentially abusive form of written sexual harassment involves drawing cartoons. While such cartoons can be considered offensive on their face, they become especially so if they depict an individual(s) who can be readily identified from the picture. For example, a five-day suspension was warranted for a male employee who drew a cartoon suggestive of male coworkers [who could be identified] involved in a sexually explicit act [26]. The arbitrator found no mitigation in the fact that other cartoons had been circulated without discipline being imposed, since they did not depict identifiable individuals. Traynor noted: "When the conduct becomes personalized, it exceeds permissible limits" [26, at 5885]. He also found the cartoon created a hostile working environment [see also 27].

VISUAL SEXUAL HARASSMENT

Visual sexual harassment is involved with such matters as indecent exposure, distribution of pornographic pictures, or staring at certain areas of someone's anatomy. For example, there was just cause to terminate an employee with twenty-five years of service who exposed himself to two female coworkers [6].[3] The women were very upset and had reservations regarding working with him in the future. There was also no evidence that his conduct had been caused by the consumption of pain pills and alcohol, as he claimed [6].

A one-day suspension was found to be appropriate for an employee, who, among other things, stared at a female employee to a point that she felt uncomfortable [29].

SEXUAL HARASSMENT—FROM WHOSE PERSPECTIVE?

Some of the federal courts have taken positions regarding *when* hostile environment sexual harassment creates a situation which is so intimidating, severe, or pervasive that it alters the working conditions for the victim. For example, the Ninth Circuit has adopted the view that conduct crosses the line of acceptability when it offends a "reasonable woman" [30]. However, the U.S. Supreme Court has opined that sexually offensive behavior does not have to reach the point that it causes psychological damage in order to be actionable [31].

[2] The poster read: "Be aware of the Lover Boys of 142 [a department with the company]. [Names deleted.] They will screw you any way they can" [1, at 183].

[3] See also *Can-Tex Industries* [28], when a twenty-one-year employee was discharged for constant and pervasive verbal harassment and who grabbed his crotch and asked: "Hungry?"

Arbitrators similarly have had to draw their own lines as to when verbal or physical conduct is so serious as to be deemed sexual harassment. This line seems to be drawn tighter by arbitrators in recent times. Arbitrator Marino explained:

> It must be understood that men and women are socialized differently. They use language differently, interpret verbal and physical symbols differently, and use and respond to humor differently.
>
> Sexual jokes, posters, propositions and the like that were loosely tolerated as the work place norm 20 years ago are unacceptable and illegal today, therefore the Grievant's statement that his actions were playful teasing is rejected by this Arbitrator [12, at 4626].

In a case decided by arbitrator Strasshofer, the guideline in the company's policy was "conduct offensive to a reasonable person" [32]. Arbitrator Levy agreed with the "reasonable person" criterion, but suggested that if a female is the victim, the notion of sexual harassment should be from the "female perspective" [33]. He argued:

> Conduct only becomes sexual harassment where it creates an intimidating, hostile or offensive working environment. Whether that occurs must be judged from the perspective of the person complaining of the conduct. As courts and other arbitrators have noted, when the complaint is that of sexual harassment against a female, the perspective to be used in making the determination is the female perspective. But, it would be demeaning and objectionable to pretend that there was a single "woman's perspective" to be applied [33, at 3216].[4]

BURDEN OF PROOF

In arbitration, it is the employer, of course, who shoulders the burden of proof to demonstrate that an accused employee is guilty of sexual harassment. That burden may be increased, depending on the quantum of proof required by an arbitrator. There are essentially three quantums of proof generally utilized. The least demanding one is a simple "preponderance of the evidence." This proof standard is used both in court and arbitration cases involving matters of interpretation/application of laws or collective bargaining agreements. It basically means that more likely than not, something is true. Applied to a discipline/discharge case involving sexual harassment, it would mean that more likely than not, an employee committed the offense [or did not commit the offense] of which s/he was accused. Proof beyond a reasonable shadow of a doubt is the criminal

[4] On the other hand, an arbitrator has stated that "state of mind is *not* the issue in this case; rather just cause for a discharge is the issue"; see *KIAM* [23, at 631].

standard used in court cases. Some arbitrators also apply it to certain kinds of discipline or discharge cases, especially those that deal with moral turpitude.

Clear and convincing evidence is another standard [quantum] of proof used both in court and arbitration cases. Conceptually, it demands a level of proof somewhere between a preponderance of the evidence and proof beyond a reasonable shadow of a doubt. However, in reality, it is closer to the latter standard than the former.

