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MEASURING ARBITRATION'S EFFECTIVENESS IN ADDRESSING WORKPLACE HARASSMENT

Stacy A. Hickox* & Michelle Kaminski**

ABSTRACT

The damage caused by workplace harassment for both targets and the employer calls for a fresh look at how harassment should be addressed in American workplaces. This study analyzes both judicial review of employers' responses to harassment and arbitration awards resolving grievances filed by alleged harassers to resolve the question of how employers should respond to alleged workplace harassment. The viability of arbitration as an alternative to the court's mandate to exercise reasonable care is particularly important given the pervasiveness of both harassment and arbitration programs. Awards reviewing discipline imposed on alleged harassers under the just cause standard demonstrate how harassment can be addressed appropriately outside of the typical litigious approach, but only if the parties creating the arbitration program and the surrounding policies provide an adequate framework to do so. Statistical analysis demonstrates which factors most influence the outcomes in arbitration awards. These awards also point out weaknesses in relying on arbitration to address harassment, many of which can be addressed by policies and collective bargaining agreements ("CBAs") dedicated to eradicating harassment in the workplace. The paper highlights some unique and

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creative approaches to harassment demonstrated through arbitration awards, which review the discipline imposed on harassers; and suggests the provision of accommodations for targets of harassment as well as other opportunities for CBAs to address harassment.

INTRODUCTION

This review of arbitration awards in claims by alleged harassers provides insight into how harassment should be addressed in American workplaces. Workplace harassment, defined as discrimination under American anti-discrimination laws, places a heavy burden on its targets. Harassment can result in targets’ lower productivity and loyalty to the employer, as well as damaged self-esteem and even psychiatric disabilities. Harassment also leads to costs for the employer, including absenteeism, greater health care usage and turnover. Despite these significant intangible costs, most of the litigation under non-discrimination laws focuses on whether a hostile environment has been created by the harassment and whether the employer is liable for the concrete compensatory damages incurred by the target. Courts pay relatively little attention to the intangible costs resulting from the harassment, which can continue with future harassment that might not be prevented by litigation. This study focuses on the question of

2 Rebecca S Merkin & Muhammad Kamal Shah, The impact of sexual harassment on job satisfaction, turnover intentions, and absenteeism: findings from Pakistan compared to the United States, NCBI (May 1, 2014), http://www.ncbi.nlm.nih.gov/pmc/articles/PMC4028468/.
3 Id.
5 Li Zhou, No one knows the economic cost of sexual harassment. These senators want to find out., Vox (June 9, 2018, 8:00 AM), https://www.vox.com/2018/6/9/17441614/sexual-harassment-cost-me-too-
whether arbitration is a viable alternative to address harassment in the workplace.

To avoid liability for workplace harassment, which is only discriminatory if severe and pervasive enough, employers have some obligation to exercise reasonable care in reacting to the harasser with the goal of preventing future harassment. In contrast, when a harasser is disciplined, subsequent arbitration will determine whether that employer had just cause to impose such discipline. This review of arbitration awards addressing such claims of alleged harassers helps determine whether arbitration is an appropriate vehicle to determine the appropriate punishment for harassers, and thereby prevent future harassment in that workplace. This question is particularly important given the pervasiveness of arbitration programs in both unionized and nonunion settings.

The “Me Too” movement and recent highly publicized incidents of harassment have drawn significant attention to the issue of workplace harassment. However, harassment is not a new issue for women, people of color, or any other employee who has been subjected to insults, threats, and even physical abuse by a supervisor or coworker as a result of their membership in a protected class. The prevalence of harassment, outlined in more detail below, raises the question of how employers should respond to eliminate future harassment in the workplace. Both litigation under nondiscrimination statutes and most research focus on what constitutes a hostile work environment and how employers can avoid li-

*Leslye M. Fraser, Sexual Harassment In the Workplace: Conflicts Employers May Face between Title VII’s Reasonable Woman Standard and Arbitration Principles, 20 N.Y.U. REV. L. & SOC. CHANGE 1, 5-6 (1992).*

*Id. at 14-15.*

*See, e.g., Cara Kelly & Aaron Hegarty, #MeToo was a culture shock. But changing laws will take more than a year. USA TODAY (Oct. 4, 2018, 12:18 PM), https://www.usatoday.com/story/news/investigations/2018/10/04/metoo-me-too-sexual-assault-survivors-rights-bill/1074976002/.*

ability if such an environment exists.\textsuperscript{10} A focus on what behaviors create a discriminatory hostile work environment arguably arose as a means of lessening the impact of zero tolerance policies that would at least theoretically lead to the discharge of any harasser.\textsuperscript{11} Instead of repeating that analysis, this paper focuses on whether an employer’s reaction to harassment constitutes reasonable care in non-discrimination litigation. That reasonable care approach is compared to arbitrators’ responses to grievances filed by alleged harassers, which provide insight into how arbitrators predict what employer response will help to end the harassment as well as an opportunity to examine different employers’ anti-harassment policies.

After an introduction to the impact of harassment of its targets, court decisions in claims of harassment based on a protected class are examined to determine which employer responses are deemed reasonable in the context of avoiding liability. Judicial responses to claims of targets of harassment demonstrate the lack of injunctive relief under the nondiscrimination statutes or under the duty to accommodate under the Americans with Disabilities Act ("ADA").\textsuperscript{12} Instead, the courts determine whether the employer is liable for the harassment by examining the reasonableness of its response to the harassment.\textsuperscript{13} While that response may include discipline of the harasser, courts tend to give employers significant discretion in determining what level of discipline is appropriate.\textsuperscript{14} Because discharge is not required even if harassment has occurred, an employer can avoid liability for past harassment without dis-

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\textsuperscript{10} Fraser, \textit{supra} note 6, at 11.
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\textsuperscript{13} Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998).
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charging the harasser, often leaving that harasser in the workplace with his target.\textsuperscript{15}

In contrast to the judicial approach, labor arbitrators tend to uphold employers’ decisions to remove harassers from the workplace, based on their violation of workplace standards of conduct, as long as employers follow the principles of just cause.\textsuperscript{16} This study examines arbitration awards resolving grievances filed by disciplined harassers to determine the reasons behind the arbitrator’s decision to uphold the discipline, reduce the discharge to some lesser discipline, or return the alleged harasser to work with back pay. An arbitrator may refuse to uphold an employer’s discharge of a harasser based on a lack of evidence that the employer’s conduct violated the employer’s prohibition of harassment, an employer’s failure to afford due process, such as following standards of notice and progressive discipline, or based on mitigating circumstances rendering discharge an inappropriate response.\textsuperscript{17}

This study provides a unique look at the anti-harassment language included in employer policies or a collective bargaining agreements (CBA). Moreover, these awards provide an opportunity to examine whether arbitrators follow legal principles which determine whether harassment created a discriminatory hostile work environment, either by directly referencing nondiscrimination law or interpreting the CBA language and/or employer policies which have incorporated those legal principles. In addition, some arbitrators’ awards include interesting solutions to the potential problems associated with returning a harasser to work. This review provides data to predict how future arbitrators will resolve grievances by alleged harassers covered by an arbitration program.

More broadly, this analysis of arbitration awards provides insight into whether arbitration is equipped to address the persistence of harassment in the workplace. The Supreme Court consist-

\textsuperscript{15} Id.


\textsuperscript{17} Id. at 279.
ently defers to arbitration as an alternative to litigation and employment arbitration provisions in non-union settings have become increasingly common. This deference to arbitration is justified by the opinion that arbitrators are resolving employment discrimination grievances competently and in general accordance with the law.

In this climate of deference to arbitration programs, some experts worry that arbitration has a tendency to suppress claims by targets of harassment, and consequently workplace harassment will be allowed to continue. For example, in August 2018, the American Bar Association approved a resolution calling on law firms and other legal employers to eschew requirements that people with claims of sexual harassment go to arbitration, and New York State has passed legislation barring mandatory arbitration of

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18 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 274 (2009) (holding that a union could waive the rights of represented employees to take nondiscrimination claims to court under a CBA that "clearly and unmistakably" required arbitration).

19 Compare Susan A. FitzGibbon, Arbitration, Mediation, and Sexual Harassment, 5 PSYCHOL. PUB. POL’Y & L. 693, 719 (1999) (stating 19% of employers with more than 100 employees utilize arbitration to resolve workplace discrimination complaints), with Alexander J.S. Colvin, The Growing Use of Mandatory Arbitration, ECON. POL’Y INST. (Apr. 6, 2018), https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration/ (stating that 53.9% of nonunion private-sector employers have and 56.2% of all private-sector nonunion employees are subject to mandatory employment arbitration procedures).


21 Colvin, supra note 19, at 10-11; see also Debra S. Katz & Matthew LaGarde, The Societal Reckoning Caused by the #MeToo Movement Must Now Translate Into Legal Reform, BLOOMBERG BNA (June 2018) ("employers use mandatory arbitration agreements to muzzle credible accusations of sexual harassment").

22 Colvin, supra note 19, at 12; see also Gerald B. Silverman, Sexual Harassment Measures to be Proposed by NY Governor, BLOOMBERG BNA (Jan. 2, 2018), https://biglawbusiness.com/sexual-harassment-measures-to-be-proposed-by-ny-governor/; N.Y. Senate bill S.6382A.
sexual harassment claims.\textsuperscript{23} These criticisms sometimes fail to recognize that targets of harassment are only required to arbitrate their claims if the arbitration program includes a clear and specific waiver of targets' rights to pursue a claim in federal court.\textsuperscript{24}

Criticists of forced arbitration also worry that arbitrators too often reverse or reduce punishments of proven harassers, allowing them to stay on the job.\textsuperscript{25} Limited review of arbitration awards by the judiciary raises concerns that arbitration will undermine the ability of employers to eradicate harassment by discharging the harasser and "deter similar behavior in the future."\textsuperscript{26} As one New York court recently noted in reversing an arbitrator’s reinstatement of a sexual harasser, arbitrators who are not appropriately analyzing grievances filed by harassers could "embolden[] future harassers to engage in pernicious misconduct," as well as discourage reporting because targets feel that employers “will do little to protect them from even well-documented and pervasive misconduct.”\textsuperscript{27} This review of arbitration awards helps to determine whether these fears are warranted.\textsuperscript{28} Although almost all of the awards reviewed in this study arose from labor arbitration agreements, arguably its conclusions should be applicable to employment arbitrators under employee-employer arbitration agreements using similar just cause analysis.\textsuperscript{29}

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\item N.Y. C.P.L.R. LAW § 7515(b)(iii) (McKinney 2018) (part of New York State Budget Bill for Fiscal Year 2019, effective July 11, 2018); N.Y. Senate Bill S6577 & House Bill A8421 (expanding prohibition against mandatory arbitration).
\item 14 Penn Plaza LLC v. Pyett, 556 U.S. 257 (2009).
\item Id.
\item See supra Abstract.
\item See supra Introduction.
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This study involved in-depth review of 60 arbitration awards to examine arbitrators’ review of the discipline of alleged harassers, typically under just cause principles. This review includes awards addressing grievances alleging unjust discharge or discipline by grievants accused of harassment based on membership in a class protected against discrimination. A few of these grievants also claim to be targets of harassment. Awards were recovered from a thorough search of arbitration awards reported by Bloomberg BNA between 2008 and 2018. Interestingly, a thorough review of BNA’s published awards revealed no awards addressing a grievance of an employee who alleged harassment as a contract violation but had not suffered discipline or discharge herself.

Examination of these awards provides insight into how language addressing harassment in collective bargaining agreements has been written and interpreted. Awards were examined for their potential to avoid the above-referenced costs of allowing harassment to continue. This paper will consider which responses from employers might prove to be the most effective to address workplace harassment. In addition to highlighting the potential value or downfalls of arbitration in preventing harassment in the workplace, arbitrators’ approaches may suggest an alternative path for courts to reduce harassment in the workplace that will benefit both the target and the employer. This paper highlights some unique and creative approaches to harassment demonstrated in arbitration awards which placed conditions on the return to work of grievants who have engaged in such behavior.

In addition, this analysis presents employers and unions with opportunities to address harassment through negotiation. The union’s role in sexual harassment cases has often been “ignored by the courts, by scholars, and by the media.” Both the strengths and weaknesses of the analyzed arbitration awards highlight how

30 See discussion infra Section III(B)(5).
31 See discussion infra Section III(B)(5).
32 See discussion infra Section III(B)(5).
collective bargaining could more effectively address harassment at work.\textsuperscript{34} Many of these same considerations also apply to an employer's establishment of an arbitration program that will review the discipline of alleged harassers in non-union settings. This analysis should help to address the sustained negative effects of both harassment for both targets and employers.

I. THE EXTENT AND IMPACT OF HARASSMENT

The Me Too movement has publicized how harassment continues to be prevalent in American workplaces.\textsuperscript{35} Almost 50% of female workers have personally experienced sexual harassment at work, and over 40% of men report that they have witnessed such harassment.\textsuperscript{36} The extent of harassment based on membership in a group protected against discrimination is evident in the consistently large number of harassment charges filed each year.\textsuperscript{37} From 2010 to 2017, the number of Equal Employment Opportunity Commission ("EEOC") charges of harassment based on membership in some group protected against discrimination grew from 31,703 to 32,175;\textsuperscript{38} then in fiscal year 2018 the number of sexual harassment charges alone increased by more than 50%.\textsuperscript{39}

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\textsuperscript{34} See discussion infra Section IV(A).


\textsuperscript{37} All Charges Alleging Harassment (FY 2010-FY 2015), EEOC https://www.eeoc.gov/eeoc/statistics/enforcement/all_harassment.cfm (last updated Apr. 3, 2019).

\textsuperscript{38} Id.

\textsuperscript{39} What You Should Know: EEOC Leads the Way in Preventing Workplace Harassment, EEOC https://www.eeoc.gov/eeoc/newsroom/wysk/preventing-workplace-harass-
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While not all of EEOC charges are substantiated, reasonable cause findings in charges alleging harassment increased by over 23% in fiscal year 2018, and the EEOC-filed lawsuits challenging workplace harassment in fiscal year 2018 increased by 50% over fiscal year 2017. Although, targets of harassment are found in diverse professions, underreporting is most common among lower wage workers.

The EEOC charge statistics likely reflect only 10% or less of all incidents of harassment that occur. The types of harassment vary: 1-6% of female employees report a history of sexual assault/rape, whereas threats related to “non-submission to advances” is reported by 3-10% of women, and 7-16% report the “promise of advancement for submission” to harassment.

Among one set of sexual harassment complaints filed in federal court, over 57% involved allegations of touching, more than 14% involved stalking, 5% involved assault, and more than 43% included requests for sexual favors.

In considering how to prevent future harassment, it is important to understand which employees are most likely to harass.

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40 Id.


44 Pina, supra note 41, at 128.


46 See Pina, supra note 41, at 129.
"[P]erpetrators of sexual harassment tend to lack social conscience and engage in immature and irresponsible behaviors, or manipulative and exploitative behaviors . . . personality measures of irresponsibility, lack of social conscience, and exoneration and legitimization of aggression . . . [are] all related to the commission of sexually coercive behaviors."47 This research suggests that both courts and arbitrators should be looking for such personality traits and other characteristics when deciding what level of discipline will prevent future harassment by a particular harasser.48

In addition to the traits of the harasser, harassment can also be explained by various "organizational-related issues including power and status inequalities," as well as the factors of "permissiveness of the organizational climate, gendered occupations, and organizational ethics, norms and policies."49 The occurrence of harassment is significantly influenced by organizational factors, including knowledge about complaint procedures, as well as the level of professionalism and discriminatory attitudes in the workplace.50 Sexual harassment will more likely occur when the harasser need not overcome internal and external inhibitions not to harass (e.g., moral restraints and workplace barriers), as well as where the target provides less resistance and the harasser is motivated to harass (potentially for the reasons outlined above).51 These studies suggest the important role to be played by organizational dispute resolution systems that address workplace harassment.52

Whatever the causes or contributing circumstances, "workplace harassment can produce a variety of harms [for the targets, including] psychological, physical, occupational, and economic harms that can ruin an employee’s life,"53 undermine self-

47 Id. at 130.
48 See id.
49 Id. at 131-32.
50 Cortina, supra note 43.
51 Pina, supra note 41, at 134
52 Id.
Harassment has been described as a "stressor that is a threat to self." Employees experiencing sexual harassment [in particular] are more likely to report symptoms of depression, general stress and anxiety, post-traumatic stress disorder (PTSD), and overall impaired psychological well-being. 

Employers also incur costs from harassment. Workplace harassment may cause the diversion of time, energy and resources "from operation of the business to legal representation, settlements, litigation, court awards, and damages." Employers also experience indirect costs of harassment, including "decreased workplace performance and productivity of both the target and her work group," as well as "increased employee turnover and reputational harm." Harassment can lead to organizational withdrawal, which includes avoiding work tasks and one's work situation as evidenced by lateness, absenteeism and other negative behaviors. Interestingly, harassment affects targets' organizational commit-

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56 U.S. EEOC, supra note 54, at 20. See also, Jennifer L. Berdahl & Jana L. Raver, Sexual Harassment, 3 APA HANDBOOK INDUS. & ORGANIZATIONAL PSYCHOL. 641, 649 (2011) (targets of harassment experience negative effects on job satisfaction, organizational commitment, turnover, depression, anxiety, PTSD, somatic complaints).

