2003


Carrie G. Donald
John D. Ralston

Follow this and additional works at: http://scholarlycommons.law.hofstra.edu/hlelj

Part of the Law Commons

Recommended Citation
Available at: http://scholarlycommons.law.hofstra.edu/hlelj/vol20/iss2/2

This document is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Labor and Employment Law Journal by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.
TABLE OF CONTENTS

I. INTRODUCTION ................................................................. 230
II. WHAT CONSTITUTES SEXUAL HARASSMENT? .......... 231
A. Definition and Liability .................................................... 231
1. Types ................................................................. 231
2. Liability of the Employer ................................................ 234
B. Legal Standards for Sexual Harassment ......................... 238
1. Title VII of the Civil Rights Act of 1964 ....................... 238
2. Collective Bargaining Agreements, Work Rules and Policies .................................................. 239
III. ACTS AND CONDITIONS FOUND TO BE SEXUAL HARASSMENT IN ARBITRATION CASES .......... 244
A. Overall ................................................................. 244
B. Sexual Propositions .................................................... 244
C. Physical Acts ............................................................ 245
D. Creation of an Offensive Environment ......................... 253
E. Offensive Telephone Calls .......................................... 265
F. Offensive Letters ....................................................... 266
G. Relationship to the Workplace .................................... 267
1. Off-Site Conduct ....................................................... 267
2. Relationship of the Harasser to the Workplace .............. 267
I. INTRODUCTION

Labor arbitrators are often called upon to settle workplace disputes in the form of grievances filed by Union members under Collective Bargaining Agreements ("CBA"). Generally grievances fit into two categories: disputes about the interpretation of CBAs and disputes about the discipline that has been assessed against Union members. In the mid-1980s and 1990s, a growing number of arbitration cases centered around disputes involving claims of sexual harassment and discipline imposed on Union members for allegedly engaging in sexual harassment. This study focuses on arbitration cases related to sexual harassment published by the Bureau of National Affairs spanning from 1990 through November 2000. The principal criterion for inclusion in this study is that the case focused on some aspect of sexual harassment. Accordingly, 129 cases were identified for inclusion in the sample. At the outset, it must be noted that the arbitration decisions do not constitute a "random sample" as that term is understood in social science.
research. Nevertheless, given an adequate sample size and array of arbitrators, trends in arbitration practices can be garnered from a comprehensive review of a particular type of case.

II. WHAT CONSTITUTES SEXUAL HARASSMENT?

A. Definition and Liability

1. Types

Sex discrimination in the workplace is prohibited by Title VII of the Civil Rights Act of 1964 ("Title VII"). Title VII provides that it is an unlawful employment practice for an employer to discriminate against any individual with respect to compensation, terms, conditions or privileges of employment because of an individual's sex. Most states and many local government units have also enacted legislation similar to Title VII governing sex discrimination in the workplace.

Sexual harassment is now a well established form of sex discrimination prohibited by Title VII and similar state and local statutes and regulations. The Equal Employment Opportunity Commission ("EEOC"), charged with enforcing Title VII, issued "Guidelines on Discrimination Because of Sex" ("Guidelines") which define sexual harassment. The Guidelines contain a three-part definition of harassment on the basis of sex:

[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such

2. Id.
4. Id. § 2000e-2(a)(1).
5. 29 C.F.R. § 1601.74 (2002) (containing a list of state FEP agencies and section 1601 containing procedural requirements).
individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.  

Two types of sexual harassment have been recognized by the EEOC and the courts. The classic form, "quid pro quo" sexual harassment, occurs where a supervisor conditions employment decisions on a sexual relationship with the employee or job applicant. Some type of sexual relationship is required in exchange for employment opportunities, accompanied with direct adverse economic consequences to an employee for noncompliance. Under this type of sexual harassment, a single incident of sexual harassment that results in tangible job detriment may be actionable. The second form of sexual harassment, known as "hostile" or "offensive" work environment, occurs where unwelcome sexual conduct or stereotyped and demeaning comments have the purpose or effect of either interfering unreasonably with the employee's work or creating an intimidating, abusive or insulting working environment. This type of sexual harassment may be committed by a supervisor, coworker or a non-employee. The EEOC Guidelines do not define verbal or physical conduct of a sexual nature. Thus, a wide group of activities could be included under this criterion.

The definition of sexual harassment continues to evolve. In hostile environment claims, plaintiffs have had a range of complaints including "sexual inquiries of a personal nature, vulgarities, requests for sexual relations; nonconsensual touching, rubbing and grabbing, and harassing telephone calls . . . obscene drawings, crude language and indecent exposure." Thus, claims can encompass both verbal and pictorial acts and offensive physical acts. A loss to an employee of tangible or economic job benefits is not a required element of hostile environment

8. Id.  § 1604.11(a).
11. Turner supra note 9, at 4, 8-9.
12. Id. at 7.
13. Id. at 4; Zalucki supra note 10, at 145.
15. See id. § 1604.11(a).
sexual harassment claims. The Supreme Court first recognized hostile environment sexual harassment in Meritor Savings Bank v. Vinson. In that case, the Court said that to be actionable, the hostile environment sexual harassment "must be sufficiently severe or pervasive... 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" In other words, the offensive conduct must be more than an isolated incident.

