Chapter 8

AVOIDING USE OF STEREOTYPES IN LABOR AND EMPLOYMENT ARBITRATION: SEXUAL HARASSMENT'S PECULIAR POSTURE IN LABOR ARBITRATION

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I have taught courses in labor law and employment discrimination for 25 years at the University of California Davis Law School. As a white woman, I have had to examine critically my own assumptions, perceptions, and biases that I bring to issues of race and gender discrimination in order to discuss these sensitive issues in class. Over the years I have become increasingly aware of the wide variety of backgrounds and experience that my more diverse students bring to the classroom and how their experiences differ greatly from my own. The stereotypes they carry with them are different from the ones I have in my head. We all create our own stereotypes about people in the world around us. Stereotypes are a form of bias or prejudice, regardless of whether they are positive or negative stereotypes.

During my academic career, I have also learned, in a personal way, about the roots of prejudice: simply stated, we all prefer people most like ourselves. I have observed this principle in action in a variety of contexts. First—faculty hiring meetings. When we hire new law school faculty, we bring a short list of extremely well-qualified candidates to campus for a day-long series of interviews. Then we meet together to discuss the candidates and vote on making offers. At this final hiring stage, our judgments are extremely subjective, because all of the candidates have sterling credentials to become law professors. In making the hiring decisions, invariably, most of us prefer those candidates most like ourselves. These are the people we feel most comfortable with. These are the ones we

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think will make the "best fit" with the current law faculty. Because the law faculty has been 80 percent men during most of my years on the faculty, it has been very difficult to hire women faculty. Only when male faculty members have become educated about the need to go beyond their comfort level and reach out to include people not like themselves, are they able to see that women will make excellent colleagues as well.

Another decision-making process that has illuminated, for me, the principle that we prefer people most like ourselves has been the law student admissions process at UC Davis. I have served as a member of the admissions committee several times over the years. We serve in panels of three—two faculty members and one student—and must have unanimous consent to make an offer to an applicant. After reading the files, including the applicants' personal statements, our panel is allowed to make ten offers out of a set of sixty files. We meet weekly for ten weeks, reading additional sets of sixty files. We end up bargaining with each other, agreeing to make an offer of admission for one of my favorite candidates if I will admit one of theirs. It becomes easy to see who our favorite candidates were. I generally argued for re-entry women, who had exciting life experiences or had taken time out to raise children before going back to law school. In other words, someone just like me! [I had gone to law school to "get out of the house," when my first two children were one and three years old.] My white male colleague on the committee generally liked the men who had high scores on the LSAT and wrote abstract philosophical essays about the nature of justice. The third member of the committee was usually a law student of color, appointed by the dean to balance out our whiteness. She or he inevitably argued for students of color who had overcome obstacles in their struggle to achieve academic success. As a result of this labor-intensive process, we ended up with a balanced group among our offers of admission because the three of us were diverse among ourselves. Because we were making decisions as a group, we could indulge our own prejudices, knowing they would be counteracted by those of the other members of the group. Of course, as we went through the process, none of us were aware we were operating out of our own belief systems—I became aware of this phenomenon only after my first two or three years on the committee.

When a decisionmaker is acting alone, he or she does not have the benefit of other's views that differ from his own. A labor arbitrator is usually the only final decisionmaker on a case. Consequently,

arbitrators must work even harder to become aware of and be able to counteract any assumptions, perceptions, and biases they may bring to the situation before them. This is, perhaps, made even more difficult by the fact that members of the National Academy of Arbitrators are not a very diverse group themselves. I do not have precise statistics, but based on published reports and membership updates, I estimate that the membership of the National Academy of Arbitrators is over 90 percent white and about 85 percent male. As reported in 2002, the membership of the Academy was 94 percent white and 88 percent male.[1] Because arbitrators are surrounded by people very much like themselves, they must take affirmative measures to reach out and be aware of the experiences of people from different backgrounds with different life stories to tell.

Although the world of labor arbitration has been a primarily white male world, it is gradually becoming more diverse. Similarly, American labor unions have struggled with diversity issues for years and are still struggling to integrate white women and men and women of color into their leadership ranks. It is my guess that most of the union officers making the decisions about which grievances are taken to arbitration are still white men. On the other hand, the ranks of employers' labor relations officials are more diverse, since labor relations is one field in the corporate world where women have been accepted over a longer period of time. But, of course, the most diverse group of participants in labor arbitration is the employees themselves. No doubt the pool of grievants that labor arbitrators meet include more women and more people of color today than was the case twenty years ago. This is true because the lower one goes down into the ranks of any American employment hierarchy, the more women and people of color one will find. Conversely, the higher the employment rank, the more white male-dominated that rank will be. That is certainly true for the University of California, the world in which I work, and I'm sure it is true for the employers and labor unions with whom labor arbitrators work.