57 Hodges, supra note 33, at 189.

58 U.S. EEOC, supra note 54, at 17-18.


61 Willness, et al., supra note 59, at 136, 149; Hodges, supra note 33, at 188.
ment even when controlling for organizational climate. Conversely, implementation of sexual harassment policies and procedures can increase employees’ commitment to an organization, as well as decrease incidents of sexual harassment. In addition, the employer’s reputation may suffer, resulting in a loss of revenue.

These costs for both the targets of harassment and employers where harassment occurs demonstrate the urgency of resolving what can and should be done to reduce or eliminate workplace harassment. Under the inclusion of harassment as a type of prohibited discrimination under both Title VII of the Civil Rights Act, the Americans with Disabilities Act (ADA), and the other non-discrimination statutes, courts have focused on what conduct creates a hostile environment, and whether the employer has exercised reasonable care to address that harassment. The analysis of court decisions below demonstrates that this approach has not be overly successful in addressing harassment and reducing its costs, perhaps because courts continue to provide employers with significant latitude in exercising reasonable care to address harassment.

II. JUDICIAL RESPONSE TO HARASSMENT

Claims by targets of workplace harassment typically arrive in the judicial system as claims of discrimination under federal and/or state non-discrimination laws. Courts reviewing these claims typically do not force an employer to take action sufficient to end the harassment. Instead, courts tend to dismiss claims if the harassment fails to rise to the level of a discriminatory hostile

63 Id. at 136.
65 See Hodges, supra note 33, at 184.
68 Harris, 510 U.S. at 19; Gallagher, 567 F.3d at 269.
69 Gallagher, 567 F.3d at 270.
work environment, and allow employers to escape liability for proven harassment if that employer has exercised reasonable care. 70

To establish a claim of discrimination in the form of harassment, the target must first establish that the harassment occurred based on and as a result of her membership in a protected class, i.e., race, sex, religion, national origin, age or disability. 71 In addition, the target must establish, based on a reasonable person standard, that the harassment occurred with sufficient severity and pervasiveness to create a hostile work environment. 72 If the target establishes all of these prerequisites, rather than imposing injunctive relief prohibiting future harassment or even requiring discipline of the harasser, remedies for claims of harassment under both federal and state non-discrimination statutes focus on monetary damages. These damages include, lost wages or benefits, compensatory and punitive damages. 73

Courts approach employer liability differently, albeit with similar tests for liability, depending on whether or not the harasser is a supervisor. 74 Reasonable care to avoid liability for harassment by supervisors requires that an employer’s response be “designed to stop the harassment, correct its effects on the employee, and ensure that the harassment does not recur.” 75 For example, an employer avoided liability for a supervisor’s harassment by discharging him two days after his harassment was reported. 76 In contrast, inaction on the employer’s part in response to a supervisor’s har-

70 Id. at 273–275.
71 See, e.g., id. at 271 ("based on sex" requirement met by proving that conduct is explicitly sexual and patently degrading to women).
72 Harris, 510 U.S. at 21.
74 Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, EEOC Notice No. 915.002 (June 18, 1999).
75 Id.; see, e.g., Patsalides v. City of Fort Pearce, No. 17-10020 WL, at *3 (11th Cir. Feb. 6, 2018) (mentioning that increasingly severe punishments for harassing behavior satisfied duty to exercise reasonable care); Pinkerton v. Co-lo. Dep’t of Transp., 563 F.3d 1052, 1062 (10th Cir. 2009) (describing reasonable care to includes prevention of harassing behavior and promptly correcting such behavior).
76 Adams v. O’Reilly Auto., Inc., 538 F.3d 926, 932 (8th Cir. 2008).
assment can demonstrate a lack of reasonable care.\textsuperscript{77} As one court noted, closely monitoring a harassing supervisor after his first encounter with target "would have been appropriate."\textsuperscript{78} An employer’s potential for liability for supervisors, however, has been limited by the Supreme Court’s 2013 decision, which narrowed the definition of "supervisor" for the purposes of employer liability in a hostile work environment claim.\textsuperscript{79}

Liability for harassment by non-supervisors is more relevant to this study of arbitration awards addressing grievances typically filed by non-supervisory bargaining unit members.\textsuperscript{80} Like liability for supervisors’ harassment, employers’ liability for non-supervisors’ harassment depends upon how the employer responds to a known hostile work environment.\textsuperscript{81} An employer’s reasonable response to harassment provides a complete defense to liability for the resultant damages.\textsuperscript{82} An employer is only liable for harassment by a non-supervisor if it was "negligent in permitting [harassment] to occur,"\textsuperscript{83} i.e., the employer knew or should have known about the harassment and failed to take adequate remedial action.\textsuperscript{84} Negligence can be established by a failure to monitor the workplace, respond to complaints or provide a system for registering complaints, or discouraging complaints from being filed.\textsuperscript{85} Conversely, employers may avoid liability based on a totality of the circumstances, including the nature of the employer’s response in light of the employer’s resources, as well as the gravity of the

\textsuperscript{77} See, e.g., Dawson v. Entek Int’l, 630 F.3d 928, 940 (9th Cir. 2011) (inaction constitutes ratification of past harassment).

\textsuperscript{78} Erickson v. Wis. Dept’ of Corr., 469 F.3d 600, 608 (7th Cir. 2006).


\textsuperscript{80} Id. at 434 n.7.

\textsuperscript{81} Turnbull v. Topeka State Hosp., 255 F.3d 1238, 1244 (10th Cir. 2001);


\textsuperscript{83} Vance, 570 U.S. at 445.

\textsuperscript{84} Burlington Indus., 524 U.S. at 768-69 (Thomas, J., dissenting); 29 C.F.R. § 1604.11(d).

\textsuperscript{85} Vance, 570 U.S. at 449.
harm inflicted upon the target and the nature of the work environment.\textsuperscript{86}

The first prong of reasonable care focuses on prevention and can be established by the adoption of a "zero tolerance policy" regarding harassment, with explanatory training, as well as providing an accessible complaint process.\textsuperscript{87} Courts often emphasize the need for training of employees and managers,\textsuperscript{88} but more training does not necessarily prevent future harassment.\textsuperscript{89} The second prong of reasonable care focuses on whether an employer’s response to harassment, including its decisions regarding disciplining the harasser, has the goal of deterring future harassment in that workplace.\textsuperscript{90} This emphasis on prevention led one expert to conclude that "zero tolerance policies need to be responsive to the gravity of the misconduct and consistently enforced in order to rid the workplace of the prohibited behavior and to avoid discrimination claims."\textsuperscript{91} To evaluate the effectiveness of arbitration in pre-

\begin{footnotesize}
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\item \textsuperscript{87} See Giddens \textit{v.} Cmtys. Educ. Ctrs., Inc., 540 F. App’x 381, 389 (5th Cir. 2013) (reasonable care shown by target’s knowledge of reasonable anti-harassment policy and complaint procedure); Marrero \textit{v.} Goya of P.R., Inc., 304 F.3d 7, 21-22 (1st Cir. 2002) (lack of reasonable care where employees never received training on or copy of anti-harassment policy); Barrett \textit{v.} Applied Radiant Energy Corp., 240 F.3d 262, 266 (4th Cir. 2001)(adoption and distribution of anti-harassment policy).
\item \textsuperscript{88} See, \textit{e.g.}, EEOC \textit{v.} Boh Bros. Constr. Co., 731 F.3d 444 (5th Cir. 2013) (liability based in part on failure to provide supervisors with guidance for investigations, 5 minutes of training per year); EEOC \textit{v.} Mgmt. Hosp. of Racine, Inc., 666 F.3d 422 (7th Cir. 2012) (possible lack of reasonable care where training was inadequate); Rob Buelow, Revamping Workplace Culture to Prevent Harassment, EEOC (Oct. 31, 2018), https://www.eeoc.gov/eeoc/meetings/10-31-18/buelow.cfm (stressing importance of training).
\item \textsuperscript{89} David G. Bowman, Revamping Workplace Culture to Prevent Harassment, EEOC (Oct. 31, 2018), https://www.eeoc.gov/eeoc/meetings/10-31-18/bowman.cfm.
\item \textsuperscript{90} Faragher, 525 U.S. at 807; \textit{Burlington Indus.}, 524 U.S. at 765.
\item \textsuperscript{91} Plass, \textit{supra} note 11, at 144.
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venting future harassment, the prevention prong of reasonable care warrants a closer review.

A. Prevention as Part of Reasonable Care

Employers can avoid liability for a hostile work environment by exercising reasonable care “to prevent and correct promptly any sexually harassing behavior.”92 Under this approach, employers should have a “comprehensive policy... [with] appropriate remedial measures that include penalizing harassers.”93 After the Court’s adoption of the reasonable care approach, some expressed concern that employers would be “second-guessed on disciplinary decisions short of discharge,”94 and predicted that the reasonable care standard would encourage employers to discharge harassers for a first offense of harassment.95 Instead, more recent critics of the Court’s reasonable care standard have suggested that the defense was “calculated to ensure that employers adopt basic policies and procedures with respect to workplace harassment, not, surprisingly, to ensure that they actually prevent it,”96 and that focusing on reasonable care gives employers “greater success in defeating legal claims than in ending harassment.”97 These concerns regarding the reasonable care standard warrant attention to how the preventative prong has been applied since its adoption.

In evaluating the reasonableness of an employer’s response to harassment by a supervisor or a co-worker, which should deter future harassment by the same offender or others,98 many courts

92 Faragher, 525 U.S. at 778; Burlington Indus., 524 U.S. at 765.
94 Id. at 780.
97 Hodges, supra note 33, at 191.
98 EEOC v. Xerxes, 639 F.3d 658, 669 (4th Cir. 2011); see also EEOC v.
and experts focus on the provision of training, the accessibility of a complaint system, and the creation of a “safe and respectful culture,” rather than considering whether the employer’s discipline of the harasser indicates the exercise of reasonable care. Even so, some experts and courts have recognized the importance of imposing consequences for harassment to prevent future harassment.

Among courts focusing on the employer’s imposition of consequences as part of the reasonable care analysis, liability can be imposed on employers which fail to take adequate or appropriate remedial action. Although an employer’s response should not constitute reasonable care requirement if it is ineffectual in ending that harassment and deterring future harassment by the

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99 EEOC, Promising Practices for Preventing Harassment, (Leadership and accountability includes imposing “discipline that is prompt, consistent, and proportionate to the severity of the harassment and/or related conduct,” and harassment policy should include “assurance that the organization will take immediate and proportionate corrective action if it determines that harassment has occurred.”). See Christine Porath, Revamping Workplace Culture to Prevent Harassment, EEOC (Oct. 31, 2018), https://www.eeoc.gov/eeoc/meetings/10-31-18/porath.cfm; Alejandra Valles, Revamping Workplace Culture to Prevent Harassment (Oct. 31, 2018), https://www.eeoc.gov/eeoc/meetings/10-31-18/valles.cfm; Victoria A. Lipnic, Public Meeting on Proposed Reboot of Harassment Prevention Efforts (June 20, 2016), https://www.eeoc.gov/eeoc/meetings/6-20-16/lipnic.cfm (“where harassment is found to have occurred, the harasser should be appropriately and proportionately sanctioned”).

100 Buelow, supra note 89 (“training must be supported by . . . robust policies and procedures (that are strongly and consistently enforced)”; Anne Wallestad, Hearing on Revamping Workplace Culture to Prevent Harassment, EEOC (Oct. 31, 2018), https://www.eeoc.gov/eeoc/meetings/10-31-18/wallestad.cfm (“Organizational responses should prioritize accountability and corrective action.”).

101 Swinton v. Potomac Corp., 270 F.3d 794, 803 (9th Cir. 2001); Howley v. Town of Stratford, 217 F.3d 141, 154 (2d Cir. 2000).
same harasser or others, courts’ general guidelines have not explicitly defined what, if any, discipline of a harasser is required to satisfy the reasonable care standard. Thus, an employer’s reasonable response can range from “expressing strong disapproval” to discharge.

An employer’s response may be insufficient if the harassment persists thereafter, whereas “[t]he cessation of harassment shows effectiveness,” typically satisfying the reasonable care standard. Yet reasonable care can be established even if the employer’s response fails to stop the harassment, as long as its response was reasonably calculated to end the harassment. This determination often depends on whether the employer’s response was proportional to the severity and persistence of the harassment. Consequently, an employer’s response may need to be greater if the harassment has been frequent and severe.

Other than some consideration of the level of harassment that occurred, courts typically allow employers considerable flexibility to determine the appropriate penalty for the harasser in ques-
tion, and tend to be "very deferential to company decisions." Such discretion has been justified by the concern that otherwise, targets will be discouraged from reporting and supervisors will be encouraged to minimize complaints, "thereby effectively reconstructing the policy."

Given such discretion, numerous decisions establish that a reasonably careful employer need not necessarily impose discharge as the penalty for the harasser. An employer can escape liability by demonstrating that it "took reasonable steps to prevent future harm." For example, one court determined that an employer exercised reasonable care by docking the pay and issuing warnings to crew members who left a noose in the locker of an African-American coworker. Such "reasonable steps to prevent future harm" can be established by counseling or a reprimand of the harasser, particularly where the harassment does not recur. Where the harassment stops after the employer has investigated, an employer may even escape liability without disciplining the harasser at all.

While discharge is not required, some courts have determined that counseling alone or a failure to take any action after the

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109 Hodges, supra note 33, at 190.
110 Plass, supra note 11, at 147; Hodges, supra note 33, at 200. See, e.g., Wilson v. Moulison North Corp., 639 F.3d 1, 12 (1st Cir. 2011) ("employer must be accorded some flexibility in selecting condign sanctions").
111 Hodges, supra note 33, at 190.
112 Green v. Franklin Nat'l Bank, 459 F.3d 903, 912 (8th Cir. 2006); Kreamer v. Henry's Towing, 150 F. App'x 378, 382 (5th Cir. 2005).
113 Porter v. Erie Foods Int'l, Inc., 576 F.3d 629, 637 (7th Cir. 2009).
115 Porter v. Erie Foods Int'l, 576 F.3d 629, 637 (7th Cir. 2009).
117 Muhammad v. Caterpillar, Inc., 767 F.3d 694, 698 (7th Cir. 2014).
acknowledged harassment occurs may result in liability for the employer.\textsuperscript{118} Employer liability may result from continuation of the harassment after inaction by an employer, especially in the absence of any discipline of the harasser.\textsuperscript{119} One court observed that employers who fail to take any action to end the harassment should not "avoid liability . . . by simply putting on a charade, pursuant to which they enact policies and procedures which 'look good on paper' but are not actually acted upon."\textsuperscript{120}

Instead of disciplining the harasser, an employer may satisfy the reasonable care requirement by separating the harasser and the target, typically by transferring one of them to another position.\textsuperscript{121} For example, moving the harasser to a different shift, along with showing him an anti-harassment video, constituted reasonable care even if the harasser was not reprimanded or told to keep away from the target, and the employer failed to ensure that their shifts never overlapped.\textsuperscript{122} Other employers have avoided liability to targets who have been offered a transfer to another position (even if they could not accept it) or a leave of absence to

\textsuperscript{118} See, e.g., Loughman v. Mainati Organization, Inc., 395 F.3d 404, 407 (7th Cir. 2005) (ten to twenty "talks" with recurring harassers was not reasonable response to physical harassment); Baty v. Willamette Indus., 172 F.3d 1232, 1242 (10th Cir. 1999) (upholding jury verdict for target where no employee was even minimally disciplined).


\textsuperscript{121} See, e.g., Tucker v. UPS, No. 15-00611-JJB-RLB, 2017 U.S. Dist. LEXIS 92995, at *26 (M.D. La. June 15, 2017) (reasonable care shown by instructing the harasser to stay away from the target's work area and disciplining him if he fails to do so); Carswell, No. 13-378, 2014 U.S. Dist. LEXIS 93329, at *57 (W.D. Pa. July 9, 2014) (employer failed to respond reasonably without effort to separate harasser from target).

\textsuperscript{122} Berry v. Delta Airlines, 260 F.3d 803, 806 (7th Cir. 2001). But see Guadalajara v. Honeywell Int'l, 224 F. Supp. 3d 488, 504 (W.D. Tex. 2016) (week long delay in removing a supervisor from close working proximity with a subordinate he has harassed might be seen as unreasonable).
avoid future harassment.\textsuperscript{123} Similarly, reasonable responses can include simply allowing the target to avoid their harassers.\textsuperscript{124} In contrast, some courts have concluded that offering the target a transfer to a less desirable shift away from the harasser is an insufficient remedy, because a remedy should impact the harasser, not the target.\textsuperscript{125} Thus, a remedial action that makes a target worse off, such as a loss of wages, can be deemed "ineffective per se."\textsuperscript{126}

Even if a hostile work environment is established and the employer has failed to exercise reasonable care, an employer typically will not be ordered to address the harassment through injunctive relief. Courts are reluctant to order removal of the harasser from the workplace or even a transfer of the target away from the harasser. Non-discrimination laws allow for such injunctive relief in theory,\textsuperscript{127} and courts have occasionally recognized that injunctive relief may be appropriate if the employer's past unresponsiveness to complaints indicates the likelihood that the employer will not take adequate remedial measures in response to future harassment.\textsuperscript{128}


\textsuperscript{124} See, e.g., Williams v. Waste Mgmt. of Ill., 361 F.3d 1021, 1030 (7th Cir. 2004) (allowing target to take breaks at location away from harasser was reasonable).


