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AND THE WINNER IS . . .? EXTERNAL LAW AND ITS INFLUENCE ON ARBITRATION OF SEXUAL HARASSMENT GRIEVANCES

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ABSTRACT

The purpose of this study is to examine arbitrators' use of legal criteria in sexual harassment grievances. By examining 132 arbitration awards published in Labor Arbitration Reports from 1982-1997, decisions were analyzed to determine whether arbitrators incorporate Title VII criteria in their decisions and, if so, whether the law influenced the arbitrator to deny, sustain, or split the grievance. Sexual harassment external law is defined by Title VII of the Civil Rights Act, EEOC Guidelines on Sexual Harassment, and legal precedents. Furthermore, cases were divided into pre- and post-1991 to ascertain whether the 1991 changes to the Civil Rights Act affected the outcome of the awards.

This article discusses the influence of external law on labor arbitration decisions involving sexual harassment grievances. In addition to researching the literature, arbitration cases relating to sexual harassment were searched to determine whether the arbitrator considered external law in reaching his/her decision. If so, did external law influence the arbitrator to deny, sustain, or split the grievance? Cases were divided into pre- and post-1991 to ascertain whether the 1991 changes to the Civil Rights Act affected the outcome of the awards. Sexual harassment external law is defined by Title VII of the Civil Rights Act, Equal Employment Opportunities Commission (EEOC) Guidelines on Sexual Harassment, and legal precedents, such as the Supreme Court decisions in *Meritor* and *Forklift* [1].

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Sexual harassment lawsuits involve situations where the victim is subjected to either *quid pro quo* or hostile environment sexual harassment. The law focuses on rights of the alleged victim (not the harasser) and considerable weight is given to the impact of the discriminatory act. On the other hand, the majority of sexual harassment arbitration cases involve discipline of a bargaining unit employee accused of engaging in sexual harassment—the victimizer. These are primarily hostile environment cases in which the employee is disciplined for engaging in inappropriate behavior or violating the company's policy against sexual harassment (rarely is such a policy incorporated into the collective bargaining agreement). For these grievances, labor arbitrators apply traditional just cause and due process concepts by interpreting the collective bargaining contract; here, intent of the harasser is important.

> . . . employment discrimination legislation is designed to protect employees from harassment and to encourage employers to punish and prevent harassment, not to provide alleged harassers with a separate opportunity to vindicate themselves. But 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. . . . This type of sexual harassment arbitration case . . . presents the arbitrator with the greatest potential for contradictions between the traditional labor concerns of due process and just cause for discipline and the requirements of and policies behind the laws and regulations against sexual harassment [2, p. 3].

The potential for conflict between the traditional arbitral role of contract interpretation and obligation of external law has been debated for over twenty years. In 1977, Richard Block posed an interesting question related to an arbitrator's dilemma when faced with reconciling collective bargaining decisions with discrimination laws. He asked: What are ". . . the criteria arbitrators should use when there is a conflict between the collective bargaining agreement on one hand and the law or public policy on the other. Should arbitrators confine their decisions to the four corners of the contract and base their decisions on traditional arbitral criteria or should they apply the law, using public policy and legal criteria" [3, p. 242; 4]? Twenty years later this question remains unanswered. Debate continues on the proper role of the arbitrator in relation to external law.

The purpose of this article is to add another perspective to this debate with a focus on sexual harassment discrimination law. First, the external law issue is examined. Second, by looking at a number of arbitrations, conclusions are drawn concerning the impact the law has on the arbitrator's ruling. Third, potential for liability is considered—when an arbitrator's decision conflicts with an employer's legal responsibility to provide a harassment-free workplace. Lastly,

recommendations are made for resolving sexual harassment disputes, both through arbitration and mediation.

THE EXTERNAL LAW DEBATE

Sexual harassment grievances are unique among discrimination grievances. In the majority of discrimination grievances the same individual is the grievant (in arbitration) and the complainant (if a lawsuit is initiated). Conversely, in sexual harassment cases it is the harasser who is the grievant in an arbitration while the victim (complainant), who is often a member of the bargaining unit, files the Title VII suit. The arbitrator's focus is on due process and just cause for discipline of the harasser, not Title VII discrimination against the victim. As stated by Arbitrator Bard in a 1991 decision, in sexual harassment cases "the alleged harasser is the plaintiff. It is therefore the plaintiff's rights which are the measuring stick by which the Arbitrator is governed" [5, p. 625]. External law, it may be argued, is not relevant.