In Meritor Savings Bank, the Supreme Court agreed with the EEOC Guidelines and made the unwelcome factor, not voluntariness, the pivotal issue when determining whether an incident constitutes sexual harassment. Thus, a sexual harassment claim can be brought by an employee even if the employee succumbed to the harasser's demands. Voluntariness, defined as consent by the claimant to the sexual activity, is not available as a defense to avoid liability. Under the EEOC Guidelines, harassing conduct is unwelcome behavior determined from the eyes and viewpoint of the targeted victim. The Supreme Court noted that "the question whether particular conduct was indeed unwelcome presents difficult problems of proof and turns largely on credibility determinations." In Meritor Savings Bank, the Supreme Court held that evidence of the complainant's provocative speech or dress was admissible in a sexual harassment case. The Court found that speech and dress can be taken into account in understanding the totality of circumstances involved. Thus, the complainant's sexual discussions in the workplace or provocative dress may be used to show the sexual requests by the alleged harasser were welcome.

In the Guidelines, the EEOC did not define the line between an offensive and inoffensive work environment. Instead, the EEOC stated that "[i]n determining whether alleged conduct constitutes sexual harassment, the Commission will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances

19. Id. at 73.
20. Id. at 67.
21. Id. at 68.
22. Id.
24. Id.; 29 C.F.R. § 1604.11(a) (2002).
26. Id. at 69.
27. Id.
28. Id.
and the context in which the alleged incidents occurred. These types of determinations are fact specific and are made on a case by case basis.

Recently, the Supreme Court ruled that same-sex sexual harassment is actionable under Title VII. In Oncale v. Sundowner Offshore Services, Inc., a unanimous Court concluded that "nothing in Title VII necessarily bars a claim of discrimination 'because of . . . sex' merely because the plaintiff and the defendant . . . are of the same sex." Reversing a prior ruling that Title VII provides no remedy for a male employee who allegedly was sexually harassed by male coworkers and supervisors, the Supreme Court remanded the case for further proceedings.

2. Liability of the Employer

In a recent Supreme Court case, Faragher v. City of Boca Raton, the issue of an employer's liability for sexual harassment by supervisors was addressed. Faragher involved sexual harassment by male supervisors of female lifeguards at a city beach, isolated from the rest of city government, over a period of several years. Two months before the plaintiff resigned, a former lifeguard complained to the city's personnel director about the harassment. Following an investigation, the city found the supervisors "had behaved improperly, reprimanded them, and required them to choose between a suspension without pay or forfeiture of annual leave." However, the plaintiff never complained herself.

In Faragher, Justice Souter noted that many lower court decisions held or assumed that conduct of a supervisor fell outside the scope of employment. The lower courts "ostensibly stand in some tension with others arising outside Title VII, where the scope of employment has been defined broadly enough to hold employers vicariously liable for

30. Id. § 1604.11(b).
31. Id.
33. Id.
34. Id. at 82.
36. Id. at 780; Analysis of Case Verbatim from "Supreme Court Increases Liability of Employers for Sexual Harassment but Creates Affirmative Action Defense," 158 L.R.R.M. 299, 299-01 [hereinafter Analysis of Case Verbatim].
37. Faragher, 524 U.S. at 780-81.
38. Id. at 783.
39. Id.
40. Id. at 782.
41. Id. at 793.
intentional torts that were in no sense inspired by any purpose to serve the employer.”42 The difference in results does not necessarily reflect the varying terms of the particular employment contracts involved, but represents “differing judgments about the desirability of holding an employer liable for his subordinates wayward behavior.”43 Souter concluded that the proper analysis should involve an inquiry into the reasons for and against holding that harassing behavior is within the scope of a supervisor’s employment.44 Furthermore, after exploring the issues, Souter focused on an agency principle: “being aided in accomplishing the tort by the existence of the agency relation.”45 He concluded that “it makes sense to hold an employer vicariously liable for some tortious conduct of a supervisor made possible by abuse of his supervisory authority.”46 Citing cases that noted that a harassing supervisor is always assisted in his misconduct by the supervisory relationship, he observed

[when] a person with supervisory authority discriminates in the terms and conditions of subordinates’ employment, his actions necessarily draw upon his supervisor position over the people who report to him, or those under them, whereas an employee generally cannot check a supervisor’s abusive conduct the same way that she might deal with abuse from a coworker.47

After recognizing employer liability when discriminatory misuse of supervisory authority alters terms and conditions of a victim’s employment, Souter addressed the holding in Meritor Savings Bank where an employer is not “‘automatically’ liable for harassment by a supervisor.”48 Noting some tension existed between the holding in Meritor Savings Bank and the position that a supervisor’s misconduct aided by supervisory authority subjects the employer to vicarious liability, the Court decided that the proper approach is the rule adopted in Burlington Industries v. Ellerth.49 The Faragher Court concluded that the city could not be found to have exercised reasonable care to prevent

42. Faragher, 524 U.S. at 794.
43. Id. at 796.
44. Id. at 797.
45. Id. at 801.
46. Id. at 802.
47. Faragher, 524 U.S. at 803 (citing Rodgers v. Western-Southern Life Ins. Co., 12 F.3d 668, 675 (7th Cir. 1993); Taylor v. Metzger, 152 N.J. 490, 505 (1998)).
the harassing conduct. The city did not disseminate its policy against sexual harassment among its beach employees, its officials did not try to keep track of its supervisors' conduct and its policy included no assurances that harassing supervisors could be bypassed in registering complaints. Moreover, he observed, "those responsible for city operations could not reasonably have thought that precautions against hostile environments in any one of many departments in far-flung locations could be effective without communicating some formal policy against harassment, with a sensible complaint procedure."

