

LABOR ARBITRATIONS AND COWORKER SEXUAL HARASSMENT: LOOKING AT THE ASSESSMENT OF MITIGATING FACTORS THROUGH A FEMINIST LENS

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ABSTRACT

Canadian labor arbitrations resolving disputes over employer discipline for alleged coworker sexual harassment were analyzed in order to explore how well women's right to a harassment-free workplace was protected in the arbitral assessment of the mitigating factors argued during hearings to support the male harasser. An analysis of the awards revealed a significant difference between reasoning that applied traditional, conventional, arbitral principles and reasoning acknowledging that the nature of sexual harassment, its seriousness, and its impact on the complainants and their female coworkers merited a creative, more independent line of reasoning. Examining arbitrations using a feminist lens, one that emphasized gendered power relationships in the workplace, enabled new insights indicating the gendering of some traditional arbitral jurisprudence and principles and some possibilities for legal reform.

In Canada, workers have the right to a workplace free from harassment and it is the employer's statutory duty to provide a safe and healthy workplace (*Robichaud v. Canada*, 1987). The Canadian Human Rights Commission (2006: 3) defines

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harassment as “any behavior that demeans, humiliates or embarrasses a person, and that a reasonable person should have known would be unwelcome,” with similar language in provincial human rights legislation. A 1989 Supreme Court decision defined workplace harassment as “unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse, job related consequences for the victim of harassment” (*Janzen v. Platy Enterprises Ltd.*, 1989: 3). Although men do report sexual harassment (Biskupic, 2001), women are still the most frequent targets (Aggarwal & Gupta, 2000; Hodges, 2006). Sexual harassment is an international problem, and although there are United Nations standards, their application varies across national jurisdictions (Aeberhard-Hodges, 1996).

Many sexual harassment policies adopt a zero tolerance approach requiring the immediate discharge of a perpetrator to reflect the seriousness of the misconduct and the employer’s legal duty of prevention, and the rights of any dismissed employee become particularly important in a unionized environment (Haiven, 2006). Women may not necessarily want a male harasser discharged, depending on the circumstances; often what is more important to them is that the harassment stops (Knapp et al., 1997; *Manitoba Lotteries Corp. and MGEU*, 2002). That said, the level of discipline, the appeal process, and the process’s outcome are all important signals to a harassed woman and her fellow employees in terms of organizational commitment and appropriate standards of behavior (Aggarwal, 1991; Knapp et al., 1997).

Originally designed to resolve grievance disputes without recourse to law courts, labor arbitrations are important channels for ensuring the collective bargaining rights of a significant number of Canadian workers. Union membership has hovered around 30% of the nonagricultural workforce since the mid-1980s (Hebdon & Brown, 2008), and many Canadian collective agreements now include language on sexual harassment. Even in the absence of a discrimination clause, Supreme Court jurisprudence states that an alleged violation of a human rights code constitutes an alleged violation of the collective agreement, thus asserting clear arbitral jurisdiction in sexual harassment cases (Mitchnick & Etherington, 2006).

An unsettled grievance claiming sexual harassment by a supervisor or manager fits the conventional, adversarial alignment of the parties in an arbitration case. A coworker sexual harassment complaint where both employees are members of the same union leads to role conflict for the union (Hodges, 2006; Marmo, 1980; O’Melveny, 2001), heightened by the legal duty of fair representation required in Canadian and American jurisdictions. Unions typically defend alleged male harassers by appealing against employer discipline, action sometimes justified by the circumstances of the case but often to the detriment of female complainants (Cohen & Cohen, 1994; Crain, 1995; Crain & Matheny, 1999; Haiven, 2006; Hodges, 2006). A historical male dominance in organized labor and a lingering domestic ideology has been linked to union barriers to women’s

equality (Acker, 1989; Briskin & McDermott, 1993) and to the way unions may approach the defense of men accused of harassing women (Cohen & Cohen, 1994), despite their increasing awareness of sexual harassment and policy development on the subject. In the typical coworker harassment arbitration, there is a reversal of what we would normally expect in the parties' positions, so that the union is defending a male harasser against discharge by an employer who, by acting primarily to fend off legal liability, is, in effect, protecting the female target's right to a harassment-free workplace.

This article explores the way in which a woman's right to a harassment-free workplace is affected by the arbitral assessment of the mitigating factors argued by the union in support of a male employee who has appealed against employer discharge for coworker sexual harassment. Specifically, arbitral reasoning relating to mitigating factors will be examined to consider how far it takes into account the explanations of sexual harassment available in the literature, reviewed below with a focus on feminist accounts of power and male dominance, while arbitral principles and jurisprudence will also be examined, for indications of gendered language or concepts. Further context for the study will be provided in sections on the arbitral principles applied in Canadian discipline cases, previous sexual harassment arbitration studies, and methodology.

UNDERSTANDING WORKPLACE SEXUAL HARASSMENT

Explanations of sexual harassment can be broadly categorized into those that emphasize the individual, organizational, or societal levels.¹ For example, Lucero, Allen, and Middleton (2006) studied the behaviors and motives of sexual harassers, concluding that they tended to repeat the same types of behavior, which escalated over time. Also, Knapp and colleagues (1997) developed a conceptual framework for understanding target responses to harassment, including the chilling impact of negative experiences at work resulting from prior reporting. So, while Knapp and colleagues' framework was individualist in the main, organizational influences were built in as context. Other authors have highlighted organizational factors, examining, for example, the type and effectiveness of workplace policy, along with union and management commitment to addressing sexual harassment (Haiven, 2006; Hart & Shrimpton, 2003).

Complementing these theoretical approaches, societal-level explanations are often feminist informed, focusing primarily on men's sexual harassment of women as a reflection of the protection of male dominance, masculinity, and power (see Handy, 2006; Hodges, 2006). Accordingly, asymmetrical power can explain sexual harassment in both male- and female-dominated workplaces:

¹ I thank Amy Warren for suggesting the typology of sexual harassment theories.

the harassment [in traditionally male workplaces] appears designed to preserve the male employees' masculinity, which is threatened by the ability of women to perform the work, and to put women back into their "rightful" place. . . . Sexual coercion more often affects women in traditionally female occupations. . . . the woman in the traditional gender role is treated as a sex object, precisely because she is in her traditional gender role. . . . Both types of harassment involve the exercise of power, but in different ways and for different purposes. (Hodges, 2006: 188)

Bearing in mind this power of men over women regardless of social or organizational status, we can better understand coworker sexual harassment as "arising from the male sexual prerogative, which implies that men have an unfettered right to initiate sexual interactions or assert the primacy of a woman's gender role over her work role" (Wilson & Thompson, 2001: 72). Wilson and Thompson (2001: 65) envisaged an organizational hierarchy as "a structure of gendered power," the exercise of which is complex and hidden, since "the very rules used to determine if behavior is being seen as harassment are ideologically produced and in themselves an exercise of power" (Wilson & Thompson, 2001: 71). This question of establishing the occurrence of sexual harassment is a fundamental turning point in the pursuit of redress for sexual harassment in arbitrations, as shown in the subsequent review of cases.