For discrimination disputes covered under collective bargaining agreements the Supreme Court's decision in *Alexander v. Gardner-Denver Co.* [6] provides a basis for the external law debate. This landmark race discrimination case focused on the conflicting rights between Title VII and arbitration. Two major concepts were at issue. The first was whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims. The Supreme Court held that a legal discrimination complaint could be filed even if the case had been arbitrated. While acknowledging that arbitration was well-suited for resolving contractual disputes, the Court concluded arbitration was inappropriate for resolving Title VII disputes. The Court based its distinction on the arbitrator's desire to effectuate the parties' intent, rather than the requirements of the legislation. The Court then set the stage for the present debate by enunciating the second concept: that arbitrators who base decisions solely on their view of the law rather than interpreting the collective bargaining agreement exceed the scope of their authority and run the risk of not having their awards enforced [7]. Thus, according to the Supreme Court in 1974, the arbitrator has authority only to resolve questions of contractual rights [6].

In general, it is agreed that an arbitrator's authority comes from the collective bargaining contract. When the contract doesn't provide legal guidance, or conflicts with Title VII, how should an arbitrator rule on a legal issue? Again, we look to *Gardner-Denver* [6] for guidance. Under these conditions, the arbitrator is required to follow the terms of the contract, not civil rights law. However, where the contract is silent or has antidiscriminatory language requiring adherence to the law, Title VII must be considered. According to *Gardner-Denver,* if an arbitrator gives full consideration to Title VII issues and the decision is later appealed, courts may give great weight to that arbitral decision [6, at footnotes 20, 21].

For arbitration cases that involve statutory rights and well-defined public policies the risk of judicial review exists if the arbitrator's award conflicts with the law. As articulated by the Supreme Court, when an award creates an express conflict with an explicit, well-defined, and dominant public policy, as articulated in statutes or judicial precedent, it may be overturned [8]. "And what public policy is more explicit and imperative than Title VII's sexual harassment policy" [9, p. 116]? Sexual harassment in the workplace is illegal based on explicit law, not from general consideration of supposed public interest.

". . . [I]f arbitration is to be preserved as a practical, expeditious, and final means of dispute resolution, the . . . inquiry is: *Whether and under what circumstances* is the consideration of statutory issues appropriate?" [10, p. 56]. First, where contractual rights are similar to, or duplicative of, the substantive right created by Title VII, in order to effectuate the parties' intent, arbitrators may be bound to consider and apply external law. Two sources may exist contractually for applying legal and public policy criteria: 1) a legal supremacy clause that conditions continued application of a provision on compatibility with existing state or federal law, and 2) a general antidiscrimination clause [4, p. 43]. Second, where the contract is silent regarding external law, it should be considered when a company policy exists against sexual harassment. "Where the parties' contract or a policy or work rule mimics a statute, regulation, or judicial interpretation, there is additional force behind the arbitrator referring to external law" [2, p. 2]. The majority of such policies are patterned after EEOC guidelines and court interpretations of Title VII as it relates to sexual harassment.

In many of the sexual harassment cases researched for this article, arbitrators cited company sexual harassment policies or just-cause clauses, not anti-discrimination or legal supremacy clauses, as justification for upholding discipline. This may reflect the fact that the grievant is not the victim of sexual harassment but the perpetrator and thus is not a member of the protected class under Title VII. For example, in *Hughes Aircraft* the arbitrator made no explicit mention of legal issues, but in upholding the discharge of a male grievant accused of verbally harassing male coworkers, he said: "The Grievant's conduct was clearly repugnant and embarrassing to his co-workers. By any standard, the Grievant's conduct constituted 'sexual harassment' " [11, p. 358]. Based on the fact that in their arguments, both the company and the union discussed EEOC guidelines and liability, it may be concluded that Arbitrator Bickner defined "sexual harassment" based on legal criteria.

