

CHAPTER 7

ARBITRATION OF SEXUAL HARASSMENT

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Introduction

The Supreme Court's 1986 ruling in *Meritor Savings Bank v. Vinson*¹ that sexual harassment violates Title VII of the Civil Rights Act confirms the creation of a wholly new federal right—one of the outstanding, new legal protections of this generation. For the first time in our history, American law guarantees that employees (women especially) need not tolerate sexual abuse in the workplace. This achievement is all the more remarkable because Title VII's prohibition of sex discrimination was not intended by Congressional proponents of civil rights legislation but was an ironic, unintended by-product of the failed strategy of opponents of that legislation.²

What took so long? Why has it taken until virtually the end of the 20th century for American law to recognize that employees are entitled to be free of sexual assaults, indecent propositions, sexually abusive language, and other indignities as the price of earning a livelihood? That proposition seems so self-evident that one might have expected it to have been expressed by common law judges long ago in the evolving law of torts.³ One might have expected it to have emerged from the thousands of arbitration cases involving discipline under the "just cause" standard or the hundreds of arbitration cases involving discrimination based on sex. Yet, for reasons that may reflect little credit on the judiciary

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¹477 U.S. 57, 40 FEP Cases 1822 (1986).

²*Id.* at 1825.

³*See, e.g.,* Salley v. Petroland, Inc., 6 IER 635 (W.D. N.C. 1991), holding that an employee may not recover against her corporate employer on the basis of a tort claim that she had been sexually harassed by her supervisor, for the reason that under North Carolina law a supervisor is viewed as a "co-employee" whose torts may not be imputed to a corporation. *Compare* Class v. New Jersey Life Ins. Co., 53 FEP Cases 1583 (N.D. Ill. 1990).

or arbitration, recognition of sexual harassment as a legal wrong came in the mid-1970s as a belated interpretation of Title VII.

If arbitrators have not led the way in articulating workplace protection against sexual harassment, in the last decade or so they have readily accepted the principle that sexual harassment violates a contract's prohibition against sex discrimination and, more commonly, that an employee who engages in sexual harassment may properly be disciplined under the "just cause" standard. Several recent articles have reviewed and classified the main patterns of arbitration cases involving sexual harassment.⁴

Questions for Arbitrators

With the statutory protection against sexual harassment settled under Title VII, this may be an appropriate time to examine three central and closely related questions that arise in the arbitration of sexual harassment cases:

1. Should arbitrators apply the "external law"—specifically Title VII's definition and standards—in deciding sexual harassment cases?
2. Is arbitral knowledge of the "law of the shop" adequate to deciding sexual harassment cases?
3. Is the arbitration forum unique in giving an alleged sexual harasser the benefit both of a due process hearing and the presumption of innocence?

Application of External Law

"Sexual harassment" is a term of art—a statutory concept that derives from an interpretation of Title VII's prohibition against sex discrimination. Indeed, the term "sexual harassment" was unknown in judicial, arbitration, labor relations, and feminist literature before the mid-1970s.⁵ The EEOC and courts have not only fashioned the lineament of sexual harassment but have also given it detailed, substantive meaning. The EEOC's 1980 guidelines⁶ and the 1986 *Vinson* decision have created and

⁴Aggarwal, *Arbitral Review of Sexual Harassment in the Canadian Workplace*, 46 ARB. J. 4 (1991); Nowlin, *Sexual Harassment in the Workplace: How Arbitrators Rule*, 43 ARB. J. 31 (1988); Nelson, *Sexual Harassment, Title VII, and Labor Arbitration*, 40 ARB. J. 55 (1985).

⁵Some authorities attribute formulation of the concept itself to Lin Farley in her book, *Sexual Shakedown: The Sexual Harassment of Women on the Job* (New York: McGraw Hill, 1978).

⁶45 Fed. Reg. 74,676 (1980).

defined a new federal right. Until now labor arbitration has played a relatively minor role in adjudicating sexual harassment cases.⁷

From the earliest administrative and judicial experiences with sexual harassment under Title VII, there have been subtle problems of definition. These problems were addressed with considerable finesse in the EEOC's 1980 sexual harassment guidelines that were later approved in *Vinson*. The EEOC's definition might be reduced to three concepts:

- *Respect*. Employees are entitled to complete respect for their person and dignity on the job. They are entitled to be free of any kind of sexual abuse or indignity.
- *Unwelcomeness*. Conduct constitutes sexual harassment only when it is unwelcome to the recipient.
- *Context*. Whether conduct is unwelcome must be determined in the factual circumstances of each case.

Applying this definition, the EEOC and federal courts recognize that sexual harassment falls in two broad categories of cases: *quid pro quo* and hostile working environment cases. *Quid pro quo* cases involve demands for sexual favors in exchange for employment benefits; these cases rarely reach arbitration because they usually involve relations between supervisors and subordinates. Hostile working environment cases are far more common in labor arbitration. The Supreme Court in *Vinson* said that a "hostile or abusive" work environment is created by conduct that is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"⁸ In arbitration the typical case involves harassment of a female employee by a male co-worker who is disciplined and then grieves the fairness of his discipline.

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. For three reasons it is appropriate (and, I believe, necessary) to incorporate

⁷The first reference I have found in Academy Proceedings to the term "sexual harassment" is in a 1980 paper by Bill Murphy, who concluded presciently that "the arbitration forum in sex-harassment cases for many reasons cannot be considered equivalent to the judicial one, but it does seem clear that there are situations in which it is appropriate and may play its subordinately useful role." Murphy, *Arbitration of Discrimination Grievances*, in *Decisional Thinking of Arbitrators and Judges*, Proceedings of the 33rd Annual Meeting, National Academy of Arbitrators, eds. James L. Stern and Barbara D. Dennis (Washington: BNA Books, 1980).

⁸*Supra* note 1, at 1827.

the federal law's definition and concept of sexual harassment into the interpretation of collective bargaining agreements. I emphasize that arbitrators should incorporate only Title VII's definition and concept of sexual harassment, not Title VII remedies. This modest proposition is not without problems and is unlikely to persuade those who maintain, rigidly, that external law has no place in arbitration.

1. *It is what the parties intended.* Incorporating the federal definition of sexual harassment into arbitral decision making is appropriate because in most cases that is what the parties intended. Thus, incorporation of federal law is consistent with traditional principles of construction. The labor-management community understands that the definition and standards of sexual harassment derive from the 1980 EEOC guidelines, as endorsed and embroidered by the federal courts. There simply is no other independent meaning in American law or labor relations. Sexual harassment cases arise under a labor agreement in two main ways: when an employee, usually female, grieves that sexual harassment violates a contract's prohibition against sex discrimination, and when an alleged sexual harasser, usually male, challenges his discipline for sexual harassment under a "just cause" provision. Unless the parties to a labor agreement have expressed an intention not to follow the federal definition of sexual harassment, it is reasonable to assume that they intended to incorporate federal law of sexual harassment when sexual harassment issues arise under their contract. This view respects the arbitrator's quintessential role as "proctor of the bargain . . . to effectuate the intent of the parties."⁹

2. *It harmonizes arbitration with federal policy.* The case is compelling for harmonizing arbitral decision making with the federal definition and standards of sexual harassment. Sexual harassment is a subject of great public interest as well as one of unusual sensitivity. To some it is a transcendental subject that defines the kind of society we are and aspire to be.

While there may be merit in Ted St. Antoine's notion that the arbitrator is merely the "official reader"¹⁰ of a labor agreement whose jurisdiction is circumscribed by the contract, the failure of

⁹Alexander v. Gardner-Denver, 415 U.S. 36, 7 FEP Cases 81 (1974).

¹⁰St. Antoine, *Discussion: The Role of Law in Arbitration*, in *Developments in American and Foreign Arbitration*, Proceedings of the 21st Annual Meeting, National Academy of Arbitrators, ed. Charles M. Rehemus (Washington: BNA Books, 1968), 77.

arbitrators to follow the federal definition and standards of sexual harassment might cause some to ask whether the national policy favoring arbitration should be reconsidered if that policy fails to accommodate other urgent national policies. The federal law of sexual harassment applies to all employers and employees, union and nonunion alike. It would be a crude and needless anomaly for labor arbitration to disregard the emerging federal law of sexual harassment.