\textsuperscript{126} EEOC v. Cromer Food Servs., 414 Fed. App'x. 602, 608 (4th Cir. 2011); Hostetler v. Quality Dining, Inc., 218 F.3d 798, 811 (7th Cir. 2000).

\textsuperscript{127} EEOC v. KarenKim, Inc., 698 F.3d 92, 98-100 (2d Cir. 2012); 42 U.S.C. § 2000e-5(g)(1) (injunctive relief is appropriate where employer "has intentionally engaged in or is intentionally engaging in such unlawful employment practice charged in the complaint . . . ").

\textsuperscript{128} Id. 100-101.
Despite this ability to order equitable relief to address discrimination, courts rarely do so.\(^{129}\) Issuance of injunctive relief has been limited to extreme examples such as a case where an employer was unresponsive to harassment complaints, foretelling a failure to take adequate remedial measures in response to future harassment.\(^{130}\) While that appellate court awarded injunctive relief to prevent the future employment of the harassing employee, the court also upheld the lower court’s refusal to grant the EEOC’s request for an independent monitor to review the employer’s employment practices and investigate future harassment complaints.\(^{131}\)

A trial court’s failure to grant injunctive relief will only be reversed if the decision is outside “the range of permissible decisions,”\(^{132}\) i.e., monetary damages are inadequate to compensate the target or that “the public interest would not be disserved by a permanent injunction.”\(^{133}\) Under this limited justification for injunctive relief, a trial court denied relief for the target of harassment even though the harassing supervisor continued to be employed, where the target was no longer working in the same department as the supervisor, and the target failed to present any evidence that the discriminatory harassment was likely to continue.\(^{134}\)

These decisions illustrate that an employer has significant motivation to meet the courts’ requirement of exercising reasonable care in response to harassment by a supervisor or a coworker. Even so, reasonable care does not necessarily require that the harasser be discharged, or even that the harassment end. As dis-


\(^{130}\) KarenKim, 698 F.3d at 100-101.

\(^{131}\) Id. at 101.

\(^{132}\) Id. at 99-100.


cussed below, arbitrators have more flexibility than the courts to address harassment in the workplace, but in reviewing the claims of alleged harassers, arbitrators focus on whether just cause was established to justify punishing the harasser. Employers express concern that the reversal of an employer’s discipline of a harasser would subject the employer to potential liability under the reasonable care standard just described, given “the employer’s obligation under Title VII to rid its workplace of those contributing to an environment of harassment.”

Courts reviewing arbitration awards concerning alleged harassers, discussed below, sometimes delve into this potential conflict.

These discrimination decisions illustrate the bind faced by targets of harassment. If they stay in the hostile work environment and file a claim, the employer may avoid liability if it responded to the harassment in a reasonable way. This “reasonable” response does not necessarily guarantee that the harassment ends, particularly if the level of severity is deemed to be relatively low. Even if the employer is found liable, at most the target will recover compensatory damages for the emotional harm suffered and punitive damages if the employer showed reckless disregard of the discrimination. But very few courts will impose any injunctive relief to prevent future harassment, such as appointing a monitor or requiring the removal or even the separation of the harasser from the target.

B. Judicial Review of Arbitrators’ Awards

In addition to hearing discrimination claims involving workplace harassment, the courts play a significant role in the enforcement of arbitration awards that review the punishment of alleged harassers. In doing so, “courts continue to honor the tradition of judicial deference to arbitration as established” by the Supreme Court in the 1960’s. Such deference carriers over to


136 Stephen Buehrer, A Clash of the Titans: Judicial Deference to Arbitration and the Public Policy Exception in the Context of Sexual Harassment, 6
claims of alleged harassers, as long as enforcement of the award will not undermine public policy against discriminatory harassment. The clear public policy against workplace harassment could result in a court’s reversal of an arbitration award which reduces or removes a harasser’s discipline that could “perpetuate a hostile, intimidating, and offensive work environment,” and “prevent an employer from carrying out its legal duty to eliminate sexual harassment in the workplace.” This section compares the impact of such deference with the resolution of harassment complaints in federal court outlined above. This deference is also an important consideration in considering the significance of the analysis of arbitrators’ awards which follows.

The Federal Arbitration Act limits judicial review of arbitration awards to instances “where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.” Such deference applies to arbitration awards arising from a CBA as well as awards by employment arbitrators appointed under an employer’s arbitration program. Thus, a court will not “reconsider the merits of an award,” meaning that reversals of arbitrators’ awards only occur based on a manifest disregard of the law, or a conflict with public policy arising from “laws and legal precedents.”

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137 Elkiss, supra note 20, at 152.
138 Id. at 161.
Under this standard of review, courts may not second guess arbitrators' decisions on fact or law, even if an arbitrator commits "serious error." A court will not reverse a labor arbitration award so long as "the arbitrator's award draws its essence from the collective bargaining agreement, and is not merely [the arbitrator's] own brand of industrial justice." In addition, courts will only reverse an arbitration award that is contrary to public policy which is "well defined and dominant," i.e., arising from "laws and legal precedents." Most courts recognize a clear legislative mandate outlawing harassment, which could justify the reversal of an award reinstating a proven harasser. For example, one court reversed an arbitrator's reinstatement of a white employee who had made a racially offensive remark to a black employee of another company, because reinstating the harassing employee "would frustrate the employer's attempt to further Title VII's goal of ridding the workplace of discriminatory conduct.

A court will not reverse an award even based on even clear public policy if the conflict can only be established by the court

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143 Id. at 765. See, e.g., Entergy Operations, Inc. v. United Gov't Sec. Officers, 856 F.3d 561, 564 (8th Cir. 2017); Commc'n Workers v. Se. Elec. Coop., 882 F.2d 467 (10th Cir. 1989) (holding that the court is not free to reject factual findings with which it disagrees or an arbitrator's interpretation of a contract).


145 Id.; see also PPG Indus., Inc. v. Local 45C, 587 F.3d 648, 651-52 (4th Cir. 2009) (arbitrator cannot ignore language of contract to "impose his own notions of industrial justice"); Mountaineer Gas Co. v. Oil, Chem. & Atomic Workers Int'l Union, 76 F.3d 606, 608 (4th Cir. 1996) (stating that a court must overturn an arbitration award which "reflects the arbitrator's own notions of right and wrong").

146 W.R. Grace, 461 U.S. at 766.

147 Id.

148 Alleyne, supra note 135, at 15.

149 W.R. Grace, 461 U.S. at 762.

150 Plass, supra note 11, at 151-52.
making factual inferences that were not made by the arbitrator. Consequently, courts tend to defer to arbitrators’ determinations as to whether the employer had just cause to impose discipline or discharge under a CBA or an individual arbitration agreement. For example, a court refused to reverse an arbitrator’s award that reinstated an alleged harasser based on the arbitrator’s determination that the employer did not prove the allegations against him, where the employer’s policy allowed but did not require discharge for any violation of employer policy. Moreover, a court’s deference to an arbitrator’s findings of fact can include an arbitrator’s reversal of an alleged harasser’s discharge because he can be rehabilitated through corrective discipline.

If harassment is established, some courts have determined that reduction of a discharge to a lesser discipline would undermine the goal of eliminating a hostile work environment. For example, a state court reversed an arbitration award which reinstated a police officer who established a long-standing pattern of sexual harassment, because his reinstatement would be “tantamount to exempting the city from its duty to enforce its own policy and the public policy against sexual harassment.”

152 Int'l Bhd. of Teamsters Local Union No. 682 v. Thoele Asphalt Paving, Inc., 2013 WL 431658, at *1 (8th Cir. 2013). See also SFIC Properties, Inc. v. Machinists, Dist. Lodge 94, 103 F.3d 923, 925 (9th Cir. 1996) (just cause requirements are inferred from all modern day CBA's which do not contain an express provision).
155 Fraser, supra note 6, at 22.
156 Id. at 12-13.
157 City of Brooklyn Ctr. v. Law En't Labor Servs., Inc., 635 N.W.2d 236, 244 (Minn. App. 2001). See also State v. AFSCME, 747 A.2d 480, 486 (Conn. 2000) (affirming reinstatement of corrections officer who directed an obscene racial epithet to state legislator based on society’s overriding interest in preventing conduct).
court explained, reinstatement of a harasser "subverts" the well-established policy of preventing workplace harassment and could discourage the reporting of harassment, by creating the perception that "their employer will do little to protect them from even well-documented and pervasive misconduct."  

Even if a court determines that an award is contrary to public policy, the court may remand the case to the arbitrator to impose discipline consistent with such policy.  

Some have suggested that the reversals of arbitration awards in favor of proven harassers based on public policy have encouraged arbitrators to uphold discharges at least where the harassment is established. However, the overview of federal case law above establishes that public policy does not necessarily require the discharge of all harassers for the employer to establish that it took reasonable steps to stop the harassment. Thus, reinstatement of employees discharged for harassing behavior will not necessarily "frustrate Title VII's goals." Because "[t]here is no public policy that every harasser must be fired," the reasonable

159 Paperworkers v. Misco, Inc., 484 U.S. 29, 40-41 n.10 (1987) ("court must not foreclose further proceedings by settling the merits according to its own judgment of the appropriate result, since this step would improperly substitute a judicial determination for the arbitrator's decision that the parties bargained for in the collective-bargaining agreement."); see also Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 510-11 (2001) (proper remedy upon vacating arbitrator's award is remand); Int'l Union of Operating Engineers v. Port of Seattle, 176 Wash. 2d 712, 742 (Wash. 2013) (remanding to arbitrator to determine appropriate discipline for employee reinstated after hanging noose at work).
161 See supra notes 81-90 and accompanying text.
162 Petersen, supra note 160, at 136.
163 Plass, supra note 11, at 155.
164 Westvaco Corp. v. United Paperworkers Int'l Union, AFL-CIO, 171 F.3d 971, 977 (4th Cir. 1999); Sierra Pac. Power Co., 2015 U.S. Dist. LEXIS 83358, at *12 (D. Nevada Jun. 25, 2015). See also, Weber Aircraft Inc. v. Gen. Warehousemen and Helpers Union, 235 F.3d 821, 826 n.3 (5th Cir. 2001) ("be-
care requirement does not necessarily conflict with an arbitration award reinstating a harasser. For example, one court enforced an award that reinstated a harasser because his misconduct, “despite its severity, did not require termination,” where the award still allowed for counseling and training of the harassing grievant.165 This decision noted “the arbitrator's ample authority to conclude that these factors made progressive discipline rather than termination an appropriate remedy” under the applicable CBA.166

This limited judicial review of arbitration awards increases the importance of determining whether arbitrators’ interpretations of just cause protections conflicts with employers’ obligation to exercise reasonable care in addressing harassment, which can but does not necessarily include punishment of a harasser. This analysis of arbitrators’ awards concerning claims for alleged harassers seeking to reverse the discipline imposed to address their harassment provides information relevant to that question.

C. Accommodations for Targets of Harassment

Targets of harassment who suffer physical and/or psychiatric disabilities167 are covered by the American with Disabilities Act (ADA).168 Reasonable accommodations for such a disability may be required, particularly when a harasser remains in the workplace, unless the employer demonstrates that accommodation

cause misconduct often differs in degree, there is no universal punishment that fits every case”); LB&B Assocs. v. Elec. Workers, 461 F.3d 1195, 1198 (10th Cir. 2006) (“[A] sexually harassing employee is vulnerable to being discharged because of the serious nature of the offense, but the ultimate act of discharge must still satisfy [] ‘just cause.’”).


166 Id. at 452.

167 See supra notes 29-32 and accompanying text.

would impose an undue hardship on the operation of its business. An employer’s duty to provide reasonable accommodation under the ADA has been analogized to the duty to exercise reasonable care to avoid liability for harassment, because both “involve the same sorts of modifications to prior workplace procedures and structures.” Despite these similarities, many courts have been reluctant to require that employers provide a wide range of accommodations for targets of harassment.

Reasonable accommodations can include “job restructuring [or reassignment of non-essential job duties,] part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, . . . and other similar accommodations for individuals with disabilities.” In contrast, “the ADA does not require creation of a new position for a disabled employee,” or excuse the employee from performing essential job duties. Just as a transfer could be a reasonable response to harassment, reasonable accommodations could include altering an employee’s work schedule, a reassignment or transfer to avoid contact with her harasser.

Despite this need for accommodation, many courts have been reluctant to require that employers provide ordinarily reasonable accommodations to targets of harassment. For targets of harassment, changes of supervision or even changes in management style generally have been characterized as overly interfering with

169 42 U.S.C. § 12112(b)(5)(A) (2012). See DiCarlo v. Potter, 358 F.3d 408, 419 (6th Cir. 2004) (“burden shifts to employer to demonstrate that the employee cannot reasonably be accommodated, because accommodation would impose undue hardship on operation of its programs”).
171 42 U.S.C. § 12111(9)(B); 29 C.F.R. § 1630.2(o)(ii).
174 See supra notes 94-97 and accompanying text.
management prerogatives. One common way to accommodate a target would be to allow a transfer of the target away from her harasser. Even though a transfer to a vacant position for which the employee with a disability is otherwise qualified has been deemed a reasonable accommodation, courts consistently have been reluctant to require the transfer of a target of harassment away from a supervisor who has aggravated or even caused her condition.

One court explained in the early days of the ADA that granting a request to work under a different supervisor would “interfere with personnel decisions within an organizational hierarchy,” and another court was “loathe to tell a company how to structure its workforce.” Since those early decisions, courts have continued to hold that the ADA does not require that an employee be allowed to change her supervisor as an accommodation, even where that supervisor caused her stress which aggravated her physical health. These courts have explained that reasonable accommodation does not include entitlement to “a supervisor ideally suited to her needs,” and a change of supervision as an accommodation “can be organizationally disruptive and subject to abuse.”

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177 42 U.S.C. § 12111(9)(B). See, e.g., Smith v. Midland Brake, Inc., 180 F.3d 1154, 1165 (10th Cir. 1999) (accommodation can include reassignment to vacant position for which employee with disability is qualified).


179 Wernick, 91 F.3d at 384.

180 Kennedy v. Dresser Rand Co., 193 F.3d 120, 123 n.2 (2d Cir. 1999).


denied a request for a transfer away from a harassing supervisor based on its "significant organizational cost" due to disrupting "the existing supervisory balance and workload."\(^{184}\) It should be noted that courts have been willing to find such transfers to be unreasonable without proof from the employer that an undue hardship would actually result.\(^ {185}\)

Other ADA decisions likewise have denied requests to transfer away from a harassing supervisor as an accommodation because working with that supervisor was essential to the job.\(^ {186}\) For example, an employee subjected to harassment by a supervisor was denied separation from that supervisor as a reasonable accommodation because the employee’s job functions required interaction with the harassing supervisor, even though the harassment continued.\(^ {187}\) These decisions demonstrate the limited ability of targets of harassment to take advantage of their right to reasonable accommodation to escape future harassment by a supervisor.