When rendering decisions on workplace grievances, arbitrators may take the position that they are not required to consider legal implications unless explicitly requested to do so under the contract. In fact, many may feel they are not qualified to interpret and apply the law. Generally, legal misinterpretations are not grounds for judicial vacation of arbitration awards. However, as may occur in decisions that exceed the scope of contractual authority, awards that display manifest disregard for the law may be overturned by the courts [12]. Because

there are often conflicting judicial opinions in different circuits, between district courts and courts of appeals, and between state and federal courts, arbitrators may face judicial confusion in interpreting the law. Two arbitrators can apply legal criteria to a similar set of facts and hand down conflicting decisions, depending on what level of judicial authority they consider dispositive of the issue [3, at 255]. Thus, if arbitrators consider legal issues in sexual harassment grievances, a concern is that there will be arbitral inconsistency. Whether or not arbitrators consider external law, their awards may conflict with the law.

In *Stroehmann Bakeries* Arbitrator Sands stated that ". . . sexual misconduct of the kind charged is absolutely inappropriate and should support immediate discharge" [13, p. 875]. However, in his ruling he did not make a determination of whether sexual harassment occurred or not, but based his decision on the fact that the company had not sufficiently investigated the incident. Thus he reinstated the grievant with back pay. Vacating this award, the appellate court stated that the fatal flaw in the decision was reinstatement without making a determination of whether harassment occurred. Such a ruling "undermines the employer's ability to fulfill its obligations to prevent . . . sexual harassment in the workplace" [14, at 1442]. Similarly, the arbitration award was overturned in *Newsday.* Using the public policy argument, the Second Circuit found reinstating an employee discharged for sexually harassing female coworkers (imposing a lesser discipline) violated "explicit, well-defined, and dominant public policy—set forth in EEOC's sexual harassment guidelines . . . [and] prevents employer from carrying out its legal duty to eliminate sexual harassment in the workplace" [15, at 845].

Arbitrators looking to these decisions for guidance may decide to deal harshly with grievants accused of sexual harassment. However, to complicate matters, arbitrators who rely on two contrary court decisions may find justification for being more lenient with similar grievants. When a linesman was discharged after a customer complained that he kissed and fondled her, the arbitrator felt corrective discipline was appropriate, but discharge too harsh a penalty. Basing his decision on just cause and mitigating factors (it was a first offense for the nineteen-years-of-service grievant, who was penitent after the act), the award reduced the discharge to a one-month suspension. As a rationale for refusing to vacate, the Tenth Circuit, rendering a decision shortly after *Misco* [8], said "We are not free, Misco teaches us, to reject factual findings with which we disagree or the arbitrator's interpretation of the contract" [16, at 468].

Because it was a first offense and discharge too harsh a penalty, an arbitrator ordered the penalty reduced to a thirty-day suspension for an employee at Chrysler Motors who sexually assaulted a female coworker. Appealing the arbitrator's decision, the employer argued that reinstatement violated public policy. Disagreeing, the Seventh Circuit noted the award did not contravene the public policy against sexual harassment in the workplace. "While we do not condone [grievant's] behavior, it was within the purview of the collective bargaining agreement and public policy for the arbitrator to order his reinstatement . . . courts

cannot upset an award because of their own view that public policy is threatened" [17, at 2868]. Adding to the dilemma arbitrators face, the Seventh Circuit acknowledged that the courts of appeals are divided on the question of when courts may set aside arbitration awards as contravening public policy.

In a more recent case, the U.S. Court of Appeals for the Federal Court found arbitrator Joseph Glasser had incorrectly interpreted and applied legal concepts [18]. The grievant admitted making harassing comments to a number of women. In addition, he had signed a statement that he received and read the Office of Personnel Management's (OPM) definition of sexual harassment and its policy statement prohibiting such harassment. Though the arbitrator found the preponderance of evidence showed the grievant had engaged in "no less than notoriously disgraceful conduct" and had been doing so for the previous twenty-five years, he reversed a sixty-day suspension given by OPM. Whether the harasser knew or should have known that his conduct constituted sexual harassment was the important issue, according to the arbitrator. Since he determined that the harasser "did not know right from wrong" and therefore did not know his conduct was sexual harassment, the grievance was sustained. Reversing the ruling, the judge found the correct inquiry in a sexual harassment case (based on Supreme Court rulings) is whether a reasonable person would find the conduct hostile or abusive and whether the victim perceived such misconduct to create a hostile environment. This must be judged from the perspective of the person being harassed, not the harasser.