Of the 122 reported cases used in this study, only eighteen arbitrators indicated and/or discussed the quantum of proof they had used in determining the outcome of their cases; ten of the eighteen supported the clear and convincing standard for sexual harassment cases. Arbitrator Nicholas explained the rationale for the choice of this standard:

> However, when the charged misconduct has a stigmatizing effect—such as in the case of sexual harassment charges as those involved here—many arbitrators raise the hurdles [above preponderance of the evidence] and require that the employer prove its case by *clear and convincing evidence* [34].

In four cases, where the quantum of proof was mentioned, arbitrators selected the preponderance of the evidence. Arbitrator Alleyne argued in favor of this standard because of arbitrator "inconsistency" in applying proof beyond a reasonable shadow of a doubt to minor, misdemeanor-type criminal conduct cases, while applying preponderance of the evidence to gross negligence misconduct cases [35]. Other arbitrators contend that preponderance of the evidence is the appropriate standard for *all* arbitration issues, because arbitration involves interpretation of the just cause clause and any contract interpretation case utilizes that standard.

Only two arbitration awards utilized the quantum of proof, beyond a reasonable shadow of a doubt. Arbitrator Borland explained the reasoning behind selecting such a quantum:

> The higher standard [i.e., beyond a reasonable doubt] is used rather consistently, however[,] in matters involving acts of a moral turpitude or criminal nature [36, at 3672].[5]

Two arbitrators introduced quantums of proof they did not explain. One of these was "proof of a higher degree of certainty" [38] and the other was a "sufficient degree of certainty to warrant discharge" [39].

[5] See also *MKM Machine Tool Co., Inc.* [37]. Arbitrator Immundo favors the quantum of proof, "beyond a reasonable doubt," in sexual harassment cases because: "It is not unrealistic to say that a person who is discharged for sexual harassment will find it difficult to find meaningful re-employment" [37, at 6189].

CREDIBILITY DETERMINATIONS

Sexual harassment cases often turn, of course, on questions of credibility—which side is telling the truth? Arbitrator Daniel explained why this is so:

> In cases of this nature, it often becomes a matter of credibility for such actions do not usually take place in the middle of the production room floor but more often are covert and one-on-one [40, at 3475].

While credibility determinations initially fall to management as part of its investigation of the matter, arbitrators will make their own assessments, should a grievance reach the arbitration stage. Arbitrator Taylor suggested some of the considerations on which credibility determinations may be made [41]:

- the accused employee has the motivation to place himself/herself in the best possible light,
- the unreasonableness and/or improbability of the accused's story,
- the vagueness of the accused's account versus the detailed account of the incident made by the victim,
- intense emotion and demeanor of the victim versus the accused,[6]
- inconsistencies by the accused in relating his/her story, and
- the damaging effects of testimony by the victim and/or by his/her witnesses.

The failure of the victim-employee to testify at the arbitration hearing, may, of course, materially weaken the employer's case [43, 44].

IMPACT OF CERTAIN COURT DECISIONS ON ARBITRATION OUTCOMES

Judging by some of the arbitration decisions made after 1990, arbitrators appear to be concerned that their awards in sexual harassment cases may be set aside by the courts on public policy grounds. Some courts have contended that an arbitration award must not be at odds with public policy as established by law forbidding sexual harassment. Two court cases involving physical sexual harassment, when an arbitrator had set aside the discharge penalty, are *Newsday v. Long Island Typographical Union* [45] and *Local 776, International Brotherhood of Teamsters v. Stroehmann Bakeries* [46]. In both of these cases, the courts considered the arbitration awards as being contrary to public policy and, accordingly, set them aside.

These court cases have had a material effect on the willingness of arbitrators to overturn a discharge penalty in a sexual harassment case, once it is determined

[6] Also see in this regard, *Porter Equipment Company* [42].

that the grievant has committed the acts for which s/he is accused. Arbitrator Hogler commented in this regard:

> The judicial precedent broadly stands for the proposition that sexual harassment involves important public policy concerns, and managerial attempts to eliminate harassment must be given due deference. But equally important, the judicial trend represented by *Stroehmann* [46] and other cases indicates that courts are willing to engage in a detailed scrutiny of arbitration awards under the public policy aspect of judicial review. Even those courts [e.g., 47, 48] upholding arbitral modifications of discipline undertake a detailed analysis of the award to ensure that the opinion has some evidentiary basis and coherent reasoning. As a result, the finality of the arbitration process becomes secondary to the public policy against sexual harassment in the workplace; and an award which appears to condone harassment can be challenged in court, with all the attendant costs of litigation and uncertainty [49, at 1161, 1167].