When the Supreme Court ruled in *Gardner-Denver* that arbitration was not preclusive of an employee's right to seek relief under Title VII, it doubtless feared that labor arbitrators might fail to apply the same Title VII standards that the EEOC and federal courts apply.¹¹ It was concerned that minority grievants might be denied statutory rights by ill-informed arbitrators in a fact finding process that the Supreme Court called "informal."¹²

Yet, in famous footnote 21,¹³ the Court left the door open for the lower federal courts, on a case-by-case basis, to accord "great weight" to arbitration awards. Incorporation of the federal standards of sexual harassment in arbitral thinking would provide appropriate justification for the federal courts to defer systematically to arbitration.¹⁴ That, in turn, might assure speedier adjudication of sexual harassment cases, eliminate the need for duplicative administrative and judicial proceedings, and, in the last analysis, enhance the role of arbitration.

3. *It is consistent with Misco and Gilmer.* The recent *Misco*¹⁵ and *Gilmer*¹⁶ cases suggest the Supreme Court is looking closely at the relationship between the federal policy that encourages labor arbitration and substantive federal and state employment policies. In *Misco* the Court reiterated its traditional support for arbitration, subject to the significant caveat that an award inconsistent with a "well-defined, dominant, explicit public policy" need not be enforced.¹⁷ In *Gilmer v. Interstate/Johnson Lane Corp.*,¹⁸ decided in May 1991, the Court upheld an agreement between a registered securities representative and a brokerage

¹¹*Supra* note 9.

¹²*Id.*

¹³*Id.*

¹⁴It might also be the occasion for the Supreme Court to reconsider *Gardner-Denver's* broad sweep.

¹⁵*Paperworkers v. Misco*, 484 U.S. 29, 126 LRRM 3113 (1987).

¹⁶*Gilmer v. Interstate/Johnson Lane Corp.*, 111 S.Ct. 1647, 55 FEP Cases 1116 (1991).

¹⁷*Supra* note 15, at 3119.

¹⁸*Supra* note 16.

firm to abide by the New York Stock Exchange's Rules, including NYSE Rule 347, which requires arbitration of "[a]ny controversy . . . arising out of employment or termination of employment." Gilmer was discharged and filed suit under the Age Discrimination in Employment Act (ADEA). His employer responded with a motion to compel arbitration. Relying on *Gardner-Denver*, the district court denied the motion to compel arbitration and held that the promise to arbitrate all employment issues under NYSE Rule 347 did not preclude a suit under the ADEA. The Fourth Circuit reversed, and the Supreme Court, resolving a conflict between the circuits, affirmed the Fourth Circuit. Writing for the Court's 7-2 majority, Justice White repeatedly referred to the federal policy that favors enforcement of agreements to arbitrate. There is, he said, no bar to enforcement of agreements to arbitrate statutory rights, unless Congress "has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."¹⁹ Rejecting several objections to arbitration of statutory ADEA claims, the Court said the following:

[I]n our recent arbitration cases we have already rejected most of these arguments as insufficient to preclude arbitration of statutory claims. Such generalized attacks on arbitration "res[t] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would be claimants," and as such, they are "far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes."²⁰

The Court in *Gilmer* was careful to distinguish *Gardner-Denver*, inter alia, on the grounds that it did not involve an express agreement to arbitrate statutory claims, it arose under a collective bargaining agreement, it involved union representation (with the inherent potential for conflict between individual and group interests), and it did not arise under the Federal Arbitration Act. Thus while *Gardner-Denver* easily survives, the *Gilmer* decision reveals a preference for the arbitration of discrimination claims that have a statutory counterpart, in contrast to the mild anti-arbitration language of *Gardner-Denver*. It would not be hard to adapt the dicta of *Gilmer* to a ruling that arbitration under a collective bargaining agreement should be accorded deference, if not a preclusive effect, in sexual harassment cases.

¹⁹*Id.*

²⁰*Id.*

What is the likely significance of arbitral adherence to the federal standards of sexual harassment? Would it make a difference to the outcome of arbitration decisions? Plainly it would. Three important examples come to mind:

1. The core of the federal concept of sexual harassment is that a sexually hostile work environment is a form of sex discrimination from which workers are entitled to protection, with the corollary that a worker who creates such a hostile environment can be disciplined. Without relying on this highly articulated concept, arbitrators could apply their own ideas of what constitutes sexual harassment, and that might lead to a proliferation of definitions and standards.

2. Until very recently federal courts have evaluated complaints of sexual harassment from the perspective of the law's classical "reasonable person" or a hypothetical "objective standard."²¹ The Ninth Circuit in a leading case has adopted a "reasonable woman" standard to replace the familiar common law standard of the "reasonable man" and "reasonable person."²² It is unclear what the "reasonable woman standard" means, let alone whether it will make a real difference to the outcome of cases; it is too early to know. Moreover, it has not been adopted by the Supreme Court. But this refinement by the Ninth Circuit is illustrative of changing aspects in the federal law of sexual harassment that arbitrators need be alert to.

3. The federal courts have ruled that Title VII prohibits discrimination based on sex only as a matter of gender and does not prohibit discrimination based on sexual preference or lifestyle.²³ If arbitrators adhere to the federal judicial interpretation of Title VII, employees who file grievances alleging sexual discrimination because of sexual orientation would not prevail. They might have protection under some other contract theory, however.

To be sure, incorporating Title VII's sexual harassment standards into arbitral reasoning carries a risk: The more explicit the incorporation of federal law into arbitration deci-

²¹See, e.g., *Reynolds v. Atlantic City Convention Center Authority*, 53 FEP Cases 1852 (D. N.J. 1990); *Robinson v. Jacksonville Shipyards*, 54 FEP Cases 83, 86-87 (M.D. Fla. 1991).

²²*Ellison v. Brady*, 54 FEP Cases 1346 (9th Cir. 1991). See *Austen v. Hawaii*, 55 FEP Cases 685, 697 (D. Haw. 1991).

²³See, e.g., *DeSantis v. Pacific Tel. and Tel. Co.*, 19 FEP Cases 1493 (1979); *Carreno v. IBEW Local 226*, 54 FEP Cases 81 (D. Kan. 1990).

sions, the greater the likelihood of judicial review—the familiar old fear of the judicial nose under the arbitral tent. This fear is a bit of a bugaboo. In any event, arbitrators need think more imaginatively about the finality of their awards in sexual harassment cases, for the significant risk of judicial review after *Misco* is present in every case that deals with statutory rights and well-defined public policies. And what public policy is more explicit and imperative than Title VII's sexual harassment policy?

In two recent (and appalling) cases in which arbitrators cavalierly ignored rudimentary Title VII standards, federal courts unhesitatingly denied enforcement to their awards.²⁴ In short, not only is it appealing in logic for arbitrators to incorporate federal law standards in sexual harassment cases, the force of *Misco* may compel them to do so.

The Culture of the Workplace

Labor arbitration's claim to special standing in our industrial relations legal system is that unions and employers entrust resolution of their contract disputes to arbitrators who understand both the dynamics of labor-management relations and the process of interpreting the language of collective bargaining agreements. In the *Steelworkers Trilogy* the Court said that national labor policy favors resolution of grievance disputes through arbitration because arbitrators have special knowledge of the parties' needs and the law of the shop.²⁵ In *Gardner-Denver* the Court reiterated that point, adding that it would not require deferral to arbitration in Title VII cases because the expertise of labor arbitrators is the law of the shop, not the law of the land.²⁶

If labor arbitrators have specialized knowledge of the workplace and the law of the shop, they have special awareness of the norms, realities, and dynamics of the workplace, including its vocabulary, traditions, expectations, aspirations, fears, and values. That is to say, they know its culture. While it may be impertinent to pose this question publicly to the arbitration profession, the question itself is highly pertinent: Does arbitral knowledge of the culture of the workplace include sufficient

²⁴*Newsday, Inc. v. Long Island Typographical Union*, 135 LRRM 2659 (2d Cir. 1990); *Stroehmann Bakeries v. Teamsters Local 776*, 136 LRRM 2875 (M.D. Pa. 1991).