MacKinnon proposed that gendered inequalities at work caused sexual harassment as long ago as 1979, in the sense that sexual segregation and associated economic inequality are reflections of sexual inequality. Recent theories of dignity and autonomy aimed at addressing what was viewed as the inadequacy of sexual/economic inequality explanations in the light of same-sex and other forms of harassment. However, it is argued in this article, in agreement with Anderson (2006: 304), that these newer theories tend to individualize and depoliticize sexual harassment, and that male dominance can explain "a wide variety of harassing acts that do not necessarily target women or have sexual content." Indeed, Zippel (2008: 178) saw gender inequality as "the underlying cause of sexual harassment" and argued, further, that the implementation of any workplace policy

itself becomes a political process in which gender and workers' interests are negotiated . . . [and] the implementation of sexual harassment laws is shaped not only by the laws themselves, but also by systems of industrial relations and institutionalized gender politics. (Zippel, 2008: 176)

The analysis and discussion of arbitration cases in this article will draw primarily upon feminist explanations and, in particular, upon Zippel's insight, by paying attention to how "gender and workers' interests" play out in the arbitration process, primarily by comparing the treatment of female complainants with that of their alleged male harassers and exploring the relationship

between arbitral principles, jurisprudence and reasoning, and gendered relations of power in the workplace.

CANADIAN ARBITRAL PRINCIPLES IN DISCIPLINE CASES

Fairness and corrective discipline are of central importance in Canadian arbitral jurisprudence (see, for example, *Oshawa Foods Division of Oshawa Food Groups Ltd. and UFCW*, 1993), underlying the recognition in labor law of an unequal balance of power between employer and employee, noted in *Alberta and AUPE* (2007) as being at its highest level in a dismissal case. The employer has to establish just cause for discipline, demonstrating that it has been applied fairly and is “consistent with principles of ‘natural justice’” (Godard, 2005: 358). Discharge is seen as a last resort and akin to capital punishment (Hebdon & Brown, 2008). Progressive discipline is normally required, consisting of verbal and written warnings, suspension, and eventually dismissal if the misconduct continues. That said, Canadian arbitrators are not bound to follow the jurisprudence, but it is expected that they will, and they usually do (Hebdon & Brown, 2008).

The jurisprudence also directs arbitral reasoning to move beyond any demonstrated misconduct itself to assess the overall situation of a case, including the impact of any remedy on the grievor and the workplace. Thus, the notion of a mitigating factor is pivotal to the outcome of an arbitration case and, by extension, the impact of the outcome on the workplace parties involved. A union could argue one or more mitigating factors in its attempt to reduce a discharge penalty, including the following: the grievor’s clean record; the grievor’s length of service; the fact that an incident was isolated; the fact that it was an unpremeditated action; plus the factors of remorse, provocation, economic hardship, and unfair discipline (Hebdon & Brown, 2008). The overall logic can be reversed, such that any potential mitigating factor can work against the grievor as an aggravating factor (for example, where there is a pattern of similar acts or no remorse is shown).

To understand the place of mitigating factors in arbitral process and reasoning, it is instructive to consider the three questions the jurisprudence requires a Canadian arbitrator to address in all discipline cases, as cited verbatim in *Royal Towers Hotel Inc. and HRCEBU* (1992: 7):

1. Has the employee given just and reasonable cause for some form of discipline by the employer?
2. If so, was the employer’s decision to dismiss (or suspend, etc.) the employee an excessive response in all of the circumstances of the case?
3. If the arbitrator does consider discharge excessive, what alternative measure should be substituted as just and equitable?

The first question requires the arbitrator to decide whether sexual harassment did occur, on the balance of probabilities (as in civil law) and guided by the relevant jurisprudence. This leads logically to answering the second and third questions, where the conclusions to the first question are placed alongside a balancing out of any mitigating and aggravating factors evident in the case. If an arbitrator accepts that one or more mitigating factors are present, then a reduction of penalty almost always follows. On the other hand, the principle of proportionality, that is, balancing the severity of an offense with the sanction proposed, is often emphasized in sexual harassment cases (for an elaboration of this, see *Alberta*, 2007), so the accurate assessment of the level of seriousness of a grievor's misconduct becomes important in understanding how the final decision is reasoned out in the award. Also, reflecting the seriousness of the allegations, most arbitrators accept the frequent union argument, based on jurisprudence, that there must be a higher standard of proof than the conventional balance of probabilities adopted in arbitrations, namely, a test of "clear, cogent and convincing evidence" when deciding on occurrence and seriousness (*Surrey [City] and CUPE*, 2003: 35).

Although Canadian arbitrators can and do use American jurisprudence in their decisions, they are required to interpret relevant Canadian employment legislation and jurisprudence relating to it, and consideration of the American "reasonable woman standard" (see Crain, 1995; Irvine 1993) would be unlikely. In Canada, the legal focus is on the reasonable behavior of the harasser, as in the definition provided above; even so, as shown in the analysis of cases below, the perception of harassed women can be an important point of arbitral proceedings in the Canadian context, and not always to their advantage.

PREVIOUS STUDIES OF SEXUAL HARASSMENT ARBITRATIONS

The majority of cases in Marmo's (1980) American study consisted of unresolved male grievances appealing against employer discipline, in a manner consistent with later reviews (for example, Aggarwal, 1991; LaVan, 1993). Marmo noted the unions' difficulty in representing both the grievor and the complainant when they are both members of the same bargaining unit, and women's reluctance to report sexual harassment due to fear of repercussions from male employees. Cohen and Cohen (1994) focused on union defense arguments in coworker cases, finding that 80% of these arguments denied the event or blamed the victim rather than blaming management or society, despite there being no significant difference between arbitrators' decisions across these categories. Crain (1995) also expressed concern at the negative role often played by unions, compounded by the potential for arbitral gender bias, and pointed out that just cause standards led to a focus on the rights of the grievor rather than those of the victim. LaVan (1993) developed a decision model to predict outcomes based

on case characteristics. A total of 90% of the cases she analyzed involved male grievors appealing against discharge, an appeal that was sustained in only 36% of these cases. The key predictors of upholding dismissal were the following: when the complainant and supporting witnesses testified; when there were multiple harasses; and when other discrimination issues were evident, such as those of age, national origin, or race.

Turning to Canadian research, in Aggarwal's study (1991), 87% of the arbitrations he reviewed appealed against discharge; management discipline was sustained in 48% of them. Aggarwal's main finding was that in assessing just cause, arbitrators divided sexual harassment into two categories: "severe or serious" and "mild" (Aggarwal, 1991: 14). A judgment that harassment was severe (for example, involving physical contact, an assault on sexual dignity, an offender in a position of special trust, conduct causing a hostile or poisonous work environment, or the victim suffering job-related consequences) generally led to discharge being upheld. Aggarwal questioned whether existing arbitral jurisprudence was adequate to deal with sexual harassment cases and suggested that the reinstatement of a perpetrator would likely be problematic for a victim and her female coworkers and send the wrong signal to other employees, "particularly bullying male workers" (Aggarwal, 1991: 15). Taylor's (1998) analysis of just cause arbitrations confirmed Aggarwal's finding that the more severe the harassment was found to be, the more severe the penalty that was awarded. Taylor concluded that the standard penalty for sexual assault or language and touching was discharge, whereas the penalty involving touching (without language) and language (without touching) was suspension; also he found that the balancing of mitigating and aggravating factors affected decisions, as expected. Haiven (2006) closely examined a small number of arbitration cases to explore how far a zero tolerance policy in a unionized environment could work. She concluded that the unions' defense of the alleged harasser in an adversarial context, combined with the mitigating factors of contrition and the lack of progressive discipline, undermined the policy, as only 38% of the discharges were upheld by arbitrators.