To minimize the possibility of a court overturning awards, arbitrators should consider the victim's rights under Title VII when resolving a grievance related to sexual harassment. When they do apply external law, what level of judicial or administrative decision making should the arbitrator use? In the absence of a Supreme Court decision on this issue, it has been suggested that arbitrators use EEOC guidelines, as they constitute the best available guide to the requirements of federal law on the subject [3, p. 249]. In addition, the arbitrator should look for guidance to past court decisions in the jurisdiction where the case is heard [19, p. 38].

As shown in the next section of this article, the majority of decisions involving discipline of an employee for engaging in sexual harassment was silent on the legal implications. Why then do arbitrators appear to skirt around legal issues in sexual harassment grievances?

IMPACT OF EXTERNAL LAW ON LABOR ARBITRATION

Arbitrators have broad discretion in deciding whether and to what extent to consider various employment laws external to the contract in resolving grievances. It has been said that ". . . with development of a body of civil rights law defining unlawful sexual harassment, labor arbitrators have increasingly turned to that external law both to define the offense and to determine the obligations of the

employer and the union to both harasser and victim" [2, p. 2]. How accurate is this statement? To find out, 132 awards (published by BNA in *Labor Arbitration Reports*) from 1982-1997 were studied for two determinations. First, do arbitrators consider external discrimination law in grievances where the grievant was disciplined for sexually harassing a coworker, customer, or independent contractor? Second, do the 1991 amendments to the Civil Rights Act influence the outcome of those awards. Conclusions were drawn based on the arbitrator's discussion section. External law is defined as mention of: 1) employer legal responsibility or liability, 2) Title VII of the Civil Rights Act, 3) EEOC guidelines on sexual harassment, and 4) court decisions related to sexual harassment in the workplace [20].

Results are mixed. While external law influenced a number of decisions, it is surprising that the majority of arbitrators continues to omit formal consideration of legal issues. Others give them only cursory consideration by briefly stating that sexual harassment is against the law or the company could be legally liable for failure to provide a safe workplace [21]. Of the 132 cases examined, in only fifty-four (41%) did arbitrators refer to the law, whereas in seventy-eight (59%) legal issues were not mentioned. However, an overwhelming number cited other arbitration rulings as the rationale for their decisions.

It appears arbitrators are reluctant to sustain in full grievances related to sexual harassment. Table 1 shows awards in all 132 cases. In over half of the cases, the company won and in less than a quarter, the union won. If split decisions and grievance sustained are combined as wins for the union, the gap between wins for labor and management narrows considerably. But, unions still are clearly the losers in these arbitrations.

Looking only at the seventy-eight cases where the law was not referenced (Table 2), unions fared a little better. Thus, for sexual harassment grievances, unions have a slight edge over management when arbitrators confine their discussion to contractual issues and do not consider external law.

However, focusing on the fifty-four cases where external law was considered, we have very different results (Table 3). Consider the implications. In general,

Table 1. Outcome of Sexual Harassment Awards—All Cases (132 Cases)

Grievance Denied	71 (54%)[a]
Grievance Sustained	24 (18%)
Grievance Split[b]	37 (28%)
(Sustained & Split)	61 (46%)

[a]Due to rounding, totals may not equal 100%.
[b]Grievance split is defined as any reduction in the discipline (usually reinstatement without back pay or reducing the number of days suspended).

Table 2. Outcome of Sexual Harassment Awards—No Legal Issues Considered (78 Cases)

Grievance Denied	34 (44%)
Grievance Sustained	16 (21%)
Grievance Split	28 (36%)
(Sustained & Split)	44 (56%)

Table 3. Outcome of Sexual Harassment Awards—Legal Issues Considered (54 Cases)

Grievance Denied	37 (69%)
Grievance Sustained	8 (15%)
Grievance Split	9 (17%)
(Sustained & Split)	17 (31%)

unions lose when they take sexual harassment grievances to arbitration. Most interestingly, they lose at an overwhelming rate (69%) when arbitrators consider external law relevant to these grievances!