²⁵*Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 583, 46 LRRM 2416 (1960).

²⁶*Alexander v. Gardner-Denver*, *supra* note 9.

insight and sensitivity to the kinds of issues raised in sexual harassment cases?

Sexual harassment issues often turn on the context of words and conduct. The same words and conduct that can be perceived as innocent and friendly in one context can be perceived as predatory and threatening in another. That is a familiar conundrum in arbitration, especially in insubordination and shoptalk cases.

A significant majority of arbitrators are men, as reflected in the membership of this Academy, and men have always dominated the profession. Do male arbitrators—whatever their understanding of labor relations, labor law, and the culture of the workplace—truly understand the problems of women in the workplace well enough to decide sexual harassment cases fairly and wisely? Reading the published arbitration decisions on sexual harassment leads me—a male arbitrator—to conclude that most male arbitrators bring considerable sensitivity, sympathy, and common sense to these cases. But there are startling exceptions. A few published decisions reflect gross arbitral insensitivity to the situation of women in a male-dominated work force. Other decisions reveal old-fashioned, Victorian, and overly protective views of working women so that one wonders where these arbitrators have been during the last 30 years.

If any deference—any legal respect—is due arbitral awards in sexual harassment cases, arbitral law of the shop should include awareness of contemporary insights into the ways gender differences are expressed in the workplace. The work of feminist scholars, such as Carol Gilligan, has led to broad understanding that men and women are socialized differently. Thus, they use language differently, interpret verbal and physical symbols differently, and use and respond to humor differently. Deborah Tannen's 1990 best seller, *You Just Don't Understand: Men and Women in Conversation*, makes a shrewd distinction between "rapport-talk" and "report-talk." Tannen cites this example of how men and women inhabit somewhat different cultures:

For most women, the language of conversation is primarily a language of rapport: a way of establishing connections and negotiating relationships. Emphasis is placed on displaying similarities and matching experiences. From childhood, girls criticize peers who try to stand out or appear better than others. People feel their closest connections at home, or in settings where they *feel* at home—with one or a few people they feel close to and comfortable with—in other

words, during private speaking. But even the most public situations can be approached like private speaking.

For most men, talk is primarily a means to preserve independence and negotiate and maintain status in a hierarchical social order. This is done by exhibiting knowledge and skill, and by telling, joking, or imparting information. From childhood, men learn to use talking as a way to get and keep attention. So they are more comfortable speaking in larger groups made up of people they know less well—in the broadest sense, “public speaking.” But even the most private situations can be approached like public speaking, more like giving a report than establishing rapport.²⁷

A demonstration of how differently men and women react to sexual suggestions was revealed in a recent Los Angeles County survey: 67 percent of men answered that they would be “flattered” by a sexual proposition made by a woman at work, but 62.8 percent of the women responded that they would be “insulted” by a sexual proposition from a male co-worker.²⁸ The Ninth Circuit in *Ellison* acknowledged this point when it commented that “a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women.”²⁹ The First Circuit has said:

[T]he man must be sensitive to signals from the woman that his comments are unwelcome, and the woman, conversely, must take responsibility for making those signals clear. In some instances, a woman may have the responsibility for telling the man directly that his comments or conduct is unwelcome. In other instances, however, a woman’s consistent failure to respond to suggestive comments or gestures may be sufficient to communicate that the man’s conduct is unwelcome.³⁰

The federal judiciary’s demonstrated sensitivity to male-female differences in the workplace is becoming the law of the land. Federal judges have said, in effect, that the goal-posts governing relations between men and women in the workplace have moved. Sexual jokes, posters, propositions, and the like that were loosely tolerated as the workplace norm 20 years ago are unacceptable and illegal today. That same sensitivity to the legitimate expectations of women workers under national policy must also be embraced by arbitrators as part of today’s law of the shop.

²⁷Tannen, *You Just Don’t Understand: Men and Women in Conversation* (New York: Ballentine Books, 1990), 77.

²⁸Gutek, *Sex and the Workplace* (San Francisco: Jossey-Bass, 1985), 96.

²⁹*Ellison v. Brady*, 54 FEP Cases 1346 (9th Cir. 1991).

³⁰*Lipsett v. University of Puerto Rico*, 54 FEP Cases 230, 243 (1st Cir. 1988).

The Rights of the Alleged Harasser

Title VII focuses only on rights of the alleged victim and the employer. The victim may complain to her employer, her union, the EEOC, a state agency, and a federal or state court. The employer has the usual panoply of rights available to any defendant or respondent in adjudicatory proceedings. That is as it should be. But under this arrangement what are the rights of the alleged harasser to disprove charges of sexual harassment? Where does he go to deny the alleged harassment? Under Title VII the alleged harasser has no legal standing as a party and, thus, no right to the presumption of innocence and no right to a due process hearing before the EEOC or the federal courts. Unless his interests are aligned with and thus defended by the employer, the alleged sexual harasser has no right to a due process hearing in any forum—except the arbitration forum, if there has been discipline under the terms of a collective bargaining agreement, or civil service statute.

Furthermore, the design of Title VII encourages management to take disciplinary action against an alleged harasser in order to limit its liability.³¹ Management lawyers acknowledge frankly that in sexual harassment cases they advise clients to act quickly to impose discipline on an employee accused of a serious sexual harassment offense if the charge appears to have merit.³² If a sexual harassment case reaches court, management's defense may rest on its lack of knowledge of the harassment and its having taken prompt disciplinary action against the alleged harasser.

In making this analysis, I do not fault the alleged victim, employers, the EEOC, or the courts for failing to provide the alleged harasser a due process hearing. Title VII does not contemplate such protection. But, is not the alleged harasser entitled to vindicate his reputation and retain his job, if he did not engage in the alleged harassment, or if the circumstances indicate that his conduct was less serious than alleged?

Arbitration, guided by the just cause provision of a collective bargaining agreement, may be the only forum that affords an alleged harasser a due process hearing and the presumption of

³¹See *Hirschfeld v. New Mexico Corrections Department*, 54 FEP Cases 268 (10th Cir. 1990).

³²See *Ending Sexual Harassment: Business Is Getting the Message*, BUSINESS WEEK, March 18, 1991, at 98.

innocence. Because of this irony in the law, unions sometimes appear to favor the alleged harasser over the alleged victim when they challenge discipline of the alleged harasser in arbitration. That appearance is unfortunate, for a union has the same duty of fair representation to consider an alleged harasser's grievance as it has to prosecute a grievance on behalf of the member who complains of sex or race discrimination by management. That is the union's chosen responsibility as well as its legal duty.

Conclusions

I conclude with these recommendations:

To Arbitrators: Incorporate the federal definition and standards of sexual harassment in such arbitration cases and become well informed about the dynamics of male-female problems in the workplace.

To the Federal Judiciary: Defer to arbitration in sexual harassment cases. To do so gives meaning to two companionable national policies: that which favors arbitration as the preferred forum for resolving workplace disputes, and that which protects workers from sexual harassment.

To the Supreme Court: Reconsider *Gardner-Denver*, in the light of *Misco* and *Gilmer*, to grant broad deference to arbitration awards in sexual harassment, if not all other Title VII cases as well.

To the Labor-Management Community and the General Public: Appreciate the fact that arbitration is virtually the only forum that affords an alleged sexual harasser the presumption of innocence and the protection of a due process hearing.