Understandably, since most sexual harassment arbitrations are appealing against discipline or discharge, and the central aim of just cause standards is to protect the rights of the grievor, a significant trend in much of the previous research has been to focus on the alleged perpetrators and the decision factors leading to the penalties awarded. For both theoretical and practical reasons, this approach is valuable. But it is apparent that less attention has been given to the complainants, the majority of whom are still women, and the way in which their rights and interests are affected. This article builds on previous research by addressing this gap, namely, by investigating the arbitral assessment of mitigating factors with a particular interest in how the implementation of traditional arbitral principles and standards may impact the women complainants' rights and interests. In doing so, the study further develops Aggarwal's observation in 1991 that traditional arbitral jurisprudence was perhaps ill suited to handle sexual

harassment cases, given the tendency toward reinstatement decisions and subsequent problems for female victims and coworkers; it also examines more closely the potential for arbitral gender bias raised by Crain (1995) in her study of U.S. cases.

METHODOLOGY

The review is based on 13 discharge cases decided between January 1999 and December 2008. The cases were initially selected by searching the Labour Arbitration Cases (L.A.C.) and the Canadian Labour Arbitration Summaries (C.L.A.S.) in the Canadian Labour Law Library for awards listed as sexual harassment, in all jurisdictions. Next, the search was narrowed down to those cases where male employees had been discharged for harassing female coworkers in the same union; harassment by managers, harassment by members of the public, and same-sex harassment were therefore excluded. These selection criteria reflected evidence in the literature of conflicted roles when a union is faced with trying to represent an alleged male harasser and a female victim who are both members of the same union (Cohen & Cohen, 1994; Crain, 1995; Haiven, 2006; Marmo, 1980). The L.A.C. database is available online and is an established source of cases as it has been used in previous research (Aggarwal, 1991; Haiven, 2006; Taylor, 1998). It cannot be assumed to include all arbitrations, as publishers select those that are clear, that are well written, and that illustrate an issue or jurisprudence of interest to industrial relations practitioners and scholars (Haiven, 2006). Indeed, the intent here is not to be representative of all data in a statistical sense or to make generalizations; the qualitative methodology emphasizes process, complex interrelationships, and the different perspectives of the actors involved, with an emphasis on what we can learn from a limited, “purposeful” sampling (Glesne, 2006: 34). The cases originate from Ontario, British Columbia, Saskatchewan, Alberta, Manitoba, and the federal jurisdiction. They are all available online.²

The questions guiding the analysis of each full text award were as follows: What was the nature of the harassment, what was the woman’s evidence, what were the arguments of the union and the employer, what was the arbitral reasoning for the weighing up of mitigating and aggravating factors, and what were the implications of embedded legal or arbitral principles for the complainant and for women employees generally? Each award was coded based on these questions. An analysis sheet was constructed for each case and then integrated with the others to develop themes based on patterns identified in the data. The analysis was informed by both industrial relations and feminist literature.

²The Canadian Law Book Web site is to be found online at Labour Spectrum: see <http://clb1.canadalawbook.ca/nxt/gateway.dll/labourspectrum>.

REVIEW OF ARBITRATION CASES

Out of the 13 discharge grievances studied, eight dismissals (62%) were overturned by the arbitrator (see Table 1) and five dismissals (38%) were confirmed (see Table 2). The analysis of the cases follow, subdivided according to decision.

Dismissals Overturned: Grievances Upheld

Seven out of the eight awards in this category gave the most weight to prior discipline in the assessment of overall circumstances, reflecting the central arbitral principle of fairness and progressive discipline. The most frequent and strongest mitigating factor noted by arbitrators was the lack of formal warning by the employer regarding the sexual harassment for which the grievor was dismissed (*Alberta*, 2007; *Community Living South Muskoka and OPSEU*, 2000; *Kitchener (City) and KPFFA*, 2008; *Surrey*, 2003; *Toronto Transit Commission and ATU*, 2006). Informal conversations or verbal counseling, whether addressing similar behavior with a different woman (or women) or addressing the harassment in question, did not constitute a formal warning and could not be used to establish a pattern of sexual harassment. To conduct informal conversations or verbal counseling was deemed as implementing progressive discipline incorrectly, leading to a finding of discharge without just cause (*Alberta*, 2007; *Kitchener*, 2008). In addition, traditional arbitral jurisprudence dictates strict observance of the “sunset clause” frequently included in Canadian collective agreements: this clause requires the removal of any formal discipline from the record after a negotiated period of time elapses, usually around two years. An employer taking into account previous formal discipline for sexual harassment occurring after this negotiated period of time is ended was seen as violating the collective agreement, leading the arbitrators involved to note a major mitigating factor in the grievor’s favor (see *Toronto*, 2006).

Six out of the eight cases placed significant weight on the grievor’s clean record (*Alberta*, 2007; *Kitchener*, 2008; *Manitoba*, 2002; *Toronto*, 2006; *Westcoast Energy Inc. and CEP*, 1999; *XL Foods Inc. and UFCW*, 2006). In three of these cases, the employer had informally counseled or spoken to the employee about previous sexual harassment-related behavior, all of these incidents involving women other than the complainant. However, because the employer action was not in the form of a formal warning (*Alberta*, 2007; *Kitchener*, 2008) or because the sunset clause was ignored (*Toronto*, 2006), none of these incidents was allowed on the record by the arbitrator. In four of the cases, added to the clean record was long service (*Kitchener*, 2008 [18 years]; *Toronto*, 2006 [15]; *Westcoast*, 1999 [24]; *XL*, 2006 [16]). In one case, the arbitrator accepted the union’s argument for a mitigating factor of positive performance appraisals (*Alberta*, 2007), while denying the employer’s attempt to include prior informal counseling for sexual harassment-related behavior, thus leaving the grievor with a clean record.

Table 1. Dismissals Overturned: Grievances Upheld

Name of case and date	Nature of harassment	Decision
<i>Westcoast Energy Inc. and CEP</i> , 1999	Pornographic e-mail, anonymous (element of stalking), denial	Reinstatement, 6 months' suspension, apologies to complainant, union executive, supervisor
<i>Community Living South Muskoka and OPSEU</i> , 2000	Repeated sexual touching of several women over 9 years, threatening behavior, denial	Dismissal unjust but no viable employment relationship, compensation awarded of one year's wages as substitute for reinstatement
<i>Manitoba Lotteries Corp. and MGEU</i> , 2002	Sexual touching and suggestive comments (2 women), sent sexually charged poem, denial	Reinstatement, 10 months' suspension
<i>Surrey (City) and CUPE</i> , 2003	Sexual touching (2 women) and sexual overtures (1 woman), denial	Reinstatement, verbal warning for 1 case + 1 day suspension for other case, lost wages and benefits, \$40,000 damages
<i>Toronto Transit Commission and ATU</i> , 2006	Repeated stalking, physical touching, denial	Reinstatement, transfer, suspension, length, and compensation to be decided by parties
<i>XL Foods Inc. and UFCW</i> , 2006	Physical touching, isolated incident, remorse and apology	Reinstatement, 4 months' suspension
<i>Alberta and AUPE</i> , 2007	Inappropriate physical touching, isolated incident but prior related behavior, denial	Reinstatement, 15 days' suspension, full compensation with interest for time between dismissal and aware (23 months)
<i>Kitchener (City) and KPFFA</i> , 2008	Numerous incidents, physical touching, repeated sexual touching (one shift), humiliating sexual comments, denial	Reinstatement, suspension for 20 shifts, indefinite demotion, transfer, compensation for lost wages and benefits at lower rank, sensitivity training upon return to work, after which able to apply for captain rank

Source: Canadian Law Library, Labour Arbitration Cases (see reference list for details of each case).