What is a union to do? For starters, unions can do a better job of screening grievances and not arbitrate obvious losers. After an employee, a foreman in the bargaining unit, was convicted of sexually assaulting a coworker, he was discharged. He had attended company-sponsored training sessions on sexual harassment law and policy. Due to his behavior, the company was sued and found guilty of violating Title VII. Nevertheless, the union arbitrated his discharge; not surprisingly, it was upheld [22]. Another case lost in arbitration involved the discharge of a probationary employee (with five months seniority) who sent love letters to her supervisor that contained graphic verbal commentaries about his body. The company had a sexual harassment policy that the grievant admitted she knew about and violated. No mitigating circumstances existed [23]. Neither of these grievances should have been arbitrated. Many similar examples can be found in the 132 cases included in this study [24].

In lieu of arbitration, both parties could agree to settle the dispute through mediation or other means of conflict resolution. Or, unions can attempt to screen arbitrators and use only those who do not think it is appropriate to consider external law in grievance resolution, thereby making their odds of winning greater. To determine if this is a realistic expectation, awards were divided into

pre- and post-1991. The significance of this date is twofold. First, and most important, the 1964 Civil Rights Act was amended that year to include punitive and compensatory damages against employers who are found liable for discrimination. Second, that was the year Anita Hill alleged that, when an employee at the EEOC, she was sexually harassed by Clarence Thomas, nominee to the Supreme Court. Did these two events affect arbitration awards?

Between the two periods, the number of sexual harassment arbitration cases are almost evenly divided (Table 4). From 1982 through 1990 there were sixty-four cases (48%), and sixty-eight (52%) from 1991 through June of 1997. For the sixty-four pre-1991 awards, twenty-five (39%) considered external law while thirty-nine (61%) did not. Numbers don't change much post-1991; twenty-nine (43%) of the arbitrators discussed the law and thirty-nine (57%) did not. For these sample cases, arbitrators were evenly divided between those who overtly consider the law and those who do not. Thus, the external law debate has not been resolved!

On the other hand, comparing awards where external law is considered (54 cases) and where it is not considered (78 cases) between pre- and post-1991, results are startling! Consider Table 5 below. Not only are unions likely to lose in arbitration when arbitrators consider external law, but grievances are overwhelming denied (76%) in the post-1991 time period! Out of the twenty-nine post-1991 rulings, unions won in only one case! Even when adding split decisions to this, the union "wins" in less than one-quarter of the grievances.

Table 4. Legal Consideration in Sexual Harassment Awards
Pre- and Post-1991 (132 cases)

	1982-1990	1991-1997
Cases:	64 (48%)	68 (52%)
Legal Issues:	25 (39%)	29 (43%)
No Legal Issues:	39 (61%)	39 (57%)

Table 5. Outcome of Sexual Harassment Awards
Legal Issues Considered: Pre- and Post-1991
(54 Cases: 25 pre-1991 and 29 post-1991)

	1982-1990	1991-1997
Grievance Denied	15 (60%)	22 (76%)
Grievance Sustained	7 (28%)	1 (3%)
Grievance Split	3 (12%)	6 (21%)
(Sustained & Split)	10 (40%)	7 (24%)

Table 6. Outcome of Sexual Harassment Awards
Legal Issues NOT Considered: Pre- and Post-1991
(78 Cases: 39 pre-1991 and 39 post-1991)

	1982-1990	1991-1997
Grievance Denied	15 (38%)	19 (49%)
Grievance Sustained	11 (28%)	5 (13%)
Grievance Split	13 (33%)	15 (38%)
(Sustained & Split)	24 (62%)	20 (51%)

Where the law is not an issue, arbitrators' decisions are less favorable to the union after 1990 (Table 6). More grievances are denied and fewer are sustained; only split decisions marginally increase. Could this reflect the fact that despite confining their reasoning to contractual issues, arbitrators are being influenced by external considerations, such as Title VII amendments and a heightened awareness that sexual harassment in the workplace is unacceptable?

Even when arbitrators do not specifically refer to Title VII or EEOC guidelines, external law may drive their decisions. Most are aware that sexual harassment is a serious problem. In *Superior Coffee & Foods*, the union cited past arbitration cases as the reason why the grievance should be sustained. Arbitrator Alleyne 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" [25, p. 613]. Though many arbitrators do not overtly refer to the law, they often discuss the concept of hostile environment. It may be argued that sexual harassment is a legal term and hostile environment a legal concept; thus, citing the law may be superfluous. If sexual harassment's conceptual origin and meaning derive entirely from Title VII, the arbitrator who uses the concept of sexual harassment in reality applies federal law [9, p. 111].