Although the EEOC has supported employers’ denial of a change in supervision as an accommodation, the EEOC guidelines do suggest that changes in supervision style and practices could be a reasonable accommodation.\(^ {188}\) Even so, courts continue to find that the ability to comply with supervisors, and other such behavioral standards, are assumed to be unvarying and universal.\(^ {189}\) Some courts go so far as to determine that abuse in the workplace is a "natural, necessary, and defensible prerogative of superior rank," requiring "stamina and resilience" from targets.\(^ {190}\) Thus, an employer has not been required to accommodate an employee by assuring that a supervisor apply "softer

\(^{184}\) Id. at 1265.
\(^{185}\) Id. at 1264.
\(^{187}\) Id. at *17-20.
\(^{188}\) EEOC Enforcement Guidance, REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT (2002).
\(^{189}\) See e.g., Keil v. Select Artificials, 169 F.3d 1131, 1136 (8th Cir. 1999).
\(^{190}\) Regina Austin, Employer Abuse, Worker Resistance, and the Tort of Intentional Infliction of Emotional Distress, 41 STAN. L. REV. 1, 1, 2 (1988).
management approaches," because an employer need not "entirely remove the possibility that a supervisor may offend a particular employee."\textsuperscript{191}

In attempting to establish that adjustments to supervision are reasonable, employees requesting the accommodation find it difficult to show that the costs of the change of supervision or even supervisory methods do not exceed the benefits.\textsuperscript{192} Even though such a cost benefit analysis is typically reserved for the undue hardship analysis, one court failed to place the burden of proof on the employer to establish that the accommodation would impose an undue hardship, instead ruling on a motion for summary judgment that the accommodation of avoiding contact with a supervisor was unreasonable.\textsuperscript{193}

Like the assignment to a particular supervisor, working with harassing coworkers has been deemed essential, obviating the need to accommodate.\textsuperscript{194} Since the ADA's adoption, courts have refused to require the reduction of an employee's stress as a reasonable accommodation because such a requirement would be too "amorphous" for the employer and consideration of potential triggers for the employee with a disability "would require far too much oversight" by the employer.\textsuperscript{195} For example, a court dismissed the claim of an employee because a transfer away from harassing coworkers who exacerbated his bipolar disorder was unreasonable.\textsuperscript{196}

Even if interactions are difficult because of past harassment, courts commonly characterize this difficulty as a "personality conflict," and conclude that it does not warrant accommodation.\textsuperscript{197} Consequently, employers have not been required to

\textsuperscript{192} Theilig v. United Tech Corp., 415 F. App'x 331, 333 (2d Cir. 2011); see also Kennedy v. Dresser Rand Co., 193 F.3d 120, 123 (2d Cir. 1999) (stating that it was virtually impossible to avoid any contact with supervisor).
\textsuperscript{193} Theilig, 415 F. App'x at 333.
\textsuperscript{194} Id.
\textsuperscript{195} Gaul v. Lucent Techs., Inc., 134 F.3d 576, 581 (3d Cir. 1998).
\textsuperscript{196} Bradford v. City of Chi., 121 F. App'x 137, 139 (7th Cir. 2005).
\textsuperscript{197} Id.; Susan Stefan, You'd Have to Be Crazy to Work Here: Worker Stress, the Abusive Workplace, and Title I of the ADA, 31 LOY. L. A. L. REV. 795, 803-04 (1998).
provide "a workplace environment of civility" as an accommodation.\(^\text{198}\) Thus, employees who have been subjected to harassment that leads to or aggravates a psychiatric disability have been unable to obtain accommodations to escape such mistreatment, even when the court recognized that the treatment was unfair, a violation of the employer's conduct, or even intolerable.\(^\text{199}\)

Only a few courts have required employers to provide accommodations for targets of harassment who have a disability including impairments that are triggered by their supervisor, coworkers, or work environment.\(^\text{200}\) Where a harassing environment triggered an employee's emotional dysregulation, one court refused to dismiss her claim because she could potentially prove at trial that her symptoms would not occur if she were "assured a normal workplace."\(^\text{201}\) However, even this court eventually dismissed her claim because she failed to establish that the work environment was sufficiently severe or pervasive to create an abusive working environment, supporting the employer's conclusion that she lacked the coping skills needed to return to work in that environment regardless of any potential accommodation.\(^\text{202}\) The court concluded that returning her back to the allegedly hostile work environment "with no clear idea of what might trigger" her psychiatric conditions "would have put her, and possible her coworkers, in danger."\(^\text{203}\)

It is the rare but forward-thinking court that will require an employer to provide a target of harassment with a transfer as an accommodation, at least when characterized as a request for change of location rather than a move away from the harassing supervisor and the employer fails to show any undue hardship from

\(^{198}\) Stefan, \textit{supra} note 197, at 801.

\(^{199}\) \textit{Id.} at 803-04.


\(^{203}\) \textit{Id.} at *21.
the transfer. One California court recognized, for example, that an accommodation allowing a target of harassment to avoid contact with her harasser was “both obvious and potentially reasonable.” The court explained that such avoidance of contact was potentially reasonable accommodation where she only sought avoidance of the person whose “behavior produced the disability.”

These decisions follow the advice of experts on the provision of accommodations who have suggested that “[e]xcluding or removing the harasser then becomes analogous to abating or limiting exposure to toxic or allergenic chemicals, ambient smoke, and the like.”

This review demonstrates that even if harassment causes or aggravates a physical or psychiatric disability in its target, that employee may be unable to obtain accommodations under the ADA which would help ameliorate the harassment. While just cause principles may be beneficial to employees with disabilities, it remains to be seen whether arbitrators can use these principles to help eradicate harassment from the work place.

III. ARBITRATORS’ APPLICATION OF JUST CAUSE TO HARASSMENT

Arbitration plays a significant role in addressing workplace harassment by applying just cause standards to grievances filed by alleged harassers. As explained above, courts often defer to arbitrators’ enforcement of principles of just cause in reviewing the appropriateness of a harasser’s discipline. Therefore, it is essential to understand how arbitrators review impositions of discipline of employees accused of harassment who are protected by a

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204 Ryan, 2017 U.S. Dist. LEXIS 202467 at *27.
206 Id. at 1341.
207 Zatz, supra note 170, at 1389.
209 Perkovich & Rowe, supra note 93, at 749.
210 Id. at 765.
CBA or covered by an employer’s arbitration program. An employer’s discipline will be required to demonstrate just cause for any discipline under most CBA’s\(^{211}\) or employer policies tied to an employment arbitration program.\(^{212}\) Just cause analysis includes determining “whether the grievant received adequate procedural due process and whether discharge was appropriate under the circumstances.”\(^{213}\) This section reviews prior, more general studies of how just cause analysis has impacted grievances by harassers, and then looks closely to determine how that just cause analysis influenced the outcomes in sixty arbitration awards resolving grievances filed by alleged harassers.

Arbitrators hearing grievances by alleged harassers typically have the final word as to what, if any, discipline should be imposed on the harasser, ranging from a warning to upholding a discharge.\(^{214}\) Under a just cause standard, a determination of whether an employer had just cause to discharge an alleged harasser depends upon numerous factors related to both the specific event leading to the discharge, including evidence that the harassment did or did not occur, and whether the facts establish that the acts constituted harassment as defined by the CBA or employer policy.\(^{215}\) Progressive discipline policies as well as both mitigating and aggravating circumstances are considered in determining whether the penalty is excessive.\(^{216}\)

The review of past arbitration awards has been recognized as a useful tool in predicting the outcome of future arbitrations, in large part because arbitrators often rely on past related deci-

\(^{211}\) Bureau of National Affairs, BASIC PATTERNS IN UNION CONTRACTS 7, 127 (14th ed. 1995).


\(^{213}\) Perkovich & Rowe, supra note 93, at 766.

\(^{214}\) See infra Table 1.


\(^{216}\) Id.
Consistency with past awards can also help predict whether an award will be upheld under judicial review. In addition, reviewing how these arbitration awards apply just cause principles to the discipline of workplace harassers provides insight into the appropriateness of relying on labor or employment arbitration to prevent future workplace harassment.

A. Application of Just Cause to Harassers

Arbitration awards, which apply just cause provisions to alleged harassers, rely heavily on traditional contract interpretation principles. Just cause protections for employees under a CBA or an employment contract "can restrict an employer's sanctions against an employee who is charged with sexual harassment." In applying principles of just cause, an arbitrator may reinstate harassers, even when that decision could result in a continuation of a hostile work environment for the target.

Arbitrators typically apply the seven tests for determining just cause, including whether the employer provided notice that discipline could result from the employee's conduct, the relationship between the rule and "orderly, efficient, and safe operation of the company's business and the performance that the company might properly expect of the employee," issues surrounding the conduct of the investigation and the application of the rule, as well as whether "the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the

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217 FRANK ELKOURI & EDNA A. ELKOURI, HOW ARBITRATION WORKS 11-2 to 11-3 (Bureau of Nat'l Affairs, 8th ed. 2016).
218 Id. at 11-8.
219 Id. at 11-26.
221 See Fraser, supra note 6, at 17.
employee’s proven offense and (b) the record of the employee in his service with the company?"\(^{223}\)

This review of recent arbitration awards builds upon several earlier, more limited reviews of arbitration awards addressing grievances by employees accused of harassment. In the 1980's, two studies found that arbitrators rarely reversed an employer’s decision to discipline a grievant for harassing behavior,\(^{224}\) particularly when the harasser had been warned and had a poor work record, the harassment continued over a lengthy period of time, or the circumstances of the harassment were otherwise “aggravated."\(^{225}\) A third study noted that discipline, rather than discharge, which corrects a harasser’s behavior could be beneficial to the employer as well as the employee, since the employer avoids the cost of recruiting a replacement.\(^{226}\)

Subsequent studies found that arbitrators’ application of the just cause standard led to the reversal or reduction of discharges to suspension in around half of the grievances brought by alleged harassers.\(^{227}\) These previously observed outcomes in grievances filed by alleged harassers can be compared to an overall 23 percent success rate for discharged grievants in labor arbitration\(^{228}\) and a success rate of 21.4 percent among employees in nonunion

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\(^{223}\) Hickox, supra note 208, at 364.


\(^{225}\) Id. at 39; Jonathan Monat & Angel Gomez, Decisional Standards Used by Arbitrators in Sexual Harassment Cases, 37 LABOR L.J. 712, 715-17 (1986).

\(^{226}\) Jennings & Clapp, supra note 220, at 757.

\(^{227}\) VERN E. HAUCK, ARBITRATING SEXUAL HARASSMENT CASES 1-5 (1995). See Jennings & Clapp, supra note 221, at 757 (explaining that arbitrators reduced or eliminated management's disciplinary actions taken against employees charged with sexual harassment in five out of seven suspensions and nine out of twenty discharges); Carrie G. Donald & John D. Ralston, Arbitral Views of Sexual Harassment: An Analysis of Arbitration Cases, 1990-2000, 20 HOFSTRA LAB. & EMP. L.J. 229, 301 (2002) (stating that “discipline is upheld in 52.34% of cases, reduced in 37.38%, and overturned in 10.28%”).

\(^{228}\) Theodore St. Antoine, Labor and Employment Arbitration Today: Mid-Life Crisis or New Golden Age, 32 OHIO STATE J. DISP. RES. 1, 16 (2017).
employment arbitration cases. In discharge cases filed by public-sector employees, employers prevailed in full in 56.17 percent of cases, whereas private-sector employers prevailed in 48.83 percent of their cases. These comparisons show that in general, a grievant charged with harassment will be more likely to succeed in reducing or removing discipline compared to other discharged grievants.

These previous studies of arbitration awards addressing grievances filed by alleged harassers did not consider in any depth the reason behind the treatment of the employer’s imposed discipline. One review in the late 1990’s concluded that “arbitrators will generally sustain a termination only where a ‘pattern of sexual harassment exists, sexual harassment is excessive, or where sexual harassment insidiously pervades the working environment.” A 2004 review found that discipline was more often reduced to a suspension rather than being wholeheartedly reversed and noted that the discipline of a harasser was sometimes deemed “too severe for the offense” because “the tenets of just cause and implementation of progressive discipline require a measured response that fits the offense and enables the offender to be rehabilitated.”

This current analysis of the arbitration awards provides more current and in-depth insight into how arbitrators review the discipline of alleged harassers. The overwhelming majority of awards focus on just cause analysis as applied under the umbrella

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231 Buehrer, supra note 136, at 277. See also Vern E. Hauck & Thomas G. Pearce, Sexual Harassment and Arbitration, 43 LABOR L.J. 31, 34 (1992) (shows that arbitrators who consider sexual harassment regularly find in favor of management (47%) or split the award (33%), but that discharges for sexual harassment have been overturned or reduced to suspensions 56% of the time).
233 Id. at 82-83.
of collective bargaining agreement language and work rules adopted by employers, with some decisions hinging on factual analysis and application of applicable policies, while others reduce discharges based on mitigating factors particular to the alleged harasser.234

B. Analysis of Arbitration Awards

A total of sixty arbitration awards were chosen for analysis to understand how arbitrators approach grievances filed by employees who commit harassment behaviors in the workplace.235 A few of these awards involved grievants who also claimed they were targets of harassment, but no awards were found that only addressed the grievance of the target of harassment.236 Awards were included if the grievant was accused of any type of harassment based on the target’s membership in a group protected against discrimination by any of the federal non-discrimination statutes, including Title VII of the Civil Rights Act, the ADA or the Age Discrimination in Employment Act.237 Employers included both private and public sector organizations.238 Awards were coded independently by the authors and a research assistant, based on the information included in the published awards.239

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235 See infra Table 1.

236 This lack of reported awards resolving targets’ claims of harassment is consistent with the AAA’s report that it had only received about 100 sexual harassment complaints in 2016. Jacob Gerchman, As More Companies Demand Arbitration Agreements, Sexual Harassment Claims Fizzle, WALL STREET JOURNAL (Jan. 25, 2018). The lack of grievances by targets of harassment may be explained at least in part by the absence of explicit anti-harassment language in CBA’s. Alleyne, supra note 135, at 4.


238 See infra Table 1.

239 See infra Table 1.
These awards were reported in Bloomberg BNA over the past ten years, between 2009 and 2018.240 This study necessarily excludes unreported awards; consequently, the study includes only one arbitration award arising from individual employee-employer arbitration agreements which tend to go unreported.241 The reliance on published awards presents a limitation of this analysis, because many awards are never published.242 Additionally, awards are not chosen for publication by Bloomberg BNA to provide a representative sample of all arbitration cases.243 The parties’ agreement to publish may depend on their privacy interests244 or other factors.245 This study could have limited generalizability because the sample was primarily composed of unionized, blue-collar work environments, since these are primarily the types of organizations that yield published arbitration awards.246

Another limitation of this study comes from the fact that arbitrators only become involved in addressing harassment if the harasser is disciplined and files a grievance, excluding situations where targets do not complain.247 This study also excludes situations where an alleged harasser is not formally disciplined due to employers’ preference to avoid conflict or damage to the alleged harasser’s career, as noted in the past,248 then these awards do not reflect those instances of harassment. Since CBAs typically exclude supervisors and managers, their challenges to discipline for harassment are necessarily excluded unless they are not covered by an employment arbitration program.249 Despite these limitations, the authors believe that there are lessons that can be learned from a systematic examination of published arbitration decisions.

240 See infra Table 1.
241 See infra Table 1.
242 Elkouri & Elkouri, supra note 217, at 263.
243 Lucero, supra note 232, at 85.
244 Elkouri & Elkouri, supra note 217, at 246.
245 Id.
246 Id.
248 Id. at 60-63.
249 Id. at 6.
Within these limitations, the sixty arbitration awards reviewed resulted from grievances filed by employees accused of harassment.\textsuperscript{250} Of those sixty awards, 39 awards involved grievants disciplined or discharged for sexual harassment (including one grievant who also alleged that she was a target of sexual harassment), and 33 alleged harassment based on the target’s membership in some other protected class (including three filed by targets and seven which also alleged sexual harassment).\textsuperscript{251} This study was intended to examine how arbitrators addressed the concerns of targets in the workplace; consequently, only behavior directed towards coworkers or supervisors was included.\textsuperscript{252} Thus, awards addressing discipline or discharge for harassment of customers, clients or members of the public only were not included.\textsuperscript{253}

1. \textit{Overall Outcomes}

The arbitration awards were first analyzed regarding the prevalence of reversing or reducing the punishment imposed by employers for alleged harassment.\textsuperscript{254} Table 1 provides the outcomes of grievances challenging the discipline or discharge of grievances by the category of grievants’ behavior, as outline above.\textsuperscript{255} The majority of the accused harassers were not returned to work by the arbitrator.\textsuperscript{256} In line with previous studies of arbitration awards addressing grievances by alleged harassers, slightly less than half of the grievances were sustained, meaning that the original punishment (most often discharge) was not upheld.\textsuperscript{257} While 27.6\% of those grievants were reinstated without any pun-
ishment, it was much more common for the grievant to be reinstated after a short term suspension or with no back pay.\textsuperscript{258}

Table 1: Outcomes of Grievances filed by Alleged Harassers

<table>
<thead>
<tr>
<th>Type of Behavior by Grievant V</th>
<th>Total No. of Grievances by Employees</th>
<th>No./% of Grievances Sustained</th>
<th>Punishment Vacated in Sustained Grievances (no./%)</th>
<th>Discharge Vacated in Sustained Grievances (no./%)</th>
<th>Discharge Reduced to Warning (no./%)</th>
<th>Discharge Reduced to Suspension (no./%)</th>
<th>Reinstated with No Back Pay (no./%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Harassment based on sex/sex &amp; other</td>
<td>37</td>
<td>17/37 (45.9%)</td>
<td>6/17 (35.3%)</td>
<td>1/17 (5.9%)</td>
<td>7/17 (41.2%)</td>
<td>3/17 (17.6%)</td>
<td></td>
</tr>
<tr>
<td>Harassment based on other protected status only</td>
<td>12/20</td>
<td>2/12 (16.7%)</td>
<td>0/12 (0%)</td>
<td>6/12 (5.0%)</td>
<td></td>
<td>4/12 (33.3%)</td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>60</td>
<td>29/60 (48.3%)</td>
<td>8/29 (27.6%)</td>
<td>1/29 (3.4%)</td>
<td>12/29 (41.4%)</td>
<td>7/29 (24.1%)</td>
<td></td>
</tr>
</tbody>
</table>

Awards were analyzed based on the protected category of the target of harassment, with one group including any target who alleged sexual harassment (even if she also alleged some other protected class underlying the harassment), and the other category includes any target alleging harassment based on any other protected class (race, national origin, etc.).\textsuperscript{259} Grievants were slightly more successful overall in challenging a discharge based on harassment as a result of race, national origin, or some other protected category compared to alleged perpetrators of sexual harassment.\textsuperscript{260} Among sustained grievances, however, the arbitrator was more likely to remove any punishment and award full back pay with reinstatement for a grievant accused of sexual harassment, compared to other types of harassment.\textsuperscript{261}

\textsuperscript{258} See infra Table 1.
\textsuperscript{259} See supra Table 1.
\textsuperscript{260} See supra Table 1.
\textsuperscript{261} See supra Table 1.
These overall results also demonstrate the impact of just cause principles on the viability of the employers’ level of discipline under just cause principles. Arbitrators were most likely to reduce a discharge to a suspension for grievants charged with either type of harassment, whereas reinstatement without back pay was most common for grievants charged with harassment based on protected categories other than sex. Reinstatement without back pay would be considered a harsher punishment, since the suspension imposed by the arbitrator typically was for no more than 10 days, whereas no back pay award would cover the entire period of time between the discharge and the arbitrator’s award. An arbitrator rarely reduced a discharge to a warning. Interestingly, none of the grievants charged with any type of harassment were required to transfer as part of their reinstatement, and only one grievant was demoted as part of the arbitrator’s award.

