

## DISCIPLINING SEXUAL HARASSERS IN THE UNIONIZED WORKPLACE: JUDICIAL PRECEDENT IS INFLUENCING ARBITRATOR ATTITUDES, AWARDS

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### INTRODUCTION

In 1998, a male kitchen worker, L<sub>-</sub>, ended his shift at a veterans' hospital and headed to the locker room. He started making jokes about the relationship that President Clinton had had with his intern, Monica Lewinsky. While several male coworkers egged him on, S<sub>-</sub>, another kitchen worker, did not. Suddenly, without prompting, L<sub>-</sub> asked S<sub>-</sub> if he wanted to engage in oral sex. S<sub>-</sub>, who was quite embarrassed, said, "L<sub>-</sub>, you're sick," and quickly tried to leave the locker room.

As S<sub>-</sub> opened the door to leave, L<sub>-</sub> repeated the question, forming the words in a whisper. The next day, S<sub>-</sub> told his supervisor that he was so distraught about the incident that he could not sleep the previous night. When questioned about the incident, L<sub>-</sub> claimed he was only teasing and joking, and that his supervisors had always condoned this type of behavior in the men's locker room.

After investigating S<sub>-</sub>'s complaint, the employer suspended L<sub>-</sub> for five days for using obscene, disrespectful language towards another employee. This type of behavior was expressly prohibited in the employee handbook, and L<sub>-</sub> had previously been disciplined for verbally abusing a patient and a nurse. Beyond that, L<sub>-</sub> had taken on-the-job training in sexual harassment, which taught him that vulgar and obscene language could create a hostile work environment. L<sub>-</sub> challenged his suspension by filing a grievance through his union. The grievance ultimately led to an arbitration hearing.

Arbitrator Sandra Smith Gangle upheld L<sub>-</sub>'s suspension,<sup>1</sup> pointing out that the United States Supreme Court had construed

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Title VII of the Civil Rights Act of 1964 to require employers to prohibit unwelcome sexual language, jokes, or other demeaning and insulting conduct of a sexual nature.<sup>2</sup> Arbitrator Gangle took cues from two Supreme Court decisions on sexual harassment, *Harris v. Forklift Systems, Inc.*<sup>3</sup> and *Oncale v. Sundowner Offshore Services, Inc.*,<sup>4</sup> in evaluating whether L's conduct was unlawful.<sup>5</sup> After using "[c]ommon sense, and an appropriate sensitivity to social context"<sup>6</sup> and evaluating whether a reasonable victim in S's position would have perceived L's questions as hostile or abusive, Arbitrator Gangle concluded that L had sexually harassed S.<sup>7</sup>

Most people would agree that an individual who sexually harasses a coworker deserves punishment. But what punishment is appropriate for such immoral and unlawful behavior? An analysis of recent labor arbitration decisions reveals that arbitrators faced with this thorny decision are influenced by Supreme Court and lower federal court rulings regarding sexual harassment.<sup>8</sup>

Although in a disciplinary arbitration an arbitrator is not typically required to decide whether the alleged harasser's behavior rose to an unlawful level,<sup>9</sup> many arbitrators are doing that type of analysis

1. See *Dep't of Veterans Affairs v. Am. Fed'n of Gov't Employees, Local 1089*, 113 Lab. Arb. Rep. (BNA) 961, 969 (1999) (Gangle, Arb.).

2. *Id.* at 965 (citing *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 66 (1986) (interpreting Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e to 2000e-17 (1994))).

3. 510 U.S. 17 (1993).

4. 523 U.S. 75 (1998).

5. *Dep't of Veterans Affairs*, 113 Lab. Arb. Rep. (BNA) at 965-66 (citing *Harris*, 510 U.S. at 22; *Oncale*, 523 U.S. at 81-82).

6. *Id.* at 966 (quoting *Oncale*, 523 U.S. at 82).

7. *Id.* at 966-67, 969.

8. Between June 27, 1998 and May 10, 2000, BNA reported twenty cases in which a union challenged the discipline or discharge imposed on an employee who was accused of sexually harassing another individual at work. This Article is based on an analysis of these cases. The time period was chosen because the landmark Supreme Court rulings in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), were handed down June 26, 1998.

9. According to the Equal Employment Opportunity Commission ("EEOC") guidelines: Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when . . . submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or . . . such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a) (2001).

These guidelines were introduced by the EEOC in 1980 and adopted by the Supreme Court in *Meritor Savings Bank v. Vinson*, 477 U.S. 73, 66 (1986). The guidelines establish that both *quid pro quo* and hostile work environment sexual harassment are prohibited forms of sex discrimination under Title VII. *Quid pro quo* harassment occurs when an employee must

before reviewing the appropriateness of the employer's disciplinary decision.<sup>10</sup> Most arbitrators, as well as the parties, regularly cite US Supreme Court and other federal court interpretations of unlawful sexual harassment as a basis for this analysis. Beyond that, the Supreme Court has given employers an incentive to investigate and eliminate harassment,<sup>11</sup> and that incentive is also affecting how arbitrators evaluate the discipline that employers impose on alleged harassers.

In addition to reviewing the particular disciplinary requirements established in a collective bargaining agreement ("CBA"), arbitrators are scrutinizing the employer's disciplinary decisions with the employer's legal obligations in mind. If the grievant's conduct rose to a level of unlawful sexual harassment, arbitrators consider the fact that a jury could impose financial liability on the employer that fails to do enough to prevent and eliminate harassment.<sup>12</sup> Consequently, when a grievant's conduct has risen to the level of unlawful harassment or is generally egregious, many arbitrators will uphold the employer's discipline or reduce it minimally.<sup>13</sup>

If, however, the grievant's conduct does not constitute sexual harassment under either federal law or the employer's own policy, arbitrators are more likely to reduce the discipline imposed on the grievant.<sup>14</sup> However, in doing so, arbitrators consider whether the grievant was trained to understand and avoid sexual harassment and whether reinstating a discharged employee, or reducing a lengthy suspension, will lead the grievant's coworkers to believe that sexual harassment in the workplace is acceptable.<sup>15</sup>

submit to direct requests for sexual favors as a condition of a job or promotion, or refuses to submit to such requests and consequently suffers a job detriment. 29 C.F.R. § 1604.11(a)(1)–(2). Hostile work environment harassment includes unwelcome sexual comments, jokes or other demeaning and insulting conduct of a sexual nature that has "the purpose or effect of unreasonably interfering with an individual's work performance." 29 C.F.R. § 1604.11(a)(3).

10. See ELKOURI & ELKOURI, *HOW ARBITRATION WORKS* 70 (Edward P. Goggin & Alan Miles Ruben eds., 5th ed. Supp. 1999) ("Arbitrators continue to hold that where contractual provisions being interpreted or applied have been formulated loosely, an arbitrator may consider all relevant factors, including relevant law.").

11. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 765 (1998) (giving employers an affirmative defense to claims of certain forms of sexual harassment committed by supervisors). These rulings will be discussed in detail *infra* Part I.

12. See *infra* Part X.

13. See *infra* Part X.

14. See *infra* Part XI.

15. See *infra* Part XI.

These are certainly not the only factors arbitrators consider in these cases. The CBA itself provides the parameters under which the arbitrator evaluates the discipline, but if it gives the arbitrator broad discretion, the above factors are being given considerable weight.

This Article will discuss the extent to which judicial precedent on sexual harassment is affecting labor arbitrators' attitudes and awards in sexual harassment cases.