EMPLOYER LIABILITY

Victims of workplace sexual harassment have the legal right to sue their employers alleging discrimination based on sex. At the heart of these lawsuits is the issue of whether the alleged conduct constitutes sexual harassment as defined by law. Arbitration, on the other hand, does not focus on the legal discrimination issue but on whether the behavior complained about constitutes sexual misconduct inappropriate to the workplace and, within that context, whether there was just cause for the disciplinary action. Under these circumstances employers may find themselves faced with conflicting obligations to: 1) the victim under

Title VII of the Civil Rights Act and 2) the alleged harasser under the collective bargaining agreement. Can an employer be held legally liable for violating Title VII if an arbitrator reinstates a grievant who, based on Title VII law, should have been discharged?

Title VII is designed to encourage employers to take disciplinary action to limit their liability. In a sexual harassment lawsuit, the employer's defense may rest on its having taken prompt and severe disciplinary action as soon as the harassment was reported. A few recent court cases are illustrative. In *Baskerville v. Culligan International,* the company was shielded from liability in a *quid pro quo* suit when the court found it took all reasonable steps to abate the alleged harassment. There was an investigative procedure known to all employees which effectively resolved complaints in a timely manner [26]. Similarly, in *Bouton v. BMW of North America, Inc.*, an employee failed to state an actionable claim of hostile environment sexual harassment because BMW had responded promptly and effectively when it was notified of the possible harassment [27].

> . . . employers that have adopted strong policies against sexual harassment and conduct serious investigations of employee complaints have a better chance of successfully defending such claims. In contrast, those employers that are not receptive to employee complaints and conduct sham investigations are subject to sharp criticism by the courts and the imposition of increasing potential liability [28, p. 87].

Since courts are carefully scrutinizing the adequacy of employer responses to sexual harassment complaints and are quick to find liability against employers that fail to deal with issues promptly [29], an argument can be made that it is legitimate for employers to impose strict penalties for employees who engage in sexual harassment.

In many of the arbitration cases researched for this article, employers argued that severe disciplinary action is a legal obligation for grievances involving sexual harassment; most discipline was indeed harsh—discharge. And, it is not only the "harasser" who may be disciplined. Consider the following. A supervisor filed a grievance when he was discharged for failing to report an incident of sexual harassment. The arbitrator, Sharon Imes, agreed with the employer that supervisors witnessing sexual harassment are required to report it. However, based on the circumstances, she considered discharge too harsh and reduced the penalty to a six-month disciplinary probation "to stress the importance of recognizing that sexual harassment . . . has the potential for creating an intimidating work environment and that any incident of such harassment should be treated seriously by all employees . . . [30, p. 916]. Similarly, in *City of Houston,* a police captain was disciplined for mishandling a sexual harassment complaint. The captain failed to follow established procedures which, the city argued, hampered its investigation and unnecessarily exposed it to legal liability. While agreeing

with the union that a ten-day suspension was excessive, Arbitrator Mark Sherman nevertheless felt "some sort of suspension is appropriate under the circumstances" [31, p. 1075] and reduced the suspension to four days. Thus, arbitrators recognize that the risk of liability is often the justification for a harsh penalty [32].

Unfortunately, employers may conduct hasty investigations, ignore mitigating circumstances, deny due process, or impose a severe penalty where a lesser one is more appropriate. It is the employer's responsibility to impose appropriate disciplinary action, ranging from reprimand to discharge. However, corrective action should be progressive in nature and reflect the severity of the conduct. Even when the conduct constitutes sexual harassment, arbitrators may sustain a grievance because the seven tests of just cause were not followed [33]. In *Kiam* [5], for example, the arbitrator discussed the law in detail and concluded Title VII does not mandate discharge of a harasser; a lesser form of discipline is within the law and fulfills an employer's obligation under EEOC guidelines. In response to the company's argument that the grievant's conduct violated public policy, the arbitrator retorted that discharge cannot be upheld on grounds of violating public policy—that is a company responsibility. Based on this rationale, he reduced the penalty to a written warning. Would reinstatement of the harasser, even on technical grounds, expose the employer to financial liability?