Apparently, the bottom line is that when supervisors' conduct is severe or pervasive, Title VII is violated regardless of what the employer knew or should have known. There is an affirmative defense available if the company exercised reasonable care and the complainant did not take advantage of preventive or corrective opportunities. The decisions place hostile environment sexual harassment on the same plane as other types of Title VII violations. Moreover, the courts distinguish between supervisors and employers in sexual harassment cases but treat the supervisor as the employer with respect to other types of claims. However, the affirmative defense recognizes that hostile environment sexual harassment is different from other types of claims.

Meritor Savings Bank phrased the issue to signal the lower courts not to tie the employer's liability too tightly to the supervisor's misconduct. However, it appears the Court now has decided to follow its articulated agency principle by strongly linking the employer to what the supervisor has done.

To invoke the affirmative defense, an employer must show proper behavior on its part and blameworthy behavior by the complainant. The Eighth Circuit ruled in Todd v. Ortho Biotech Inc. that an employer was not liable when the supervisor engaged in an attempted rape and the

50. Faragher, 524 U.S. at 808.
51. Id.
52. Id. at 808-09.
53. Id. at 792.
54. Id. at 807.
55. Faragher, 524 U.S. at 807.
56. Id.
57. Id. at 780.
59. Faragher, 524 U.S. at 802. Chief Justice Rehnquist, the author of the Supreme Court decision in Meritor Savings Bank, is part of the majority opinion in Faragher.
60. Id. at 807.
61. 138 F.3d 733, 735 (8th Cir. 1998).
employer took timely and appropriate remedial action. It appears that an employer would now be held liable and have to pay damages because the second part of the affirmative defense cannot be utilized.

Courts look to both parts of the new affirmative defense, especially the first part, in determining whether to impose liability, finding an employer liable only if it knew or should have known of the harassment and did not take appropriate remedial action. However, the Supreme Court’s ruling is likely to give impetus to employer dissemination of antiharassment procedures and to place an emphasis on adopting an early warning system. This could well cause employers to move against supervisors far earlier than in the past. In light of the new defense adopted by the Supreme Court, could a supervisor who is discharged for alleged sexual harassment sue in state court for wrongful discharge? It is arguable that allowing state courts to second guess an employer’s actions, which were taken to comply with Title VII, would thwart the purpose of the new affirmative defense and be preempted.

Some grievants claim that the employer is responsible for sexual harassment of employees. For example, in *Burnett & Sons v. Millmen’s Local 1618*, a female mill worker alleged that a yard foreman made sexual comments about her to other workers and that he verbally abused her after being warned to stop. Although the Grievant was a female worker and was laid off, the grievance advanced. The claim alleged the company sexually harassed the Grievant. However, the arbitrator established that the yard foreman was not a supervisory or management employee but was merely a coworker with additional responsibilities. Furthermore, after the Grievant made her initial complaint, the foreman was ordered to cease any harassment. As far as the company knew, the abusive behavior had ended. The arbitrator ruled that the company could not be held liable unless it knew about the harassment and failed to take any action. Therefore, the grievance was denied.

62. See id. at 735-36.  
63. Id.  
64. See e.g., Marrero v. Goya, 304 F.3d 7, 20-21 (1st Cir. 2002).  
65. Analysis of Case Verbatim, supra note 36.  
67. Id. at 746, 751.  
68. Id. at 749.  
69. Id.  
70. Id. at 751.  
72. See id. at 751.  
73. Id.  
74. Id.
B. Legal Standards for Sexual Harassment

1. Title VII of the Civil Rights Act of 1964

In a case involving a retaliatory discharge, an employer was ordered to make the Grievant whole for any lost wages and benefits and was ordered to pay six months of severance. The employer was also required to post notice of the award, to apologize to the Grievant and to give reassurance to current employees that there would be no future reoccurrence of retaliation. The arbitrator found the employer violated Title VII. The employer had discharged an employee with twelve years of service experience after she made sexual harassment complaints and sought Union assistance. The worker remained in a quasi-supervisory position and there was no record of poor work performance or insubordination. Because the employer’s business was small and there was only a small chance that the Grievant and the employer could have a productive working relationship in the future, an extensive monetary remedy (i.e., lost wages, severance) was ordered instead of reinstatement.

In a different case, after reviewing an employer’s sexual harassment policy, an arbitrator found that a “working foreman” without “super seniority” was a member of the bargaining unit and not a supervisor under the federal guidelines. Therefore, the company could not be held responsible for the foreman’s harassment because the harassment stopped once the company intervened. Although the Grievant no longer worked for the company at the time of arbitration, the case was found arbitrable because public policy favors arbitrability and the resolution of sexual harassment claims.

76. Id.
77. Id. at 1014.
78. Id. at 1014-15.
79. Id. at 1014.
82. Id. at 749.
83. Id. at 750.

When settling a sexual harassment claim, a city violated its contract with the Union when it transferred the complaining employee after a competitive application process to a different area represented by another Union. The contract was violative because the city maintained the employee’s old pay rate in the new position even though the pay rate exceeded the maximum for her new position. The city was ordered to change the transferred employee’s pay to the maximum allowed by contract.