### I. EMPLOYERS' INCENTIVE TO PREVENT AND CORRECT HARASSMENT

In *Burlington Industries, Inc. v. Ellerth*<sup>16</sup> and *Faragher v. City of Boca Raton*,<sup>17</sup> the Supreme Court granted new protection for employers facing liability for hostile environment sexual harassment committed by supervisors: the employer is not liable if it "exercised reasonable care to prevent and correct promptly" the harassment; the harassed employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise"; and the employer did not subject the employee to an adverse, tangible employment action.<sup>18</sup>

Given this huge incentive for employers to prevent, identify, and eliminate sexual harassment, it is not surprising that sexual harassment is listed as a prohibited activity in many CBAs and employment policies.<sup>19</sup> In the aftermath of these decisions, it is imperative that employers take aggressive steps to prevent and correct sexual harassment at all levels of the company.<sup>20</sup> Many companies now train all their employees on what may constitute sexual harassment, how to avoid engaging in it, and how to report any incidents to management.<sup>21</sup> Beyond that, the rulings motivate employers to move more

16. 524 U.S. 742 (1998).

17. 524 U.S. 775 (1998).

18. *Faragher*, 524 U.S. at 807; *Burlington Indus.*, 524 U.S. at 765. An adverse, tangible employment action occurs when the employee suffers "a significant change in employment status, such as discharge, demotion, or undesirable reassignment." *Id.* at 744.

19. See, e.g., *Safeway, Inc. v. United Food & Commercial Workers, Local 373R*, 112 Lab. Arb. Rep. (BNA) 1050, 1053 (1999) (Silver, Arb.) (detailing the company's employment policy prohibiting unlawful harassment); *Beta Steel Corp. v. Int'l Longshoremen's Ass'n, Local 2038*, 112 Lab. Arb. Rep. (BNA) 877, 878 (1998) (Brookins, Arb.) (detailing CBA provisions prohibiting sexual harassment).

20. See Cynthia L. Gibson, *Sexual Harassment Investigations*, FOR DEF., Sept. 1999, at 37 (discussing how, in the wake of the above-mentioned *Faragher* and *Burlington Industries* rulings, federal courts are examining the adequacy of employers' sexual harassment prevention policies and the timeliness of their corrective measures).

21. See, e.g., *Dep't of Veterans Affairs v. Am. Fed'n of Gov't Employees, Local 1089*, 113

swiftly to initiate investigations into allegations of sexual harassment, and, in many cases, to harshly discipline employees who sexually harass coworkers or subordinates.<sup>22</sup>

In addition to being held liable for sexual harassment of subordinates by supervisors, employers may also be held liable for sexual harassment of workers by coworkers.<sup>23</sup> Under federal law, employers will be held liable for coworker sexual harassment if they knew or should have known of the conduct and failed to take immediate corrective action.<sup>24</sup> Many companies fear that if they do not discipline an alleged harasser harshly enough, the remainder of the workforce will think such behavior is acceptable.<sup>25</sup>

Many disciplined or discharged employees, however, argue that the employer's fear of potential litigation against it by the harassed employee caused the employer to blindly impose discipline in disproportion to the seriousness of the offense.<sup>26</sup> Amidst this changing landscape, labor arbitrators are hearing numerous cases

Lab. Arb. Rep. (BNA) 961, 965 (1999) (Gangle, Arb.); *City of Ada v. FOP Lodge 111*, 113 Lab. Arb. Rep. (BNA) 422, 423 (1999) (Goodman, Arb.). The EEOC advises employers to educate all parties about the subject of sexual harassment, to inform employees of their right to raise the issue, and to develop appropriate sanctions for harassers. EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(f) (2001).

22. When discussing what impact these holdings were having on employers, Marc Silverman, a partner with Brown & Wood (now, Sidley Austin Brown & Wood, LLP), who represents employers, told the *New York Law Journal*: "Given the large damage awards employers can face if found liable for sexual harassment, employers may be more willing to terminate alleged harassers or individuals who are obligated to report sexual harassment but fail to [do so]." Lisa I. Fried, *Sexual Harassment: Revisiting the High Court's Rulings a Year Later*, N.Y. L.J., June 3, 1999, at 5. Cf. *AMG Indus., Inc. v. United Rubber, Cork, Linoleum, & Plastic Workers, Local 582*, 106 Lab. Arb. Rep. (BNA) 322, 327 (1996) (Donnelly, Arb.) (discussing how the employer's fear of litigation under the state's law against hostile work environment harassment prompted the employer to develop a policy to impose discipline, including discharge, on any employee who engaged in sexual harassment).

23. The EEOC guidelines on harassment state that an employer is liable for coworker harassment "where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action." 29 C.F.R. § 1604.11(d).

24. *Id.*; see also *EEOC v. Hacienda Hotel*, 881 F.2d 1504, 1515-16 (9th Cir. 1989) ("The prevailing trend of the case law . . . seems to hold that employers are liable for failing to remedy or prevent a hostile . . . work environment of which management-level employees knew, or in the exercise of reasonable care should have known.").

25. See *City of Oakland v. Int'l Ass'n of Firefighters, Local 55*, 112 Lab. Arb. Rep. (BNA) 392, 397, 399 (1999) (Silver, Arb.); *Ralphs Grocery Co. v. United Food & Commercial Workers, Local 135*, 112 Lab. Arb. Rep. (BNA) 120, 122 (1999) (Prayzich, Arb.); *Beta Steel Corp. v. Int'l Longshoremens' Ass'n, Local 2038*, 112 Lab. Arb. Rep. (BNA) 877, 879, 884 (1998) (Brookins, Arb.).

26. See, e.g., *Mead Corp. v. United Paperworkers Int'l Union, Local 731*, 113 Lab. Arb. Rep. (BNA) 1169, 1179 (2000) (Frankiewicz, Arb.); *PPG Indus., Inc. v. Bhd. of Painters, Local 579*, 113 Lab. Arb. Rep. (BNA) 833, 838-39 (1999) (Dichter, Arb.); *Fleming Cos. v. Teamsters, Local 110*, 112 Lab. Arb. Rep. (BNA) 257, 258 (1999) (Duff, Arb.).

where employees who were disciplined or discharged for sexual harassment are challenging their employer's actions.<sup>27</sup> Through their union representatives, the employees—the grievants—ask arbitrators for a reversal or reduction of their suspensions, or a reinstatement of their employment.<sup>28</sup>

In these cases, the arbitrator must first determine whether the grievant is guilty of the conduct in question. Next, she must ascertain whether, given the nature of the conduct, an employer had “just cause” to impose the discipline that it did.<sup>29</sup>

## II. LOOKING AT THE EMPLOYER'S INVESTIGATION

It is quite common in disciplinary arbitrations for the union to attempt to bolster its position by attacking the employer's investigative process.<sup>30</sup> However, despite the incentive the Supreme Court gave employers in *Faragher* and *Burlington Industries* to quickly and thoroughly investigate sexual harassment complaints, arbitrators are not imposing stricter investigatory requirements on employers. If the CBA does not establish the parameters for disciplinary investigations, arbitrators generally look to see if the employer conducted a reasonable investigation, not whether it turned over every rock to get at the truth.<sup>31</sup>

In *Mead Corp. v. United Paperworkers International Union, Local 731*,<sup>32</sup> the union claimed that the employer did not do enough to corroborate the complainant's claims against the grievant. The union asserted that the employer should have interviewed all potential witnesses to the grievant's conduct, not just those who accused him of improper conduct. The union, relying on Arbitrator Carroll

27. Between June 27, 1998 and May 10, 2000, BNA reported twenty of these cases.

28. Disciplinary cases comprise the largest portion of labor arbitration cases. See FAIRWEATHER'S PRACTICE AND PROCEDURE IN LABOR ARBITRATION 454 (Ray J. Schoonhoven ed., 4th ed. 1999).