Additional important questions remain unanswered. In the first Supreme Court decision related to sexual harassment, the justices suggested that, to avoid liability, employers adopt a strong antisexual-harassment policy and grievance procedure with provisions that guarantee the harasser cannot block the process [34, p. 15]. Is the harasser "effectively blocking the process" by grieving the disciplinary action? What are the rights of the innocent third party (the victim) for whom, once again, a hostile environment exists? What are the public policy implications? Should courts overrule decisions where arbitrators do not consider whether enforcement of rights under a labor contract would violate public policy? In cases involving public policy issues, "The public has a right to know, and it is incumbent upon arbitrators to explain their thought process" and public policy analysis in their opinions when they reinstate an employee discharged due to sexual harassment [35, p. A-3].

Earlier studies have concluded that ". . . arbitrators have historically resolved and continue to resolve employment discrimination grievances, and the evidence indicates that they are doing so competently and in general accordance with the law under Title VII" [36, p. 755]. Unfortunately for the majority of grievances involving sexual harassment discrimination, as we have seen, arbitrators generally are not explicitly considering the law. Most confine themselves to the four corners of the agreement and use the traditional seven tests of just cause, not civil rights law, when determining appropriate discipline. It could be argued that the grievance turns on the just-cause issue, not legal rights, since it is not the victim

who has grieved but the victimizer. However, if the award does not consider the public policy against sexual harassment in the workplace and minimizes the misconduct, it may perpetuate a hostile, intimidating, and offensive work environment. Above all, an award that ignores external law may prevent an employer from carrying out its legal duty to eliminate sexual harassment in the workplace.

RECOMMENDATIONS

Develop Contract Language

Though many employers have adopted sexual harassment policies, these usually are not part of the collective bargaining agreement. If they were, and included EEOC guidelines, arbitrators would have the authority to interpret external law, since the law would be a part of the contract. "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" [37, pp. 38-39].

Ten years ago, arbitrator William Rule found including sexual harassment language in collective bargaining agreements "does not appear to be a high priority bargaining item at this time" [34, at 16]. He suggested that in the future, parties may see fit to add such language to their contracts. Unfortunately, very little progress has been made in the last decade. Most of the 132 arbitration cases referred to company policy, not contract language. The agreement should establish mutually acceptable procedures for resolving sexual harassment disputes and contain a statement that the arbitrator's decision will contain a finding as to whether or not there was a discriminatory act committed and conform to any requirements established by the EEOC.

Consider External Law

Despite the fact that the collective bargaining agreement rarely has language pertaining to sexual harassment, it can be argued that arbitrators should consider the external law when interpreting the contract to resolve a sexual harassment grievance. Why? It is what the parties intended. There is no other meaning of sexual harassment than that of the law. Considering the law harmonizes arbitration with federal policy against workplace sexual harassment. If the law is ignored, it "might cause some to ask whether the national policy favoring arbitration should be reconsidered if that policy fails to accommodate other urgent national policies" [9, at 113]. On the positive side, it would provide justification for the courts to defer to arbitration awards; "if there is an issue of public policy

directly connected to the dispute, it is fair to conclude that the courts will expect arbitrators to make a finding of fact" [19, p. 35]. Still not convinced? It can be argued that the law is explicitly incorporated in the contract through the general antidiscrimination clause, which most contracts contain. Thus, "there can be no question that both parties desire a resolution of the statutory dispute in arbitration" [10, p. 62].

Mediation

It can be concluded, based on this study of 132 arbitration awards, that arbitration of sexual harassment grievances is a no-win situation for either the union or the company. From the union's perspective, it is a two-time loser. First, as the data show, unions lose the majority of arbitrations, especially when external law is considered by the arbitrator, which is increasingly more common. Second, in coworker hostile environment harassment, both the harasser and the victim are likely to be members of the union. Member is pitted against member. Often, to make a compelling case for overturning the discipline, the union downplays the seriousness of the incident and may even blame the victim. This results in a divided membership.