An arbitrator held that a work rule prohibiting “engaging in or encouragement of sexual harassment” subject to a “written warning/two workdays off first offense penalty and a second offense penalty of discharge cannot be held as facially unreasonable.” Although the arbitrator noted that all cases must be addressed individually, he found the policy reasonable given the view that sexual harassment is “totally unacceptable employee behavior.”

The discharge of a corrections officer for egregious behavior in violation of the company’s disciplinary policy was sustained despite the lack of a sexual harassment policy. The Union never disputed the alleged acts occurred, such as the interference with other employees’ work, the use of coercive language and the grabbing of female crotches. Instead, the Union argued that the female officers’ high tolerance for crude behavior and the lack of a sexual harassment policy proved that a work rule was not violated. Unpersuaded, the arbitrator found collectively the behavior was within the gross misconduct rule and failed to warrant progressive discipline. The termination was sustained.

85. Id. at 608.
86. Id.
88. Id.
89. Id.
91. Id. at 309.
92. Id.
93. See id. at 310.
94. Id.
Discharge was found too severe where an employer had a poorly written sexual harassment policy that did not sufficiently define, categorize or provide examples of prohibited conduct. Therefore, where a Grievant claimed his pursuits amounted to unrequited displays of affection, including many off-duty activities, the arbitrator found the Grievant was sufficiently informed that his actions were creating a hostile work environment. The Grievant was reinstated with seniority, benefits and full back wages minus any disability or other potential wages. In addition, the discipline was reduced to a warning letter.

Termination was sustained in a case involving egregious physical and verbal harassment. The Union charged that a last minute posting of the sexual harassment policy should have precluded the Grievant from being fired. Although the arbitrator did find a possibility that there was a last minute posting of the policy, the Grievant admitted he understood sexual harassment and that his actions would amount to sexual harassment if he was found guilty. The Grievant denied the acts; however, because the arbitrator found the charges credible, the grievance was denied and the late posting discounted.

An employee’s termination was upheld where the arbitrator determined he violated the company’s work rules. The employee failed to comply with the rules by deliberate disobedience, disrespect and disorderly conduct. The employee engaged in offensive conduct and created a hostile and intimidating atmosphere through the use of racial slurs, gender-based comments and implied threats to non-union workers. Similarly, where a newspaper’s district representative harassed female paper carriers, a two-week suspension without pay followed by a one-week suspension with pay for counseling was sustained.

96. Id. at 627-28.
97. Id. at 630.
98. Id.
100. Id. at 555.
101. Id. at 555-56.
102. Id. at 556.
103. Id.
105. Id.
In one case, a male employee with fifteen years of service experience was discharged for violating his employer’s sexual harassment policy because his conduct was so offensive. The employee claimed during the arbitration hearing, “I did nothing wrong, and still believe all of this was a big joke.” The union argued that the allegedly offensive actions were a matter of interpretation and that the company ineffectively communicated the harassment policy. However, the arbitrator cited the 1980 EEOC Guidelines referring to respect, unwelcomeness and context when evaluating a company’s sexual harassment policy. Moreover, the arbitrator found the company fulfilled its obligations and noted the Grievant had asked his target if she was going to file sexual harassment charges.

An arbitrator’s findings were mixed in a case involving a supervisor’s misconduct. The arbitrator found that the company had removed the offending supervisor from the alleged victims but suggested that the policy should be strengthened. However, the Union requested punitive monetary damages, compensation for pain and suffering, a written apology from the supervisor and a sixty-day suspension. Citing general arbitral practice and the agreement’s silence, the arbitrator who was granted authority in a CBA found he had no authority regarding supervisorial discipline and denied the apology and suspension requests. However, the arbitrator ordered the supervisor’s continued separation from the complainants. Furthermore, the arbitrator noted that company policy prohibited sexual discrimination and harassment “as provided by law.” Although the law provides for monetary damages, the arbitrator stated “[w]hile agreeing to prohibit sex discrimination, and thus to arbitrate grievances alleging sex discrimination, the Company did not necessarily mean to vest its


108. Id. (citation omitted).
109. Id. at 781.
110. Id.
111. Id. at 780.
113. Id. at 300.
114. Id. at 298.
115. See id. at 300-01.
117. Id. at 301.
arbitrators with the power to award compensatory and punitive damages that are virtually unknown in labor arbitration."118 Regarding the pain and suffering compensation, the arbitrator denied the request stating "arbitrators generally lack authority . . . and because the Grievants failed to prove the amount of any mental distress they suffered . . ."119

In another case, a police sergeant, who was suspended and demoted for harassment, received a mixed finding from the arbitrator.120 Although there were specific charges filed against him relating to acts against specific individuals, the charge failed "because it lack[ed] the specific details required . . . [i]n the Collective Bargaining Agreement and also because it lump[ed] together . . . alleged actions toward three different female subordinates."121 However, two charges of the sexual harassment were sustained.122 Therefore, the arbitrator removed the suspension and ordered full back pay at the Grievant’s reduced rank and sustained the demotion.123

A fire lieutenant with twenty-two years of service was discharged for physical and verbal harassment against recruits of his gender.124 The arbitrator noted that regardless of the Grievant’s years of service, the Grievant already had been through sensitivity training, had been responsible for executing the department’s sexual harassment policy and had committed at least three offenses in a short time span.125 The Grievant’s acts violated both local civil service rules and the departmental regulations.126