Table 2. Dismissals Confirmed: Grievances Denied

Name of case and date	Type of harassment	Decision
<i>Canadian Broadcasting Corp. and CMG, 1998</i>	Inappropriate touching, sexual assault in form of forcible attempts to kiss, threatened rape comment, denial	Just cause for dismissal
<i>Canadian Airlines International Ltd. and IAM, 2000</i>	Forcible attempts to kiss, repeated sexual touching, sexual talk, intimidating sexual overtures, addressed to several women, denial	Just cause for dismissal
<i>Trillium Health Centre and CUPE, 2001</i>	Forcible attempts to kiss, sexual talk, sexual touching, entrapment, addressed to 2 women, one of whom was an accommodated (vulnerable) employee, denial	Just cause for dismissal
<i>Ottawa-Carleton Regional Police Services Board and OCRPA, 2005</i>	Repeated forcible kissing of 1 woman (element of entrapment), inappropriate sexual language/ innuendo with 4 other women, denial	Just cause for dismissal
<i>Health Employers' Association of British Columbia and BCNU, 2006</i>	Unwelcome sexual touching, kissing and innuendos, sexual harassment of 4 coworkers on multiple occasions, denial	Just cause for dismissal

Source: Canadian Law Library, Labour Arbitration Cases (see reference list for details of each case).

In half of the cases, economic hardship was noted as a mitigating factor. Arbitral reasoning included the loss of income combined with shame for the grievor and his family in a case involving the sending of a pornographic e-mail, plus the loss of the grievor's union executive position (*Westcoast, 1999*); personal hardship due to a grievor's being married with two children and having bought a new home the day he was dismissed (*Manitoba, 2002*); and personal hardship in the case of a 56-year-old grievor who had lost all his savings and had had to move into a smaller apartment, which meant he was now unable to support his elderly mother (*Toronto, 2006*). Less frequent mitigating factors noted by the arbitrator were found in cases where the grievor was deemed to have shown remorse or apologized (*Manitoba, 2002; XL, 2006*) or had taken steps to

rehabilitate himself (*Manitoba*, 2002); where the incident was an isolated one (*Surrey*, 2003; *XL*, 2006); where the harassment was not premeditated or vindictive (*Surrey*, 2003); and where the harassment had no effect on business operations (*Manitoba*, 2002).

To more fully understand how mitigating factors are assessed in the awards (arbitral questions 2 and 3), including their relationship with arbitral decisions on whether the sexual harassment did occur and, if so, how serious it was (question 1), this article continues with a closer examination of three of the awards studied where dismissal was overturned with the substitution of suspension. These three cases were selected on the basis of what we can learn from them; all of them have some elements of interest regarding the use of jurisprudence or the way the mitigating factors were assessed.

In *XL Foods and UFCW* (2006), the employer had dismissed a male assembly line worker in a meat plant for the sexual harassment of a female quality assurance inspector when he grabbed her by the buttocks to move her out of the way of his work. Both parties agreed that the incident occurred but differed as to whether it was sexual harassment. The union argued that it was not, because the jobs the two were doing meant that she was in close proximity to him, he was angry because she kept getting in his way when he was trying to do his job, there was no lewd or sexual language, and there was no groping or rubbing of a sexual nature; finally, the union argued, not all physical touching is sexual. They proposed the following as mitigating factors: the act had not been premeditated, it was an isolated incident, he apologized to the supervisor immediately, and although insensitive his behavior fitted the workplace culture. Overall, the union's position was that the assembly line worker's conduct was not serious enough to warrant discharge.

Usefully for our purposes, the award detailed the established jurisprudence on sexual harassment, including *Janzen v. Platy Enterprises* (1989), which clearly states that in the workplace it is an "abuse of both economic and sexual power" (*XL*, 2006: 7). Even so, the arbitration board noted a typology of sexual harassment "frequently cited in these types of cases" (*XL*, 2006: 7) developed by Aggarwal and Gupta (2000), whom the board quoted verbatim on sexual annoyance, as differentiated from coercive harassment, in which an alleged harasser is in a formal position of authority over the complainant:

Sexual annoyance . . . is sexually related conduct that is hostile, intimidating, or offensive to the employee, but nonetheless has no direct link to any tangible job benefit or harm. Rather, this annoying conduct creates a bothersome work environment and effectively makes the worker's willingness to endure that environment a term or condition of employment. (*XL*, 2006: 7)

After hearing all the evidence and considering the jurisprudence submitted by the parties, the chair of the board in *XL* concluded that although the physical touching "only lasted approximately two seconds . . . despite the layers of

clothing . . . this constituted ‘sexually offensive physical contact’” (*XL*, 2006: 8). So the answer to the first arbitral question was that sexual harassment did occur and that it fell into the less serious sexual annoyance category. However, the jurisprudence had consistently asserted that serious forms of sexual harassment involved improper physical contact (touching, rubbing, forced kissing, fondling) as differentiated from less serious forms (sexual remarks, crude jokes, suggestive words or gestures), with the serious form usually leading to a penalty of discharge and the less serious open to reinstatement. Despite this acknowledgment, the award followed the logic of a judge who had argued that not every physical contact type of sexual harassment means that “the employee will be summarily dismissed. . . . Generally, a single incident of wrongdoing, without any other factors, must be very serious to justify dismissal” (*XL*, 2006: 10). Based on this line of reasoning and Aggarwal and Gupta’s typology, the award concluded by referring to mitigating factors to justify the decision that dismissal was excessive in the circumstances. These factors were listed much as the union had proposed them: this was an isolated incident, the misconduct was not part of a persistent pattern, there were no lewd comments or sexually charged conversation, the grievor had 16 years of service, and the grievor had immediately apologized to the supervisor. Reinstatement was to take effect 21 days after the decision, amounting to a suspension of nearly four months without pay but without loss of benefits.

This award is of interest because of the way it sets out the relevant definitions and jurisprudence (see the award for more detail) and its argument that not all physical touching is serious enough to warrant dismissal. In this particular case, it seems a reasonable conclusion, but the application of Aggarwal and Gupta’s typology to coworker sexual harassment is not always effective in assessing the seriousness of the harassment, depending on how the arbitrator interprets it. Based on the cases reviewed in this study, the typology often reinforced union arguments and facilitated arbitral reasoning that coworker sexual harassment did not fall into a serious category because the perpetrator did not have authority over the women involved (for example, *Manitoba*, 2002; *Saskatchewan and SGEU*, 2001). This assumption ignores the asymmetrical power relations between men and women coworkers that underlie sexual harassment (Zippel, 2008). Paradoxically, in the very few cases where the grievor did have some supervisory power over the victim (for example, *Canadian Airlines International Ltd. and IAM*, 2000; *Kitchener*, 2008), the arbitrators did not judge the sexual harassment as coercive either, making a lesser penalty more likely.