Here and in the remainder of the paper, we conduct some statistical analyses to determine the significance of various factors on the result of the arbitration. The primary dependent measure we use is the overall outcome of the arbitration, assessed on a three-point scale (1 = discipline vacated, i.e., the grievant is reinstated with no discipline; 2 = discipline reduced, i.e., the grievant is reinstated with some punishment; and 3 = discipline upheld.) The in outcomes between sexual harassers and other harassers were not significantly different (ANOVA, F=.005, n.s.). This suggests that arbitrators’ application of just cause principles to any type of harassment results in similar outcomes for the harassers.

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262 See supra Table 1.
263 See supra Table 1.
264 See supra Table 1.
265 See supra Table 1.
266 See supra Table 1.
267 See infra Sections B.2-B.7.
268 See supra Table 1.
2. Anti-Harassment Language

Arbitrators are charged with interpreting a collective bargaining agreement, which often includes review of an employer’s discipline under its policies adopted under its managerial authority preserved in the CBA. Almost all awards identified an employer-initiated work rule or a rule in a contract clause (referenced collectively as “rules” here) that had been violated by the grievant. As one arbitrator who was not provided with such language noted, “[i]t would be instructive if we could measure the [g]rievant's behavior, proven, as well as claimed by the Company,” against the employer’s policy.

Arbitrators’ reliance on anti-harassment language has become more common over time. In a review of 92 arbitration awards from the 1990’s, only 33 percent of the awards specifically mentioned that the employer had a sexual harassment policy. In contrast, a 2004 study of arbitration awards addressing harassment found that in 75 percent of the cases, management relied on a specific sexual harassment policy, and “over 30% of the cases cited the use of some other type of rule (e.g., rules prohibiting verbal abuse.”) In awards where the arbitrator set aside the discipline, 50 percent cited the employer’s sexual harassment policy; among awards where discipline was reduced or upheld, more than 80 percent of the awards cited policy.

In this current analysis, all but one of the 60 awards addressing harassment identified some company policy and/or CBA language related to harassment. Many of the awards referenced just cause protection and general non-discrimination language in applicable CBA’s, but only two referenced specific language prohibiting harassment in a CBA; in the remainder of the awards, the

269 See supra Table 1.
271 Petersen, supra note 160, at 137.
272 Lucero, supra note 232, at 78.
273 Id.
274 See supra Sections III.B.2-B.3.
arbitrator relied on employer-developed policy language on harassment to reach her decision.\textsuperscript{275} 

Just cause principles require some relationship between the rule allegedly violated by a grievant and the employer’s interests, but it has been noted that rules prohibiting harassment are “by their nature, are reasonably related to the ‘orderly, efficient and safe operation of the employer’s business,’” because “[c]ooperation in assisting the employer to satisfy its legal obligations is clearly performance which an employer might ‘properly expect of its employees.’”\textsuperscript{276} In this analysis, the reasonableness of the rule on harassment was reviewed in 21 out of 60 (35.0 percent) of the awards, with only two of those rules found to be unreasonable.\textsuperscript{277} For example, one award found reasonable a plant rule prohibiting “sexual harassment when [] submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment.”\textsuperscript{278} One arbitrator accepted an employer’s more practical justification for a rule prohibiting racist behavior: “their high potential to provoke a violent response.”\textsuperscript{279} 

This analysis shows several things. First, most CBAs do not directly address harassment by employees covered by the agreement; instead, management is given the discretion to create policies to prohibit harassment, but just cause protections still apply to any discipline resulting from a violation of those policies.\textsuperscript{280} Second, because arbitrators are charged with interpreting CBAs and employer policies, it is not surprising that almost all arbitration awards referenced the applicable CBA language and/or policy in analyzing whether the employer had just cause to discipline the harassing grievant.\textsuperscript{281} Last, the absence of any reference to applicable CBA or policy language did not appear to result in greater

\textsuperscript{275} See supra Sections III.B.2-B.3. 
\textsuperscript{276} Petersen, supra note 160, at 138. 
\textsuperscript{277} See supra Sections III.B.2-B.3. 
\textsuperscript{280} See supra Sections III.B.2-B.3. 
\textsuperscript{281} See supra Sections III.B.2-B.3.
success among grievants in challenging the discipline; in fact, those awards more often upheld the discipline.\textsuperscript{282}

After the Supreme Court recognized that unionized employees can be required to arbitrate statutory rights, some speculated that labor unions and employers might move toward securing such waivers by including specific references to statutory protections in CBA’s.\textsuperscript{283} In this analysis, however, only four of the 53 awards referencing policy and/or CBA language directly referred to the legal prohibitions against harassment, with one additional award referencing EEOC guidelines on harassment, and another two referencing both.\textsuperscript{284} Parties may refrain from directly incorporating statutory references related to harassment because such an omission will likely preserve the harassment target’s ability to file a claim of discrimination under those statutes rather than relying on the grievance and arbitration process to address the harassment.\textsuperscript{285}

If the CBA or employer policy specifically referenced nondiscrimination statutes, the arbitrator assumed “derivative authority to consider federal and state antidiscrimination law as part of examination whether there was just cause to discharge employee for sexually harassing another [] employee.”\textsuperscript{286} As one arbitrator noted in upholding the discharge of an employee charged with sexual harassment, although the “just cause” provision controls, “the general guidelines and structure of federal law” still apply “so that the opinion and award are not repugnant to that law.”\textsuperscript{287}

3. \textit{Influence of Legal Standards}

A CBA or policy need not incorporate a specific reference to non-discrimination statutes for those statutes to impact an arbi-

\textsuperscript{282} See supra Sections III.B.2-B.3.


\textsuperscript{284} See supra pp. 28-30.


\textsuperscript{287} \textit{Id.}
In reviewing the discipline of alleged harassers, arbitrators often follow the federal Equal Employment Opportunity Commission's Guidelines on Sexual Harassment. As noted twenty years ago, if the contract or policy language "mimics a statute, regulation, or judicial interpretation, there is additional force behind the arbitrator referring to external law." Since the concept of sexual harassment "derives entirely from Title VII, the arbitrator who uses the concept of sexual harassment in reality applies federal law." Arbitrators may also be influenced by the courts' application of anti-harassment principles in response to judicial reversal of awards found to conflict with the public policy against harassment, as discussed earlier. Consistent with this logic, our analysis shows that at least some arbitrators reference non-discrimination case law to determine whether the grievant's behavior constitutes harassment.

Historically, arbitrators sometimes "tended to be aware of judicial approaches to cases and attempted to mirror them." One 1998 review of arbitration awards concluded that "external law influenced" many decisions, but was completely ignored in others. This review observed that "the majority of arbitrators continues to omit formal consideration of legal issues," with 41 percent referring to the law, compared to 59 percent of the awards in which legal issues "were not mentioned." In cases where the law was not referenced, outcomes more often favored the harass-

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288 Alleyne, supra note 135, at 15.
289 Id.
290 Elkiss, supra note 20, at 152.
292 See supra Section III.
293 See supra Section III.
294 Petersen, supra note 160, at 142.
295 Elkiss, supra note 20, at 155.
296 Id.
In 1990’s review of awards observed that “arbitrators have increasingly turned to that external law both to define the offense and to determine the obligations of the employer and the union to both harasser and target.” In 2000, another expert noted that case law may be persuasive enough to change an arbitrator's determination as to whether conduct constitutes harassment and warrants the assigned punishment, especially where the employer's sexual harassment policy restates the precepts of nondiscrimination law. Similarly, a 2000 review of arbitration awards addressing harassment noted that arbitrators’ perspective of “boys will be boys” that led to their reversal of discipline and discharges has evolved to where most arbitrators “reflect the view of the courts and society generally with regard to current fundamental precepts.” This evolution may reflect changes in contract and policy language that more closely aligns with judicial and EEOC standards regarding what constitutes harassment.

Awards reviewed in this study reflect continued influence of legal standards on award reasoning and outcomes. For example, one arbitrator reduced the discharge of one alleged harasser to a warning after referencing two Supreme Court cases, which discussed when harassment constitutes discrimination and concluded that the altercation between coworkers did not “rise to the level of harassment.” Similarly, another award relied on one of those same Supreme Court decisions as well as EEOC guidelines regarding the severity and pervasiveness, and unwelcomeness of the racial harassment, in reducing a police department grievant’s discharge to a suspension.

297 Id.
300 Perkovich & Rowe, supra note 93, at 763-65.
4. Defining Harassment

Regardless of whether the policy directly incorporated legal definitions of harassment, work rules or contract provisions addressing harassment typically mirrored the language of federal non-discrimination statutes. For example, the CBA between GBC Metals and the International Association of Machinists, which prohibited sexual harassment where "(1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, . . . or (3) such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment." To further illustrate how employer policies mirror the federal legal definition of harassment, this table reflects the outcome of the awards compared to the arbitrators' reliance on policy language used to explain or illustrate what constitutes harassment.
Table 2: Influence of Anti-Harassment Language

<table>
<thead>
<tr>
<th>Outcome =&gt;</th>
<th>Total</th>
<th>Discipline Upheld</th>
<th>Discipline Reduced</th>
<th>Discipline Vacated</th>
</tr>
</thead>
<tbody>
<tr>
<td>Specific Definitional Language Referenced</td>
<td>39</td>
<td>17 (43.6%)</td>
<td>17 (43.6%)</td>
<td>5 (12.8%)</td>
</tr>
<tr>
<td>Language NOT Referenced</td>
<td>21</td>
<td>14 (66.7%)</td>
<td>3 (14.3%)</td>
<td>4 (19%)</td>
</tr>
</tbody>
</table>

This suggests that while specific language may not be influencing whether a grievance is sustained, a lack of reference to a specific definition is associated with more denials of grievances, whereas reference to specific language is associated with the reduction of a discharge to some lesser discipline. Thus, unions may want to seek more specific contract language which could in fact benefit employees accused of harassment. Conversely, employers may want to review contract or policy language to ensure that it supports the discharge of confirmed harassers and to adequately guide an employer’s investigation to prove that harassment occurred.

It is interesting that two employers’ policies specifically stated that its definition of harassment went beyond the legal definition: “[i]n order to eliminate sexual harassment in the workplace, AT&T prohibits all unprofessional behaviors, including some that go beyond the legal definition of sexual harassment.” The second policy adopted by Rite Aid states, under the heading “Respect for the Individual,” that “[t]he following list contains examples of conduct that is inappropriate and, as such, prohibited regardless of

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306 Id.
whether it constitutes harassment as a legal matter: [s]exual bantering, jokes and teasing, etc.⁴⁰⁸

This next table considers whether the arbitrator’s award expanded upon the definition of harassment in the CBA or policy language to determine whether the grievant’s behavior violated that policy.⁴⁰⁹

**Table 3: Definition of Harassment Discussed**

<table>
<thead>
<tr>
<th>Outcome =&gt;</th>
<th>Total</th>
<th>Discipline Upheld</th>
<th>Discipline Reduced</th>
<th>Discipline Vacated</th>
</tr>
</thead>
<tbody>
<tr>
<td>Specific Definition of Harassment Discussed</td>
<td>25</td>
<td>7 (28%)</td>
<td>13 (52%)</td>
<td>5 (20%)</td>
</tr>
<tr>
<td>Definition NOT Discussed</td>
<td>35</td>
<td>24 (68%)</td>
<td>8 (22.9%)</td>
<td>3 (8.6%)</td>
</tr>
</tbody>
</table>

This review of employer policies and CBA language demonstrates the potential for employers and parties to CBAs to adopt more concrete language to define harassment. Greater specificity could encourage greater compliance, but would certainly provide clearer guidance to arbitrators appointed to interpret and enforce such language in both determining whether harassment occurred and what punishment is appropriate. With clearer guidance, arbitrators would be more likely to issue awards in line with public policies against harassment.

Regardless of whether the applicable CBA’s or work rules provided specific definitions or examples of harassment, 25 of the 60 (41.7 percent) awards in which harassment was alleged against the grievant discussed any definition of harassment (beyond citing the contract or work rule language).⁴¹⁰ In 18 of those 25 awards (72 percent), the grievance was sustained, but only five of those

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⁴⁰⁹ See infra Table 3.
⁴¹⁰ See supra Table 3.
awards removed any punishment; the remainder imposed a suspension or no back pay in lieu of discharge. In the other 35 (58.3 percent) of the awards, the arbitrator did not discuss in any depth whether the grievant’s conduct did or did not constitute harassment. Anova results indicate that in cases in which the definition of discrimination was discussed, the arbitrator was significantly more likely to reduce the discipline than in cases in which the definition was not discussed (F=8.716, p < .01).

The definitions of harassment in employer policies varied considerably. Creation of a hostile work environment, taken directly non-discrimination case law, was referenced in 15 out of 39 (38.5 percent) awards in which employer policy was referenced. Interference with the harassment target’s work, a factor commonly relied upon in federal harassment litigation, was referenced in 18 of the 39 (46.2 percent) policies referenced in awards. Similarly, some reference to the effect or impact of the harassment on the target, also a factor in harassment litigation, was referenced in 11 of the 39 (28.2 percent) policies referenced in awards. Employer policies also often provided examples of behavior that constitutes harassment, such as inappropriate touching, display of pornography, or use of derogatory names or words. Such examples were included in the policies reviewed in 27 of the 39 (69.2 percent) awards.

311 See supra Table 3.
312 See supra Table 3.
313 See supra Table 3.
314 Harris, 510 U.S. at 18.
315 See supra Table 3.
316 See, e.g., LeGrand v. Area Resources for Community and Human Services, 394 F.3d 1098, 1102 (8th Cir. 2005) (factors considered include frequency, severity, whether harassment is physical threatening or humiliating and whether harassment unreasonably interferes with target's work performance).
317 See supra Table 3.
318 See supra Table 3.
319 See supra Table 3.
321 See infra Table 4.
This study categorized the language used to define harassment into three general types: language modeled after the law and legal cases, language that focuses on the employer’s interests (e.g., that behavior is harassment only if it interferes with the employer’s operation), and language that includes examples.\footnote{See infra Table 4.} A given CBA or policy could incorporate multiple types of language.\footnote{See infra Table 4.} Of the 39 awards which included information on the type of language,\footnote{See infra Table 4.} 61.5 percent used legal language, 33.3 percent used language that focused on employer interests, and 69.2 percent included examples.\footnote{See infra Table 4.}

While the number of cases is small, analysis indicates that using employer-focused language to define harassment is associated with significantly more grievances being sustained and with penalties being reduced or eliminated.\footnote{See infra Table 4.} (Regression, F=3.11, p<.05, adjusted $R^2 = .14$; t for employer-focused language = -2.51, p<.05; Legal language and examples had no significant relationship to the outcome).\footnote{See infra Table 4.} The distribution of cases is shown in Table 4.\footnote{See infra Table 4.}
Table 4: Language used to define harassment and outcomes

<table>
<thead>
<tr>
<th>Type of Language</th>
<th>Outcome of Awards</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Grievance</td>
<td>Grievance</td>
</tr>
<tr>
<td></td>
<td>sustained--</td>
<td>sustained with</td>
</tr>
<tr>
<td></td>
<td>returned to</td>
<td>some lesser</td>
</tr>
<tr>
<td></td>
<td>work with no</td>
<td>punishment</td>
</tr>
<tr>
<td></td>
<td>penalty (no./%)</td>
<td>(no./%)</td>
</tr>
<tr>
<td>Legal</td>
<td>Included</td>
<td>12/24 (50%)</td>
</tr>
<tr>
<td></td>
<td>Not included</td>
<td>5/15 (33.3%)</td>
</tr>
<tr>
<td>Employer-</td>
<td>Included</td>
<td>6/13 (46.2%)</td>
</tr>
<tr>
<td>focused</td>
<td>Not included</td>
<td>11/26 (42.3%)</td>
</tr>
<tr>
<td>Example</td>
<td>Included</td>
<td>10/27 (37%)</td>
</tr>
<tr>
<td></td>
<td>Not included</td>
<td>7/12 (58.3%)</td>
</tr>
<tr>
<td>Total</td>
<td>5/39 (12.8%)</td>
<td>17/39 (43.6%)</td>
</tr>
</tbody>
</table>

As demonstrated in the table, about three-quarters of cases using employer-focused language resulted in the grievance being sustained, either partially or entirely (7 of 13, or 76.9 percent). This compares to 66.7 percent for cases using legal language and 51.9 percent for cases using examples as part of their definition of harassment. Thus, when the definition of harassment focuses on the employer’s interests rather than the target’s interests, arbi-
Arbitrators are less likely to find that the behavior in question meets the definition of harassment.