Comment—

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Introduction

Arbitration pursuant to a collective bargaining agreement between employers and unions, as representatives of employees,

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is a vital component of industrial democracy. Arbitration enables employer and employee to debate and resolve their differences on a more equal footing than is possible in any other forum, given the obvious imbalance of power between them. These principles hold as true in the arbitration of grievances where the employee has been disciplined for sexually harassing a co-worker as they do in the arbitration of any other grievance. Sexual harassment grievances, however, require more from the arbitrator than the scrupulous attention to fairness and knowledge of management-labor dynamics expected in other arbitral proceedings. They require a pronounced sensitivity on the part of the arbitrator to the rights of a third party who is not represented by either the employer or the union—the harassed woman.¹

If the arbitrator does not show such sensitivity to the rights of women to harassment-free workplaces, arbitration only mitigates the imbalance of power between men in management and men in the bargaining unit, while ignoring or even condoning the imbalance of power in most workplaces between male and female workers. Recent federal court decisions reveal that such arbitral awards will not be accorded finality and will be set aside by courts because they violate the strong public policy against sexual harassment.

Arbitral Awards and Public Policy Considerations

Two recent examples of how *not* to arbitrate a sexual harassment grievance should help to illustrate these points. In both grievance proceedings the arbitrator was faced with the familiar questions: Was the grievant discharged by the employer for just cause? If not, what is the remedy?

In the first proceeding the grievant had been discharged following the employer's investigation of a complaint by a customer's female employee that she had been sexually assaulted by

¹In this paper, the victim of sexual harassment will be referred to as female and her harasser as male. While both men and women can be sexually harassed in the workplace by members of the opposite sex, the vast majority of people who report sexual harassment at work in authoritative surveys are women harassed by men. See, e.g., U.S. Merit Systems Protection Board, *Sexual Harassment in the Federal Government: An Update* (Washington, D.C., 1988) (hereafter "USMSPB study") (Study conducted in 1987 of a representative cross-section of all federal employees found that 42 percent of all women employed by the federal government reported experiencing sexual harassment at work, 14 percent of all men).

the grievant, whose job was to make deliveries to the employer's customers. In this situation analysis of just cause for discharge should include consideration of whether the employer's determination that the assault occurred and merited discharge of the grievant, was unfounded or unreasonable, and whether the grievant was afforded notice and an opportunity to respond to the allegation of misconduct before the discharge. Unfortunately, the arbitrator in this case made no attempt to consider the reasonableness of the employer's belief that the grievant had committed the assault. Instead he appeared to approach the grievance with his very "own brand of industrial justice,"² based on whether a "reasonable man" in the grievant's shoes would have considered assaulting the woman concerned. It is hard to explain otherwise his permitting the grievant's attorney to ask the employer's witness not once, but twice, the insulting and irrelevant question, "Would you think an average man or yourself would make a pass at a woman who weighs 225 pounds?" Why else did he disregard the grievant's admission that he made sexual comments to the victim about his own wife's body? Why else did he dwell on such irrelevant details as the effect of the incident on the grievant's marriage and his children, and on the facts that the victim had a female roommate and did not have a boyfriend, and was, in the arbitrator's opinion, "unattractive and frustrated"? This arbitrator reinstated the grievant with full back pay and benefits. He sent a clear message to all the employer's female employees that any complaints they might have about sexual harassment or assault would not be taken seriously in the arbitral arena even if their employer disciplined the harasser, unless the arbitrator deemed them sufficiently attractive to "merit" harassment or if they had a witness (which is unusual in sexual assault complaints).

In the second proceeding, the grievant was discharged after the employer conducted an investigation of a complaint of sexual assault/physical touching by a female co-worker, which revealed two other incidents in which the grievant had earlier physically assaulted female co-workers (both of whom were new or probationary employees who did not report the assaults at the time). Five years earlier the grievant had been discharged for

²The U.S. Supreme Court in *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597, 46 LRRM 2423 (1960), cautioned that all arbitral awards should "draw [their] essence from the collective bargaining agreement" and should not represent merely the arbitrator's "own brand of industrial justice."

“offensive and unauthorized contact” with other female employees but had been reinstated by an arbitrator who nonetheless warned then that “[a]ny action on the part of [the grievant] which is consistent with this past citable behavior shall be grounds for immediate discharge and he will not be given the benefit of the doubt or shown any leniency.” Despite this warning, and despite concluding that the grievant was lying in denying the three assaults since receiving that warning, the arbitrator presiding over the second discharge proceeding reinstated the grievant, stating “these offenses are not ones that call for immediate discharge; instead such offenses call for the application of progressive discipline.” In other words, if the grievant had been disciplined after either of the two previously unreported assaults, discharge would still have been inappropriate until the final incident.

While this arbitral award avoided the pitfalls of arbitral subjectivity and cruel ridicule of the sexual harassment victim evident in the first proceeding described, it sent an equally clear message to female employees of the employer about how seriously the arbitrator viewed the problem of sexual harassment in the workplace. It disturbingly communicated to male workers that they could physically assault at least three female co-workers before being fired, and indeed many more if they, like the grievant, were cunning enough to pick on the young, the new, and the probationary female employee who might be too scared to speak out and complain. One study of sexual harassment victims found that 85 percent of all victims do not report the offensive behavior to supervisors or other officials for reasons including embarrassment, fear of worsening work conditions, and fear that their complaints may be held against them.³

Thankfully for their female employees, the employers in these two proceedings refused to accept the arbitral awards and successfully sought review in federal court. This was an unusual step; statistics indicate that very few cases involving discrimination-related just cause grievances are ever relitigated and even fewer are reversed.⁴ Only a few years ago the employer might have accepted such arbitral awards. Indeed, there was no appeal in one appalling 1987 case in which an arbitrator reinstated a

³USMSPB study, at page 24, fig. 3-1; page 28, fig. 3-5.

⁴Willig, *Arbitration of Discrimination Grievances: Arbitral and Judicial Competence Compared*, Proceedings of the 39th Annual Meeting, National Academy of Arbitrators, ed. Walter J. Gershenfeld (Washington: BNA Books, 1986), 120.

male employee who he found had intentionally approached a female employee from behind and moved his finger upwards between her buttocks,⁵ nor in a 1986 case in which reinstatement was ordered for a man who intentionally wrapped an electric cord around a female employee's legs and rubbed her crotch area and left buttock,⁶ nor in a 1985 case in which an arbitrator reduced to a 15 day suspension an employer's discharge of an employee who admitted he had exposed his genitals to two women on numerous occasions over a period of two years and had made unwelcome sexual advances and other grossly obscene gestures to other female employees.⁷

Perhaps the reason the employers in the two recent cases sought to challenge the finality of the arbitral awards is that there can now be no doubt that there is an explicit, well-defined, and dominant public policy against sexual harassment in the workplace, ascertainable by reference to laws and legal precedents and not from general consideration of supposed public interest. When such a public policy exists, it is well established by the U.S. Supreme Court in its 1987 decision, *United Paperworkers v. Misco*,⁸ and in its 1983 decision, *W.R. Grace & Co. v. Local 759*,⁹ that a court may refuse to accord an arbitral award finality if it violates that public policy.

The public policy against sexual harassment in the workplace has been developing since the late 1970s, when courts first began to interpret the prohibition of discrimination on the basis of sex in the "terms, conditions and privileges" of employment in Title VII of the Civil Rights Act and state fair employment law analogues to encompass prohibition of uninvited and unwanted sexual attention and conduct of a sexual nature in the workplace. In 1986 the U.S. Supreme Court resolved conflict among the federal Courts of Appeal by ruling unanimously in *Meritor Savings Bank v. Vinson*¹⁰ that "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult" whether based on sex, race, color, religion, or national origin, and whether or not the environment

⁵Sugardale Foods, Inc., 86 LA 1017 (Duda 1986).

⁶Boys Markets, Inc., 88 LA 1304 (Wilmoth 1987).

⁷Hyatt Hotels Palo Alto, 85 LA 11 (Oestreich 1985).

⁸484 U.S. 29, 126 LRRM 3113 (1987).

⁹461 U.S. 757, 31 FEP Cases 1409 (1983).