Another point arising from the *XL* case was that, although there was a mention at the beginning of the award that the woman was Filipina and therefore possibly more upset given her cultural background, this aspect, interestingly, was virtually invisible thereafter. The implication is, reading between the lines as it were, that her reaction is partially explained away by her ethnicity, the result, in effect, being a lessening of the seriousness of the incident; this raises the question of both gender and ethnic inequalities as underlying the grievor’s action,

a question left unaddressed in this award. Of interest here is that, in other cases, unions argued that the ethnicity and cultural background of the male grievor was a mitigating factor (for example, *Community Living*, 2000; *Trillium Health Centre and CUPE*, 2001). This raises the question of whether ethnicity can potentially work against women but in favor of men, at least in the assembling of arguments in a just cause case. In the end, the arbitrators in the cases noted did not accept the cultural background of a grievor as a mitigating factor, but, on the other hand, in *XL* the award omitted to state that the woman's Filipino cultural background should not be assumed to lessen the seriousness of the offense. Further, it could be argued that her ethnicity should have been considered as increasing the seriousness of the harassment. Even though Marmo and Queneau (2001) argued against applying different standards according to a harassed person's race/ethnicity, they suggested instead a modified reasonable-person standard (in the context of U.S. cases) that does take account of the victim's "relevant individual and group characteristics" (Marmo & Queneau, 2001: 309).

Moving to another case, in *Community Living South Muskoka and OPSEU* (2000), five female staff members were subjected to repeated sexual touching over a nine-year period in residential homes for mentally challenged people, and after investigation the employer dismissed the grievor. This harassment was very different from that involved in the previous case, as indicated by the manager's evidence, based on the women's reports:

He would try to reach something in the kitchen cupboard above them and in doing so would push his groin into them or brush against their breast. They described other actions that were disturbing and embarrassing enough to make them avoid working with them. (*Community Living*, 2000: 2)

The women were afraid of this harasser, both for themselves and their families, testifying at the hearing only under subpoena, and they had participated in the employer investigation on condition that they remain anonymous. During the first meeting, the female manager described the grievor as "aggressive and glaring across the table in an attempt to intimidate" (*Community Living*, 2000: 2) The union agreed that his behavior was unacceptable, but the major mitigating factor proposed was that he did not know that his behavior was offensive because the women did not tell him. If they had done so, he would have stopped; if he had been advised earlier by management, he would have had the opportunity to stop. Potential rehabilitation was indicated, since after hearing witnesses' evidence at the hearing he had sought professional counseling. His psychologist testified that the case revealed "a common reaction of a group or 'mob hysteria' toward a man of the grievor's age" (*Community Living*, 2000: 5) and that his ethnicity and age should be taken into account. A final mitigating factor argued was a violation of progressive discipline principles, since the employer had already made up its mind to terminate the grievor at the first meeting of the investigation because, at

that time, management members had in front of them allegations of the grievor's abuse of a female client.

The arbitral reasoning was that sexual harassment had occurred repeatedly, noting that although the grievor had no direct control over the women's work, he nevertheless had indirect influence on their employment "because they were afraid to work with him and refused shifts with him, which directly affected their availability to work" (*Community Living*, 2000: 8). Also, when working with him they had to alter the way they dressed and wore their hair, and they had to avoid "hot spots" (*Community Living*, 2000: 8) such as the kitchen so as to avoid any unwelcome physical contact. The grievor had clearly caused a poisoned work environment. With regard to the second and third arbitral questions, the mitigating factors rejected in the award were the allegation of conspiracy against the women, based on the evidence, together with age and ethnicity:

To suggest that the grievor did not know that touching women without their consent is improper is simply absurd. No matter how old-fashioned the grievor might claim to be, there surely has never been a time when a man could improperly touch a woman without her consent. The grievor cannot claim to be ignorant of the impropriety of his actions. (*Community Living*, 2000: 6)

Instead, the major mitigating factor for the arbitration board was the lack of warning given to the grievor, leading to a reduction of the penalty to six months' suspension. The arbitral reasoning focused primarily on the fact that none of the women had made it clear that the grievor's behavior was unacceptable. This was in spite of the complainants' evidence that they had made it clear nonverbally through gestures and through sudden movements to avoid him, and at least once verbally, and their statement, accepted by the board, that they were afraid of him. Indeed, the award had earlier on discussed the jurisprudence and research explaining why women targeted by sexual harassment often refrained from reporting the harasser, quoting verbatim from an earlier case:

Silence can be the natural consequence of a woman's fear of embarrassment at the thought of publicizing an unpleasant and humiliating experience. It can also be motivated by a natural fear of reprisal and the possibility of charges of lying for ulterior motives or having provoked the male employee by conduct that invited sexual advances. (*Canadian National Railway Co. and CBRT & GW*, 1988: 199)

Despite this recognition, in the board's view the employer's lack of action in addressing the long-term poisoned work environment caused by this grievor's harassment was serious enough for the board to decide that the discharge was without just cause, even though it could be argued that if the women were unwilling or unable to inform management of what was happening then it would be difficult if not impossible for the employer to act. This is not necessarily to lessen the employer's responsibility, but it is to say that there is a disturbing strand

running through this arbitral reasoning that borders on a “blame the victim” mentality. The board expanded on the problems of women remaining silent in their reasoning that if the grievor had known his behavior to be offensive, he would have stopped. But it is difficult to reconcile this with previous text in which the board had stated clearly that “The grievor cannot claim to be ignorant of the impropriety of his actions” (see the quotation in full above), when they rejected mitigating factors of age and ethnicity. The board continued by pointing out that if the employer had trained the staff members in their right to a harassment-free workplace they would have had the knowledge and skills to report the grievor’s behavior earlier. He would have stopped harassing them, and thus the long-term deterioration in the work environment would have been averted. This is not convincing, according to the facts of the case. Also, the board reasoned that the women would have been better able to deal with the potential return of the grievor upon his reinstatement (they testified that they were too afraid to work with him in the future). While any training of women staff members in their rights is better than none at all, this line of reasoning appears to ignore previous references in the award to the barriers to underreporting; furthermore, it clearly misunderstands the workplace power relationships that assert gender roles over work roles (Hodges, 2006; Wilson & Thompson, 2001).

The unique aspect of this case among those studied here is that once the board’s decision to reduce the penalty to suspension was made, the board then moved to deal with their next decision, that the grievor could not be reinstated as it was clear that the complainants could not work with him because they were afraid of him and shift work made it difficult to schedule their avoidance of him. At this point, the award shifted to a discussion of the appropriate level of damages to compensate the grievor for not being able to return to work (because employment relations were not viable). This technical consideration took up about one-third of the text, in which the interests of the harassed women became virtually invisible. In the end, the board awarded the grievor one year’s wages in lieu of six months’ suspension. Noted in the award was a dissenting board member’s decision in favor of six months’ compensation, less any amount of income earned from any source during the year identified by the majority decision.

The last case to be reviewed in this section is *Toronto Transit Commission and ATU* (2006), in which a female clerk alleged repeated harassment by a Wheel Trans operator. The arbitrator accepted that the grievor’s following her home on three occasions after a late night/early morning shift constituted sexual harassment, but concluded that previous conversations and an invitation did not. The complainant also stated that he had physically touched her during a work interaction and then followed her again for a fourth time after his dismissal. However, the arbitrator did not agree that these last two incidents constituted sexual harassment, reasoning that the grievor’s following her home three times had caused her to be in such an emotional state that she had imagined both of the subsequent incidents. The grievor denied any harassment at all, including

following her home. The mitigating factors proposed included the grievor's seniority, the difficulty of his finding work at his age, and economic hardship, but the major one was the employer's taking into account a previous sexual harassment-related misdemeanor when deciding upon discharge, in violation of the sunset clause.