29. Employers in most unionized workplaces are precluded from disciplining or discharging an employee unless that employee engages in conduct that constitutes “just” or “proper” cause for that discipline or discharge. *Id.* at 583. The burden is on management to establish that it had just cause for its action, and then the burden shifts to the union to justify the grievant's conduct. ELKOURI & ELKOURI, HOW ARBITRATION WORKS 905-06 & n.103 (Marlin M. Volz & Edward P. Goggin eds., 5th ed. 1997). For an extensive discussion of just cause, see *id.* at 911 and *infra* Part X. See generally ADOLPH M. KOVEN & SUSAN L. SMITH, JUST CAUSE: THE SEVEN TESTS (2d ed. 1992).

30. See, e.g., *Mead Corp. v. United Paperworkers Int'l Union, Local 731*, 113 Lab. Arb. Rep. (BNA) 1169, 1179-80 (2000) (Franckiewicz, Arb.).

31. *Id.* at 1183-84.

32. 113 Lab. Arb. Rep. (BNA) 1169.

Daugherty's famous seven-step test for just cause,<sup>33</sup> argued that the employer's failure to interview all potential witnesses compelled the arbitrator to reinstate the grievant. The seven-step test requires, among other things, that an employer use due process when investigating the alleged misconduct of an employee.<sup>34</sup>

Arbitrator Matthew Franckiewicz ultimately agreed to reduce the grievant's discharge to a one-week suspension, but not because the investigation was faulty.<sup>35</sup> He wrote:

[W]hile there is a due process dimension in the concept of just cause, a grievant's primary guarantee of due process stems from the requirement that the employer prove to a neutral arbitrator that the purported misconduct in fact occurred. Thus while I would not condone a discharge based solely on the hunch that the employee had engaged in misconduct and the hope that evidence could be found to justify that hunch, I do not believe that just cause requires an employer to do more than to conduct a reasonable investigation and to afford the grievant an opportunity to give his side of the case. I do not believe it is required to search for possible corroboration or contradiction of the witnesses against the grievant, at least where such avenues have not been suggested by the grievant himself to the employer. Nor is the investigation deficient merely because the company fails to ask every question that can be suggested retrospectively.<sup>36</sup>

### III. DID THE GRIEVANT CREATE A HOSTILE ENVIRONMENT?

This Section discusses a series of Supreme Court decisions that provide guidance for determining whether an individual's misconduct created a hostile work environment. In *Meritor Savings Bank v. Vinson*,<sup>37</sup> the Court held that a plaintiff bringing a claim under Title VII for hostile environment sexual harassment must prove that the harassment occurred,<sup>38</sup> that it was unwelcome,<sup>39</sup> and that it was "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"<sup>40</sup>

33. See *infra* Part IX and note 107 for a detailed explanation of Arbitrator Carroll Daugherty's seven-step test for just cause.

34. See *infra* note 107.

35. *Mead Corp.*, 113 Lab. Arb. Rep. (BNA) at 1183-84 (reducing the discharge to a one-week suspension because the grievant's conduct was not outrageous enough to forego progressive discipline of a longtime employee with an unblemished record).

36. *Id.* at 1184.

37. 477 U.S. 57 (1986).

38. *Id.* at 64.

39. *Id.* at 68.

40. *Id.* at 67 (alteration in original) (quoting *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)).

In *Harris v. Forklift Systems, Inc.*,<sup>41</sup> the Supreme Court stated, “Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person [in the plaintiff’s position] would find hostile or abusive—is beyond Title VII’s purview.”<sup>42</sup> The Court further clarified the plaintiff’s burden, holding that courts should consider the totality of the circumstances—including the frequency and severity of the conduct, whether the conduct was physically threatening or humiliating, whether a mere offensive utterance was made, or whether the conduct unreasonably interfered with the complainant’s work performance—to decide if a hostile or abusive workplace existed.<sup>43</sup>

However, in evaluating the unlawfulness of the conduct, the Court said that the ultimate determination should not turn on whether the plaintiff suffered some type of psychological trauma or injury.<sup>44</sup> While Title VII certainly bars conduct that would seriously affect a reasonable person’s psychological well-being, the Court made clear that “[s]o long as the environment would reasonably be perceived, and is perceived, as hostile or abusive, there is no need for it also to be psychologically injurious.”<sup>45</sup>

The importance of the totality of the circumstances test was emphasized in *Oncala v. Sundowner Offshore Services, Inc.*,<sup>46</sup> where the Court explained that “[t]he real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed.”<sup>47</sup> The Court stated that Title VII is not a “general civility code”<sup>48</sup> and reiterated that “ordinary socializing in the workplace—such as male-on-male horseplay or intersexual flirtation—” is not unlawful discrimination.<sup>49</sup> The Court further stressed that “[c]ommon sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing . . . and

41. 510 U.S. 17 (1993).

42. *Id.* at 21.

43. *Id.* at 23.

44. *Id.*

45. *Id.* at 22 (citation omitted) (citing *Meritor*, 477 U.S. at 67).

46. 523 U.S. 75 (1998).

47. *Id.* at 81–82.

48. *Id.* at 81.

49. *Id.*

conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive."<sup>50</sup>

#### IV. ARBITRATORS GUIDED BY THE US SUPREME COURT

When labor arbitrators evaluate the conduct of alleged sexual harassers, they too view the conduct from the perspective of a reasonable victim and draw distinctions between minor, offhanded comments, and severe, abusive conduct.<sup>51</sup> In *Conagra Frozen Foods v. International Brotherhood of Teamsters, Local 878*,<sup>52</sup> the grievant asked the complainant to go out on a date, and she refused. Despite her refusal, he later told her he wanted to "rock her world," played dangerous pranks on her at work, followed her, and stared at her constantly—even after she obtained a job transfer to get away from him.

The union cited *Oncala* in an attempt to support its position that asking an employee out on a date, staring at her, or criticizing her work is not harassment. The union further argued that the grievant should be reinstated with back pay and seniority because he had no physical contact with the complainant and did not directly request sexual favors from her.

Arbitrator Barry Baroni, however, determined that the grievant had sexually harassed the complainant.<sup>53</sup> The instant case was not analogous to the ordinary workplace socializing that the Supreme Court held to be lawful in *Oncala*, Arbitrator Baroni wrote, because the grievant did more than simply ask the complainant out on a date.<sup>54</sup> The grievant's repeated, unwelcome behavior "agitated and upset the Complainant and made her afraid of [him]."<sup>55</sup> Arbitrator Baroni pointed out that the issue of severity or pervasiveness must be evaluated from the victim's perspective, not from the perpetrator's, and that many federal courts have established that conduct that men consider unobjectionable may offend women.<sup>56</sup>

50. *Id.* at 82.

51. *See, e.g.*, *Baskin Robbins v. Teamsters, Local 630*, 111 Lab. Arb. Rep. (BNA) 554, 556 (1998) (Richman, Arb.) (indicating that a number of arbitrators agree that "it is the reasonable victim of the charged conduct who determines whether it has reached the level of harassment").

52. 113 Lab. Arb. Rep. (BNA) 129 (1999) (Baroni, Arb.).

53. *Id.* at 133.

54. *Id.* at 132.

55. *Id.*

56. *Id.* at 133 (citing *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991); *Lipsett v. Univ. of P.R.*, 864 F.2d 881, 898 (1st Cir. 1988)).