It is the rare arbitrator, such as the award in concerning the Montana Dep't of Labor and Industry, who carefully examines whether the grievant's conduct rises to the level of constituting sexual harassment.\textsuperscript{331} Relying heavily on factors developed by Professor and Arbitrator Ted St. Antoine, this arbitrator discussed the requirement that the conduct be sexual in nature, unwelcome to the target and be considered offensive by a reasonable person, as well as the requirement that harassment be sufficiently pervasive or severe to create a hostile environment, based on a totality of the circumstances.\textsuperscript{332}

5. \textit{Just Cause Principles}

Arbitrators typically apply just cause principles to grievances filed by alleged harassers.\textsuperscript{333} These principles include notice to the employee that their conduct is prohibited, the sufficiency of the evidence of misconduct, consistency of enforcement of the policy.\textsuperscript{334} The just cause for the level of discipline imposed will depend on adherence to principles of progressive discipline and consideration of mitigating and aggravating factors relevant to the level of discipline imposed.\textsuperscript{335} The awards in this study are analyzed for the influence of these different factors on the outcome of grievances filed by alleged harassers.\textsuperscript{336}

\textsuperscript{331} Mont. Dep't of Labor & Indus., 133 Lab. Arb. Rep (BNA) 916, 923 (2014) (Jacobs, Arb.).
\textsuperscript{332} \textit{Id}.
\textsuperscript{333} Bowers, et al., \textit{supra} note 299.
\textsuperscript{334} \textit{Id}.
\textsuperscript{335} \textit{Id}.
\textsuperscript{336} \textit{See supra} Section III.B.5.
i. Notice

Just cause requires a grievant’s knowledge that his conduct was prohibited by a CBA or an employer’s policy and could result in discharge.\textsuperscript{337} Thirty years ago, many CBAs and policies made no express reference to sexual harassment as grounds for immediate discharge without prior progressive discipline.\textsuperscript{338} For the purposes of this analysis, we assume that this notice requirement arguably is not met under more vague “zero tolerance” policies which do not specifically state that any proven harasser will be discharged. In this current analysis, arbitrators often noted that the work rule or contract provision provided specific notice to employees that harassing behavior could result in discharge.\textsuperscript{339}

Table 5: Role of Notice

<table>
<thead>
<tr>
<th>Outcome =&gt;</th>
<th>Total</th>
<th>Discipline Upheld</th>
<th>Discipline Reduced or Vacated</th>
</tr>
</thead>
<tbody>
<tr>
<td>Policy Noticed Discharge as Discipline</td>
<td>33 (55%)</td>
<td>16 (48.5%)</td>
<td>17 (51.5%)</td>
</tr>
<tr>
<td>No notice</td>
<td>27 (45%)</td>
<td>15 (55.6%)</td>
<td>12 (44.4%)</td>
</tr>
</tbody>
</table>

This table illustrates which awards noted that the employer’s policies allowed for discharge as a discipline for engaging in harassment.\textsuperscript{340} The contract provisions or work rules were not counted as providing notice based only on “zero tolerance” type of

\textsuperscript{337} Lucero, supra note 232, at 81; see also Buehrer, supra note 136, at 279.


\textsuperscript{339} See supra Table 5.

\textsuperscript{340} See supra Table 5.
language, if discharge was not specifically referenced as a potential discipline.\textsuperscript{341}

These figures suggest that the lack notice of discharge as a potential punishment may not be influential in an arbitrator’s decision as to whether to uphold the grievance, since more grievances were denied when the arbitrator did not discuss the provision of notice.\textsuperscript{342} These differences are not statistically significant (Anova, F=.289, n.s.).\textsuperscript{343} However, a lack of notice was highlighted by one arbitrator who explained that the employer should give “clear notice to its employees that the type of conduct involved here has been found to be a violation of the Sexual Harassment Policy by an arbitrator and subject to severe discipline,” and concluded that discharge was too harsh a penalty for the first employee to be “caught.”\textsuperscript{344} He explained further that where the employer is “trying to use a Grievant as an example to establish a ‘get tough’ policy” which has not been enforced in the past, the discipline of discharge may lack just cause.\textsuperscript{345}

Looking more closely at the possible discipline for harassment under these policies, of the 60 awards addressing harassment by a grievant, 27 (45 percent) awards discussed the level of discipline allowed or suggested by the employer’s policies.\textsuperscript{346} It is important to note that among those 27 employer policies, all but one indicated that discharge was a possible punishment, along with other less severe punishments such as a suspension.\textsuperscript{347} However, only two of those policies required discharge if an employee committed harassment and one required at least a long term suspension, compared to 26 policies which provided for punishment “up to and including discharge.”\textsuperscript{348} Twelve policies included

\begin{itemize}
\item \textsuperscript{341} See supra Table 5.
\item \textsuperscript{342} See supra Table 5.
\item \textsuperscript{343} See supra Table 5.
\item \textsuperscript{345} Id.
\item \textsuperscript{346} See supra Table 5.
\item \textsuperscript{347} See supra Table 5.
\item \textsuperscript{348} See supra Table 4.
\end{itemize}
vague "zero tolerance" language without specifying a level of punishment.  

More specifically, one policy explained that harassment (among other behaviors) will "typically lead to termination," and yet the harassing grievant’s discharge was still reduced to a suspension because the employer failed to prove that the grievant’s use of "nigger" violated its harassment policy. In a second award, an employer’s policy stated that repeated harassment would result in discharge, but the discharge was reduced to a suspension without back pay because of the employer’s failure to properly warn the harassing grievant. Allowing for a range of punishments for harassment provides both the employer and the arbitrator with greater discretion in assigning a punishment to a particular grievant. These examples also illustrate how discretion in punishment opens the door for reliance on other factors typically considered in just cause analysis, which are discussed below.

**ii. Evidence of Harassment**

Weighing of the evidence, including credibility assessment, are significant to the outcome of arbitrations reviewing grievances by alleged harassers. Employers typically carry the burden of proving that a discharged grievant committed sexual harassment. In claims of alleged harassment, some arbitrators apply a preponderance of the evidence test, such as is used in other

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349 See supra Table 4.
352 See Koven & Smith, supra note 222, at 8-9 (noting that the “just cause” approach uses an extrinsic method and takes into account the industry’s norms when deciding on the reasonableness of punishments).
353 Jennings & Clapp, supra note 220, at 761.
354 Petersen, supra note 160, at 133; Monat & Gomez, supra note 225, at 715.
types of arbitration, while others require employers to prove just cause for disciplining harassers by clear and convincing evidence or beyond a reasonable doubt. To determine whether an employer has met this burden, this study demonstrates that arbitrators often engage in an analysis of the evidence of the harassing behavior, in large part because questions of fact involved in sexual harassment cases often are difficult to prove. Since the arbitrator is charged as the fact finder, many weigh the credibility of the grievant compared to the other witnesses who provide information about the harassment that led to the discipline or discharge in question.

In the awards reviewed in this study, arbitrators weighed such evidence in 42 out of 60 (70 percent) harassment awards, as shown in Table 5. In awards addressing the punishment of harassment based on sex or sex plus some other protected category, 23 of 37 (62.2 percent) of the awards found the evidence sufficient to support the charge alleged by the employer, while 6 of 37 (16.2 percent) found the evidence insufficient to support the discipline imposed, and only 8 (21.6 percent) did not discuss the evidence in any detail. In awards addressing other types of harassment, the evidence was deemed sufficient to support the discipline in 11 out of 23 (47.8 percent) of the awards, and insufficient in only 2 (8.7 percent) of the awards, while 10 (43.5 percent) awards did not weigh the evidence of other types of harassment. These differences in the sufficiency of evidence between sexual and other


356 Id.

357 See Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 68 (1986) (noting whether complained-of conduct was sexual harassment "presents difficult problems of proof and turns largely on credibility determinations committed to the trier of fact").

358 Koven & Smith, supra note 222, at 318-22.

359 See supra Table 5.

360 See supra Table 5.

361 See supra Table 5.
types of harassment were not statistically significant (Anova, F=1.17, n.s.)\textsuperscript{362}

Not surprisingly, for all of the types of harassment, if the evidence was insufficient in the arbitrator's eyes, then the grievance typically was sustained.\textsuperscript{363} For example, AT&T was unable to justify punishment for a claim of harassment by a grievant without proof of any reaction from the alleged target, where it conducted an inadequate investigation resulting in an incomplete report on the incident.\textsuperscript{364} If the evidence was sufficient, however, the arbitrator still sometimes reduced or vacated the punishment for other reasons.\textsuperscript{365}

Table 6: Sufficiency of Evidence

<table>
<thead>
<tr>
<th>Discussion of evidence</th>
<th>Total</th>
<th>Evidence sufficient</th>
<th>Evidence lacking</th>
<th>Evidence not discussed</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sexual Harassment</td>
<td>37</td>
<td>23 (62.2%)</td>
<td>6 (16.2%)</td>
<td>8 (21.6%)</td>
</tr>
<tr>
<td>Other Harassment</td>
<td>23</td>
<td>11 (47.9%)</td>
<td>2 (8.7%)</td>
<td>10 (43.5%)</td>
</tr>
<tr>
<td>Total</td>
<td>60</td>
<td>34 (56.7%)</td>
<td>8 (13.3%)</td>
<td>8 (21.6%)</td>
</tr>
</tbody>
</table>

The importance of the weight of the evidence establishing harassment, and the quality of the employer's investigation to obtain such evidence, is illustrated in the award concerning an employee's comments and behavior toward female coworkers described by the union as "[in]sufficiently severe enough to create a hostile or abusive working environment," where the alleged targets did not allege that "the Grievant's comments or behavior al-

\textsuperscript{362} See supra Table 5.
\textsuperscript{363} AT&T Mobility, 134 Lab. Arb. Rep. (BNA) 941, 949, 954, 956 (2014) (Holley, Arb.).
\textsuperscript{364} Id. at 956.
\textsuperscript{365} Id. at 941-42, 946.
tered the terms or conditions of their employment.” Noting that the evidence of harassment “must be persuasive in order to protect against the potentially unbound variables of circumstantial evidence,” the arbitrator concluded that “circumstances surrounding the alleged acts were poorly investigated,” including incomplete witness statements, and that a finding of just cause would require “a more in-depth review of all the facts” to establish that the grievant’s behavior constituted sexual harassment. Consequently, the grievant was reinstated with full back pay.

Awards like this demonstrate that at least some of the perception of arbitrators’ leniency toward harassment may arise from employers’ failure to adequately demonstrate that the grievant engaged in any violation of a nondiscrimination or anti-harassment policy. This outcome parallels common decisions in harassment litigation in which the target has failed to present sufficient proof that the harassment created a hostile work environment.

### iii. Consistency

Consistent enforcement of a work rule or CBA provision is an important principle in applying a just cause standard. Thus, employees who engage in similar types of harassment must be treated “essentially the same unless there is a reasonable basis, such as differing degrees of fault or an employee’s length of service, for assessing different penalties.”

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367 Id. at 1503.
368 Id. at 1504.
369 Plass, supra note 11, at 154; Grossman, supra note 96, at 72 (summarizing other studies); see, e.g., Boyer-Liberto v. Fontainebleau Corp., 786 F.3d 264, 274-75 (4th Cir. 2015) (explaining that isolated comments based on race not severe or frequent enough to create hostile work environment); Richert v. Glob. Pers. Sols., Inc. No. 1:17-CV-3, 2018 U.S. Dist. LEXIS 70009, at *12 (E.D. Tenn. Apr. 26, 2018) (explaining that comments and stares not severe or pervasive enough).
370 Koven & Smith, supra note 222, at 462-63.
371 Fraser, supra note 6, at 25.
ciple was seen as potentially "problematic if an employer intends to take a hard stance on sexual harassment by discharging employees found guilty of misconduct," if the employer has neglected to discipline similar behavior in the past.372

Given the importance of consistent application of employer policies in most just cause analysis, it is somewhat surprising that only 13 of 60 (21.7 percent) of the awards considered past enforcement of a rule against harassment, including eight awards addressing harassment based on sex or sex plus some other category and five awards concerning other types of harassment only.373 Awards noted that the rule had not been enforced consistently against another employee in seven of the awards addressing harassment based on sex or sex plus another category and four of the awards addressing harassment based only on a different protected category.374 In four out of these seven awards involving sex discrimination, the grievance was sustained; in two of the four awards involving other harassment the grievance was sustained.375 When arbitrators found consistent past enforcement of the anti-harassment rule, which occurred in only two awards, the arbitrator upheld one grievance (but denied any back wages) and denied the other.376 This demonstrates that although past inconsistent enforcement can be a factor in just cause analysis, it does not necessarily undermine an employer’s discipline of a harasser.

As noted in 1992, this preference for consistent imposition of discipline can make it difficult for an employer to justify disciplining an employee who has engaged in harassing behavior that has been tolerated in the past.377 Discipline may be justified without a history of enforcement of a harassment policy if the grievant’s conduct can be characterized as relatively more severe.

372 Id. at 26.
373 See supra Table 1.
374 See supra Table 1.
375 See supra Table 1.
376 See supra Table 1.
or frequent.\textsuperscript{378} One employer’s efforts to address a pattern of harassment were supported, despite an absence of past enforcement, based on the arbitrator’s conclusion that a pattern of harassment at the workplace warranted “prompt and appropriate corrective action” including the discharge of eight employees.\textsuperscript{379} The problem with surpassing more lax past enforcement of anti-harassment policies can be overcome by strengthening the language and punishment attached to policies or CBA language, as explained below.

\textit{iv. Progressive Discipline}

Application of progressive discipline principles is another precept that is often incorporated or inferred in a CBA or employer policy and enforced by arbitrators.\textsuperscript{380} Under a system of progressive discipline, “employers should discharge only those employees who, even after warnings and other forms of discipline, are unable to improve their work performance or eliminate their difficulties at work.”\textsuperscript{381} Failure to follow this principle could result in the grievant’s reinstatement “unless the employer can show that there are no circumstances which indicate that the grievant can be rehabilitated by corrective discipline.”\textsuperscript{382} In some ways, the influence of progressive discipline principles parallels the concept of reasonable efforts to prevent future harassment under non-discrimination law analysis.\textsuperscript{383} The difference may rest on what type of level of harassing behavior demonstrates an inability to be rehabilitated so as to prevent future harassing behavior.

In general, progressive discipline can inform the grievant that his behavior is unacceptable and helps “ensure that employees understand employer rules and policies,” while ensuring that the appropriate level of discipline is administered based on the seri-
ousness of the offense. Under a policy of progressive discipline, an employer might lack just cause to discharge an employee who has engaged in harassing behavior for the first time. For example, a grievant’s inappropriate race-related comments to a student coworker did not prevent his reinstatement where the comments were made in just one day. Similarly, the grievance of a target of alleged threats by a coworker was dismissed where the arbitrator noted that “two isolated dates do not a total environment make.”

In 16 of the 60 (26.7 percent) of the awards reviewed in this study, notions of progressive discipline were discussed. In 12 of those awards, the arbitrator found that progressive discipline was followed, while 4 found that progressive discipline was not followed. Of the 12 where progressive discipline was followed, the grievance was still upheld in four awards, for other reasons; of the four where progressive discipline was not followed, three grievances were sustained, with two grievants receiving reinstatement without back pay and one receiving a short term suspension. This data suggests that adherence to a progressive discipline policy does not appear to be a significant influence on the outcome of grievances filed by alleged harassers.

Despite notions of progressive discipline, arbitrators in some of the awards upheld a discharge for a first-time behavior if the severity of the grievant’s behavior justified discharge. One award, for example, noted that where sexual harassment is established, “progressive discipline is not generally required” but also opined that “[d]ischarge may not always be appropriate even

384 Lucero, supra note 232, at 75.
385 Id.
where some form of harassment has been found."\(^{391}\) The penalty need only be reasonably calculated to end the harassment."\(^{392}\) This reasoning parallels the judiciary’s test for the reasonableness of an employer’s response to reported harassment, which can depend on the severity of the harassment.\(^{393}\)

v. *Mitigating/Aggravating Factors*

In reviewing the appropriateness of the discharge or other discipline for established harassment, arbitrators will often consider mitigating or aggravating circumstances, or the lack thereof. The other primary ground for reversing discharge for sexual harassment has been whether the penalty was appropriate or commensurate with the offense.\(^{394}\) Mitigating and aggravating circumstances can include the context in which the misconduct took place, the subjective frame of mind of the grievant and the target, the impact on the target, whether the grievant was contrite or susceptible to rehabilitation, and finally, the grievant's tenure of service and work record.\(^{395}\) Consideration of mitigating factors could result in a reversal of a discharge imposed on a proven harasser, particularly for a first offense.\(^{396}\) Conversely, a court reviewing the reasonableness of an employer’s response to harassment will likely find that a discharge was reasonable, since such a response would end the harassment by that employee, even if the court does not believe discharge was required to remedy the situation.\(^{397}\)

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\(^{392}\) *Id.* at 923.
\(^{393}\) *See*, e.g., Billings *v.* Town of Grafton, 515 F.3d 39, 47-50 (1st Cir. 2008) (reversing summary judgment in favor of employer where supervisor repeatedly and egregiously stared at female employee's breasts on many occasions over multi-year period).
\(^{394}\) Perkovich & Rowe, *supra* note 93, at 749.
\(^{395}\) *Id.* at 767; *see also* Hauck & Pearce, *supra* note 231, at 35 (explaining that clean work record generally favors harassing grievant, but record cannot overturn suspension for extremely lewd speech or behavior; poor work record may be used to substantiate claim that sex harassment is unacceptable).
\(^{396}\) Fraser, *supra* note 6, at 17-18.
\(^{397}\) *Id.* at 18.
Experts have debated the appropriate role of surrounding circumstances in reviewing the discipline of alleged harassers. Some argue that it is appropriate for mitigating circumstances to potentially reduce a penalty’s extent and magnitude, particularly where an employee’s characteristic suggests that “the employee's behavior is capable of being corrected,” or “a good work record indicates that the harasser can be rehabilitated.” However, an excellent work record may also accompany “a long, undocumented history of harassment.” Because mitigating factors may not be directly related to their tendency to engage in future harassment, arbitration has been criticized as a means of addressing harassment in the workplace.