¹⁰477 U.S. 57, 40 FEP Cases 1822 (1986).

causes economic injury. The Court quoted an earlier federal Court of Appeals decision to the effect that:

[s]exual harassment which creates a hostile or offensive environment for members of one sex is every bit the arbitrary barrier to sexual equality at the workplace that racial harassment is to racial equality. Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets.¹¹

Since 1986 the federal courts have developed sexual harassment jurisprudence, the expression of the public policy against sexual harassment, to a level of some sophistication, recognizing that gender hierarchies exist in the workplace and that unfortunately some men use sex in the workplace to keep women from fulfilling their full employment potential in a number of different ways. Thus courts have recognized that harassing behavior, lacking a sexually explicit content but directed at women and motivated by hostility against women, is a form of sexual harassment, a form particularly prevalent in non-traditional employment for women. In *Hall v. Gus Construction Company* in 1988,¹² for example, the U.S. Court of Appeals for the Eighth Circuit recognized that male construction crew members who urinated in female construction crew members' water bottles and gas tanks were sexually harassing the women through this conduct just as much as they were when grabbing at the women's thighs and breasts and when inflicting incessant verbal sexual abuse on them.

Many courts now recognize as sexually harassing behavior that creates a barrier to the progress of women in the workplace because it conveys the message that they do not belong or that they are welcome only if they will subvert their identities to the sexual stereotypes prevalent in the environment. For example, the posting of pornographic pictures of women at work may now be held to be sexual harassment regardless of the fact that these pictures were often present before women were employed there and are prevalent in society at large. As one court recently explained:

Title VII promise[s] to open the workplace to women. When the preexisting state of the work environment receives weight in eval-

¹¹Henson v. City of Dundee, 682 F.2d 897, 902, 29 FEP Cases 787, 791 (1982).

¹²Hall v. Gus Construction Co., 842 F.2d 1010, 46 FEP Cases 573 (8th Cir. 1988).

uating its hostility to women, only those women who are willing to and can accept the level of abuse inherent in a given work place—a place that may have historically been all male or excluded women intentionally—will apply to and continue to work there. It is absurd to believe that Title VII opened the doors of such places in form and closed them in substance. A preexisting atmosphere that deters women from entering or continuing in a profession or job is no less destructive to and offensive to workplace equality than a sign declaring “Men Only.”¹³

Finally, of course, courts recognize directed sexual behavior, such as sexual comments and sexual assaults, as forms of sexual harassment to be eliminated in the workplace.

As the public policy against sexual harassment has developed since *Meritor*, so too has the awareness of female workers of the illegality of unwelcome sexual conduct in the workplace. Perhaps the employers in the two arbitral proceedings described earlier in this paper sought to calm the outrage among female workers at the renewed presence of male co-workers known to abuse women. Certainly most women would be appalled by the assumption implicit in the two awards, that a physical assault on a woman, which would be grounds for criminal charges, is not sufficient grounds to discharge that employee.

Whatever the reason these particular employers sought review, the emphatic responses of the federal courts involved suggest that courts will not hesitate in the future to set aside arbitral awards which are insensitive to the problem of sexual harassment in the workplace. The first award, involving the assault of a female employee of the employer's customer, was set aside by Judge William Caldwell of the U.S. District Court for the Middle District of Pennsylvania on March 18, 1991 in *Stroehmann Bakeries v. Local 776*.¹⁴ Judge Caldwell vacated the award and remanded it for consideration to another arbitrator, stating the following:

[T]he arbitrator's decision to reinstate [the grievant] violates [public policies with regard to sexual harassment in the workplace and against sexual assault and abuse in general] and sends a message to Stroehmann employees and to the public that complaints of sexual assault are not treated seriously, sensitively, or with real regard for the truth of the allegations.

The credence and weight which was attached to irrelevant considerations, by itself, offends public policy. The manner in which the

¹³Robinson v. Jacksonville Shipyards, 55 E.P.D. ¶40,535, at 65,762 (M.D. Fla. 1991).

¹⁴55 FEP Cases 606 (M.D. Pa. 1991).

award was reached could easily deter other victims, and [the grievant's] reinstatement could suggest to Stroehmann's work force that claims of unwitnessed sexual harassment will not be treated seriously.¹⁵

Newsday, Inc. v. Long Island Typographical Union, No. 915 involving the recidivist and unapologetic harasser, was set aside by Judge Leo Glasser of the U.S. District Court for the Eastern District of New York in February 1990. When the union appealed this decision the U.S. Court of Appeals for the Second Circuit affirmed it,¹⁶ and finally the U.S. Supreme Court refused to review that decision on March 18, 1991.¹⁷ Judge Glasser's order did not remand the case to another arbitrator as Judge Caldwell's does in *Stroehmann*, but instead reinstated the employer's discharge of the grievant. The Court of Appeals approved this approach under the circumstances, stating:

[The second arbitral] award of reinstatement completely disregarded the public policy against sexual harassment in the workplace. The [second] arbitrator has also disregarded [the first arbitral] ruling that any further acts of harassment by [the grievant] would be grounds for discharge. Instead [the second arbitral] award condones [the grievant's] latest misconduct; it tends to perpetuate a hostile, intimidating and offensive work environment. [The grievant] has ignored repeated warnings. Above all, the award prevents *Newsday* from carrying out its legal duty to eliminate sexual harassment in the workplace.¹⁸

What Should Arbitrators Learn From These Decisions?

These decisions should provide food for thought for all arbitrators involved in sexual harassment disciplinary grievances. The first lesson must be that arbitrators, who should already be expert in their understanding of labor-management relations, should take responsibility for understanding workplace sexual dynamics and the serious nature of the problems posed for women by sexual harassment.

Sexual harassment is contrary to public policy and the law because it seriously affects the employment of many women in this country. Despite widespread knowledge that sexual harassment on the job is illegal, it is a persistent problem. One study

¹⁵*Id.* at 608.

¹⁶54 FEP Cases 24 (2d Cir. 1991).

¹⁷55 FEP Cases 352 (U.S. 1991).

¹⁸*Supra* note 16, at 28.

conducted in 1987 of a representative cross-section of all federal employees found that 42 percent of women employed by the federal government reported experiencing sexual harassment at work; this figure was depressingly exactly the same as that reported seven years earlier in a prior survey of the federal work force.¹⁹ Of the harassed women in 1987, 26 percent reported they had been harassed in the same way as the women in the two proceedings described in this paper, by deliberate touching; in the earlier survey only 15 percent of female victims reported this type of harassment.²⁰ Clearly, despite the solid support of the law against women's victimization in this way, there is no cause for complacency.

These statistics reflect stunted employment opportunity for women. Even as the door of advancement has opened to women, they have often been greeted with hostility and resentment that finds expression through sex stereotyping and sexual harassment. Women are most likely to be harassed if they have a "nontraditional" job, are working in a predominantly male environment, and have been employed for 15 years or less.²¹ Through sexual harassment male co-workers and supervisors try to show that women do not belong or should have only a restricted role as sex objects in what had previously been an "all-male club."²² Now that the law forbids employers from advertising that "women need not apply" for jobs historically filled by men, harassment and assaults targeting women as a class have often become the bar to women's entry into, and success in, better paying jobs.

Having to work alongside a known harasser is intolerable for women. Many women resign rather than remain in workplaces poisoned by sexual harassment. Others lose their jobs and their livelihood when they refuse to accede to sexual harassment. The federal government study estimated that 36,647 federal employees left their jobs because of sexual harassment over the two-year study period from 1985 to 1987.²³ Women who are

¹⁹USMSPB, at 11.

²⁰*Id.*, at 16, fig. 2-5.

²¹*Id.*, at 20.

²²Law, *Girls Can't Be Plumbers—Affirmative Action For Women in Construction: Beyond Goals and Quotas*, 24 HARV. C.R.-C.L. L. REV. 45, 49 (1989); Crull & Cohen, *Expanding the Definition of Sexual Harassment*, OCCUPATIONAL HEALTH NURSING 141, 143 (Mar. 1984); Gruber & Bjorn, *Blue Collar Blues: The Sexual Harassment of Women Auto Workers*, 9 WORK & OCCUPATIONS 271, 272 (Aug. 1982).