An arbitrator sustained discharge for an employee after a single instance of sexual harassment.127 The employee had been informed of the company’s policy several weeks before and the company’s policy did not “spell out minor, major, or intolerable violations of its Sexual Harassment Policy.”128 Moreover, the policy clearly stated “the full gamut of discipline ‘up to and including immediate discharge’ is

118. Id.
119. Id. at 302.
121. Id. at 1181.
122. See id. at 1184.
123. Id.
125. Id. at 928.
126. Id.
128. Id.
applicable.” 129 Similarly, another arbitrator found discharge reasonable when an employee exposed himself to female coworkers, violating the shop rule that prohibited immoral conduct. 130 Although the Union argued that the company did not take into account the Grievant’s drinking problems and prescription drug use, the arbitrator was not persuaded. 131 The arbitrator wrote “the exhibiting of a male penis publicly . . . is not a right, but is a wrong behavior and therefore the conduct conflicts with generally or traditionally held moral principles and is immoral.” 132

In a somewhat unusual case, termination was unreasonable because of the employee’s popularity with customers and employees. 133 An employee maintaining more than twenty years of service experience was discharged for violating the sexual harassment policy after attending the company’s sexual harassment seminar. 134 The employee was a head clerk who had an outstanding work history, was valuable to the company and was admired by customers and coworkers. 135 However, the company cited his repeated verbal and physical sexual allusions and jokes, his failure to set good standards of behavior and his inappropriate drawings shown to coworkers, including a seventeen year-old complainant. 136

On the other hand, the Union cited unsolicited fundraising, petition signing and impassioned letter writing by coworkers and customers in support of the Grievant after his discharge. 137 Even the complainant indicated she did not want the Grievant fired but merely wanted the offending activity to stop. 138 Ultimately acknowledging the work rules were violated, the arbitrator concluded that “[t]he Grievant’s apparent lack of malicious intent, his excellent work record, long years of service, sincere contrition, and certain potential for rehabilitation indicate discharge is too severe a penalty.” 139 Therefore, the nine weeks of unemployment was a sufficient penalty. 140

---

129. Id.
131. Id. at 1156-57.
132. Id. at 1157.
134. Id. at 787.
135. Id.
136. See id. at 788-89.
137. Id. at 790.
139. Id. at 791.
140. Id.
III. ACTS AND CONDITIONS FOUND TO BE SEXUAL HARASSMENT IN ARBITRATION CASES

A. Overall

Of cases reviewed, fifty-five involved hostile or offensive environments, thirty-nine involved physical acts, eleven involved propositions, four involved letters and two involved telephone calls. Five cases involved harassment off the work site. Discipline was upheld in 52.73% of hostile or offensive environment cases, was reduced in just under 42% and overturned in 5.45% (3 cases). Comparable results were found in cases involving physical acts: discipline was upheld in 56.41%, was reduced in one third and overturned in about 10% of these cases. In over 70% of cases involving propositions discipline was upheld, with 27.27% (six cases) having discipline reduced and no cases resulting in reversal. In three of the four letter-writing cases, discipline was reduced; discipline was upheld in one case. Discipline was reduced in both telephone-related cases. Discipline was upheld in two off-site conduct cases and reduced in two; the fifth case resulted in discipline being overturned.

B. Sexual Propositions

Arbitrators often must make a determination whether any sexual harassment has occurred. These fact situations run the gamut from isolated comments to alleged sexual assaults. Issues may include whether the conduct was welcomed, whether the incident was innocent and could be taken out of context or whether the incident even occurred at all.

141. Appendix B
142. Appendix C
143. Appendix D
144. Appendix E
145. Appendix F
146. Appendix G
147. Appendix B
148. Appendix C
149. Appendix D
150. Appendix E
151. Appendix F
152. Appendix G
In a case of physical acts peppered with sexual propositions, a discharge was sustained where a male Grievant engaged in improper and forced touching of several female employees. 153 One of the complaining female employees may have been a willing participant in the sexual acts. 154 However, the arbitrator found that the Grievant’s discharge was warranted. 155 In a similar case, discharge of a newspaper distribution manager was found justified where he harassed a female clerk at one of the businesses on his route. 156

A male employee with fifteen years of service was rightfully discharged for requesting a female employee to remove her clothes, propositioning her to sleep with him and asking whether she would sleep with two or three other workers. 157 In another case, a male custodian was terminated for propositioning and groping a female student working as an assistant under his direction. 158 In addition, a police officer’s ten-day suspension for addressing a female citizen with “hey, babe” was sustained. 159 The officer had a previous disciplinary record, was untruthful and the accuser’s story was consistent and supported by a third party. 160

C. Physical Acts

An arbitrator reluctantly sustained the discharge of an employee with thirty-seven and a half years of service for grabbing a female
worker on the buttocks and crotch.\textsuperscript{161} By sustaining the grievance, the arbitrator discounted the Grievant’s long exemplary work record.\textsuperscript{162} Although the victim initially intended not to report the incident, other coworkers learned of it and teased her.\textsuperscript{163} Noting that arbitrators occasionally overlook one time uncharacteristic behavior, the arbitrator stated that reducing “[t]his discharge to a suspension . . . would send the message that despite sexual harassment policies and stiff external law, the voice of a harassed female employee can be ignored. . . .”\textsuperscript{164} In another case, an employee with twenty-five years of service was rightfully terminated for exposing himself.\textsuperscript{165} Moreover, in a different case, a male employee with thirty-two years of service was terminated for violating a last chance agreement by pinching a female coworker’s buttocks.\textsuperscript{166} Although the victim was attempting to address the situation through the Union, once management became aware of the incident, it investigated the situation and terminated the Grievant.\textsuperscript{167} The arbitrator disagreed with the Union’s contentions and ultimately ruled that management had the power to discipline the Grievant regardless of the private efforts to resolve the issue.\textsuperscript{168}