Arbitrators’ consideration of mitigating circumstances is well-supported by just cause principles, but mitigating circumstances may have less of a positive impact for alleged harassers, compared to other grievants in labor arbitration. One study concluded that mitigating factors have less of an impact in harassment cases, even for accused harassers with “long service and otherwise unblemished records,” perhaps because arbitrators are “abandoning just-cause standards in favor of court-related concepts and approaches, at least in this type of case.” Similarly, a 2002 review of arbitration awards concerning harassment found that while seniority was sometimes cited as a mitigating factor, “several arbitrators specifically did not consider seniority—especially in more egregious cases—when weighing discharge against some lesser discipline.”

398 Jennings & Clapp, supra note 221, at 761.
399 Id.
400 Kline, supra note 355, at 221.
401 Id. at 222.
402 Id. at 219-20 (explaining that proportionality standard “allows the reviewing body to substitute its own judgment of the seriousness of the harassment for the actual severity experienced by the target.”).
403 Koven & Smith, supra note 222, at 463-67.
404 Id.
405 Petersen, supra note 160, at 142.
406 Donald & Ralston, supra note 227, at 297.
Some arbitrators have intentionally disregarded mitigating factors in upholding the discharge of a known harasser. As one arbitrator noted back in 1994, in upholding the discharge of an employee when faced with the thirty-seven years of service who grabbed the crotch and buttocks of another employee, sexual harassment is “rightfully recognized and properly proscribed both in law and in sexual harassment policies” of employers, and reversal of that harasser’s discharge “would send the message that despite sexual harassment policies and stiff external law, the voice of a harassed female employee can be ignored and that the deference owed to a [person] of this grievant’s stature or standing should override.”

Like seniority, a grievant’s work record can provide a mitigating circumstance to justify a reduction of a discharge to a lesser discipline. Like other favorable characteristics, a grievant’s previous good work record “suggests that corrective discipline will work.” Conversely, a discharge for sexual harassment will much more likely be upheld if the grievant has a poor work record.

In this analysis of more recent arbitration awards, mitigating or aggravating circumstances were considered, if not controlling, in 26 out of 60 (43.3 percent) of the awards addressing harassment behavior by the grievant. This number is surprisingly low, given the commonality of arbitrators considering mitigating or aggravating circumstances, but affirms the above-referenced observation in an earlier study. Even where considered, the limited influence of mitigating and aggravating factors is illustrated by one award in which the arbitrator stated that given the employer’s zero tolerance policy, discharge would be “justifiable” for any

408 Id. at 737.
409 Id. at 741, 743.
410 Jennings & Clapp, supra note 220, at 762.
411 Id.
412 Id.
413 See infra Table 7.
proven harassment, "notwithstanding the grievant's past work history and disciplinary record." 414 Yet the arbitrator still went on to uphold the grievance and reinstate the alleged harasser, based at least in part on the grievant’s tenure and lack of prior discipline, as well as issues of proof. 415 In contrast, another arbitrator explicitly disregarded mitigating factors in the grievant’s favor, including tenure, a prior good work record, and remorse, and upheld the discharge based on “the company's stance that it could not repair damage” if the grievant remained a member of its workforce, given the strong evidence that the harassment took place, and the conclusion that a discharge was “within bounds of reasonable management discretion.” 416

Table 7 shows how often the arbitrator considered the different mitigating factors outlined below, including the grievant’s job tenure with this employer, past job performance, past discipline or misbehavior (or lack thereof). 417 We looked for but did not find any awards based on instigating behavior of others, or the grievant’s disability. Note that some arbitrators considered more than one mitigating factor that applied to a particular grievant. 418

415 Id. at 1724.
418 Id.
### Table 7: Consideration of Mitigating and Aggravating Circumstances

<table>
<thead>
<tr>
<th>Type of Behavior by Grievant</th>
<th>Awards Considering Any Circumstances (no./%)</th>
<th>Job Tenure (no./% of awards considering any)</th>
<th>Past Performance (no./%)</th>
<th>Past Discipline/Misbehavior (no./%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sexual Harassment</td>
<td>13 (35.1%)</td>
<td>4 (30.8%)</td>
<td>3 (23.1%)</td>
<td>11 (84.6%)</td>
</tr>
<tr>
<td>Other Harassment</td>
<td>13 (56.5%)</td>
<td>10 (76.9%)</td>
<td>4 (30.8%)</td>
<td>9 (69.2%)</td>
</tr>
<tr>
<td>Total</td>
<td>26/60 (43.3%)</td>
<td>14 (53.8%)</td>
<td>7 (26.9%)</td>
<td>20 (76.9%)</td>
</tr>
</tbody>
</table>

It is notable that a grievant’s past misbehavior or even discipline, often for similar behavior, was taken into account in many of the awards that considered any mitigating or aggravating factors.\(^{419}\) This falls in line with the observation that in harassment claims, arbitrators may be more likely to uphold discharge as the discipline for a repeat offense.\(^{420}\)

Given the importance of seniority in reviewing discipline for other types of offenses, it is notable that consideration of past discipline was much more common than consideration of the grievant’s tenure with the employer.\(^{421}\) It should also be noted that, tenure was significantly less likely to be considered by arbitrators in cases of sexual harassment compared to other forms of harassment (Anova, F=9.52, p < .01).\(^{422}\) The least significant mitigating factor appeared to be the grievant’s past job performance.\(^{423}\)

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The consideration of mitigating or aggravating circumstances for grievants charged with harassment raises the question of whether an arbitrator will reinstate a proven harasser because of his job tenure or past misbehavior or performance.424 The awards which considered mitigating and/or aggravating circumstances were analyzed to determine the outcome of the arbitration award.425 Table 8 shows the outcome of the awards for each of the following mitigating circumstances considered.426 Note that some awards considered more than one mitigating circumstance.427

Table 8: Impact of Mitigating & Aggravating Circumstances

<table>
<thead>
<tr>
<th>Type of Harassment</th>
<th>Mitigating Factor Considered</th>
<th>Outcome of Awards</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Grievance sustained--</td>
</tr>
<tr>
<td></td>
<td></td>
<td>returned to work with no</td>
</tr>
<tr>
<td></td>
<td></td>
<td>penalty (no./%)</td>
</tr>
<tr>
<td>Sexual</td>
<td>Job Tenure</td>
<td>0/4 (0%)</td>
</tr>
<tr>
<td></td>
<td>Past Performance</td>
<td>0/3 (0%)</td>
</tr>
<tr>
<td></td>
<td>Past Discipline / Misbehavior</td>
<td>1/11 (9.1%)</td>
</tr>
<tr>
<td>Other</td>
<td>Job Tenure</td>
<td>0/10 (0%)</td>
</tr>
<tr>
<td></td>
<td>Past Performance</td>
<td>0/4 (0%)</td>
</tr>
<tr>
<td></td>
<td>Past Discipline / Misbehavior</td>
<td>0/9 (0%)</td>
</tr>
<tr>
<td>Total</td>
<td>Job Tenure</td>
<td>0/14 (0%)</td>
</tr>
<tr>
<td></td>
<td>Past Performance</td>
<td>0/7 (0%)</td>
</tr>
<tr>
<td></td>
<td>Past Discipline / Misbehavior</td>
<td>1/20 (5%)</td>
</tr>
</tbody>
</table>

426 Id.
This table shows that in awards that considered job tenure, typically as a mitigating circumstance, half of the grievances were not sustained, meaning that the employer’s original discipline was supported, while half were sustained with some punishment less than discharge (such as suspension or no back pay) imposed.\textsuperscript{428} Of the awards considering past performance, which can be mitigating or aggravating, four of seven were not sustained and three of seven were sustained.\textsuperscript{429} Of the awards considering past discipline or the lack thereof, half of the grievances were not sustained, and 9 of 20 were sustained but still imposed some lesser discipline.\textsuperscript{430} This analysis suggests that although a harasser may be reinstated based on mitigating circumstances, it is unlikely that the harasser will escape a suspension or loss of back wages as a lesser punishment. None of the mitigating or aggravating circumstances appear to have a significantly greater impact on the punishment ultimately imposed. But reinstatement under these circumstances raises serious questions about the interests of the harassment target, who must face her harasser after he is reinstated based on such factors.

As for differences between sexual harassment and other types of harassment, this analysis shows that all three factors tend to have a more positive effect, reducing the imposed punishment, for grievants who committed other harassment as compared to sexual harassment.\textsuperscript{431} The most positive impact came from job tenure for those accused of other types of harassment, whereas grievants accused of sexual harassment appeared to benefit slightly more from their lack of a disciplinary record.\textsuperscript{432} However, these differences were not statistically significant.\textsuperscript{433}

\textsuperscript{428} \textit{Id.}; see, e.g., Chenega Sec. & Support Solutions, 137 Lab. Arb. Rep. at 284.
\textsuperscript{430} See, e.g., Chenega Sec. & Support Solutions, 137 Lab. Arb. Rep. at 284.
\textsuperscript{432} See, e.g., Equistar Chemicals, 126 Lab. Arb. Rep. at 1497.
\textsuperscript{433} \textit{Id.}
By focusing considerable attention on the mitigating circumstances presented by the harasser, at least some of these arbitrators may be doing little to prevent future harassment. While some mitigating factors may be good predictors of future behavior, such as past related misconduct, the seniority and work performance factors may not be an accurate predictor of whether the grievant will engage in similar misbehavior in the future.

6. Interests of Targets

Most arbitrators focus on the just cause factors rather than considering the impact of the grievant’s behavior on the target, or even his potential future negative impact. Our analysis confirmed that consideration of the interests of the target of harassment was rare: the arbitrator discuss the interests of the target of the harassment in only 12 of the 60 (20 percent) awards reviewed. For example, one award noted that the grievant’s comments about coworkers’ national origin made them feel “uncomfortable.” Another award considered evidence that the harassment by the grievant had created a “climate of tension and unpleasantness that resulted in there being a ‘toxic’ and offensive environment” in that workplace and noted that since her removal, “the daily life had improved and without the previous tension between them that had earlier existed with the Grievant when she was working there.”

In contrast to this limited consideration of the interests of the target of harassment, at least some arbitrators seem to disregard the interests of the target as a factor. Overall, in eight awards, the arbitrator considered the interests of the target, but still ordered the employer to return the grievant to work. For exam-

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434 Fraser, supra note 6, at 2, 4.
437 Id.
ple, one award noted the "emotional pain" of coworkers who were negatively affected by the grievant's hanging of nooses in the workplace, and yet the arbitrator still reduced his discharge to a warning.\textsuperscript{440} Of the five involving sexual harassment, three grievances were sustained and two denied, and of the seven which concerned harassment based on some category other than sex, five were sustained and two denied.\textsuperscript{441}

Related to the consideration to the interests of the targets of harassment, six of the 60 awards reviewed placed some conditions on the return to work of an alleged harasser.\textsuperscript{442} A harassing grievant's contrition can provide grounds for his reinstatement.\textsuperscript{443} One arbitrator explained: "sexual harassment is a learned behavior of varying degrees of seriousness, and it can be unlearned through the appropriate impositions of sanctions."\textsuperscript{444} A lack of remorse worked as an aggravating factor, as in the award which explained that the discharged harasser was not entitled to opportunity for rehabilitation, since "[i]t is impossible to assist and counsel employee who is in total denial."\textsuperscript{445}


\textsuperscript{442} See infra notes 445-448 and 450-454.

\textsuperscript{443} See infra notes 445-448 and 450-454.

\textsuperscript{444} Id.

Relying on similar logic with the opposite result, one arbitrator relied in part on a grievant’s assurance that he understood that sending thousands of sexual text messages to coworkers was wrong, and that he would not repeat such conduct. In contrast, one arbitrator affirmed a five day suspension despite the union’s assertion that the grievant who had engaged in sexual harassment now “gets it” and “has undergone education and has had an epiphany of sorts in this regard and that further transgressions will not occur.” The arbitrator explained that elements of just cause were established and the rule against harassment was “not only reasonable but also essential under law.”

Some arbitrators have required more than assurances; for example, in one claim of racial harassment, the discharged grievant was required to submit an apology to his fellow employees regarding his offensive social media posts, before returning to work without any back wages. This same grievant was also ordered to participate in an anger management class at his own expense prior to his reinstatement after a suspension without back pay in order to address his use of extremely offensive language and racial slurs in the workplace.

Taking the oversight role one step further, while returning the grievant to work after a suspension, one arbitrator placed the grievant on a two year last chance agreement and required periodic mental examinations to assure his employer that he is mentally and physically fit to resume his job, despite the arbitrator’s finding that his texts and calls to coworkers did not create a hostile environment. Similarly, another arbitrator returned a discharged grievant to work after a suspension, despite his making sexually explicit statements to coworkers, but allowed the employer to “di-

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448 Id.  
450 Id.  
rect EAP [employee assistance]" for the grievant “to assist in the correction of his behavior.”

Some awards focused on the employer’s conduct upon the return to work of a discharged grievant. A university, for example, was ordered by the arbitrator to provide training for the discharged grievant “concerning appropriate workplace interaction and cultural sensitivity” before his reinstatement after a short suspension. Another arbitrator limited the employer’s discretion by returning an assistant manager to work, despite his racially offensive comments, but only to a non-supervisory position that involved “no or limited conduct with the public.”

7. Overall statistical assessment

We have discussed a number of different factors that might influence an arbitrator’s decision. Using a regression, we assessed which ones have a significant impact while holding the others constant. Results are shown in Table 9. Because of the limited number of cases, only key variables are included in the analysis.

454 Id.
456 See infra Table 9.
Table 9: Impact of factors on arbitration outcomes

<table>
<thead>
<tr>
<th></th>
<th>Mean</th>
<th>s.d.</th>
<th>B</th>
<th>t</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sexual harassment</td>
<td>.62</td>
<td>.49</td>
<td>.059</td>
<td>.40 n.s.</td>
</tr>
<tr>
<td>Definition of harassment discussed</td>
<td>.42</td>
<td>.50</td>
<td>-.51</td>
<td>-3.55***</td>
</tr>
<tr>
<td>Discharge noted as possible punishment</td>
<td>.55</td>
<td>.50</td>
<td>-.04</td>
<td>-.27 n.s.</td>
</tr>
<tr>
<td>Mitigating factors considered</td>
<td>.43</td>
<td>.50</td>
<td>.14</td>
<td>.98 n.s.</td>
</tr>
<tr>
<td>Evidence sufficient</td>
<td>.57</td>
<td>.50</td>
<td>.51</td>
<td>3.22 **</td>
</tr>
<tr>
<td>Evidence lacking</td>
<td>.13</td>
<td>.34</td>
<td>-.77</td>
<td>-3.33 **</td>
</tr>
</tbody>
</table>

Notes: arbitration outcome (1=grievance sustained; discipline overturned; 2=grievance partially sustained; discipline reduced; 3=grievance denied; discipline upheld)
Adjusted R² = .47 ***
** p<.01, *** p<.001, n.s. = not significant

Results indicate that overall, arbitrators are not treating cases of sexual harassment differently than cases of other types of harassment. When arbitrators discussed the definition of harassment applied in the case, the discipline was significantly more likely to be vacated or reduced. The sufficiency of the evidence—either enough or not enough—was strongly and significantly associated with the outcomes. The other factors—whether discharge was noticed as a possible discipline and the consideration of mitigating factors—were not significant when the other factors were taken into account.

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457 See supra Table 9.
458 See supra Table 9.
459 See supra Table 9.
460 See supra Table 9.
Overall, the application of just cause analysis to grievances filed by harassers provides some insight into how such behavior can be addressed in the workplace. These arbitration awards focus more on the provision of general notice to employees, with most failing to devote any significant attention to a clear definition of harassment.\(^{461}\) Instead, arbitrators spend significant time determining whether the grievant actually engaged in the alleged behavior, based on credibility determinations and weighing of conflicting evidence.\(^{462}\) This fact-based approach can lead to confusion among employees, the union, and even the employer as to what behavior is prohibited, and may lead to relatively more similar misbehavior in the future by other employees.

### IV. Conclusions and Recommendations

The persistence of harassment and its negative impact on both targets and employers calls for a new approach by both employers and the adjudicatory bodies which address such behavior. In contrast to the typical application of just cause principles as outlined in the previous section, some arbitrators offer unique approaches to harassment. These approaches appear to address at least some of the concerns of both targets and employers who seek to prevent future harassment in their workplaces.