Additionally, Arbitrator Baroni cited *Hall v. Gus Construction Co.* to support his decision that the grievant's conduct was sexually motivated, and therefore actionable sexual harassment, even though the grievant never physically touched the complainant and never made direct requests for sexual favors.<sup>57</sup> Relying on *Hall*, Arbitrator Baroni wrote, "it appears that the Grievant directed his actions . . . at women *based upon their sex and solely for the purpose of intimidation*. Thus, . . . the evidence proves that Grievant's conduct did constitute sexual harassment."<sup>58</sup>

Another attempt to determine whether a grievant's conduct rose to the level of unlawful harassment occurred in *Mead Corp v. United Paperworkers International Union, Local 731*,<sup>59</sup> where Arbitrator Franckiewicz wrote:

The salient consideration is whether the employee knows, or should know, that his topics are offensive to other employees. . . . In some cases, . . . it is not self-evident that the particular topic is likely to offend, and the employee is not expected to moderate his remarks unless co-workers inform him that the conversation makes them uncomfortable.<sup>60</sup>

Although the grievant's repeated sexual comments to a female coworker were offensive, the arbitrator reduced the grievant's discharge to a one-week suspension because employees regularly engaged in sexual teasing in the grievant's workplace, the complainant sent mixed signals by her own participation in sexually oriented banter and actions, and the complainant never told the grievant that she was bothered by any of his comments.<sup>61</sup> The arbitrator's award was influenced by the testimony of other female employees who asserted that they had also been subject to the grievant's sexual remarks, but that the grievant stopped making the comments when they told him that they found his remarks offensive.<sup>62</sup>

57. *Id.* at 132–33 (citing *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1014 (8th Cir. 1988) (finding that unlawful sexual harassment may exist even when the perpetrated conduct is not clearly sexual in nature, but would not have occurred but for the fact that the plaintiff was a woman)).

58. *Id.*

59. 113 Lab. Arb. Rep. (BNA) 1169 (2000) (Franckiewicz, Arb.).

60. *Id.* at 1182.

61. *Id.* at 1182–83.

62. *Id.*

## V. DID THE GRIEVANT KNOW HIS CONDUCT WAS PROHIBITED?

Arbitrators routinely allow employers to enforce sexual harassment policies that are stricter than Title VII.<sup>63</sup> Indeed, when an employer's sexual harassment policy clearly indicates the conduct that constitutes sexual harassment, and employees are trained on those policies, arbitrators are not concerned about whether the grievant's conduct meets a legal definition of sexual harassment.<sup>64</sup> In such instances, arbitrators focus on whether the employee knew, or should have known, of the policy and whether the conduct he engaged in was prohibited by that policy.<sup>65</sup>

In *Department of Veterans Affairs v. American Federation of Government Employees, Local 1089*,<sup>66</sup> the union and the employer disagreed over whether the grievant had seen the employee handbook, which expressly prohibited the use of insulting, abusive, or obscene language to or about other personnel. The arbitrator said the issue was moot because the grievant had actual knowledge of the policy through prior disciplinary proceedings and participation in on-the-job training on avoiding sexual harassment.<sup>67</sup>

In *PPG Industries, Inc. v. Brotherhood of Painters, Local 579*,<sup>68</sup> the union represented a male employee charged with sending sexual material to female and male employees over the employer's E-mail system. The union argued that the grievant did not violate the sexual harassment policy because the recipients of the E-mail were not offended by the jokes. The arbitrator, however, found that the pertinent policy section, unlike other sections in the sexual harassment policy, did not require that the prohibited conduct be unwell-

63. See, e.g., *PPG Indus., Inc. v. Bhd. of Painters, Local 579*, 113 Lab. Arb. Rep. (BNA) 833, 842 (1999) (Dichter, Arb.) (enforcing employment policy that prohibited certain conduct even if it was welcomed by coworkers); *Dep't of Veterans Affairs v. Am. Fed'n of Gov't Employees, Local 1089*, 113 Lab. Arb. Rep. (BNA) 961, 964, 968 (1999) (Gangle, Arb.) (upholding employee's suspension for violation of clause in employee handbook that prohibited "[d]isrespectful conduct, use of insulting, abusive or obscene language to or about other personnel").

64. See, e.g., *PPG Indus.*, 113 Lab. Arb. Rep. (BNA) at 842.

65. See, e.g., *id.* at 840; *Dep't of Veterans Affairs*, 113 Lab. Arb. Rep. (BNA) at 965. Employers generally notify employees of proper and improper behavior through policies contained in employee handbooks, information directly distributed to employees, and notices posted around the worksite. In determining whether such rules may be enforced, arbitrators usually follow Arbitrator Daugherty's test for notice, which requires that the company "give to the employee forewarning or foreknowledge of the possible consequences of the employee's disciplinary conduct." KOVEN & SMITH, *supra* note 29, at 23.

66. 113 Lab. Arb. Rep. (BNA) 961 (1999).

67. *Id.* at 965.

68. 113 Lab. Arb. Rep. (BNA) 833 (1999).

come by coworkers in order for a violation to occur.<sup>69</sup> While the recipients of the E-mail may not have taken offense, the act of sending it still violated the policy, the arbitrator wrote.<sup>70</sup>

## VI. NO PATIENCE FOR IGNORANT HARASSERS

Given the huge financial liability employers can face from sexual harassment suits,<sup>71</sup> employers that fail to implement strong and detailed sexual harassment policies leave themselves quite vulnerable. However, despite the inducement the Supreme Court gave employers to do just that, arbitrators are not exactly stringent with employers who fail to take these steps. Instead, many arbitrators appear more concerned with preventing harassers who are ignorant about sexual harassment from getting off scot-free.

For example, in *PPG Industries*, Arbitrator Dichter held that notwithstanding the employer's sexual harassment policy, the grievant should have intuitively known that his conduct was improper.<sup>72</sup> Arbitrator Dichter reasoned that "including in one's E-mail folder [sexually] graphic pictures and a video and then sending that material to someone at work from your workplace is the type of act that one's own common sense must tell them is wrong."<sup>73</sup>

In *Conagra Frozen Foods v. International Brotherhood of Teamsters, Local 878*,<sup>74</sup> the union argued that the employer provided insufficient notice to the grievant about the grounds for his termination because the harassment policy did not define sexual harassment. Arbitrator Baroni denied the grievance and wrote:

The . . . policy against harassment did not specifically single out sexual harassment, but it certainly prohibited harassment, which sexual harassment is an integral part of. As to the overall lack of notice objection raised by the Union, federal law makes sexual harassment in the workplace illegal, and federal law is binding on everyone, whether it is incorporated in Company policy or not.<sup>75</sup>

69. *Id.* at 842.

70. *Id.*

71. The Civil Rights Act of 1991 substantially increased employers' potential liability by amending Title VII to allow juries to award both compensatory and punitive damages to successful plaintiffs in discrimination suits. 42 U.S.C. § 1981a (1994).

72. *PPG Indus.*, 113 Lab. Arb. Rep. (BNA) at 842.

73. *Id.* at 842-43.

74. 113 Lab. Arb. Rep. (BNA) 129 (1999) (Baroni, Arb.).

75. *Id.* at 133 (citation omitted).

## VII. IS A SINGLE INCIDENT HARASSMENT?

In sexual harassment arbitrations, the employer frequently defends a suspension or discharge with evidence of prior charges of sexual harassment brought against the grievant. Employers argue that given the employee's repeated involvement in prohibited conduct, he is beyond rehabilitation and the employer must now focus on deterring others in the workplace from engaging in similar behavior. When rendering their awards, many arbitrators consider multiple incidents of harassment committed by the grievant to be relevant,<sup>76</sup> but in many instances, the CBA prevents arbitrators from considering the grievant's past behavior problems.

Many CBAs require the employer to use progressive discipline to address problems in the workplace.<sup>77</sup> Typically this means that the employer must initially warn the employee and later impose progressively harsher discipline before terminating the employee. Furthermore, some CBAs mandate that an employer may only consider the prior disciplinary record of an employee within a specified past period of time.<sup>78</sup> When determining how severely to discipline a repeat offender, an employer may not consider any disciplinary action that occurred further in the past than the specified time period extends. An employee with no documented misconduct within the specified past period is considered a first-time offender, and the employer must restart the progressive discipline process.