Arbitrator Reginald Alleyne sustained the discharge of a salesman who, during an evening social event at a company-sponsored conference, repeatedly poked a female employee to learn the room number of another female, twice grabbed the buttocks of a second female employee and invited her to sue him, and later grabbed another female [whose room he earlier had sought to learn] and pulled her on top of him in her room [35]. Alleyne, in discussing the propriety of the penalty, cited arbitration awards in 1986 and 1987, when the arbitrators had reduced the penalty, but rejected these outcomes as "not in keeping with current arbitral thinking on the subject." He argued that: "[B]oth societal and judicial views on the seriousness of sexual harassment have undergone dramatic change between then and now" [35, at 613; 50].

One of the cases that arbitrator Alleyne was critical of was *Boys Markets Incorporated* [52]. In that case, arbitrator Wilmoth overturned the discharge of an employee who had moved his finger in an upward movement between the buttocks of a female coworker. The grievant claimed he had accidently brushed her. It is interesting that arbitrator Wilmoth noted in his decision that he reviewed [prior] sexual harassment cases contained in Volumes 81 to 85 of the BNA's *Labor Arbitration Reports* in preparing his decision. He noted that in ten sexual harassment cases reported in those volumes, only five sustained discharge. This review prompted a conclusion by arbitrator Wilmoth that discharge is not necessarily the appropriate action in every incident [52, at 1306]. He said arbitrators "must consider the mainstream of arbitral thinking" [52, at 1306]. Of course, since the time that arbitrator Wilmoth was writing, "arbitral thinking" has become more strict in sexual harassment cases.

A contrary school of thought [to arbitrator Alleyne's] is provided by arbitrator Bard. A lengthy but pertinent quote from one of his awards is:

> Unless the employer can establish that the Arbitrator is also bound by public policy—by the fact that an employee may have violated Title VII of the

> Civil Rights Act—in sexually harassing a co-employee—violation of law is not *per se* the standard by which the Arbitrator is obligated to judge the grievant's behavior, only one standard by which the Arbitrator may judge the reasonableness of the work rule.
>
> Otherwise, the Arbitrator's jurisdiction is limited to determining whether or not just cause exists under the terms of the labor agreement . . .
>
> The Arbitrator might reject the employer's public policy argument in this case because this is not a case where the issue is an alleged inconsistency between the promulgated sexual harassment policy and "well-defined and dominant" and "ascertainable" laws and precedents [cite omitted].
>
> It [public policy] only requires that the hostile work environment be eliminated. It does not automatically mandate the termination of an harassing employee, only that he or she erases the offensive conduct and that the employer take other steps to provide reasonable assurances that he or she will be able to pursue a job in relative peace [23, at 625].

NEED FOR A SEXUAL HARASSMENT POLICY

In the ninety-two reported arbitration awards rendered since 1990, there were thirty-one cases (about 33%) that specifically mentioned the employer had a sexual harassment policy. While no claim is made for the representativeness of this statistic, there is a clear indication of employer awareness and concern regarding such misconduct. It is fundamental in arbitration that employees must be made aware of proscribed behavior before they can be discipline/discharged. The exception to this general statement occurs when the misbehavior is so egregious on its face [i.e., *malum in se*] to be obviously wrong to employees [e.g., theft, fighting, etc.] or if common sense would dictate that a certain behavior is wrong. Arbitrator Kanner has forcefully argued that no rule prohibiting sexual harassment is necessary:

> I am of the view that a notice proscribing sexual harassment need not be published or posted by the Employer in the first instance. There are certain rules of conduct which are considered so well known that employees are deemed well aware of same. Misconduct such as theft, drinking on the job, and insubordination, etcetera need not be codified by written rule and disseminated to employees. In the same manner unwelcomed touching of a female by a male is well known in contemporary times as sexual harassment and is deemed by employers as unacceptable work place conduct [53; 54, at 7129].

Nevertheless, it is probably preferred practice to establish a sexual harassment rule or policy [55]. Arbitrator Moore has enunciated some of the reasons for having and enforcing such rules or policies:

> Decency, safety, production, public relation [sic], and obeying the various laws are merely a few of the motivations for companies to enforce strict non harassment rules [56].

Sometimes, however, employer-promulgated rules are challenged by unions as being unreasonable or unfair. Arbitrator Bard provided some guidelines regarding sexual harassment rule "reasonableness:"

> There are few, if any, arbitrators who would view a work rule which attempted to comply with federal and state legal requirements to be per se unreasonable. Such rules, by their nature, are reasonably related to the "orderly, efficient and safe operation of the employer's business." Cooperation in assisting the employer to satisfy its legal obligations is clearly performance which an employer might "properly expect of" its employees [23, at 624, 57; 58; 59].

One arbitrator noted that an employer can impose higher standards of conduct on its employees than is required by Title VII [60, at 3421].