There is an increasing body of scholarship examining the roles that personal background and life experience play in the decisions that judges make. The most dramatic examples are among

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[1] *See* Stephen Crow & Sandra Hartman, *The National Academy of Arbitrators: Decline and Fall or Renewal?*, 2002 Proceedings of the National Academy of Arbitrators 206, 212 (2002). The data were based on a 1999 survey of National Academy members.

federal judges. United States Presidents appoint federal judges. Consequently, republican presidents appoint republicans to the bench, and democrats appoint democrats. There are few departures from this basic rule. In my fields of law— labor law and employment discrimination—one can often predict the outcome of the case simply by reading the biography of the judge and noting who appointed him, and occasionally her, to the bench. One recent study found that judges appointed by President Carter ruled in favor of a race discrimination plaintiff 78 percent of the time, while judges appointed by President Reagan ruled in favor of a race discrimination plaintiff only 18 percent of the time.[2] On women's issues, the gap was not quite so wide: the Carter judges ruled on the women's side 56 percent of the time, while the Reagan judges ruled on the women's side 36 percent of the time.[3] In contests between unions and companies, the Carter judges supported the unions 61 percent of the time and the Reagan judges supported the unions 43 percent of the time.[4] This phenomenon is inevitable and a deliberate consequence of our democratic system with its three inter-dependent branches of government. But what does this have to do with labor arbitration?

It is my thesis that decisionmaking by labor arbitrators is also influenced by their background and life experiences. Consequently, arbitrators must become aware of their own biases in order to limit the impact of their preconceptions on their decisions. The bias may take the form of simple pleasure or displeasure in working with a particular advocate, derived from a previous acquaintance in working with that person on a prior case. It may take the form of questioning the competence of a new advocate, perhaps a woman, and wondering if she is competent to handle the case, whether representing the union or the employer. And whenever gender, racial or ethnic discrimination issues are the focus of an employment dispute, now in arbitration, an arbitrator must be aware of his or her own assumptions or viewpoints on race or gender issues and take them into account in reaching a decision. The arbitrator must also be on the lookout for the role that bias may have played in how the employee was initially treated at

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[2] *See* Rowland & Carp, Politics and Judgment in Federal District Courts (University Press of Kansas 1996), at 49 ("For cases dealing with racial minority discrimination the difference between the behavior of the two presidential cohorts is astonishing.").

[3] *Id., see* Table 2-10.

[4] *Id.*

work and in how the union or the company handled the grievance and investigation leading up to the arbitration.

To illustrate possible problems posed by the stereotypes we all hold in our heads, I would like to use sexual harassment cases as an example. Labor arbitrators must have an interesting view of sexual harassment because of the unique posture these cases assume in labor arbitration. The vast majority of labor arbitrations involving sexual harassment are filed by unions on behalf of men who have been disciplined, usually discharged, for harassing women.[5] These alleged harassers are claiming that there was no "just cause" for their discharge under the collective bargaining agreement. Few grievances filed by women complaining about harassment seem to reach arbitration, and the few that do are by women complaining that they have been retaliated against by the employer for complaining about sexual harassment. Perhaps the major reason arbitrators hear few, if any, grievances from women about the harassment itself is because the employer has already acted, as required by federal law, to stop the harassment. Or, perhaps male-dominated labor organizations are not willing to accept or pursue women's grievances of harassment against fellow union members. And many women may be afraid to file sexual harassment grievances in the first place, knowing that the men in the workplace control the grievance machinery. Many women simply fear the men will back each other up and do nothing about the harassment.[6]

For whatever reason, labor arbitrators are primarily asked to evaluate sexual harassment issues from the harasser's point of view—in order to assess whether the harasser was accorded his procedural rights during the grievance and discipline process and whether the employer's discipline against him was appropriate under the circumstances. This structural posture may make it dif-

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[5]One study found that there were 129 arbitration opinions published by the Bureau of National Affairs involving some aspect of sexual harassment during the 10 years from 1990 through November 2000. In at least 113 of the cases, arbitrators were ruling on the appropriate discipline of harassers. *See* Carrie Donald & John Ralston, *Arbitral Views of Sexual Harassment: An Analysis of Arbitration Cases, 1990-2000*, 20 Hofstra Lab. L. J. 229, 230, and Table 2 at 298 (2003). "Arbitrators are in the unique position of reviewing most cases from the perspective of the alleged harasser rather than the victim." *Id.* at 302.

The overwhelming percentage of sexual harassment complaints are made by women. At the EEOC, women filed 91 percent of sexual harassment charges in 1992 and 86 percent of the charges in 2001. *See* Martha S. West, *Preventing Sexual Harassment: The Federal Courts' Wake-Up Call for Women*, 68 Brooklyn L. Rev. 457, note 3 at 457-458 (2002).