In sexual harassment arbitrations, where the alleged harasser is grieving the severity of the discipline he received, this frequently works in the grievant's favor. If the CBA has these types of provisions, the arbitrators must exclude any untimely complaints against the harasser from the record. Once the arbitrator does that, the record often includes only a single incident or sporadic incidents of harassment.

76. See, e.g., *FAA v. Prof'l Airways Sys. Specialists*, 112 Lab. Arb. Rep. (BNA) 129, 134 (1999) (Sergent, Arb.).

77. Progressive discipline involves "the use of disciplinary penalties (warnings, suspension and reprimands) short of discharge in an attempt to change a person's behavior." *FAIRWEATHER'S*, *supra* note 28, at 323; see also *Or. Dep't of Corr. v. Or. AFSCME Council 75*, Local 3940, 113 Lab. Arb. Rep. (BNA) 374, 378, 380 (1999) (Skratek, Arb.) (relying on progressive discipline clause in CBA to determine appropriateness of level of discipline).

78. See, e.g., *Penn. Turnpike Comm'n v. Teamsters, Local 250*, 113 Lab. Arb. Rep. (BNA) 737, 737 (1999) (Duff, Arb.) (six-month limitation for past warnings, twelve-month limitation for past suspensions); *Fleming Cos., v. Teamsters, Local 110*, 112 Lab. Arb. Rep. (BNA) 257, 257 (1999) (Duff, Arb.) (nine-month limitation).

Many federal courts are reluctant to find unlawful harassment based on a single incident of harassment, particularly if no physical conduct was involved.<sup>79</sup> When faced with a single incident (or sporadic incidents), arbitrators must evaluate whether that incident alone was severe or pervasive enough to create an objectively hostile workplace.<sup>80</sup> In making this determination, arbitrators are guided by the terms of the CBA, the employer's sexual harassment policy, relevant federal court decisions, and the context of the employment setting.

In *City of Ada v. FOP Lodge 111*,<sup>81</sup> the employer, a local police department, charged a police sergeant with sexual harassment and demoted him to the rank of police officer for snapping the bra strap of a female subordinate. During the investigation, the female dispatcher begged department officials not to terminate the grievant over this conduct. The grievant admitted to snapping the bra strap, but argued that his conduct did not amount to sexual harassment, and that, in any event, his demotion violated the CBA because it was arbitrary and capricious. The employer's sexual harassment policy closely mirrored the language of the Equal Employment Opportunity Commission's guidelines on sexual harassment,<sup>82</sup> and all employees, including the grievant, had received sexual harassment training.

The arbitrator ruled that the conduct was not unlawful sexual harassment because the grievant did not ask any sexual favors of the dispatcher and he was only involved in a single incident.<sup>83</sup> The arbitrator sustained the grievance and restored the grievant to the rank of sergeant and made him whole for all lost wages and benefits.<sup>84</sup>

In *Department of Veteran Affairs v. American Federation of Government Employees, Local 1089*,<sup>85</sup> Arbitrator Gangle looked at several factors—the Supreme Court's decision in *Oncale v. Sundowner Offshore Services, Inc.*, the normal standard of conduct in

79. See, e.g., *Gross v. Burggraf Constr. Co.*, 53 F.3d 1531, 1542 (10th Cir. 1995); *Jones v. Clinton*, 990 F. Supp. 657, 677 (E.D. Ark. 1998); *EEOC v. Champion Int'l Corp.*, No. 93 C 202791995 U.S. Dist. LEXIS 11808, at \*27 (N.D. Ill. Aug. 1, 1995).

80. See, e.g., *Dep't of Veterans Affairs v. Am. Fed'n of Gov't Employees, Local 1089*, 113 Lab. Arb. Rep. (BNA) 961, 968 (1999) (Gangle, Arb.); *City of Ada v. FOP Lodge 111*, 113 Lab. Arb. Rep. (BNA) 422, 424 (1999) (Goodman, Arb.).

81. 113 Lab. Arb. Rep. (BNA) 422 (1999).

82. EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a) (2001). The language of the guidelines is iterated *supra* note 9.

83. *City of Ada*, 113 Lab. Arb. Rep. (BNA) at 424.

84. *Id.* at 425.

85. 113 Lab. Arb. Rep. (BNA) 961 (1999).

the grievant's workplace, and the terms of the CBA—to determine whether the comments a male grievant made to a male coworker in a single conversation constituted unlawful sexual harassment.<sup>86</sup> This is the case described in detail in the Introduction of this Article, involving a male employee asking a male coworker in the men's locker room if he wanted to engage in oral sex. After the coworker called the grievant “sick” and attempted to leave, the grievant repeated the question. The coworker reported the incident and the grievant was given a five-day suspension for using obscene, disrespectful language towards another employee.

At the arbitration, the union asserted that the grievant's questions were “shoptalk,” or typical end-of-the-day joking among male employees that had always been acceptable, particularly in the men's locker room. Also, because the Clinton-Lewinsky affair was being discussed in the news at the time, the union asserted that the complainant should have been able to tolerate what he heard. While other coworkers testified that joking and teasing about third parties did go on in the locker room, they said that the grievant's comments, which were directed at an individual, were unacceptable.

Arbitrator Gangle agreed and upheld the grievant's suspension.<sup>87</sup> Quoting *Oncale*, she pointed out that “[c]ommon sense, and an appropriate sensitivity to social context” in which the behavior occurred will enable the fact finder to distinguish between “ordinary socializing in the workplace—such as male-on-male horseplay—” and severe or abusive behavior, “which a reasonable person in the plaintiff's position would find severely hostile or abusive.”<sup>88</sup>

Arbitrator Gangle first evaluated the atmosphere of the workplace and concluded that the employer and union, by express terms in the CBA, intended it to be based on mutual respect and reasonable decorum.<sup>89</sup> The grievant violated this standard of behavior, Arbitrator Gangle said, by directing a demeaning, hostile, and abusive question to a coworker.<sup>90</sup> His question could only have been interpreted to be a direct solicitation for sex or “a demeaning put-down intended to shock the recipient or belittle his sexuality,” she

86. *Id.* at 966 (citing *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81–82 (1998)).

87. *Id.* at 969.

88. *Id.* at 966 (quoting *Oncale*, 523 U.S. at 81–82).

89. *Id.* at 966.

90. *Id.*

wrote.<sup>91</sup> “While such a remark might possibly be shrugged off by some co-workers, it would clearly be offensive to others.”<sup>92</sup>

In this case, however, the grievant should have known that his comments bothered the complainant because the complainant called the grievant “sick” and got up to leave the room, she reasoned.<sup>93</sup> Although the grievant had clear notice that the coworker found the question unwelcome and offensive, he repeated it. The arbitrator concluded that this was abusive conduct in the grievant’s workplace.<sup>94</sup>

#### VIII. TOLERATING SHOFTALK SETS THE STANDARD FOR THE FUTURE

As stated above, the social context of the workplace in question is critical when an arbitrator evaluates a single incident of alleged harassment. If, for example, managers generally ignore sexual jokes or profanity in the workplace, the arbitrator may require the employer to show how the grievant’s conduct was distinguishable from the shoftalk normally tolerated at work.<sup>95</sup>

This is what happened in *Beta Steel Corp. v. International Longshoremen’s Ass’n, Local 2038*.<sup>96</sup> The grievant was terminated after writing “R\_ sucks donkey” in a layer of dust on the rear window of a forklift driven by R\_, a friend and coworker. This was done in the presence of the grievant’s foreman. Before the grievant wrote the statement, he discussed it with R\_, who agreed that the grievant should do it. R\_ then drove the vehicle around the plant. The grievant and R\_ thought the incident was a funny joke, but the humor was lost on the grievant’s foreman, who viewed the conduct as vulgar and disrespectful of his position. The foreman reported the incident to upper management, which terminated the grievant.