Nevertheless, another arbitrator pointed to the shortcomings of a written sexual harassment policy, noting that it [policy] directed its remarks to the victims of harassment, and not to the perpetrators. Moreover, the policy failed to define sexual harassment, and its elements were not described, nor were examples of forbidden harassment provided [23]. Arbitrator Bard noted:

> No written policy should ever attempt to be exhaustive on this subject. However, it must sufficiently define, categorize and provide examples of prohibited conduct so that in a followup to that policy an employer can reasonably advise an employee as to the effect of his or her conduct and reasonably relate that conduct to the written policy [23, at 627].

Arbitrator Bard also recommended including in a sexual harassment policy a provision stating that confidentiality cannot be promised [23, at 628].

RETALIATION FOR MAKING SEXUAL HARASSMENT COMPLAINTS

The 1964 Civil Rights Act, of course, contains an antiretaliation provision [61], but most collective bargaining agreements do not usually have one. Thus, allegations of retaliation for making a sexual harassment complaint must be asserted under the just cause clause or other appropriate contract clause. In one case an employer was found to have violated the parties' collective agreement by removing an employee from her job classification and shift in response to her sexual

harassment complaint [63]. The company's employee relations manager had had a meeting with the complainant and the alleged male harasser. Neither wanted to work together and neither would volunteer to leave their job classification or shift. The manager then decided that the female employee would have to leave as she had less seniority than the male employee. Arbitrator Fullmer argued that an employer cannot use the seniority provisions to remove a complainant from her classification. He stated:

> Given the relatively recent advent of statutory, administrative, and contractual protection of women, in any given industrial enterprise, the women may well as a group have less seniority than the men. It may also be the junior-most women who are the most likely to be the subject of sexual harassment [63, at 6092].

Fullmer also pointed out:

> Whether sexual harassment complaints have merit or not, it is important that the complainant be protected from retaliation. Otherwise legitimate complaints will remain buried because the complainants will be afraid to come forward. Also, rightly or wrongly, there is a perception in some circles that women are frequently penalized for making complaints of sexual harassment [63, at 6092].

In another case, an employee was denied a promotion because of her refusal to acquiesce to the demands of her supervisor for sexual favors [64]. She received a retroactive promotion and back pay as the supervisor also retaliated by giving her a poor performance appraisal.

However, in another retaliation case, an arbitrator reached a different conclusion. A female complained because of sexually offensive items that were contained in his office [65; 66]. The arbitrator found that she had, thus, made a *prima facie* case of sexual harassment in that she had suffered two years of offensive remarks, and her layoffs and denial of bumping rights came shortly after her complaint. Nevertheless, arbitrator Landau maintained that the company offered substantial business reasons for her layoff, namely, that the company was overstaffed, she was the least senior employee, and she did not meet minimum standards to bump [65].

In an interesting case, an employee attempted to retaliate against a female coworker because she brought a sexual harassment complaint against him [67]. He intended to intimidate her by staring at her. However, she did not report the incident until several months later. The grievant was subsequently reinstated, but was transferred to a different work area [67].

SAME-SEX SEXUAL HARASSMENT

The U.S. Supreme Court has recently decided that same-sex sexual harassment is covered by Title VII [68]. Arbitrators have also reached the same decision. Arbitrator Bickner found just cause to uphold the termination of a male homosexual clerk who sexually harassed male coworkers by repeatedly making sexually explicit remarks and by making unwelcomed sexual advances toward them [69]. He was told that his advances were unwelcomed, and four years previously he had been given a one-week suspension for touching a male employee. Arbitrator Bickner stated: "By any standard, the Grievant's conduct constituted 'sexual harassment' [69, at 4804].

WORKING CLIMATE AS A MITIGATING FACTOR IN SEXUAL HARASSMENT CASES

In a number of cases, the defense was raised by the grievant/union that discipline/discharge was not warranted because of the existence of a work climate of flirtation, playfulness, touching, joking, etc. The grievant in such cases claims that his/her behavior was nothing more than an extension of the general climate of permissiveness existing in the workplace.

Arbitrator Levy noted in this respect:

> To ignore such things as an atmosphere of joking and kidding that goes as far as touching and hugging other employees is to ignore facts which unquestionably affect whether the conduct being complained of is punishable as sexual harassment. When a company tolerates a loose environment, and knows that its employees engage in such behavior, they have in a sense, created a policy of permitting such conduct. Employees are entitled to rely on such an implicit policy in deciding how to react to one another [33, at 3216].

In another case there was just cause to discharge a long-term male employee, even though in the past he and a female coworker had participated in sexually explicit conversations, and she also used language that was vulgar and inappropriate [70]. However, when he fondled her breasts and crotch on two occasions, she objected to his behavior and avoided him thereafter. Arbitrator Winograd had this to say:

> A woman does not invite sexual advances merely because she speaks crudely, laughs at off-color jokes, participates in sexual activity while not at work, or expresses her enjoyment of sexual activity. Sexual harassment occurs when a person is subjected to undesired or offensive sexual conduct, even if that person would find the same conduct acceptable, or even enjoyable when committed by a different person or in different circumstances [70, at 991; 71].