Although the arbitrator did decide that the grievor's following the complainant home late at night constituted serious sexual harassment, it is proposed here that she nevertheless underestimated its level of seriousness, given that the behavior would be identified elsewhere as predatory or as stalking with its associated fear on the part of the female victim (see, for example, *Miracle Food Mart and UFCW*, 1994; *Trillium*, 2001). This meant that a number of offenses listed by the employer now became innocent or "non-culpable," and this was subsequently compounded by the arbitrator's conclusion that there was a "flagrant violation by the employer to rely upon and fail to destroy [the] previous record" (*Toronto*, 2006: 1). The combination of a now limited occurrence of sexual harassment with the employer's failure to properly implement the progressive discipline laid down by the collective agreement formed the basis of reasoning leading to the upholding of the grievance. This thread was continued in the award's consideration of the economic hardship that dismissal would create in a 56-year-old person. It was argued that the age of the person

renders the likelihood of obtaining comparable employment dismal. To date, he has only been able to work intermittently. Indeed the economic consequences of his discharge have been devastating. Where formerly he supported his aged mother, he can no longer do so. (*Toronto*, 2006: 16)

Weighing up all these mitigating factors, the award concluded that the dismissal was unjust, and ordered reinstatement, with the grievor's transfer to another division to avoid contact with the complainant. The seriousness of the misconduct and his continued denials (at least until the latter stages of the grievance, when he admitted to some incidents but not all of them) and his lack of remorse warranted "a severe response" (*Toronto*, 2006: 16), however. The arbitrator noted the length of time between the dismissal and the decision—three years—and stated that this time was too long for a suspension but left it to the parties to come to an agreement on placement and the amount of compensation that would be appropriate within the parameters set out in the award.

This case again illustrates the importance of progressive discipline in arbitrations, and in particular it illustrates how violating a sunset clause in a collective agreement can form a powerful mitigating factor, in turn preventing the establishment of a pattern of sexual harassment, and therefore lessening the seriousness of the harassment. The case also provides a good example of how significant economic hardship can be seen by arbitrators as a strong mitigating factor. Since the decision in the end is a matter of balancing the relative influence of both mitigating and aggravating factors, the award illustrates how, when the

seriousness of the sexual harassment is underestimated and is placed alongside a heavy weighting of any mitigating factors present, the reasoning is likely to end in the overturning of a dismissal.

In the cases discussed in detail so far, the overriding interest in the rights of accused male harassers, and the impact of the arbitral decision on them, was in complete contrast to the significant marginalization of the female complainants in the way the arbitration process played out. A feminist lens allowed for an appreciation of the near invisibility of women's interests, an echo of the gender invisibility in workplace practice and in social policy affecting women (see Briskin & McDermott, 1993). Next, three cases in which the grievances were denied are examined in order to see what is different about them.

Dismissals Confirmed: Grievances Denied

The mitigating factors argued by the union in these cases were broadly similar to those outlined in the arbitrations in which the penalty of discharge was overturned; the real difference was in the weight the arbitrators placed on the claimed mitigating factors once the nature and seriousness of the sexual harassment was established. As demonstrated in the three cases detailed below, although corrective discipline was, as we would expect, carefully considered, the precise implementation of progressive discipline, particularly with regard to formal and informal warning of inappropriate behavior, was not given so prominent a place as the seriousness of the conduct and the attitude of the grievor.

In *Canadian Airlines and IAM* (2000), the employer dismissed a male lead hand for repeated physical sexual touching, attempted kissing, sexual talk, and intimidating sexual overtures. One woman had filed a complaint and said it was on behalf of her fellow workers, who had also been harassed while doing their airplane cleaning job, but who had been afraid of coming forward in the investigation. Two of the woman's coworkers were summoned to testify and corroborated her evidence. As well as fearing for their jobs, the complainant said, the women were scared at work and afraid that the harassment might escalate to rape. The mitigating factors argued by the union included the common occurrence of sexual banter in the workplace; the absence of progressive discipline, in that there was no formal warning and therefore the grievor had no chance to correct his behavior; plus his community service work and his family situation. This case was unusual in the data set, since the union had participated in a joint investigation with the employer and the union representative had been summoned as an employer witness. Because the investigation report had established sexual harassment, it would have been difficult to attack the credibility of the complainant and the 17 other witnesses the union representative had interviewed during the joint process. Interestingly, then, the union's central argument was a procedural one, based on jurisprudence: that complaints of sexual harassment required a higher degree of probability than the standard one enshrined in the arbitral

principle of balance of probabilities. This was accepted by the arbitrator. Nevertheless, after a careful review of the evidence, the conclusion with regard to the first arbitral question was that a very serious type of physical sexual harassment had occurred.

Emphasizing that contrition was a cornerstone of consideration of reinstatement, and given that the grievor had denied the allegations throughout, even at the arbitration hearing, the arbitrator concluded that it was impossible to begin to rebuild the employment relationship. Moreover, if there was no contrition, there was no guarantee that the sexual harassment would not recur “if an offender as a starting point will not admit his wrongdoing” (*Canadian Airlines*, 2000: 9). A final argument was that character references did not diminish the incident or mitigate the denial of misconduct.

In contrast to arbitrators in cases analyzed above, it is notable that this arbitrator did not see the lack of formal warning as so important. It is instructive to compare this case with *Community Living* (2000), where the lack of formal warning was seen as the major mitigating factor justifying a reduction in the penalty, even though the circumstances were very similar to those involved in the case at present under discussion. In both cases, the sexual harassment was seen to be serious misconduct, several women were involved over a considerable time period, they were afraid of the grievor, he denied all wrongdoing, and the arbitrators decided that reinstatement was impossible. However, in the *Community Living* case, the fact that the employer had not formally warned the grievor was deemed a major mitigating factor, and, moreover, this criticism extended to the failure of the women to report the harassment. This led to a reduced penalty for the grievor, that of suspension, but because reinstatement was not seen as a viable remedy, the grievor was awarded one year’s wages as compensation instead. In contrast, in *Canadian Airlines* (2000), the fact that the employment relationship could not be rebuilt was the final step in a line of reasoning leading to the dismissal of the grievance, and the lack of warning did not feature as important at all in the face of the serious misconduct and the grievor’s denial that any harassment had taken place.

In *Trillium Health Centre and CUPE* (2001), an employee was dismissed for sexually assaulting two women who worked in a hospital kitchen. As in some other cases studied, there was one complainant, but other women testified to support her allegations of sexual harassment including attempted kissing, grabbing, other physical sexual touching, and vulgar, sexual language. The complainant was followed to a small back room when the incident occurred, and another woman, a “special needs person who [was] accommodated in her employment by her employer” (*Trillium Health Centre*, 2001: 4), testified she was in an elevator when the grievor assaulted her, so there was an element of entrapment, as in *Canadian Airlines* (2000), if not stalking. The mitigating factors argued by the union were as follows: that the dismissal was discriminatory based on the grievor’s age and ethnic background; that consideration of the investigatory

notes used by the employer in its decision to discharge should be prohibited because of the sunset clause in the collective agreement; and that the grievor had seniority and a clean record (presumably as a result of the sunset clause). However, after an assessment of the evidence and the credibility of the witnesses, the award concluded that the grievor had sexually harassed and assaulted the complainant as alleged, and that this was the sole reason for the discharge, thus dismissing the union's main mitigating factor of discrimination.