²³USMSPB study, at 40.

fired or resign in the face of sexual harassment not only lose their jobs, but, because of their job turnover, they are frequently relegated to lower paying jobs at the bottom of the seniority ladder.²⁴ Thus, sexual harassment is a significant reason that women, as a class, have shorter tenure on the job which, in turn, substantially contributes to the wage gap between men and women.²⁵

One sure way to avoid sexual harassment is to not come to work, therefore sexual harassment contributes to absenteeism. A study of all employees of the eastern region of the Federal Aviation Administration (FAA) found that 40 percent of all women employees had been harassed and 21 percent of the victims said it affected their attendance at work.²⁶ Furthermore, sexual harassment affects women's job performance. Many women subjected to sexual harassment find it difficult to concentrate on their work and often devote time and energy, which could be devoted to their duties, to avoiding their harassers. Moreover, an employee's self-esteem and her ability to perform her job successfully are undermined when supervisors, co-workers, or subordinates view her as a sexual object rather than a worker. The FAA study found that nearly one-third of women who were sexually harassed reported that the quality of their work suffered and nearly one-fifth found that the quantity of their work declined.²⁷

Of course, many women cannot afford to stay away from work, to quit, or to be fired. They may silently put up with various forms of harassment—and suffer even more profound personal costs. The law against sexual harassment is premised on an understanding that women who have been sexually harassed suffer great stress and a decrease in psychological well-being.²⁸

²⁴Farley, *Sexual Shakedown*, at 23–25 (New York: McGraw Hill, 1978).

²⁵According to the U.S. Department of Labor, 12 percent of the wage gap between men and women is attributable to the difference in length of employment with the present employer, and 10 percent is attributable to years of training completed in the present job. Women's Bureau, U.S. Dept. of Labor, *Time of Change: 1983 Handbook on Women Workers*, at 90 (1983).

²⁶Working Women's Institute, *Results of a Survey on Gender Bias and Sexual Harassment in the FAA Eastern Region*, at 13 (1985) ("FAA study").

²⁷FAA study, at 13.

²⁸See Am. Psychiatric Ass'n Bd. of Trustees, *Statement on Discrimination Based on Gender and Sexual Orientation*, 145 AM. J. PSYCHIATRY 1494 (1988). See also Hamilton, Alagna, King & Lloyd, *The Emotional Consequences of Gender-Based Abuse in the Workplace: New Counseling Programs for Sex Discrimination*, 6 WOMEN IN THERAPY 155 (1987), reprinted in *Women, Power and Therapy* (M. Brande ed., (Haworth Press, 1987); Salisbury, Ginorio, Remick & Stringer, *Counseling Victims of Sexual Harassment*, 23 PSYCHOTHERAPY 316 (1986).

One recent arbitral award showed impressive understanding of the stress effects of harassment. Arbitrator William Murphy found that the reactions of a sexual harassment victim who had had her sweatshirt pulled up twice by a male co-worker in the presence of another man, exposing her bare breasts, were no "greater than could normally and reasonably be expected." She was initially too ashamed and embarrassed to report the incident and then, a month later, suffered a paralysis of her body for which she was prescribed anti-depressants, a tranquilizer, and indefinite medical disability leave.²⁹

The vast majority of arbitral awards in sexual harassment disciplinary grievances reveal that most arbitrators are well aware that sexual harassment is a serious problem.³⁰ Whether the employer has a specific policy against harassment or simply prohibits, as most traditional workplace rules do, "indecent or immoral conduct" or "threatening, intimidating, coercing, or interfering with fellow employees on the premises," it is clear to

²⁹Livers Bronze Company 90-1 ARB. ¶8223 (Murphy 1989).

³⁰See, e.g., Porter Equipment Co., 86 LA 1253 (Lieberman 1986) (discharge proper where employee forced another co-worker to touch his exposed penis); Tampa Electric 87-2 ARB ¶8320 (Vause 1986) (discharge is appropriate where management establishes sexual harassment has occurred after careful, complete investigation and no discrimination against grievant is evident); New Industrial Techniques, Inc., 84 LA 915 (Gray 1985) (11 year employee properly discharged for offensive touching of several female employees after warning given); Rockwell International Corp., 85 LA 246, 251 (Feldman 1985) (discharge appropriate upon evidence of unwelcome touching of three female employees together with offensive body language; "it appears that the grievant is without a defense in this matter and is therefore unemployable at this facility. His conduct is not to be tolerated in the workplace and certainly any employee, no matter the sex, is allowed a safe place to work and as a matter of fact the company is so charged."); Zia Co., 82 LA 640 (Daughten 1984) (employer properly discharged employee with otherwise unblemished 24-year work record who knew of sexual harassment policy and who physically assaulted female co-worker on three occasions at work; arbitrator noted employer's legal obligations to ensure that employees are protected against harassment and other forms of discrimination); United Electric Supply Co., 82 LA 921 (Madden 1984) (employer properly discharged warehouseman who had made persistent and continued unwelcome advances to several female co-workers despite warning, since advances created offensive working environment and caused employer loss of work time due to employees' efforts to avoid him); Alumax Extrusions, Inc., 81 LA 722 (Miller 1983) (employee properly discharged for drawing obscene pictures and placing them in view of employees and customers, particularly given his contempt for prior warning by persistent conduct); Care Inns, Inc., 81 LA 987 (Taylor 1983) (nursing home properly discharged janitor after one assault involving kissing nurse on cheek; employees have right to be safe from abusive actions; it is duty and responsibility of employer to give protection and employer need not let conduct become progressively worse before cause is removed).

most arbitrators that employers have a duty to eliminate harassing conduct and that male employees must modify their behavior accordingly or face discipline, including discharge. Only a tiny minority of awards reveal the sort of insensitivity to the problem of sexual harassment detailed in the five cases highlighted earlier in this paper.

A second lesson to be learned from recent court decisions is that arbitrators must be careful not to deprive harassment victims, who have no representation in a sexual harassment disciplinary grievance, of their rights. Arbitrators rarely preside over sexual harassment grievances filed by the victims themselves for the simple reason that a victim harassed by a member of management is far better off filing in "an equal opportunity commission forum which not only has specialized expertise in this area but also which has authority which is not based upon and constrained by a collective bargaining agreement."³¹ In disciplinary grievances based on sexual harassment allegations, however, the victim's rights may be implicated and should not be negated.

The Supreme Court warned against arbitral awards that preclude resort to court for resolution of employment discrimination problems in *Alexander v. Gardner-Denver Co.*, when it emphasized the following:

Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. . . . The purpose and procedures of Title VII indicate that Congress intended federal courts to exercise final responsibility for enforcement of Title VII; deferral to arbitral decisions would be inconsistent with that goal. . . . [C]ourts should ever be mindful that Congress, in enacting Title VII, thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims. It is the duty of courts to assure the full availability of this forum.³²

In *Alexander* the Court considered what weight a court in a Title VII case should accord to an earlier arbitral award pur-

³¹Philadelphia Gas Works, 90-1 ARB. ¶8061 (Tener 1989).

³²*Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51, 56, 60 n.21, 7 FEP Cases 81, 87, 88, 89, 90 n.21 (1974).

porting to resolve the employment discrimination claim brought by an individual against an employer. While that case concerned a dispute between a discrimination victim and a discriminatory employer, not an employee perpetrator of discrimination and an employer trying to stop the discrimination, the principles announced have a particular relevance to disciplinary grievances where the arbitrator's award reestablishes a hostile work environment for women. Such an award recreates employment discrimination, yet leaves the victims of the harasser with no federal court forum in which to assert their rights to freedom from such discrimination. Where the employer takes prompt effective remedial action against harassment, the employer is not liable for its occurrence. 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. Such an award is contrary to well-defined public policy, as enunciated clearly in *Gardner-Denver*.

Conclusions

As employers move to eliminate sexual harassment, arbitrators can expect to preside over more grievances filed by harassers disputing the discipline imposed upon them. While arbitrators should, of course, always be ready to set aside arbitrary or capricious discipline and be alert to due process violations, it is vital that arbitrators take sexual harassment as seriously as the federal courts. If not, women's rights are diserved and the arbitral award may be overturned by a federal court. True industrial democracy can exist only when women stand on equal footing with men, something that can happen only when sexual harassment no longer poisons work experiences for women.