The employer, on the other hand, though more often the victor in arbitrations, may be a loser in the long term if the victim later files a Title VII lawsuit. Critics of arbitrators applying external law challenge the arbitrator's knowledge of the law and his/her ability to interpret the law correctly. Not all arbitrators are lawyers; not all lawyers are experts on discrimination law. Thus, what was to be a final resolution of a grievance can turn into a lengthy lawsuit if the law is not applied or misapplied. And, there is no guarantee that the employer will prevail. As the cases show, many of the decisions were split: reinstatement with no back pay. To overrule management's discipline and return a harasser to the workplace may subject the company to future liability—the grievant may harass again!

An alternative method of dispute resolution for sexual harassment grievances is external mediation. This is a process for resolving disputes in which a neutral person—trained in mediation methods—from outside the company helps the employer and employee negotiate a mutually acceptable agreement. This process does not lead to an imposed solution. Mediation differs from arbitration in that it offers participants an opportunity to retain control of the outcome, whereas arbitration does not. It resolves the issue quickly, and there is a greater likelihood the resolution will be positive for both parties. Early intervention may reduce the adversarial and defensive tendencies of those involved. Since mediation is a confidential process, the victim is protected from reprisals and the harasser from public embarrassment. And, since both parties agree to the resolution, there is less likelihood of the victim filing a lawsuit against the company or the union.

CONCLUSION

The critical issue arbitrators face is how to protect due process rights for a grievant accused of sexual harassment while at the same time ensuring that the victim's Title VII rights are preserved. Also, employer liability must be considered when an employee discharged for sexual harassment is reinstated, based not on innocence but on a mitigating circumstance. Victims of harassment are not represented by either the employer or the union in arbitration; their rights may be implicated and should not be negated.

> An arbitral award that undermines prompt and effective remedial relief and perpetuates sexual harassment denies women "the full availability" of a forum to challenge the harassment as plaintiffs, rather than as mere witnesses with no representation by attorneys or a union. This is so because the individual woman cannot take the arbitrator to court or seek to have the award put aside, and has no cause of action against an employer who did the right thing in attempting to eliminate the sexually harassing environment [38, p. 132].

Thus, arbitrators must ensure they do not deprive harassment victims of their legal rights. If they do, they run the risk of having their awards overturned by the courts for violating the explicit public policy against workplace sexual harassment. And what, if any, liability might be incurred by an arbitrator who orders the company to reinstate a known harasser?

An interesting argument, one the higher courts have not yet heard, involves the union's liability. Can the victim of harassment (usually another union member) sue the union for interfering with his/her rights under Title VII and/or breaching its duty of fair representation under the National Labor Relations Act? For, in the final analysis, it is the union that argues against imposing discipline, pitting member against member, in these sexual harassment grievances. But this argument is best left for a follow-up article.

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ENDNOTES

1. *Civil Rights Act of 1964,* 42 U.S.C. sec. 2000e-2(a)(1); *EEOC Guidelines,* 20 CFR 1604.11(a)(1990); *Meritor Savings Bank v. Vinson,* 477 US 57 (1986); *Harris v. Forklift Systems, Inc.,* 114 S. Ct. 367 (1993).

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4. For further discussion see Benjamin Wolkinson and Dennis Liberson, The Arbitration of Sex Discrimination Grievances, *The Arbitration Journal, 37*:2, pp. 35-44, June 1982.
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7. This idea is based on the Supreme Court decision *in United Steelworkers of America v. Enterprise Wheel & Car Corp.,* 363 US 593 (1960).
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22. Donald Daughton, arbitrator, *ZIA Co.,* 82 LA 640, 1984.

23. Joseph Gentile, arbitrator, *American Protective Services,* 102 LA 161, 1994.
24. For example see: Stanford Madden, arbitrator, *United Electric Supply,* 82 LA 921, 1984, and Roland Strasshofer, arbitrator, *Dayton Newspapers,* 100 LA 48, 1992.
25. Reginald Alleyne, arbitrator, 103 LA 609, 1994. The cases he cited were C. Cohen, arbitrator, *GTE Florida,* 92 LA 1090, 1989, and Henry Wilmoth, arbitrator, *Boys Market Inc.,* 88 LA 1304, 1987.
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31. Mark Sherman, arbitrator, *City of Houston,* 107 LA 1070, 1996.
32. See Thomas Gallagher, arbitrator, *County of Ramsey,* 86 LA 249, 1986 and Anne Holman Woolf, arbitrator, *Mcdonnell Douglas,* 94 LA 585, 1989.
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