A utility worker who was frequently in contact with customers was suspended indefinitely and reassigned to a non-customer contact position.\textsuperscript{169} The Grievant had been accused of fondling a female customer.\textsuperscript{170} The employee had received two prior disciplinary violations for similar behavior.\textsuperscript{171} The Grievant claimed none of the prior incidents occurred and pointed out that no grievances had been filed after his first

\begin{itemize}
\item[162.] \textit{id.} at 743.
\item[163.] \textit{id.} at 738.
\item[164.] \textit{See id.} at 737; \textit{see also} Simkins Indus. v. United Paperworkers Int'l Union, Local 214, 106 Lab. Arb. Rep. (BNA) 551, 554 (1996) (Fullmer, Arb.) (upholding the discharge of an employee with thirty-six years of experience); Int'l Mill Serv. v. United Steelworkers of Am. Dist. 34, 104 Lab. Arb. Rep. (BNA) 779, 780, 783 (1995) (Marino, Arb.) (holding that it was proper to terminate a male employee with fifteen years of experience for touching a female coworker’s buttocks as well as making lewd comments towards her).
\item[167.] \textit{id.} at 553-54.
\item[168.] \textit{id.} at 554-55.
\item[170.] \textit{id.}
\item[171.] \textit{id.}
\end{itemize}
two reprimands; however, the accusers had no motive for lying and the accused frequently changed his recollection.\textsuperscript{172} Additionally, the employee had been warned that any incidents after the second could result in disciplinary action, including discharge.\textsuperscript{173} However, although the discharge was eventually levied, it was reduced by the company to a suspension without pay and reassignment.\textsuperscript{174}

A male corrections employee was terminated after the discovery that he and another coworker had engaged in sexual activity in state offices or vehicles on five occasions, while on duty.\textsuperscript{175} The female coworker charged sexual harassment and claimed her male coworker had forced her to perform fellatio and masturbate him.\textsuperscript{176} However, after investigation, it was determined that the female coworker suffered from post-traumatic stress and dissociative disorders as a result of childhood sexual abuse.\textsuperscript{177} Therefore, whether the sexual acts were unwanted was questionable.\textsuperscript{178} Nevertheless, the Grievant was still terminated for inappropriate sexual activity while on duty.\textsuperscript{179} The female coworker was not disciplined because of her diagnosis and the uncertainty about her ability to consent.\textsuperscript{180}

Discharge was unwarranted where another employee charged the Grievant with sexual assault and the accuser appeared to be the aggressor.\textsuperscript{181} Previously, the male employee had received discipline for engaging in mutually consensual sexual acts on the job.\textsuperscript{182} The arbitrator and the company could not agree on what type of sexual conduct actually occurred.\textsuperscript{183} The accuser’s allegations included groping,
grabbing and other inappropriate behavior.\textsuperscript{184} However, the Grievant claimed it was the accuser who approached him, unbuttoned her pants and raised her blouse; he then attempted to leave the room and exit the situation.\textsuperscript{185} Given his prior disciplinary record, the company discharged the Grievant.\textsuperscript{186} Nevertheless, because this employee maintained a high quality work record and the accuser continued to change her story, the arbitrator ordered the Grievant be reinstated and made whole.\textsuperscript{187} Although the arbitrator acknowledged the filing of criminal charges hampered the company's investigation, the arbitrator declared the Grievant "totally exonerated."\textsuperscript{188} Moreover, the arbitrator ordered that the transferred false accuser never to work in the same store as the Grievant,\textsuperscript{189} as long as they work for the same company.\textsuperscript{190}

Discharge was too severe a penalty for a security guard who kissed a female coworker without consent.\textsuperscript{191} Although the guard had a prior disciplinary record, previous reprimands for misbehavior had been effective at reducing and eliminating the offending activity.\textsuperscript{192} Moreover, the guard and the accuser had a relationship marked by suggestive bantering.\textsuperscript{193} The arbitrator found the kiss was beyond acceptable, but given the accuser's acceptance of the relationship, the previous activity between the two parties was not sexual harassment and should not have been considered during the decision to discipline.\textsuperscript{194} In addition, the other accusation against the guard was never proven.\textsuperscript{195} Ultimately, the guard was reinstated with seniority but without back pay.\textsuperscript{196}

Furthermore, discharge or other discipline was found too severe in a case involving a male correction officer accused of engaging in sexual acts with female inmates because the "beyond a reasonable doubt\textsuperscript{197}
standard” was not used where potential crime occurred.\textsuperscript{197} However, in another case involving a security guard, discharge was sustained where the offending guard had a prior disciplinary record.\textsuperscript{198} The arbitrator found no reason for the accuser to lie and believed her to be more credible than the Grievant.\textsuperscript{199}