Arbitrator Alexander also pointed out the difference between flirtation and sexual harassment:

> . . . arbitrators should distinguish (as do judges) between "mere flirtation" and sexual harassment and to the extent that a coworker fails to indicate that certain comments or a kiss or a handholding are unwelcome, a flirtation argument might be made. "Flirtation" and consent would be relevant to the selection of corrective discipline *vis a vis* discharge [73, at 254].

The arbitrators strongly indicate that an employee crosses the line of acceptable conduct when it becomes apparent that the behavior is [or no longer] is welcomed.

OTHER MITIGATION CONSIDERATIONS IN SEXUAL HARASSMENT CASES

While it is not in the province of an arbitrator's authority to grant amnesty, arbitrators can and do sometimes mitigate disciplinary penalties if circumstances warrant. Such mitigation is not necessarily considered just because an employee never sexually harassed anyone before. Arbitrator Brunner observed:

> There is no room for a "one free" bite doctrine in sexual harassment. It can and does happen that people inexplicably do strange things no one can account for in their history [74, at 742; 75].

Neither is it cause for mitigation if the person who is sexually harassed does not register an immediate complaint [76]. Nor is it mitigating that a company failed to provide a lie detector test to prove a grievant's innocence, as arbitrators give little or no weight to lie detector results, or that the grievant was the first bargaining unit member discharged for sexual harassment, or that he qualified for unemployment compensation, as two different legal forums are involved—one that interprets the law and the other, the parties' contract [56].

There was also no mitigation involved in a case when a male employee asked sexually explicit questions and requested sexual acts from three female coworkers [77]. Although the grievant offered no explanation or showed no remorse at the time he was confronted, he nevertheless raised a defense at the arbitration that he was a victim of a medical disability, namely, "atypical depression," and that he was "immature and insecure emotionally," and had "sexual difficulties." The arbitrator, however, brushed aside this defense, saying:

> . . . there is no requirement that an employer treat a sexual dysfunction as a medical disability, even if it is able to identify what it is. There is a legitimate presumption that sexual harassment arises from intended behavior [77, at 341].

However, the following circumstances have been considered modifiers of discipline in some sexual harassment cases:

- disparate treatment by employer [78-81];
- long service grievant [51; 82-85];
- victim failed to testify [43, 44, 86];
- due process not given to grievant or not given opportunity to respond to his accuser [87-88];
- when the complainant recanted her story [89];
- when there was an improper investigation [90];
- no previous discipline and/or sexual misconduct in record [82].

DISCUSSION

This study of 122 published arbitration awards, covering the period 1980 to 1996, illustrates the arbitral approaches to, and reasoning in, sexual harassment issues. As a generalization, the cases demonstrate that arbitrators are not only aware of, but often mirror, approaches and concepts taken by the courts. In one sense, this is a surprising result, in that the arbitrator's responsibility in sexual harassment matters is whether or not an employer had just cause, under a collective bargaining agreement, to discipline/discharge an employee alleged sexual harassment misconduct. On the other hand, court decisions, such as *Stroehmann Bakeries* [46] and *Newsday* [45], vacating arbitration awards on public policy grounds, have no doubt caused some arbitrators to reconsider modification or mitigation to employer-imposed penalties upon finding that evidence supported the guilt of the aggrieved employee. Although it is impossible to offer statistically meaningful results [91], it appeared that arbitrators were less willing to mitigate imposed penalties for sexual harassment and other egregious cases, since these cases had been decided. Even long service and otherwise unblemished records on the part of employees who were found to have committed acts of sexual harassment have not served to overturn discharge or other forms of discipline. This result indicates that many arbitrators perhaps are abandoning just-cause standards in favor of court-related concepts and approaches, at least in this type of case. It also appears to be true regardless of the form that the sexual harassment takes, be it verbal, physical, written, or visual.

Employer seriousness regarding the eradication of sexual harassment is also made plain in the number of cases where the existence of such a sexual harassment policy was noted. About 33 percent of the arbitration awards since 1990 noted such policies [92]. Nevertheless, arbitrators have asserted that given the

serious nature of sexual harassment, even the absence of a policy will not result in the discipline/discharge being overturned on that ground alone.