[6]For a discussion of the fear that deters women from complaining about harassment, *see* West, *supra*, note 5, at 467-468.

ficult for an arbitrator to evaluate the impact the harassment has had on women in the workplace.

Meanwhile, more and more employers have become acutely sensitized to sexual harassment issues as a result of U. S. Supreme Court opinions. The U. S. Supreme Court has created an affirmative defense for an employer to limit its liability for sexual harassment.[7] To take advantage of this affirmative defense, however, the employer must take immediate action to end the harassment. Consequently, since 1998, many employers have adopted "zero tolerance" policies for sexual harassment.[8] These employers will immediately suspend a harasser at the first hint of harassment, and then discharge the harasser at the conclusion of the employer's investigation, if the employer believes harassment has occurred. Employers may be discharging harassers, even if the harassment was not "severe and pervasive," as required by federal law, because the employer wants to take no chances. Employers are calculating that the cost of arbitrating a harasser's grievance, claiming insufficient cause for discharge, will be less costly than the potential and substantial liability for emotional distress damages resulting from a woman's successful harassment lawsuit.[9] To forestall any lawsuit, they simply fire the alleged harasser.

When the harasser's discharge grievance is arbitrated, what view does the arbitrator have of the woman who suffered the harassment? She is now being represented by the employer— she does not have her own advocate. The union is taking the side of the harasser, which only compromises the union further in the eyes of women who suffer harassment on the job. Even though the employer terminated the harasser, the employer may not have done a competent investigation and may not have protected any "due process" procedural rights the harasser may have had.

Consequently, the arbitrator may end up reinstating the harasser, even though the arbitrator believes harassment did occur. It just may not have been of an egregious enough nature to cost a twenty-five year employee his job, particularly an employee with a good work record. Or the company may have fired the harasser too quickly without a sufficient investigation. Whatever the reason,

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[7] *See Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton,* 524 U.S. 775 (1998).

[8] *See* Robert Perkovich & Anita Rowe, *What Part of "Zero" Don't You Understand?: The Arbitration of Sexual Harassment Discipline and "Zero Tolerance" Policies*, 36 Willamette L. Rev. 749 (2000).

[9] *Id.* at 785.

from the woman's point of view, she has suffered the harassment, but has learned, once again, that she is not being protected, and the harasser is back on the job.

Because of the developments under Title VII in sexual harassment litigation, one may even wonder if employers and unions are indirectly cooperating with each other to put harassers back to work. The unions are aware that employers must take strong measures, once harassment is reported to them, to limit their liability under federal law. Maybe they are reassuring the men who are being discharged that they need not worry—they will eventually get their jobs back through arbitration. The studies of arbitrations involving sexual harassment issues show that arbitrators were overturning the discipline of sexual harassers at higher rates in the late 1990's than before. One study found that the discipline of harassers was upheld in 62 percent of arbitration cases from 1990–1995, but in only 44 percent of the cases from 1995–2000.[10] Perhaps labor arbitrators are viewing employers' stricter polices against sexual harassment as overly harsh or that employers are disciplining employees for less serious types of harassment.

As I was working on this project, I also came to realize that labor arbitrators do not hear the most egregious examples of sexual harassment at work, because the most egregious cases involve harassment by supervisors, not co-workers. Supervisors are not "employees" under the National Labor Relations Act, and, therefore, are not covered by collective bargaining agreements in the private sector and have no access to arbitration. Only in the public sector would some supervisors in separate bargaining units be covered by collective bargaining agreements. Therefore, labor arbitrators are hearing primarily cases where a male co-worker is seeking reinstatement after harassing a woman co-worker, or, in a few situations, where a male employee is seeking reinstatement after harassing a woman supervisor. Male co-workers do not have the kind of economic and psychological power over women at work that supervisors have, so harassment by co-workers rarely takes the extreme form of harassment that supervisors engage in, such as requiring women to have sex with them in order to keep their jobs. Under the federal law on sexual harassment, labor arbitrators are hearing discipline cases based on an underlying fact pattern where women have suffered under a "hostile environment" created by the co-worker's harassment. Labor arbitrators

[10] *See* Donald & Ralston, *supra* note 5, at 301–302.

are not hearing cases where the discipline was given for subjecting women to "tangible job detriments," where women have lost their jobs or have lost a promotion because of resisting the sexual demands of supervisors.[11]

As a result of these changes in the federal law on sexual harassment, I am worried that labor arbitrators may have developed a skewed view of sexual harassment, and may identify more with the worker being discharged for sexual harassment than with the women suffering harassment. That skewed view may be reinforced by gender. As discussed by the Ninth Circuit in a famous sexual harassment case, *Ellison v. Brady,*[12] "conduct that many men consider unobjectionable may offend many women."[13] The Ninth Circuit explained:

> We realize that there is a broad range of viewpoints among women as a group, but we believe that many women share common concerns which men do not necessarily share. For example, because women are disproportionately victims of rape and sexual assault, women have a stronger incentive to be concerned with sexual behavior. Women who are victims of mild forms of sexual harassment may understandably worry whether a harasser's conduct is merely a prelude to violent sexual assault. Men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a woman may perceive.[14]

Consequently, labor arbitrators must remind themselves to evaluate underlying fact patterns taking these gender differences into account.