Arbitral reasoning on the sunset clause is instructive in the light of *Toronto* (2006), where it was a major mitigating factor in the reinstatement of an employee who had stalked a female coworker. In the case at present under discussion (*Trillium*, 2001), the union objected to the inclusion of evidence from the employer's investigatory notes of interviews concerning a prior incident, because of the sunset clause. Even though the arbitrator in this case acknowledged that the sunset clause meant the evidence was inadmissible as part of the grievor's record, the role of the arbitrator was, in the arbitrator's own words, to "sort through the evidence and determine what evidence is cogent and what evidence should be ignored or given little weight" (*Trillium*, 2001: 5). Having thus circumvented the sunset clause, the award upheld the discharge based primarily on the seriousness of the offense, recognized as predatory and aimed at vulnerable women, which was deemed to outweigh any mitigating factors submitted:

I am satisfied that sexual harassment falls within the same category of serious misconduct as theft, and that discharge is *prima facie* the appropriate penalty even in the case of a first offence. . . . The grievor is a middle-aged man with more than 23 years' seniority and a clean record. These are factors which are generally considered to be mitigating. But age, seniority and a clean record do not constitute a licence to sexually harass or assault co-workers. . . . I am satisfied that [the complainant's] discomfort should have been obvious and that she attempted to discourage the grievor. I am satisfied that the grievor engaged in a premeditated course of sexual predation of particularly vulnerable co-workers. The grievor was aware of the Employer's policy regarding sexual harassment. The grievor has refused even to acknowledge much less apologize for his misconduct. On the contrary, when he testified he tried to portray himself as an innocent victim of harassment and unwanted touching. There is no hint of any corroboration of these assertions, and I do not believe them. Finally, there is no evidence that the grievor could be returned to employment in this workplace in a position where he would have no contact with his victims, or where he would not have the opportunity to offend again. I am not satisfied that there is any basis for mitigating the penalty of discharge in this case. (*Trillium*, 2001: 8)

A knowledge and understanding of sexual harassment as involving unequal, gendered power relations at work is further indicated in this award by a careful assessment of female witnesses' credibility in the award, with the explanation that

“not immediately report[ing] the various incidents to the Employer is consistent with classic sexual predation and a victim’s reaction to it. . . . There is nothing to suggest [the witnesses’] are exaggerating or that they should not be believed” (*Trillium*, 2001: 6). As noted above, the more traditional arbitral interpretation has been to deem the lack of communication by sexually harassed women with either the grievor or management as a strong mitigating factor in favor of the grievor in the assessment of the penalty (see, for example, *Community Living*, 2000; *Saskatchewan*, 2001).

The last case discussed in this section is *Ottawa-Carleton Regional Police Services Board and OCRPA* (2005), in which the arbitrator pursued a line of reasoning similar to that in the previous case. The case involved two civilian employees. A male coworker had sexually assaulted a woman while alone with her in a locked storage room; this included attempted kissing on three occasions, despite her pulling back and trying to get away. During the investigation, two other civilian female employees and two female police officers had reported sexual innuendo and personal comments, the civilian employees also alleging more serious sexual and vulgar language. Many mitigating factors were submitted by the union: there was no clear and cogent evidence for sexual assault; the complainant had misperceived the situation; she had led the grievor on so that he did not know his behavior was unwelcome; workplace banter was often sexual; the employer investigation was unfair as the grievor denied sexual assault and it was unfair to accuse him of showing no remorse; and, finally, progressive discipline was incorrectly implemented because this was the first occurrence of harassment. This is a long and complicated case (the award was 44 pages in length), and most of it is devoted to establishing the credibility of the witnesses. As is often the case in sexual harassment, the incident occurred in a private and unobserved place, and corroboration is difficult to obtain (Sev’er, 1999). For the purposes of this article, the main point to be made is that the arbitrator, after concluding that the credibility of the complainant and other female witnesses was sound and the grievor’s evidence was not, decided that there was just cause for discipline and continued by assessing mitigating and aggravating factors in order to decide on the appropriate penalty. The award cited the *prima facie* text, noted above, from *Trillium Health Centre* (2001) as a means of leading into a discussion of the seriousness of the harassment. Citing relevant jurisprudence, it was concluded that there was a “high degree of probability” (*Ottawa*, 2005: 33) that the grievor did sexually assault the complainant.

After considering the jurisprudence submitted by the parties on potential mitigating factors, the arbitrator rejected all of them as either not evident in the case or not strong enough to outweigh the seriousness of the misconduct; also, very importantly in this case and in consistency with *Trillium Health Centre* (2001), s/he saw the grievor’s attitude of showing no remorse and blaming the women concerned as predicting no possibility for rehabilitation:

Given no apology for his inappropriate behavior [to complainant], no insight concerning his own behavior towards women, no remorse for his conduct but, rather, he blames female co-workers for it, the Employer's conclusion, that there does not exist assurance that the grievor's misconduct will not re-occur in the future is not unreasonable. (*Ottawa-Carleton*, 2005: 43)

This award is noteworthy because it followed *Trillium Health Centre* (2001) in establishing that, even if the harassment concerned is coworker sexual harassment, its seriousness merits dismissal without the need to apply progressive discipline, even if the harassment is a first offense and the harasser has long service with the employer. Consequently, the weighing up of mitigating and aggravating factors makes it less likely that a dismissal will be overturned, particularly if the behavior is determined to be sexual assault, the grievor has denied any wrongdoing, and the grievor blames the female complainants.

DISCUSSION AND CONCLUSION

The analysis of the cases discussed above revealed a significant difference between the reasoning in the awards that applied traditional arbitral principles in a conventional way, and the reasoning acknowledging that the nature of sexual harassment, its seriousness, and its impact on the complainants and their female colleagues merited a creative, more independent line of reasoning. Examining these arbitrations using a feminist lens, one that recognizes gendered power relationships in the workplace (as in Wilson & Thompson, 2001; Zippel, 2008), enabled new insights as to the apparent gendering of traditional arbitral jurisprudence and principles as well as their interpretation.

First, the definition of sexual harassment in the majority of the cases studied had the effect of deeming coworker sexual harassment as less serious than in cases where formal, organizational power is involved. The oft-cited jurisprudence ignored the gender inequality underlying sexual harassment and downplayed the abuse of sexual power noted in the literature (Hodges, 2006; Zippel, 2008) and highlighted in the Supreme Court case *Janzen v. Platy Enterprises* (1989). Second, women's rights were marginalized in comparison to those of their male harassers, sometimes resulting in lengthy discussions of compensation for an overturned dismissal and the eventual invisibility, in effect, of the female complainants.