Obviously, in the discipline cases involving sexual harassment, the employer has the burden of proof. That burden may be increased by an arbitral requirement that the employer must prove its case by the quantum of proof—beyond a reasonable shadow of a doubt. Most employers might be relieved to learn that only a tiny fraction of arbitrators are disposed to utilizing this standard. Most of the arbitration awards where the quantum of proof was discussed indicated that clear and convincing evidence was proper. Clear and convincing evidence is a high level of proof, however. It is doubtful that the quantum of proof may adequately be ascertained, as most arbitrators are reluctant to reveal this information. If they indicate the use of too high a quantum of proof, they become *personae non grata* with management attorneys, and too low a standard might earn them a rejection by union labor attorneys in the arbitrator selection process.

Arbitrators, as the courts do, view the occurrence of sexual harassment from either the perspective of the "reasonable person" or "reasonable woman." The latter standard appears to be applicable (of course, in sexual harassment cases against women) because of the different socialization patterns between men and women.

* * *

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ENDNOTES

1. R. Francis, *General Dynamics, Fort Worth [Tex.] Division,* 100 Lab. Arb. 180 (BNA) (1992).
2. Source: the Equal Employment Opportunity Commission, Washington, D.C.
3. The Bureau of National Affairs publishes selected arbitration cases in its *Labor Arbitration Reports* (LA), while the Commerce Clearing House has a similar approach in publishing arbitration award in its *Labor Arbitration Awards* (ARB). Only a small percentage of all arbitration awards are published in any given year.
4. Supervisors, of course, are not employees within the meaning of the National Labor Relations Act, Section 2, except in the construction industry.
5. Quid pro quo sexual harassment can only be carried out by a person possessing managerial authority, who uses that authority to threaten adverse consequences or make promises of economic gain, to achieve his/her [sexual] objectives. Naturally, a nonmanagement employee has no such power.

6. D. Traynor, *Eureka Company,* 94-1 ARB. ¶ 4231 (CCH) (1993). [Same case reported at 101 Lab. Arb. 1151 (BNA)].
7. B. Baroni, *Skill Pipe Line Corp.,* 97 Lab. Arb. 957 (BNA) (1991).
8. R. Britton, *The Kelly Springfield Tire Company,* 94-2 ARB. ¶ 4338 (CCH) (1994).
9. B. Baroni, *Phillip Morris USA,* 90-2 ARB. ¶ 8348 (CCH) (1990). [Same case reported at 94 Lab. Arb. 826 (BNA)].
10. W. Kaufman, *Ralphs Grocery Company,* 100 Lab. Arb. 63 (BNA) (1992). [Same case reported at 93-1 ARB. ¶ 3290 (CCH)].
11. There were other incidents of verbal sexual harassment at issue in that case [10].
12. C. Marino, *International Mill Service Granite City and Alton, Illinois,* 95-2 ARB. ¶ 5320 (CCH) (1995). [Same case reported at 104 Lab. Arb. 779 (BNA)].
13. R. Landau, *Department of the Army, 6th Infantry Division,* 94-1 ARB. ¶ 4170 (CCH) (1994).
14. L. Donnelly, *AMG Industries,* 96-2 ARB. ¶ 6322 (CCH) (1996).
15. A. Koven, *Todd Shipyards Corporation, San Francisco Division,* 86-1 ARB. ¶ 8072 (CCH) (1985).
16. E. Teple, *Owens-Brockway Plastics, Inc., Sullivan Plant,* 93-1 ARB. ¶ 3032 (CCH) (1992).
17. N. Bernstein, *The Quaker Oats Company,* 95-1 ARB. ¶ 5038 (CCH) (1993).
18. N. Lipson, *Michigan Consolidated Gas Company,* 92-2 ARB. ¶ 8328 (CCH) (1991).
19. J. Fullmer, *Plain Dealer Publishing Company,* 99 Lab. Arb. 1161 (BNA) (1992).
20. W. Richard, *United Telephone Company of Florida,* 93-1 ARB. ¶ 3045 (CCH) (1992).
21. E. Curry, *Ferro Corporation,* 93-2 ARB. ¶ 3501 (CCH) (1993).
22. J. Gentile, *American Protective Services, Inc.,* 94-2 ARB. ¶ 4401 (CCH) (1994). [Same case reported at 102 Lab. Arb. 161 (BNA)].
23. H. Bard, *KIAM [Duluth, MN],* 97 Lab. Arb. 617 (BNA) (1991).
24. D. Morgan, *Housing Authority of the City of Erie [PA],* 96-1 ARB. ¶ 6185 (CCH) (1995).
25. W. Wyman, *Schlage Lock Company,* 87-1 ARB. ¶ 8088 (CCH) (1986). [Same case reported at 88 Lab. Arb. 75 (BNA)].
26. D. Traynor, *Fruehauf Trailer Corporation,* 93-2 ARB. ¶ 3584 (CCH) (1993).
27. M. Miller, *Alumax Extrusion, Inc.,* 81 Lab. Arb. 722 (BNA) (1983).
28. J. Shearer, *Can-Tex Industries,* 90 Lab. Arb. 1230 (BNA) (1988).
29. H. Bernhardt, *Norfolk Naval Shipyard,* 104 Lab. Arb. 991 (BNA) (1995).
30. *Ellison v. Brady,* 924 F.2d 872 (9th Cir. 1991).
31. *Harris v. Forklift Systems, Inc.,* 114 S. Ct. 367 (1993).
32. R. Strasshofer, *Dayton Newspapers, Inc.,* 100 Lab. Arb. 48 (BNA) (1992).
33. J. Levy, *National Beef Packing Company,* 95-1 ARB. ¶ 5043 (CCH) (1994). [Same case reported at 103 Lab. Arb. 1005 (BNA)].
34. S. Nicholas, *Vista Chemical Company,* 104 Lab. Arb. 818 (BNA) (1995).
35. R. Alleyne, *Superior Coffee and Foods,* 103 Lab. Arb. 609 (BNA) (1994).
36. *Michigan Department of Social Services, Regional Distribution Center,* 84-1 ARB. ¶ 8145 (Borland, arb.) (1984), at 3672.