So far, I have not found empirical data to demonstrate a statistically significant difference in outcomes of sexual harassment arbitrations depending upon whether the arbitrator is a man or a woman. Perhaps that is because there are still relatively few women among labor arbitrators. In one recent study, women arbitrators upheld management's "just cause" for discipline in sexual harassment cases 50 percent of the time, and male arbitrators 40 percent of the time.[15] The male arbitrators were more inclined to reduce the penalty, issuing a split decision 41percent of the time, and the women arbitrators only 31 percent of the time. But both male and

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[11]Only supervisors can take action which creates a "tangible job detriment." *See Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742, 753–54, 768 (1998).

[12]924 F.2d 872 (1991).

[13]*Id.* at 878.

[14]*Id.* at 879 (footnotes omitted).

[15]Cooper, Bognanno, and Befort study presented at the 2007 National Academy of Arbitrators meeting, San Francisco, May 2007 (data on file with the author).

female arbitrators found no just cause for discipline 19 percent of the time. So, perhaps the gender of the arbitrator matters a little bit, but not significantly. In this sample of 102 cases, 86 of the arbitrators were men, and only 16 were women, so the number of cases in each category decided by the women was quite small.[16] Among federal judges, male and female judges do view sexual harassment from different vantage points. In judicial opinions, male judges, including those on the Supreme Court, tend to see instances of harassment as an individual man's personal fantasy or fling.[17] Male judges tend to view discrimination in general as just the misguided actions of a few prejudiced individuals. Women judges, on the other hand, tend to see sexual harassment as systemic—as part of a much larger pattern of sex discrimination—as one way men wield power over women in the workplace.[18] Women judges see sexual harassment as part of the gender power dynamic in the workplace, not the acting out of personal sexual fantasies. Some labor arbitrators probably share these same assumptions as federal judges, while others do not.

Because labor arbitration, however, takes place in a largely male world, all arbitrators must work extra hard to make sure women's complaints of sexual harassment are taken seriously. Labor arbitrators have a very important role to play to make it clear that women have a right to work in an environment that is free from harassment, one of the most invidious forms of sex discrimination that women continue to face.

When an arbitrator reinstates a man previously discharged for sexual harassment, several questions need to be addressed:

- Has the arbitrator taken into account the impact of possible reinstatement of the harasser on the woman targeted by the harassment?
- Has the arbitrator given the employer leeway to reassign the harasser to a different part of the workplace, in order to protect the woman he harassed?

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[16]The women arbitrators found just cause for discharge in 8 cases, found no just cause in 3 cases, and imposed a lesser discipline in 5 cases. *Id.*

[17]*See* West, *supra* note 5, at 504 note 229.

[18]*Id.* at 466–67, notes 33–35. In *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), Justice Ruth Bader Ginsburg commented in her concurrence, "The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed. . . . It suffices to prove that a reasonable person . . . would find, as the plaintiff did, that the harassment so altered working conditions as to 'ma[k]e it more difficult to do the job.'" 510 U.S. at 25.

- Has the arbitrator authorized the employer to notify the woman of the harasser's reinstatement, so she is prepared for the fact that he is being returned to the workplace?
- Should other measures be taken to protect the woman from further harassment or retaliation by other employees?
- Upon reinstatement, will the harasser be working with other women? Should they be informed of his prior discipline for harassment?[19]

Sexual harassment cases provide just one example of the types of cases where gender stereotypes inevitably play a role in their presentation and resolution. Sexual harassment remains only one subset of the larger category of sex discrimination in employment. In any type of arbitration involving people of opposite genders, or people from differing cultures, arbitrators must be on the lookout for the subtle role that stereotypes play.

Finally, because the American labor force is becoming increasingly diverse, the National Academy of Arbitrators must continue to work on increasing the diversity of the Academy itself. In order for employees to perceive labor or employment arbitration as a fair forum where they will receive a fair hearing, it is important that the decisionmakers become more diverse to better reflect the diversity of the employees whose cases they hear.

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[19]I have argued elsewhere that when harassers are reinstated or continue to work for an employer after having been disciplined for harassment, women who are required to work with the former harasser should be informed of the prior discipline in order to protect themselves and to encourage them to report any further incidents of harassment to management. *See* West, *supra* note 5, at 519–522.