Comment—

R. GAULL SILBERMAN*

Policy Guidance on Current Issues of Sexual Harassment*Definition*

The EEOC's Guidelines define two types of sexual harassment: "quid pro quo" and "hostile environment." The Guidelines provide that "unwelcome" sexual conduct constitutes sexual harassment when "submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment." "Quid pro quo harassment" occurs when "submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual." The EEOC's guidelines also recognize that unwelcome sexual conduct that "unreasonably interfer[es] with an individual's job performance" or creates an "intimidating, hostile, or offensive working environment" can constitute sex discrimination, even if it leads to no tangible or economic job consequences.

* * *

Although quid pro quo and hostile environment harassment are theoretically distinct claims, the line between the two is not always clear and the two forms of harassment often occur together. Under these circumstances it would be appropriate to conclude that both harassment and retaliation in violation of section 704(a) of Title VII have occurred.

Determining Whether Sexual Conduct Is Unwelcome

Sexual harassment is "unwelcome verbal or physical conduct of a sexual nature." Because sexual attraction may often play a

*[Editor's Note: The second discussant on this panel was R. Gaull Silberman, Vice Chairman, Equal Employment Opportunity Commission, Washington, D.C. She preferred to have the EEOC Policy Guidance on Sexual Harassment, issued on March 19, 1990, speak for itself. Therefore we have excerpted pertinent sections of that document below. The full text may be found at 405 FEP Manual 6687-6701.]

role in the day-to-day social exchange between employees, “the distinction between invited, uninvited-but-welcome, offensive-but-tolerated, and flatly rejected” sexual advances may well be difficult to discern.” . . . But this distinction is essential because sexual conduct becomes unlawful only when it is unwelcome. . . .

When confronted with conflicting evidence as to welcomeness, the Commission looks “at the record as a whole and at the totality of circumstances,” . . . evaluating each situation on a case-by-case basis. When there is some indication of welcomeness or when the credibility of the parties is at issue, the charging party’s claim will be considerably strengthened if she made a contemporaneous complaint or protest. (For a complaint to be “contemporaneous,” it should be made while the harassment is ongoing or shortly after it has ceased. . . .) Particularly when the alleged harasser may have some reason (e.g., a prior consensual relationship) to believe that the advances will be welcomed, it is important for the victim to communicate that the conduct is unwelcome. . . . Thus, in investigating sexual harassment charges, it is important to develop detailed evidence of the circumstances and nature of any such complaints or protests, whether to the alleged harasser, higher management, co-workers, or others.

While a complaint or protest is helpful to charging party’s case, it is not a necessary element of the claim. Indeed, the Commission recognizes that victims may fear repercussions from complaining about the harassment and that such fear may explain a delay in opposing the conduct. . . . The relevance of whether the victim has complained varies depending upon the “nature of the sexual advances and the context in which the alleged incidents occurred.”

* * *

In some cases the courts and the Commission have considered whether the complainant welcomed the sexual conduct by acting in a sexually aggressive manner, using sexually-oriented language, or soliciting the sexual conduct.

* * *

Conversely, occasional use of sexually explicit language does not necessarily negate a claim that sexual conduct was un-

welcome. Although a charging party's use of sexual terms or off-color jokes may suggest that sexual comments by others in that situation were not unwelcome, more extreme and abusive or persistent comments or a physical assault will not be excused, nor would "quid pro quo" harassment be allowed.

Any past conduct of the charging party that is offered to show "welcomeness" must relate to the alleged harasser. . . . Thus evidence concerning a charging party's general character and past behavior toward others has limited, if any, probative value and does not substitute for a careful examination of her behavior toward the alleged harasser.

A more difficult situation occurs when an employee first willingly participates in conduct of a sexual nature but then ceases to participate and claims that any continued sexual conduct has created a hostile work environment. Here the employee has the burden of showing that any further sexual conduct is unwelcome, work-related harassment. The employee must clearly notify the alleged harasser that his conduct is no longer welcome. If the conduct still continues, her failure to bring the matter to the attention of higher management or the EEOC is evidence, though not dispositive, that any continued conduct is, in fact, welcome or unrelated to work. In any case, however, her refusal to submit to the sexual conduct cannot be the basis for denying her an employment benefit or opportunity; that would constitute a "quid pro quo" violation.

Evaluating Evidence of Harassment

The Commission recognizes that sexual conduct may be private and unacknowledged, with no eyewitnesses. Even sexual conduct that occurs openly in the workplace may appear to be consensual. Thus, the resolution of a sexual harassment claim often depends on the credibility of the parties. . . . Supervisory and managerial employees, as well as co-workers, should be asked about their knowledge of the alleged harassment.

* * *

Of course, the Commission recognizes that a charging party may not be able to identify witnesses to the alleged conduct itself. But testimony may be obtained from persons who observed the charging party's demeanor immediately after an alleged inci-

dent of harassment. Persons with whom she discussed the incident—such as co-workers, a doctor, or a counselor—should be interviewed. . . . As stated earlier, a contemporaneous complaint by the victim would be persuasive evidence both that the conduct occurred and that it was unwelcome. So too is evidence that other employees were sexually harassed by the same person.

* * *

In a “quid pro quo” case, a finding that the employer’s asserted reasons for its adverse action against the charging party are pretextual will usually establish a violation. If [the employer’s reasons for termination] are pretextual, and if the sexual harassment occurred, then it should be inferred that the charging party was terminated for rejecting the employer’s sexual advances, as she claims.

Determining Whether A Work Environment Is “Hostile”

. . . Since “hostile environment” harassment takes a variety of forms, many factors may affect this determination, including: (1) whether the conduct was verbal, physical, or both; (2) how frequently it was repeated; (3) whether the conduct was hostile and patently offensive; (4) whether the alleged harasser was a co-worker or a supervisor; (5) whether others joined in perpetrating the harassment; and (6) whether the harassment was directed at more than one individual.

In determining whether unwelcome sexual conduct rises to the level of a “hostile environment” in violation of Title VII, the central inquiry is whether the conduct “unreasonably interfere[s] with an individual’s work performance” or creates “an intimidating, hostile, or offensive working environment.” . . . Thus, sexual flirtation or innuendo, even vulgar language that is trivial or merely annoying, would probably not establish a hostile environment.

(1) *Standard for Evaluating Harassment.* In determining whether harassment is sufficiently severe or pervasive to create a hostile environment, the harasser’s conduct should be evaluated from the objective standpoint of a “reasonable person.” . . . Thus, if the challenged conduct would not substantially affect the work environment of a reasonable person, no violation should be found.

* * *

A “reasonable person” standard also should be applied to the more basic determination of whether challenged conduct is of a sexual nature. . . .

This objective standard should not be applied in a vacuum, however. Consideration should be given to the context in which the alleged harassment took place. . . .

The reasonable person standard should consider the victim’s perspective and not stereotyped notions of acceptable behavior. For example, the Commission believes that a workplace in which sexual slurs, displays of “girlie” pictures, and other offensive conduct abound can constitute a hostile work environment even if many people deem it to be harmless or insignificant. . . .

(2) *Isolated Instances of Harassment.* Unless the conduct is quite severe, a single incident or isolated incidents of offensive sexual conduct or remarks generally do not create an abusive environment. . . . A “hostile environment” claim generally requires a showing of a pattern of offensive conduct. In contrast, in “quid pro quo” cases a single sexual advance may constitute harassment if it is linked to the granting or denial of employment benefits.

But a single, unusually severe incident of harassment may be sufficient to constitute a Title VII violation; the more severe the harassment, the less need to show a repetitive series of incidents. This is particularly true when the harassment is physical.

* * *

The Commission will presume that the unwelcome, intentional touching of a charging party’s intimate body areas is sufficiently offensive to alter the conditions of her working environment and constitute a violation of Title VII. More so than in the case of verbal advances or remarks, a single unwelcome physical advance can seriously poison the victim’s working environment. If an employee’s supervisor sexually touches that employee, the Commission normally would find a violation. In such situations it is the employer’s burden to demonstrate that the unwelcome conduct was not sufficiently severe to create a hostile work environment.