The concept of accommodation, as required under the ADA, provides a second approach to harassment in the workplace.\(^{463}\) While only a minority of courts requires a broad range of accommodations for targets of harassment, a greater willingness or agreement to accommodate harassment targets would provide them with more opportunities to remain and be productive in their workplaces.

Rather than relying on the courts and arbitrators to eradicate harassment from their workplaces, both employers and unions can work together to adopt effective language in policies and

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\(^{461}\) See supra Table 9.

\(^{462}\) See supra Table 9.

\(^{463}\) Nowlin, supra note 224, at 40.
CBA’s. Such language can provide some of the unique solutions included in arbitrators’ awards, as outlined below, and allow for accommodations for targets of harassment. In addition, policies and CBAs can help to define what behavior is intolerable. But perhaps more importantly, the parties can agree to the appropriate level of punishment for different types of harassing behavior. Instead of simplifying the appropriate response to “zero tolerance,” this approach would support employers’ discharge of employees who engage in severe and pervasive harassment, while allowing for lesser punishment on a progressive basis for less serious forms of harassment or where the harasser demonstrates little propensity to reoffend.

A. Creative Remedies for Targets

Unlike the courts, arbitrators enjoy some discretion in fashioning remedies when hearing grievances by alleged harassers. Thirty years ago, Nowlin recognized that employers and unions can agree to a range of response to harassment, ranging from “counseling the complainant on assertiveness or prevention” to various disciplinary options as well as employee assistance for the offender. More recently, unique remedies for sexual harassment include “‘improvement plans’ for telling dirty jokes,” and calls for an obligatory apology. The arbitrators’ awards analyzed in this study provide a wider view of appropriate remedies to address harassing behavior. By placing conditions on a grievant’s return to work, the arbitrator could address the concerns of both the target and the employer in situations where the harassment was insuf-

464 Specific ground rules for both labor and employment arbitration, such as the process to select the arbitrator, the extent of discovery and the allocation of costs, helps to ensure the fairness of the process itself. Jean R. Sternlight, Disarming Employees: How American Employers are Using Mandatory Arbitration to Deprive Workers of Legal Protection, 80 BROOKLYN L. REV. 1309, 1314-15 (2015).
465 Id.
466 Hauck & Pearce, supra note 231, at 38; see also Alleyne, supra note 135, at 16 (“Some sexual harassment victims seek no more than an acknowledgment of wrongdoing by the perpetrator and a promise by the employer that it will prevent the harassment from happening again.”).
icient under just cause standards to support the grievant’s discharge.

Some arbitrators placed some limitations on the grievant’s return to work, in an apparent attempt to recognize the interests of both the employer and the target. For example, conditioning the reinstatement of a grievant on participation in the employer’s employee assistance program (EAP), or an anger management class prior to reinstatement could be a creative solution to addressing harassing behavior that does not warrant discharge, particularly for a first offense.

Grievants with mental health issues can be given the opportunity to establish their readiness to return to work without harassing others. Following one example from this study, arbitrators could allow the employer to require periodic mental health examinations to ensure that formerly harassing employees are “mentally and physically fit to resume job.”

Arbitrators have also given flexibility to an employer to reinstate a harassing grievant to a different area or position so as to avoid contact with their target. In contrast, the grievance of a target of harassment was denied where she had demanded that she be transferred to a particular position, away from her harasser. This arbitrator determined that the employer exercised “sound judgment” by advising both employees to avoid “verbal conversations” and be professional if they did come into contact with each other, as well as disciplining the harasser for her behavior.

472 Id. at 1502.
These approaches parallel the courts’ responses to requests for accommodations by targets of harassment.

B. Accommodations for Targets

Rather than allowing employers to avoid accommodations for targets of harassment, employers and unions should recognize the benefit of providing a “normal” workplace as an accommodation. The EEOC has advised that “[i]n some circumstances, supervisors may be able to adjust their methods as a reasonable accommodation by, for example, communicating assignments, instructions, or training by the medium that is most effective for a particular individual (e.g., in writing, in conversation, or by electronic mail).”473

Like the minority of courts which have allowed for accommodations for targets of harassment, parties to a CBA can help to provide targets of harassment with a “normal” workplace.474 Agreements could specifically allow a target of harassment to transfer away from her harasser as an accommodation, unless such a transfer would cause the employer an undue hardship.475 This approach would follow the advice of experts on the provision of accommodations who have suggested that “[e]xcluding or removing the harasser then becomes analogous to abating or limiting exposure to toxic or allergenic chemicals, ambient smoke, and the like.”476

In crafting CBA and policy language to address harassment, employers and unions can recognize the strategies adopted by these courts to consider the interests of the targets of harassment. Potential solutions can include both transfers of the harasser or the target as well as other accommodations which could lessen the

476 Zatz, supra note 170, at 1389.
continuing negative effects of harassment on the target as well as other potential targets

C. Employer Policies

The duty to exercise reasonable care in response to harassment should inspire employers to adopt policies or negotiate collective bargaining agreement provisions which clarify what reasonable care entails. Many have long advised that “employers should adopt a strict, written sexual harassment policy that all employees can understand. The policy should define and provide examples of sexually harassing conduct and should state emphatically that sexual harassment is prohibited and is cause for discipline or discharge.”

The policy should also be clear as to when harassment rises to the level of warranting discharge. The policy should at a minimum “sufficiently define, categorize and provide examples of prohibited conduct so that in a follow up to that policy an employer can reasonably advise an employee as to the effect of his or her conduct and reasonably relate that conduct to the written policy.” Human resources consulting firms have advised employers to administer “[d]iscipline that is prompt, consistent, and proportionate to the severity of the harassment,” and would even evaluate supervisors and managers based on implementation of “metrics for harassment response and prevention.” Similarly, the Society for Human Resource Management (SHRM) has suggested that em-

477 Kline, supra note 355, at 225.
478 Id. at 229.
479 Petersen, supra note 160, at 138.
ployers take “appropriate action to remediate or prevent the prohibited conduct from continuing.”

Without more concrete advice, employers develop vague policies regarding discipline, such as Facebook’s policy which states that “[i]f Facebook determines that an employee’s conduct has violated this Policy, we will take steps to ensure the conduct is effectively addressed, and any employee found to have engaged in harassing conduct may be subject to discipline, up to and including termination.” Similarly, a review of federal agencies showed that they lacked “standardized recommended penalties” for sexual misconduct, despite a 1981 Merit Systems Protection Board decision which provided factors to be considered in determining penalties for employee misconduct. Such ambiguity allows for arguments about whether the conduct even constitutes harassment, depending on its perceived severity and pervasiveness, as well as the level of impact on the target’s terms and conditions of employment.

In addition to more specificity in a policy’s definition of harassment, employers should reconsider the appropriateness of their responses to harassment beyond the reasonable response required to avoid liability under the non-discrimination statutes. As one expert explained, “it’s more about what the company does in response to harassment complaints than what it says. Boards and executives have to be willing to take corrective action against


484 Bowers, et al., supra note 299, at 54.


486 Id.
harassers, whether that means a stern talking to, a suspension, or termination.” Another attorney explained that “[p]otential offenders also need to have a reason to fear real consequences.” Along the same lines, Fisher & Phillips, a large employer-side employment law firm, has recommended that employers “take action against the accused employee if the allegations against them are substantiated through your investigation,” taking “action sufficient to ensure that the behavior is not reasonably likely to occur again.” In its policy, an employer could specify a “hierarchy of bad behaviors,” with “proportionate corrective action based on how bad the conduct is,” and less severe discipline for conduct that falls into a “grey area.”

D. Unions & Collective Bargaining

Just as employer policies can be clarified, unions can work together with employers to develop appropriate responses to workplace harassment. Thirty years ago, experts recognized that sexual harassment of workers “is a problem of significant magnitude for both labor and management and represents an opportunity for cooperation in addressing the problem,” including ensuring that employees “clearly understand the types of behavior that are unacceptable” and that the remedy is appropriate for the individual offense. Nowlin suggested that parties to CBA’s can “work together toward the eradication of sexual harassment from the workplace.” It has long been observed that “[t]he need for employers

487 Id.
491 Nowlin, supra note 224, at 40.
492 Id.
to develop, adopt, implement, and enforce policies proscribing sexual harassment is particularly well served by collective bargaining."\[^493\]

Collective bargaining can support and influence employers’ need to develop, adopt, implement, and enforce sexual harassment policies, by forcing “the adoption and enforcement of a formal policy that is one step closer to limiting the employer's legal liability and avoiding fraudulent sexual harassment claims.”\[^494\]

Where a CBA “fails to clearly state the penalty which will be imposed for sexual harassment in the workforce, an employer may be faced with competing standards of addressing sexual harassment complaints.”\[^495\] The language of an anti-harassment CBA or policy should address the “seriousness of the behavior, the organizational context, and circumstance of the accused individual” to help determine the appropriate response.\[^496\]

In addition, parties to a CBA can work toward the prevention of harassment by agreeing to the “adoption of preventive-maintenance measures designed to discourage sexual harassment,” including “jointly sponsored sexual harassment sensitivity training, education on sexual harassment law, and jointly structured sexual harassment monitoring groups designed to identify and remedy early patterns of unlawful harassment, to which initial complaints of harassment could also be taken for informal resolution.”\[^497\]

Employers and unions have not fully taken advantage of this opportunity. Unions may resist direct involvement in addressing harassment because members can sometimes be the harassers,\[^498\] and because of some preference for a hostile work environment among union members.\[^499\] Instead, unions should view collective bargaining as an opportunity to address harassment in the workplace, based on employers’ and unions’ common interest

\[^{493}\] Hauck & Pearce, supra note 231, at 38.
\[^{494}\] Id. at 39.
\[^{495}\] Fraser, supra note 6, at 18.
\[^{496}\] Lucero, supra note 232, at 84.
\[^{497}\] Alleyne, supra note 135, at 17.
\[^{498}\] Id. at 5, 10 (discussing potential conflicting duty of fair representation claims by target and perpetrator of harassment).
\[^{499}\] Hodges, supra note 33, at 205.
in providing a safe and productive place for employees to work. Arbitration has long been recognized as a potentially effective “anti-discrimination tool.” As we saw in the above analysis, arbitration can be used to address workplace harassment by allowing for external review of the discipline imposed on the alleged harasser.

Experts have advised that CBAs should include “explicit arbitration rules for discharge grievances involving sexual harassment” which “parallel the rules by which similar cases would be governed at trial.” Inclusion of such language would reduce an arbitrator’s discretion, thereby increasing the predictability of cases. Furthermore, the employer would reduce the likelihood that union and the outcome of harassment cases, and reducing the differential treatment between employees in similar cases. Perhaps most importantly, inclusion of more specific anti-harassment language in a CBA or employer policy, grounded in Title VII protections as developed by the courts, will obviate the need to answer the lingering question of whether the arbitrator should follow the contract only or adhere to the anti-harassment norms found in public policy because inclusion of Title VII-consistent language will result in the same outcome regardless of how that question is answered.

In addition to limiting an arbitrator’s discretion, collective bargaining over the scope of and appropriate discipline for harassment can also reduce the discretion of employers to determine which discipline is appropriate, which is recognized as inherent in the reasonable care standard adopted by the Supreme Court.


Kline, supra note 355; see Buehrer, supra note 136, at 296 (explaining that employers should negotiate a specific provision dealing with sexual harassment for all Title VII claims or delineate in applicable work rules how different sexual harassment incidents will be addressed and punished); Fraser, supra note 6, at 44 (explaining that CBAs should clearly specify anti-harassment policies and attached penalties, state parties’ intent to “comply with all antidiscrimination laws”).

Kline, supra note 355, at 227.

Elkiss, supra note 20, at 150.

Hodges, supra note 33, at 200 (“Flexibility in responsive action gives the employer the power to decide whether termination or other discipline is appropriate.”).
One past commentator suggested that the parties to a CBA limit the arbitrator's authority to change an employer's choice of discipline if the harassment is proven, as long as the grievant has been afforded due process protections inherent in just cause analysis.\(^5\) This approach, however, gives considerable discretion to interpret and apply its anti-harassment policy.

Instead of limiting an arbitrator's role and giving so much discretion to the employer, the parties can bargain about more specific language regarding what behavior constitutes harassment and what the appropriate punishment should be for various forms of harassment. Without bargaining to reduce employers' discretion, preserving such discretion and limiting an arbitrator's role can result in inconsistent imposition of discipline on harassers, as well as discipline for harassment serving as a pretext for other types of discriminatory or anti-union treatment.\(^6\) As an example of an alternative strategy, the Association of Flight Attendants International, representing 26,000 workers at American Airlines, has a professional standards program that handles crew-to-crew complaints.\(^7\) AFA International President Sara Nelson suggested that employers should engage with unions on how to institute policies for reporting.\(^8\)

Unions are well-positioned to address workplace harassment through representation of members and collective bargaining. Treating harassment as a serious issue gives unions an opportunity to appeal to female and minority members of the bargaining unit.\(^9\) By highlighting the negative effects of harassment for all involved,\(^10\) unions can appeal to employees who support unions "where they find opportunities to share common interests with other employees."\(^11\) Unions can also help to make employees

\(^5\) Fraser, supra note 6, at 45.
\(^6\) Id.
\(^8\) Id.
\(^9\) Hodges, supra note 33, at 198-99.
\(^10\) Id. at 198; see supra notes 29-39.
\(^11\) Id. at 227 (explaining that unions "must transform themselves into organizations that appeal to the workers of the twenty-first century").
aware of their rights, which can be particularly effective with the employer’s support.512

Unions can play an important role in strengthening protection against retaliation for filing a complaint, which could otherwise be reflected in future performance evaluations.513 One arbitrator foreshadowed the potential role of collective bargaining in his award which sustained the grievance of an employee accused of sexual harassment, suggesting that the harassment policy should "give a clear notice to its employees that the type of conduct involved here has been found to be a violation of the Sexual Harassment Policy by an arbitrator and subject to severe discipline" to support the discharge of harassers in the future.514 Another arbitrator likewise suggested that a clear description of prohibited conduct and the accompanying punishment, as well as consistent enforcement of such a policy, would support the employer’s decisions to discharge harassers in the future.515

Employers and unions may also want to consider the adoption of both mediation and restorative practices to address harassment in the workplace. Mediation could be used in conjunction with or alternative to a CBA’s grievance procedure as a way to end harassment without filing a complaint with the EEOC.516 Mediation can be an effective means of resolving disputes that arise from miscommunication and to bridge power differentials,517 such as between a harasser and his target. Mediation can resolve the issue quickly with a resolution that is positive for both parties and avoiding the adversarial and defensive tendencies of those involved.518 Mediation also provides confidentiality for both the


516 Hodges, supra note 33, at 221.

517 Stone, supra note 500, at 481.

518 Elkiss, supra note 20, at 162.
target and the employer, and could provide a quicker resolution of the harassment which is acceptable to the target, the harasser, the employer and the union. 519

At least one expert has suggested that for claims of sexual harassment involving substantial monetary relief for the target would be “best resolved by mediator-assisted negotiations.” 520 Unlike arbitration, mediation can include all parties with an interest in a harassment dispute, including both the target and the accused harasser. 521 Labor arbitration or even litigation could still be used to resolve harassment claims that remain unresolved after mediation. 522

Restorative practices, such as restorative justice and peacemaking circles, provide a process to obtain reparation for the target, provide the offender an opportunity to take responsibility and achieve reconciliation within their communities of care. 523 Restorative justice dialogue has been recognized as playing an important role in restoring the harm caused to survivors of sexual violence. 524 Given the potential for restorative practices to address conflict in workplaces, 525 restorative practices for targets in the workplace could be particularly helpful in situations where the target will continue to work with the harasser. As recently recognized by Sharon Fast Gustafson, the general counsel nominee for the EEOC, “[r]esolution of disputes without litigation is an important part of the lawyer’s job, just as it is an important part of the EEOC’s function.” 526 If a target of harassment is willing to participate, restorative practices may be a productive way to stop future harassment without resorting to discharging a harasser whose behavior may not have become a dischargeable offense.

519 Hodges, supra note 33, at 221-22.
520 Alleyne, supra note 135, at 16.
521 Id.
522 Id.
525 Umbreit & Armour, supra note 523, at 84.
526 See Lee & Casuga, supra note 507.
Such an approach would be consistent with an increased emphasis on following up with both the target and the harasser after inappropriate behavior occurs.\textsuperscript{527}

By considering creative remedies to harassment, aimed at rectifying such behavior, employers and unions can help address the persistence of such behaviors in the workplace. Some arbitrators have shown how the parties can assure that a perpetrator is ready to return to work without continuing to engage in harassment. Accommodations can help to address the concerns and interests of the target or target of such behavior. More broadly, the parties to a collective bargaining agreement can agree to more specific descriptions of prohibited behavior and appropriate levels of punishment to put employees on more specific notice than provided by many "zero tolerance" policies.\textsuperscript{528} Adoption of restorative practices can also help to address the harm that results from harassment, with a focus on improving the work environment for everyone.

\textsuperscript{527} Robinson, \textit{supra} note 512.
\textsuperscript{528} See Plass, \textit{supra} note 11, at 127-28.