The employer argued that the statement was vulgar because it referred to bestiality. It also was of a different nature than the usual workplace shoftalk and violated the standard of conduct expressed in the CBA, the employer said. The CBA contained a provision forbidding the writing of graffiti on company property, as well as one

91. *Id.*

92. *Id.*

93. *Id.* at 966–67.

94. *Id.* at 967.

95. *See, e.g., Beta Steel Corp. v. Int’l Longshoremen’s Ass’n, Local 2038*, 112 Lab. Arb. Rep. (BNA) 877, 883 (1998) (Brookins, Arb.).

96. 112 Lab. Arb. Rep. (BNA) 877 (1998).

forbidding sexual harassment. The union argued that the statement was mere shoptalk, a private joke between friends, and not necessarily vulgar because it was possible that “R\_ sucks donkey” referred to an innocuous part of a donkey, rather than its sex organ.

Arbitrator Robert Brookins held that any intention that the grievant and R had for this episode to be a private joke between them ended when the grievant wrote it on the window of a company-owned forklift.<sup>97</sup> This act converted the private joke into a public act, he wrote.<sup>98</sup>

After analyzing the content of the statement, Arbitrator Brookins held that “although different individuals might interpret the statement differently and the Grievant might have had a non-vulgar intent,” the company was bound only by a reasonable interpretation of the statement under the surrounding circumstances.<sup>99</sup> Arbitrator Brookins concluded that it was reasonable for the company to believe that the statement was meant to refer to a male sex organ since R\_ admitted as much during the arbitration.<sup>100</sup> And, he wrote, it was unlikely that the grievant held a dissimilar interpretation about what the statement meant.<sup>101</sup>

However, while the statement was vulgar, the arbitrator held that it constituted shoptalk that was consistently repeated at this worksite.<sup>102</sup> While no bright-line test exists to determine whether the reference to bestiality was shoptalk, the arbitrator held that the test was whether a reasonable person in the same circumstances would interpret it as such.<sup>103</sup> Additionally, Arbitrator Brookins reasoned that because the employer admitted that employees regularly used foul language at work, the employer failed to show how the grievant’s written statement reached a higher level.<sup>104</sup>

#### IX. WAS THERE JUST CAUSE TO IMPOSE THE PENALTY?

Once the arbitrator determines the extent of the grievant’s conduct, he or she then evaluates whether the employer had just cause to penalize the grievant as it did for this conduct. A labor arbitrator’s

97. *Id.* at 881.

98. *Id.*

99. *Id.* at 880.

100. *Id.* at 879.

101. *Id.* at 879–80.

102. *Id.* at 880.

103. *Id.*

104. *Id.*

power arises from the CBA between the employer and the union. Almost every CBA requires that the employer establish just cause before imposing discipline.<sup>105</sup> This requirement is so universally accepted that some arbitrators presume that this is the standard even if the CBA does not specifically require it.<sup>106</sup>

Although the just cause standard is universally used in labor arbitrations, the parties and the arbitrator rarely define it. Instead, arbitrators tend to exercise their own discretion about what it means.<sup>107</sup>

While some CBAs expressly prohibit sexual harassment,<sup>108</sup> many do not illustrate the specific examples of conduct that would lead to discipline or discharge.<sup>109</sup> Instead, these agreements often give management the right to administer disciplinary action when an employee violates the law or the employer's rules or policies.<sup>110</sup> As

105. See FAIRWEATHER'S, *supra* note 28, at 583.

106. See Roger I. Abrams & Dennis R. Nolan, *Toward a Theory of "Just Cause" in Employee Discipline Cases*, 1985 DUKE L.J. 594, 599.

107. Arguably, the best attempt to define just cause was made by Arbitrator Carroll Daugherty in *Grief Bros. Cooperage Corp. v. United Mine Workers, Dist. 50*, 42 Lab. Arb. Rep. (BNA) 555, 557-59 (1964) (Daugherty, Arb.). Under Arbitrator Daugherty's frequently cited approach, employers will only have just cause for their decisions if they meet all of the following seven elements:

(1) **Proof**: Whether the employer provides the arbitrator with substantial evidence that the employee is guilty as charged;

(2) **Notice**: Whether the employer provided the employee with notice that certain conduct will result in discipline;

(3) **Reasonable rule or policy**: Whether the employer's rule or order was reasonably related to the orderly efficient and safe operation of the employer's businesses and the performance that the employer expected of the employee;

(4) **Investigation**: Whether the employer investigated whether the employee violated a company rule or policy before administering the discipline;

(5) **Fair investigation**: Whether the employer investigated the conduct fairly and objectively;

(6) **Equal Treatment**: Whether the employer applies its policies and rules equally to all employees; and

(7) **Penalty**: Whether the penalty imposed on the employee was reasonably related to the seriousness of the proven offense and the employee's past record.

See KOVEN & SMITH, *supra* note 29, at 23-24; Abrams & Nolan, *supra* note 106, at 601.

108. See, e.g., *Safeway, Inc. v. United Food & Commercial Workers, Local 373R*, 112 Lab. Arb. Rep. (BNA) 1050, 1053 (1999) (Silver, Arb.); *Beta Steel Corp. v. Int'l Longshoremen's Ass'n, Local 2038*, 112 Lab. Arb. Rep. (BNA) 877, 878 (1998) (Brookins, Arb.).

109. See ELKOURI & ELKOURI, *supra* note 29, at 887-88 (explaining that the inclusion of a just cause clause in CBAs provides sufficient predicate for management to initiate disciplinary actions against employees, up to and including discharge, even for conduct not specifically prohibited in the agreement).

110. See, e.g., *Kuhlman Elec. Corp. v. UAW, Local 1772*, 112 Lab. Arb. Rep. (BNA) 691, 692 (1999) (Goldberg, Arb.).

discussed above, it is very common for employers to have policies prohibiting sexual harassment.<sup>111</sup>

If the employer does not have a policy, or has one that is vague, arbitrators use their judgment to decide whether the employer had just cause for the disciplinary action.<sup>112</sup> If the CBA gives the employer broad discretion to impose discipline, an arbitrator will not overturn that decision unless it is discriminatory, arbitrary, capricious, unreasonable, or not based on fact.<sup>113</sup> Additionally, arbitrators, mindful of the liability employers now face in sexual harassment cases, will often uphold a grievant's discharge if the grievant's conduct rose to the level of unlawful harassment or violated the company's sexual harassment policy.<sup>114</sup>

For example, in *Ralphs Grocery Co. v. United Food & Commercial Workers, Local 135*,<sup>115</sup> the grievant was terminated after he kissed a female employee for a second time after knowing that his first kiss upset her. At the arbitration, even the union steward admitted that the grievant had a habit of hugging and kissing coworkers. The CBA did not require the employer to progressively discipline employees for sexual harassment, and there was a dispute at the arbitration over whether the grievant had been warned by the company after the first kiss. The union argued that the grievant should be afforded the benefit of progressive discipline. Arbitrator Prayzich, however, held that, in the absence of a CBA requirement on progressive discipline, the employer has broad discretion to discipline and discharge employees.<sup>116</sup> He held that progressive discipline was appropriate for absenteeism, work performance problems, and less serious rule violations, but that discharge was appropriate for more serious misconduct such as sexual harassment.<sup>117</sup>

111. See, for example, the employer's sexual harassment policies in *PPG Industries, Inc. v. Brotherhood of Painters, Local 579*, 113 Lab. Arb. Rep. (BNA) 833, 835 (1999) (Dichter, Arb.), and *City of Ada v. FOP Lodge 111*, 113 Lab. Arb. Rep. (BNA) 422, 423-24 (1999) (Goodman, Arb.).