When the victim is the target of both verbal and non-intimate physical conduct, the hostility of the environment is exacerbated

and a violation is more likely to be found. Similarly, incidents of sexual harassment directed at other employees in addition to the charging party are relevant to a showing of hostile work environment. . . .

(3) *Non-physical Harassment*. When the alleged harassment consists of verbal conduct, the investigation should ascertain the nature, frequency, context, and intended target of the remarks. Questions to be explored might include:

- Did the alleged harasser single out the charging party?
- Did the charging party participate?
- What was the relationship between the charging party and the alleged harasser(s)?
- Were the remarks hostile and derogatory?

No one factor alone determines whether particular conduct violates Title VII. . . . In general, a woman does not forfeit her right to be free from sexual harassment by choosing to work in an atmosphere that has traditionally included vulgar, anti-female language.

* * *

The Commission agrees with the dissent in *Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6th Cir. 1986), *cert. denied*, 107 S. Ct. 1983 (1987), that a woman does not assume the risk of harassment by voluntarily entering an abusive, anti-female environment. . . . [A] district court found that a hostile environment was established by the presence of pornographic magazines in the workplace and vulgar employee comments concerning them; offensive sexual comments made to and about plaintiff and other female employees by her supervisor; sexually oriented pictures in a company-sponsored movie and slide presentation; sexually oriented pictures and calendars in the workplace; and offensive touching of plaintiff by a co-worker. . . .

(4) *Sex-based Harassment*. Although the Guidelines specifically address conduct that is sexual in nature, the Commission notes that sex-based harassment—that is, harassment not involving sexual activity or language—may also give rise to Title VII liability (just as in the case of harassment based on race, national origin, or religion) if it is “sufficiently patterned or pervasive” and directed at employees because of their sex. . . .

Acts of physical aggression, intimidation, hostility, or unequal treatment based on sex may be combined with incidents of

sexual harassment to establish the existence of discriminatory terms and conditions of employment. . . .

(5) *Constructive Discharge*. Claims of “hostile environment” sexual harassment often are coupled with claims of constructive discharge. If constructive discharge due to a hostile environment is proven, the claim will also become one of “quid pro quo” harassment. It is the position of the Commission and a majority of courts that an employer is liable for constructive discharge when it imposes intolerable working conditions in violation of Title VII when those conditions foreseeably would compel a reasonable employee to quit, whether or not the employer specifically intended to force the victim’s resignation. . . .

An important factor to consider is whether the employer had an effective internal grievance procedure. [I]f an employee knows that effective avenues of complaint and redress are available, then the availability of such avenues itself becomes a part of the work environment and overcomes, to the degree it is effective, the hostility of the work environment.

* * *

Employer Liability for Harassment by Supervisors

(1) *Application of Agency Principles—“Quid Pro Quo” Cases*. An employer will always be held responsible for acts of “quid pro quo” harassment. A supervisor in such circumstances has made or threatened to make a decision affecting the victim’s employment status, and he therefore has exercised authority delegated to him by his employer. . . .

* * *

(2) *Application of Agency Principles—“Hostile Environment” Cases*. . . . The Commission interprets *Vinson* to require careful examination in “hostile environment” cases of whether the harassing supervisor was acting in an “agency capacity.” Whether the employer had an appropriate and effective complaint procedure and whether the victim used it are important factors to consider, as discussed below.

(b) *Direct Liability*. The initial inquiry should be whether the employer knew or should have known of the alleged sexual harassment. If actual or constructive knowledge exists, and if the

employer failed to take immediate and appropriate corrective action, the employer would be directly liable. Most commonly an employer acquires actual knowledge through first-hand observation, by the victim's internal complaint to other supervisors or managers, or by a charge of discrimination.

An employer is liable when it "knew, or upon reasonably diligent inquiry should have known," of the harassment. . . . Thus, evidence of the pervasiveness of the harassment may give rise to an inference of knowledge or establish constructive knowledge. . . .

The victim can of course put the employer on notice by filing a charge of discrimination. . . . It is important to emphasize that an employee can always file an EEOC charge without first utilizing an internal complaint or grievance procedure and may wish to pursue both avenues simultaneously because an internal grievance does not prevent the Title VII charge-filing time period from expiring. . . . If the employer takes immediate and appropriate action to correct the harassment and prevent its recurrence, and the Commission determines that no further action is warranted, normally the Commission would administratively close the case.

(c) *Imputed Liability.* The investigation should determine whether the alleged harassing supervisor was acting in an "agency capacity." . . . The following principles should be considered, and applied where appropriate in "hostile environment" sexual harassment cases, [to determine whether the supervisor was acting within the scope of his employment].

1. *Scope of Employment.* A supervisor's actions are generally viewed as being within the scope of his employment if they represent the exercise of authority actually vested in him. It will rarely be the case that an employer will have authorized a supervisor to engage in sexual harassment. . . . However, if the employer becomes aware of work-related sexual misconduct and does nothing to stop it, the employer, by acquiescing, has brought the supervisor's actions within the scope of his employment.

2. *Apparent Authority.* An employer is also liable for a supervisor's actions if these actions represent the exercise of authority that third parties reasonably believe him to possess by virtue of his employer's conduct. . . . The Commission believes that in the absence of a strong, widely disseminated, and consistently enforced employer policy against sexual harassment, and an

effective complaint procedure, employees could reasonably believe that a harassing supervisor's actions will be ignored, tolerated, or even condoned by upper management. . . . A supervisor's capacity to create a hostile environment is enhanced by the degree of authority conferred on him by the employer, and he may rely upon apparent authority to force employees to endure a harassing environment for fear of retaliation. . . .

But an employer can divest its supervisors of this apparent authority by implementing a strong policy against sexual harassment and maintaining an effective complaint procedure.

* * *

3. *Other Theories.* A closely related theory is agency by estoppel. An employer is liable when he intentionally or carelessly causes an employee to mistakenly believe the supervisor is acting for the employer, or knows of the misapprehension and fails to correct it. . . .

Liability also may be imputed if the employer was "negligent or reckless" in supervising the alleged harasser. . . . This is essentially the same as holding the employer directly liable for its failure to act.

An employer cannot avoid liability by delegating to another person a duty imposed by statute. . . .

Finally, an employer also may be liable if the supervisor was aided in accomplishing the tort by the existence of the agency relation. . . .

Preventive and Remedial Action

(1) *Preventive Action.* The EEOC's Guidelines encourage employers to:

take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

An effective preventive program should include an explicit policy against sexual harassment that is clearly and regularly communicated to employees and effectively implemented. . . .

(2) *Remedial Action.* Since Title VII "affords employees the right to work in an environment free from discriminatory intim-

idation, ridicule, and insult," an employer is liable for failing to remedy known hostile or offensive work environments. . . .

When an employer receives a complaint or otherwise learns of alleged sexual harassment in the workplace, the employer should investigate promptly and thoroughly. The employer should take immediate and appropriate corrective action by doing whatever is necessary to end the harassment, make the victim whole by restoring lost employment benefits or opportunities, and prevent the misconduct from recurring. Disciplinary action against the offending supervisor or employee, ranging from reprimand to discharge, may be necessary. Generally, the corrective action should reflect the severity of the conduct. The employer should make follow-up inquiries to ensure the harassment has not resumed and the victim has not suffered retaliation.

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When an employer asserts it has taken remedial action, the Commission will investigate to determine whether the action was appropriate and, more important, effective. . . . If the Commission finds that the harassment has been eliminated, all victims made whole, and preventive measures instituted, the Commission normally will administratively close the charge because of the employer's prompt remedial action.

[Vice Chairman Silberman commended the use of alternative dispute resolution in sexual harassment disputes, but the Commission wants to be careful that victims do not get second-class justice in the process since they cannot bargain away their civil rights. With the increasing caseload of the EEOC, any method that brings swifter handling is to be encouraged, including arbitration, provided that the law is enforced.]