Discharge was found too severe when a male teacher was accused of verbally and physically sexually harassing female middle school students.\textsuperscript{200} Although the accusations included the teacher grabbing students’ buttocks and touching their hips and breasts, the teacher disputed the details and indicated the touchings were not intended to be sexual.\textsuperscript{201} At least one student indicated she was uncomfortable being touched but did not believe the touching was sexual in nature.\textsuperscript{202} The arbitrator agreed with school officials and counselors that if the touching was intended to be sexual, then discharge was justified.\textsuperscript{203} Regardless, the teacher was warned about potential violations and the evidence indicated that any touchings were no longer part of an acceptable teaching method because it made students uncomfortable.\textsuperscript{204} Because the behavior violated boundaries but was not harassment, the teacher was reinstated with a strict no-touching rule.\textsuperscript{205}

However, a male custodian with seventeen years of service was terminated for groping a female student by grabbing her buttocks.\textsuperscript{206} Because he was a convicted felon, the Grievant was motivated to lie and was viewed by others as dishonest.\textsuperscript{207} His claim that the contact was friendly and non-sexual was without merit.\textsuperscript{208} However, a male school bus driver was suspended and transferred after allegations that he

\begin{quote}
\textsuperscript{199.} See id. at 821; see also Ralphs Grocery Co. v. United Food and Commercial Workers Local 135, 112 Lab. Arb. Rep. (BNA) 120, 124 (1999) (Prayzich, Arb.).
\textsuperscript{201.} Id. at 1000.
\textsuperscript{202.} Id. at 995.
\textsuperscript{203.} Id. at 999, 1002.
\textsuperscript{204.} Id. at 999.
\textsuperscript{207.} Id. at 448.
\textsuperscript{208.} Id.
\end{quote}
grabbed a female student’s buttocks on his bus. However, there was some question as to the nature and intent of the driver’s actions. Although the arbitrator sustained the discipline, the driver was to be given additional activity routes to balance his pay because the reassignment was intended to be protective rather than punitive. The Grievant’s hourly wage remained unchanged but the new route was shorter thereby resulting in less pay.

Returning to the private corporate context, a male worker was terminated for various actions against three female workers at an off-site sales conference. First, the Grievant repeatedly approached one female responsible for conference hotel room assignments requesting another female’s room number. The male Grievant jabbed a woman in the ribs and even pushed her against a post and kissed her. During one exchange, a passing manager intervened because the woman was in pain; however, the Grievant responded “[s]he’s not in pain. She likes it rough.” The same evening, another employee complained she was grabbed twice by the Grievant; who then responded, “[s]o... sue me if you don’t like it.” Also, the female employee and another complained that the Grievant followed one of them to their room where he forced himself on top of one and pulled the other on top of him. Testifying about their fear, the women stated they were finally able to persuade him to leave, although he used sexually explicit words towards them while leaving. Although the Union cited two decisions, one from 1986, and the other from 1987, as precedent, the current arbitrator stated that by 1994, perspectives on sexual harassment had changed. Thus, the discharge was sustained.

210. Id. at 1124.
211. Id. at 1125.
212. Id.
214. Id. at 610.
215. Id. at 610-11.
216. Id. at 611.
217. Id.
219. Id. at 612.
221. Id. at 614.
In another case involving egregious behavior, a male employee was discharged where there was credible evidence that he had repeatedly engaged in improper activity.\(^\text{222}\) The employee engaged in unwanted groping, massaging and repeatedly forced his victims to touch him.\(^\text{223}\) Moreover, the arbitrator noted that the failure to verbalize objection to physical contact does not make it any less unwanted.\(^\text{224}\) The employee’s conduct created an intimidating, hostile, and offensive work environment.\(^\text{225}\) However, it is noteworthy that as part of the original discharge, the company did place the Grievant “on a leave of absence without pay so that he might become eligible for an early pension, in deference to his long service to the Company.”\(^\text{226}\) Yet, in another case involving groping and profane language, a corrections officer was found rightly terminated for indecent behavior and for intimidating several female coworkers.\(^\text{227}\) A male worker was terminated for brushing up against two female coworkers, touching breasts, making sexually suggestive comments and looking them over.\(^\text{228}\) The employer’s policy defined sexual harassment as “unwelcome, unwanted, and unsolicited non-businesslike comments, sexual advances, requests for sexual favors, or any other verbal or physical conduct of a sexual nature.”\(^\text{229}\)

Similarly, a male employee was properly discharged when he touched a female coworker’s arm as she exited a restroom, outside of which he was waiting.\(^\text{230}\) The Grievant had a history of other misconduct.\(^\text{231}\) The Grievant also claimed the female coworker’s indebtedness to him generated the complaint.\(^\text{232}\) However, the arbitrator


\(^{223}\) Id.

\(^{224}\) Id. at 961.

\(^{225}\) Id.


\(^{229}\) See id.; see also City of Flint v. AFSCME Local 1600, 104 Lab. Arb. Rep. (BNA) 125, 126-27 (1995) (House, Arb.) (finding that a male employee was rightly terminated for pinning a female employee against a wall, attempting to kiss her and grabbing her several times).


\(^{231}\) Id.