112. See, e.g., *Dep't of Veterans Affairs v. Am. Fed'n of Gov't Employees, Local 1089*, 113 Lab. Arb. Rep. (BNA) 961, 965 (1999) (Gangle, Arb.) (interpreting employer policy that proscribed "[d]isrespectful conduct, use of insulting, abusive or obscene language to or about other personnel").

113. See *FAIRWEATHER'S*, *supra* note 28, at 316.

114. See, e.g., *Ralphs Grocery Co. v. United Food & Commercial Workers, Local 135*, 112 Lab. Arb. Rep. (BNA) 120, 124-25 (1999) (Prayzich, Arb.).

115. 112 Lab. Arb. Rep. (BNA) 120 (1999).

116. *Id.* at 124.

117. *Id.*

Because the grievant's conduct clearly violated the company's policy, as well as state and federal law, Arbitrator Prayzich ruled that upholding the discharge was the only logical action to take. He wrote: "A contrary ruling would establish an unacceptable standard of conduct for other employees, have a serious negative impact on the Company's Policy which prohibits sexual harassment, and potentially expose the Employer to liability."<sup>118</sup>

#### X. DISCIPLINE IS REDUCED FOR LESS SERIOUS CONDUCT

If a grievant's conduct did not rise to the level of unlawful harassment, most arbitrators will reduce the grievant's discipline.<sup>119</sup> However, in doing so, arbitrators consider the training the grievant received about sexual harassment and the impact that a reduced suspension or a reinstatement may have on other employees who could be led to believe that sexual harassment is tolerated.<sup>120</sup>

For example, *PPG Industries, Inc. v. Brotherhood of Painters, Local 579*,<sup>121</sup> illustrates how difficult it can be to balance these issues. The grievant had downloaded pornographic material from the Internet onto his work computer, E-mailed it to his home E-mail address, and then sent copies of the pornographic material to coworkers. A female employee who shared the grievant's office computer saw the material at work because the grievant had failed to close his E-mail program. She reported this to management, which commenced an investigation.

The employer's investigation involved reviewing the contents of the grievant's E-mail files, as well as those of the employees who had received his E-mails. The investigation revealed that a total of nine employees were using the company's E-mail system to distribute sexual material. The employer determined that 25 percent of the

118. *Id.* at 124-25.

119. *See, e.g.*, *PPG Indus., Inc. v. Bhd. of Painters, Local 579*, 113 Lab. Arb. Rep. (BNA) 833, 844-45 (1999) (Dichter, Arb.); *Beta Steel Corp. v. Int'l Longshoremen's Ass'n., Local 2038*, 112 Lab. Arb. Rep. (BNA) 877, 884 (1998) (Brookins, Arb.); *Baskin Robbins v. Teamsters, Local 630*, 111 Lab. Arb. Rep. (BNA) 554, 556 (1998) (Richman, Arb.).

120. These are certainly not the only considerations. Other issues arbitrators routinely consider in sexual harassment cases include whether the victim's testimony was credible, whether the incident was reported to management, whether the victim suffered any loss in job status after refusing to submit to or tolerate the grievant's sexual overtures, whether the employer had a harassment policy in place, whether the grievant was trained to understand the policy, the relationship between the grievant and the target, and the type of complaint procedure the employer implemented to learn about sexual harassment complaints. *See* BNA EDITORIAL STAFF, *GRIEVANCE GUIDE* 116-18 (8th ed. 1992).

121. 113 Lab. Arb. Rep. (BNA) 833 (1999).

grievant's E-mail files contained material of a sexual nature. Some of the material included sexual jokes sent to other employees, sexually graphic pictures, and a video sent to an employee of one of the employer's contractors.

When asked about the sexual material on his office computer, the grievant claimed he did not know the contents of some of it because he could not open the programs at work. He then admitted that he E-mailed the material to his home computer and sent them to other employees without having time to read it. The company's systems manager, however, was able to use the grievant's office computer to open the sexually graphic attachments. Furthermore, an employee who had received pornographic E-mail from the grievant testified that he initially saw the grievant viewing it on his computer at work.

The employer gave warnings to eight of the employees involved because they did not send hard-core material over the employer's computer system. The employer, however, terminated the grievant for violating the company's sexual harassment and electronic communication policies and lying about his conduct. In the arbitration proceeding, the union argued that the termination was too harsh because the grievant, who had worked at the company for nine years, had not initially received a warning, did not know that his behavior was a violation of the company policies, and had not engaged in conduct serious enough to be considered sexual harassment. Beyond that, the union asserted that the employer did not prove that the employee could open the electronic material at work and violated a federal statute by opening the grievant's private E-mail. The employer, PPG, argued that its decision was supported by plant rules, prior arbitrators' decisions, the seriousness of the grievant's conduct, and the employer's legal obligation to eliminate sexual harassment.

Arbitrator Dichter reinstated the grievant, who had been out of work for nine months, but did not require the employer to provide back pay.<sup>122</sup> He agreed with the employer's position that the grievant's conduct was serious and prohibited, and that the employer could face serious consequences if it failed to take action against him.<sup>123</sup> "An employer that fails to strongly address conduct like the grievant's is buying itself a lawsuit," he wrote.<sup>124</sup>

122. *Id.* at 845.

123. *Id.* at 844.

124. *Id.*

However, Arbitrator Dichter said that he must also consider the facts that the recipients of the E-mail welcomed it, the grievant was not the only employee who lied in the investigation, and the grievant previously had an unblemished record.<sup>125</sup> “This Arbitrator must do what he believes to be fair under the circumstances while not doing anything that could be considered as condoning the abhorrent behavior by grievant. This is a fine line to walk,” the arbitrator concluded.<sup>126</sup>

In *Baskin Robbins v. Teamsters, Local 630*,<sup>127</sup> B\_, a female co-worker of the grievant, asked the grievant in a meeting if he was having a bad day. He replied that he was, but that he always felt better after smelling her. B\_ greeted the remark with a smile. Because there were insufficient chairs for all the individuals in the meeting room to sit down, the grievant asked B\_ if she wanted to sit on his lap. She declined the offer and laughed. A coworker who attended the meeting reported the incident to management. After an investigation, the employer discharged the grievant in accordance with the employer’s zero-tolerance policy for sexual harassment. The policy had been distributed to employees and discussed with them in meetings.

The employer had in place a sexual harassment policy that was more stringent than Title VII. That policy stated that the victim’s perception of the grievant’s conduct determined whether that conduct constituted sexual harassment in each case. Arbitrator Lionel Richman concluded that the grievant’s comments were not sexual harassment, even under this zero-tolerance policy, because B\_, the recipient of the comments, did not find them offensive.<sup>128</sup> However, because other female employees in the same situation might have been offended by the grievant’s comments, the arbitrator only reduced the discipline in part.<sup>129</sup> He required the employer to reinstate the grievant with back pay, but allowed the employer to consider the first five days of the grievant’s discharge as a suspension without pay.<sup>130</sup> He reasoned that while an arbitrator must determine whether or not the grievant was guilty of sexual harassment, he must also be mindful of the employer’s right to control behavior in the

125. *Id.*

126. *Id.* at 845.

127. 111 Lab. Arb. Rep. (BNA) 554 (1998) (Richman, Arb.).

128. *Id.* at 556.