37. L. Immundo, *MKM Machine Tool Co., Inc.*, 96-1 ARB. ¶ 6037 (CCH) (1995).
38. R. Barnhart, *Godchaux-Henderson Sugar Co., Inc.*, 75 Lab. Arb. 377 (BNA) (1980).
39. M. Snider, *King Soopers Inc.*, 101 Lab. Arb. 107 (BNA) (1993). [Same case reported at 93-2 ARB. ¶ 3602 (CCH)].
40. W. Daniel, *Morton Salt, Division of Morton International, Inc.*, 95-1 ARB. ¶ 5096 (CCH) (1994).
41. F. Taylor, *Care Inns, Inc., d/b/a Care Inn Nursing Home*, 83-2 ARB. ¶ 8517 (CCH) (1983). [Same case reported at 81 Lab. Arb. 678 (BNA)].
42. I. Lieberman, *Porter Equipment Company*, 86-1 ARB. ¶ 8275 (CCH) (1986). [Same case reported at 86 Lab. Arb. 1253 (BNA)].
43. S. Dallas, *Veterans Administration Medical Center*, 82 Lab. Arb. 25 (BNA) (1984).
44. A. Coffey, *Shell Oil Company, Shell Chemical Company, Division of Shell Oil Company*, 85-1 ARB. ¶ 8130 (CCH) (1984).
45. *Newsday v. Long Island Typographical Union*, 915 F.2d 840 (2nd Cir. 1990).
46. *Local 776, International Brotherhood of Teamsters v. Stroehmann Bakeries*, 969 F.2d 1436 (3rd Cir. 1992).
47. *Communication Workers v. S.E. Elec. Co-op*, 882 F.2d 467 (10th Cir. 1989).
48. *Chrysler Motors v. International Union*, 959 F.2d 685 (7th Cir. 1992).
49. R. Hogler, *Fry's Food Stores of Arizona*, 99 Lab. Arb. 1161 (BNA) (1992).
50. See also the comments of arbitrator Imes in *Metropolitan Transit Comm.* [51].
51. S. Imes, *Metropolitan Transit Commission*, 96-2 ARB. ¶ 6282 (CCH) (1996).
52. H. Wilmoth, *Boys Markets Incorporated*, 88 Lab. Arb. 1304 (BNA) (1987).
53. R. Kanner, *Abtco, Inc.*, 104 Lab. Arb. 551 (BNA) (1995).
54. W. Heekin, *Stark County Sheriff*, 96-2 ARB. ¶ 6215 (CCH) (1995).
55. Indeed, some arbitrators consider it a necessity. For example, arbitrator Bard has remarked: "In general, an employer is obligated in this day and age to promulgate policies with respect to sexual discrimination;" [23, at 624].
56. H. Moore, *Potlatch Corporation, Arkansas Pulp and Paperboard Division*, 104 Lab. Arb. 691 (BNA) (1995).
57. See also Safeway Inc. [58]. Arbitrator Goldberg noted: "Sexual harassment rules are reasonable not only because they help minimize potential Employer exposure to Civil Rights liability. They also assist in maintaining order and decorum, not to mention a more productive work environment" [58, at 723]. *Accord. Ideal Electric Co.* [59].
58. M. Goldberg, *Safeway Inc.*, 105 Lab. Arb. 718 (BNA) (1995).
59. W. Heekin, *Ideal Electric Co.*, 98 Lab. Arb. 410 (BNA) (1991).
60. T. Heinsz, *The Prudential Insurance Company of America*, 94-1 ARB. ¶ 4090 (CCH) (1993).
61. See Section 704(a) of the Civil Rights Act of 1964, 42 U.S.C. § 200c-3(a). For a discussion of the anti-retaliation provision in the Civil Rights Act, see [62].
62. Douglas Massengill and Donald Petersen, "Gone but not forgotten: Is post employment retaliation actionable?" in *Journal of Individual Employment Rights*, Vol. 16, No. 2, 1997, pp. 119-126.