Third, the traditional interpretation of the mitigating factors of provocation, progressive discipline, and economic hardship often appeared to be gendered. For example, there was a resonance between the traditional mitigating factor of provocation and blame-the-victim type themes identified in the cases studied, such as women being said to lead their harassers on by participating in sexual banter and inviting men's attentions. This resonance in turn dovetailed with some well-established principles of progressive discipline. For example, the expectation that an employer must ensure that employees know and understand the rules can be related to union counsels' arguments that an alleged perpetrator was not

aware that he had harassed the complainant(s). This position was often bolstered by the argument that had the grievor known he would have stopped, but the female complainants had not told him that his behavior was offensive. Moreover, the combination of the two mitigating factors—not knowing that sexual harassment is occurring (because no-one has told the man) and provocation—can be seen as in mutual reinforcement with the Canadian human rights legal standard for establishing sexual harassment: that the perpetrator should know or should have reasonably known that the behavior was unwelcome. It is argued here that the complex overlaying of these legal principles constituted a potentially powerful influence toward the reasoning that there were very strong mitigating circumstances, often working against women complainants and protecting male coworkers who had, nevertheless, been found by the arbitrator to have seriously sexually harassed their female coworker(s).

Furthermore, the central arbitral principle of progressive discipline, requiring formal warning with the chance of improvement before dismissal, was particularly significant. The employer's responsibility for ensuring a harassment-free workplace has to be placed in the context of the strict arbitral rules surrounding dismissal. The question arises of how best to interpret the need for fair treatment of the accused harasser without the arbitral tendency to conflate the responsibility of the employer to issue a formal warning with the responsibility of the complainant to always inform the alleged harasser that the harasser's behavior is unwelcome and to file a formal complaint if it does not stop. As we saw in the *Community Living* award (2000), this conflation can result in arbitrators' ignoring the generally accepted barriers preventing women from telling their harassers to stop, or reporting their behavior to management. In the cases reviewed for this study, these barriers included intimidation, potential or actual hostility, fears for job security, humiliation, embarrassment, or wanting to fit in (consistent with Fitzgerald, Swan, & Fischer, 1995; see also Welsh & Gruber, 1999), and they are seen here as reflecting the difficulties of working in what Wilson and Thompson (2001: 65) called a "structure of gendered power." In addition, it is significant that progressive discipline rules are based on long-established arbitral jurisprudence primarily developed in the early, traditionally male-dominated, unionized workplaces such as manufacturing and mining.

Turning to economic hardship as a mitigating factor, while it is fair to consider the overall circumstances of a person's dismissal, and we should be mindful of the history of unions formed to prevent employers' use of arbitrary hiring and firing, it is, nevertheless, a gendered principle, since, as shown in the cases discussed above, it is based on the male breadwinner model. Wage solidarity is important, but the labor movement's history of advocacy and negotiation for a living wage to allow men to support their wives and families has been identified as a countervailing influence in unions' pursuit of equal pay for women (McFarland, 1979). The tension between workers' interests in general (class) and women's interests in particular (gender) in the labor movement and in industrial relations

has been noted by feminist scholars such as Acker (1989) and Briskin and McDermott (1993) in the context of the negotiation of pay equity. This study provides some new insights into the way in which the implementation of sexual harassment legislation in a traditionally male-dominated area of industrial relations, namely, arbitrations, often works to reproduce gendered inequality in the workplace by prioritizing the rights of a male harasser over the interests of a female coworker. The main contribution of this study is to highlight the embeddedness of gendered arbitral principles as an explanatory mechanism; as such, it differs from and complements earlier arbitration studies by Aggarwal (1991), Haiven (2006), and Taylor (1998), while building on Zippel's work (2008) and adding to the industrial relations literature on dispute resolution.

From a policy and practice perspective, it is instructive to ask whether the traditional interpretation of the need for a formal warning works effectively in sexual harassment cases if women are unlikely to confront the harasser or report to management. Also, any informal attempts at the organizational level, such as employee counseling or joint union-management attempts to resolve questions of harassment, in the cases studied did not count as formal warnings, and this worked eventually to protect the interests of the male grievor; ultimately, it also worked against the interests of the female complainant. In only a few, more creative, awards was serious sexual harassment reasoned to be equivalent to theft in the arbitral sense and, as such, requiring no application of progressive discipline even under conventional jurisprudence (*Ottawa-Carleton*, 2005; *Trillium*, 2001). The other practical question arising from this study is whether the sunset clause should be applied so strictly in sexual harassment cases, since it often prevented the establishment of a pattern of serious misconduct, artificially inflating the weight of the clean record and long service mitigating factors. Only one arbitrator adopted reasoning that circumvented the sunset clause (*Trillium*, 2001).

Arbitrations in Canada were designed to resolve disputes without the rigidities of the court system, and so the legislation governing them is largely about procedure rather than about scope or content. Also, the problems highlighted above mostly concern the interpretation of the law rather than the letter of the law, so that change through legal reform is difficult. Nevertheless, there are a few options that could be considered by Canadian governments to improve the protection of women from coworker sexual harassment. First, federal and provincial jurisdictions could make it mandatory under their labor law that arbitrators apply all relevant employment law, with specific reference to the human rights codes and all sexual harassment cases, including coworker cases, rather than relying on current judicial precedent, which could be interpreted to apply only to cases where the grievance has been filed by a woman claiming sexual harassment (see *Parry Sound (District) Social Services Administration Board v. OPSEU*, 2003). Second, based on this study, sexual harassment arbitration cases demand a different, nontraditional application of jurisprudence, so that the regulations covering arbitrations under labor legislation could prohibit the application of the

sunset clause in sexual harassment cases, and limit the use of the absence of a formal warning as a mitigating factor. Although this would likely be seen as a radical move in the arbitrator community, as it would regulate content instead of just procedure, Mitchnick and Etherington (2006) do point to a growing trend of refuting union arguments for reinstatement based on a clean record if the record features prior discipline that is protected by the sunset clause. Third, it is clear from this study that more arbitral training is needed on the causes and consequences of coworker sexual harassment, as well as on the gendered nature of traditional discipline jurisprudence. Most jurisdictions legislate for tripartite agencies to oversee the training, standards, and registration of qualified arbitrators. This new sexual harassment training could be added to their role by the responsible minister, buttressed by a legal requirement for arbitral training in all relevant employment legislation, listed in the regulations to include the human rights code with special reference to sexual harassment and to coworker sexual harassment in particular.

We must not lose sight of the right of the accused to be heard in a fair forum and the responsibility of unions to represent the interests of the grievor. Even so, based on the present study, the rights of many women to a harassment-free workplace have been compromised by the Canadian arbitration process through the embeddedness of gendered jurisprudence and its interpretation. Private mediation is a realistic alternative in the United States (Alexandrowicz, 2002; Harkavy, 1999), but its suitability for sexual harassment has been questioned because of a too great power imbalance between the two parties, one of whom is usually a woman (Irvine, 1993), and the option is not readily accessible to Canadian unionized women for whom arbitration is the legal route available. That said, there is a growing interest in Canada in alternative dispute resolution processes such as mediation-arbitration (Hebdon & Brown, 2008), which could, in theory, be applied to sexual harassment cases and would introduce an informal, collaborative stage aimed at avoiding arbitration. A more proactive and positive role for unions is important as well (Haiven, 2006; Hodges, 2006; O'Melveny, 2001), for example, including more prevention in practice and participation in joint union-management investigations. The gaining of some redress by women through access to workers' compensation on the grounds of psychological harassment is another channel being developed in Canada, albeit slowly (Lippel & Sikka, 2010); this would be open to nonunionized as well as unionized women. For now, however, this study indicates a need to seriously consider arbitral reform so that labor arbitration, which is an important channel of redress, unequivocally supports unionized women's rights to a harassment-free workplace.

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