129. *Id.*

130. *Id.*

workplace.<sup>131</sup> “The Employer is not obligated to hope that the Grievant speaks only to employees who are like-minded to B\_ in his joking fashion. There is a risk in the workplace which the Employer legitimately seeks to avoid. Grievant’s conduct places the Employer at jeopardy of such a risk.”<sup>132</sup>

Additionally, in *Beta Steel Corp. v. International Longshoremen’s Ass’n, Local 3028*,<sup>133</sup> the arbitrator reversed the grievant’s discharge, and ordered him to be reinstated without back pay after the arbitrator concluded that, although the grievant engaged only in shoptalk, his conduct put the employer at risk for a harassment suit.<sup>134</sup> The grievant had written, “R\_ sucks donkey” in a layer of dust on a company forklift. R\_, a coworker, then drove the forklift around the plant. The grievant had previously been warned about his use of vulgar language after repeatedly using a slang term for a woman’s sex organ in conversations with female employees. One of the employees, Ms. X, sued the employer for harassment based on those comments. The grievant defended his action by citing the First Amendment.<sup>135</sup>

Although the arbitrator concluded that the donkey statement was merely shoptalk, he was quite mindful of Beta Steel’s need to eliminate litigation risk. “Because the statement is written, it is susceptible to broader public consumption than a verbal statement” the arbitrator wrote, adding that this created litigation risks for the employer.<sup>136</sup> “Clearly, the Company is not bound to accept such risks and, at the very least, may protect itself by disciplining employees who use its property to broadcast vulgar statements,” he continued.<sup>137</sup> Beyond that, the arbitrator found that strong discipline was needed to rehabilitate the grievant because he had shown no remorse for tormenting Ms. X.<sup>138</sup>

#### XI. EMPLOYERS SHOULDN’T BE BLINDED BY LIABILITY

As this Section will show, however, arbitrators are skeptical of employers who are so concerned about litigation risk that they fail to

131. *Id.*

132. *Id.*

133. 112 Lab. Arb. Rep. (BNA) 877 (1999) (Brookins, Arb.).

134. *Id.* at 884.

135. *Id.* at 878.

136. *Id.* at 881.

137. *Id.*

138. *Id.* at 884.

evaluate a grievant's conduct realistically. Consider, for example, *Fleming Cos. v. Teamsters, Local 110*,<sup>139</sup> where the grievant was terminated for telling a female coworker, "Every time you jump up and down your ass bounces."

The union argued that the employer's decision to terminate the grievant was overkill, driven by its concern about potential liability for sexual harassment. It explained that employees often use profanity in the locker room and that the complaining female employee was known to use the word "fuck" at work herself. The female employee denied this allegation, but did state that the grievant's use of the word "ass" would not have bothered her had it not been used to describe her.

The employer urged the arbitrator not to interfere with its exercise of discretion, asserting that it could not afford to keep this employee because of the potential liability he posed. The employer said that the grievant, a truck driver, had been accused one year earlier of making a sexually harassing comment to a customer. After that previous incident, the company forced the grievant to surrender that truck route, issued him a final warning, and trained him on what constituted sexual harassment. The employer argued that it had just cause to fire the grievant because the grievant repeatedly violated the company's sexual harassment policy, violated sexual harassment law, and was previously both warned and trained.

Arbitrator Duff conceded that the grievant's comment was offensive, went beyond casual shop banter, and should not be tolerated by the company.<sup>140</sup> However, he agreed with the union that the employer's discipline was disproportionate to the conduct and reduced the termination to a suspension without back pay.<sup>141</sup> Arbitrator Duff reasoned:

The Company has understandably taken a strong position of opposition to the kind of comment the Grievant made and it certainly cannot be forced to tolerate anything that really amounts to sexual harassment. Allowing a pattern of sexual harassment to transpire in its workplace could subject it to catastrophic liability consequences.

Nevertheless, this case has to be placed in some realistic perspective. A wisecrack about someone's rear end bouncing or shaking is crude and uncalled for, but it falls far short of the kinds

139. 112 Lab. Arb. Rep. (BNA) 257 (1999) (Duff, Arb.).

140. *Id.* at 259.

141. *Id.*

of repulsive and/or forceful sexual advances and gestures that sexual harassment laws and policies are really designed to prevent. . . .

The Company did have to take swift, strong disciplinary action in this matter and the Grievant must bear the blame for so stupidly forcing its hand. [However, c]ircumspect justice can be effectuated by now converting the Grievant's termination to a long suspension without back pay. Surely this hiatus in the Grievant's employment status will impress upon him that any comments having sexual overtones may have far-reaching and very serious ramifications.<sup>142</sup>

In *Mead Corp. v. United Paperworkers International Union, Local 731*,<sup>143</sup> Arbitrator Franckiewicz acknowledged that employers have a duty to keep the workplace free of sexual harassment, but reminded the employer that this does not mean that every employee who engages in any form of sexual harassment should be discharged.<sup>144</sup> The male grievant's conduct involved verbal comments to a female employee that included sexual innuendoes and banter.

In reducing the grievant's penalty from discharge to a one-week suspension, Arbitrator Franckiewicz likened his decision to that of the Second Circuit in *St. Mary Home, Inc. v. Service Employees International Union, Dist. 1199*.<sup>145</sup> In *St. Mary Home*, the grievant-appellee was discharged after he was arrested for possession of marijuana on work premises. Subsequently, an arbitrator reinstated the grievant-appellee and converted the discharge into a lengthy suspension without pay. The employer appealed, arguing that the arbitrator's award violated the strong public policy against the use, possession, and sale of illegal drugs. The Second Circuit upheld the arbitrator's award, holding that while there was a strong public policy against the use, possession, and sale of illegal drugs, there simply was no similar public policy endorsing the permanent discharge of an employee who engaged in illegal drug-related conduct.<sup>146</sup>

## CONCLUSION

Given the emotional intensity associated with these types of disciplinary proceedings, it is not surprising that arbitrators are looking to neutral and more objective sources for guidance. And, as it turns out, US Supreme Court and lower federal court precedents on hostile

142. *Id.*

143. 113 Lab. Arb. Rep. (BNA) 1169 (2000) (Franckiewicz, Arb.).

144. *Id.* at 1182.

145. *Id.* at 1182 n.2 (citing *St. Mary Home, Inc. v. Serv. Employees Int'l Union, Dist. 1199*, 116 F.3d 41 (2d Cir. 1997)).

146. *St. Mary Home*, 116 F. 3d at 46.

environment sexual harassment have become helpful tools, not only for the arbitrators, but also for the parties, who use them to bolster their characterizations of the grievant's conduct.

Employers' actions that are designed to root out and stop harassment are affecting the disciplinary decisions they make and, as the analyzed cases demonstrate, the outcomes of many arbitrations. Grievants who have been trained on sexual harassment and later direct extreme, offensive comments to coworkers or make them the target of unwelcome sexual advances are not winning the hearts of labor arbitrators when they claim ignorance of an employer's harassment policy. Beyond that, when the grievant's conduct is extreme, or physical in nature, many arbitrators are sympathetic to the employer's concern about liability and will uphold harsh discipline or reduce it in such a way that the grievant still learns his lesson.

Nevertheless, as the cited cases reveal, arbitrators are substantially reducing a grievant's discipline when employers are so blinded by their own risk of liability that they cannot distinguish between casual office banter and the type of unwelcome, severe, and pervasive conduct that creates a hostile work environment.

Just as the Supreme Court in *Harris* urged juries to view the totality of the circumstances before making judgments about sexual harassment, arbitrators in these disciplinary proceedings are considering judicial precedent, as well as the arguments presented by the parties, to enable them to make reasoned decisions.