63. J. Fullmer, *Champion International Corporation (Hamilton, Ohio Mills),* 96-1 ARB. ¶ 6020 (CCH) (1995).
64. E. Barnett, *United States Department of Labor,* 92-2 ARB. ¶ 8596 (CCH) (1992).
65. R. Landau, *ITT Federal Services Corporation,* 96-1 ARB. ¶ 6139 (CCH) (1995).
66. The items that were in his office included a clock with windup breasts, a naked man in a barrel, a bowling pin with a jock strap, etc.
67. W. Heekin, *Indiana University,* 94-2 ARB. ¶ 4543 (CCH) (1994).
68. *Oncale v. Sundowner Offshore Services Inc.,* US SupCt, No. 96-568 6/9/97.
69. M. Bickner, *Hughes Aircraft Company,* 94-2 ARB. ¶ 4357 (CCH) (1993). [Same case reported at 102 Lab. Arb. 353 (BNA)].
70. D. Winograd, *Dominick's Finer Foods,* 101 Lab. Arb. 982 (BNA) (1993).
71. See also *U.S. West Communications* [72], when the apparent "friendliness" of a customer encouraged a telephone equipment installer to remove her shoulder strap and squeeze her buttocks.
72. C. Eisele, *U.S. West Communications,*. 93-1 ARB. ¶ 3237 (CCH) (1992).
73. E. Alexander, *Indiana Michigan Power Company,* 103 Lab. Arb. 248 (BNA) (1994).
74. R. Brunner, *George Koch Sons, Inc.,* 102 Lab. Arb. 737 (BNA) (1994).
75. See also *GTE Florida Incorporated* [76]. Arbitrator Cohen noted: "Additionally, the fact that the victims failed to complain when the events took place is not material. It is well understood that women are reluctant to make sexual harassment claims" [76, at 1093-1094].
76. C. Cohen, *GTE Florida Incorporated,* 92 Lab. Arb. 1090 (BNA) (1989).
77. J. LaManna, *Steuben Rural Electric Corporation, Inc.,* 98 Lab. Arb. 337 (BNA) (1991).
78. J. Odom, *Pan Am Support Services, Inc.,* 89-1 ARB. ¶ 8306 (CCH) (1988).
79. S. Savage, *Ohiocubco, Inc. d/b/a Cub Foods,* 88-2 ARB. ¶ 8394 (CCH) (1988).
80. D. Paull, *American Mail-Well Envelope,* 105 Lab. Arb. 1209 (BNA) (1995).
81. S. Nicholas, *Panama Canal Commission,* 96-2 ARB. ¶ 6340 (CCH) (1996).
82. T. Heinsz, *Dayton Power and Light Company,* 83-1 ARB. ¶ 8068 (CCH) (1983). [Same case reported at 80 Lab. Arb. 19 (BNA)].
83. H. Oestreich, *Hyatt Hotels, Palo Alto [Calif.],* 85-1 ARB. (CCH) (1985). [Same case reported at 85 Lab. Arb. II (BNA)].
84. T. Gallagher, *County of Ramsey, Minnesota,* 86-1 ARB. ¶ 8251 (CCH) (1986).
85. J. Fogelberg, *State of Minnesota, Department of Revenue,* 86-2 ARB. ¶ 8591 (CCH) (1986).
86. H. Hooper, *Duke University,* 100 Lab. Arb. 316 (BNA) (1993). [Same case reported at 93-1 ARB. ¶ 3146 (CCH)].
87. J. Dunn, *Kidde, Inc., Weber Aircraft Division,* 86 Lab. Arb. 681 (BNA) (1985).
88. E. Ellmann, *Heublein, Inc.,* 87-1 ¶ 8220 (CCH) (1987). [Same case reported at 88 Lab. Arb. 1292 (BNA)].
89. D. Borland, *Michigan Department of Social Services, Regional Detention Center,* 84-1 ARB. ¶ 8145 (CCH) (1984).
90. M. Wohl, *Avis Rent A Car Shuttlers,* 105 Lab. Arb. 1057 (BNA) (1995).

91. Published arbitration awards represent only a small fraction (2-5%) of the total number of decisions rendered each year.
92. A truer picture of the proportion of firms having a sexual harassment policy may emerge from a broader base of sample firms. Of course, the existence of an arbitration award usually indicates that the firm is unionized.

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