\(^{232}\) Id. at 569-70.
found that this could have easily motivated the Grievant’s actions and the Grievant was less credible given his prior disciplinary record.233

However, a male worker was unjustly discharged after he denied all allegations that he engaged in various incidents of touching and other offensive behavior against three female employees.234 The company insufficiently communicated its sexual harassment policy and inconsistently dispensed discipline.235 Specifically, in an incident involving similar behavior, an employee was only suspended for five days after he offered an apology to the harassed parties.236 Therefore, the discharge was properly converted into a twenty-day suspension and the employee was reinstated to his previous position with all back pay and benefits from the end of the suspension forward.237

In another case, a male worker was unjustly discharged where he tugged at the sweatpants of a junior female coworker.238 The two employees involved had engaged in previous horseplay and the Grievant did not have a prior disciplinary record.239 Although the arbitrator found the current incident went beyond horseplay, given the employees’ past working relationship and the Grievant’s exemplary record, the Grievant was reinstated without back pay.240 However, in another case involving a “playful” atmosphere, discharge was sustained because the accused had a prior warning for unwanted hugging and the current victim was upset by the incident.241 Furthermore, the Grievant admitted he hugged his accuser twice on the day in question.242 Although the arbitrator acknowledged that every work environment must individually be evaluated, this incident crossed the line because the Grievant was warned of the risks of his behavior.243

233. See id.; see also Plain Dealer Publ’g Co. v. Newspaper & Magazine Drivers’ Union, Local 473, 99 Lab. Arb. Rep. (BNA) 969, 975-76 (1992) (Fullmer, Arb.) (discussing factors which lead to credibility determinations by an arbitrator; the case deals with a newspaper distribution manager who claimed business problems with the accuser’s boss which ultimately led to a harassment complaint).


235. Id. at 110.

236. Id. at 112-13.

237. Id. at 113.


239. Id. at 63-64.

240. Id. at 66-67.


242. Id. at 1006.

243. Id. at 107.
In a case of male-on-male harassment, discharge of a male fire department lieutenant was sustained where the offender placed his hands in a recruit's front pockets and pulled the recruit towards him from behind. On another occasion, the same offender placed a spanner wrench between a recruit's legs from behind and pulled the recruit towards him. On two other occasions, the same offender made reference, during a recruit's classroom training session, to homosexual conduct on camping trips. The harasser had no direct supervisory role or any legitimate reason for being in contact with the recruits in any of the instances.

D. Creation of an Offensive Environment

An arbitrator found a hostile environment was created by a subordinate's exceptionally offensive and obscene comments in response to a poor performance review by his supervisor. Although there was some contention by the Union as to whether the comments were directed at the supervisor, the arbitrator found that even "if the statements had been directed toward another person, they would still be sexual harassment." Moreover, the arbitrator was convinced that the Grievant's "choice of words were so obscene and demeaning that he created a hostile environment."

Another arbitrator found a hostile environment was created for a number of school employees by a fellow custodian employee. The accused made numerous comments about the employees' personal appearance, made extra and inappropriate visits to the victims' classrooms, made unwanted personal invitations and made sexually charged comments. Although after two teachers confronted the Grievant, he then stopped harassing them, while others never confronted him but complained to their superior. The Grievant stated his

245. Id.
246. Id.
247. Id.
249. Id.
250. Id.
252. Id.
253. Id.
comments and actions were not intended to be sexually oriented and that he made similar personal invitations to males and females alike; this claim was later supported by others.\textsuperscript{254} He also stated that he believed the policy in place required an offended person to confront the harasser and ask him or her to stop the conduct.\textsuperscript{255} Ultimately, the arbitrator found the harasser’s intent irrelevant and no requirement for direct confrontation existed.\textsuperscript{256} The harasser’s actions were unwanted and reasonably interpreted as sexual.\textsuperscript{257} The Grievant’s demotion was sustained because it removed him from contact with the teachers.\textsuperscript{258}

Another arbitrator found no sexual harassment had occurred where a sheriff made certain renovations to improve jail operations that led to female corrections employees being subjected to male nudity and obscene gestures by the male inmates.\textsuperscript{259} The arbitrator noted that there is an unusual working environment in correctional facilities and that the inmates’ offensive behavior was not directed at female employees.\textsuperscript{260} Furthermore, the renovations were not completed to create an offensive or hostile environment but to adhere to state requirements regarding inmates.\textsuperscript{261}

Discharge was upheld in a more classic case involving sexual harassment by a senior worker against a female subordinate.\textsuperscript{262} The senior male worker, who had a previous suspension for making unwanted advances towards another employee, had been given a general warning being told to keep his hands to himself.\textsuperscript{263} Despite the warnings, there was some support for the accuser’s claim that the Grievant made humping gestures at her from behind and had grabbed her hand.\textsuperscript{264} He initially denied the accusations but then admitted to grabbing the female’s hand.\textsuperscript{265} Although the accuser initially chose to handle the situation herself, she became fearful for her job and reported the

\textsuperscript{254} Id.
\textsuperscript{255} Id.
\textsuperscript{260} Id. at 455-56.
\textsuperscript{261} Id. at 454, 456.
\textsuperscript{263} Id. at 250.
\textsuperscript{264} Id.
\textsuperscript{265} Id.
Grievant. The complaint was also motivated by the Grievant unjustifiably reassigning his accuser. He also warned his accuser that other crew members believed she was sleeping on the job. Subsequently, the Grievant stopped “all unnecessary communication” with the accuser. Noting that progressive discipline would not be effective in this case given the Grievant’s previous suspension, the discharge was sustained.

A police officer was also found to have created a hostile environment where he touched a female subordinate’s thigh, referred to his alleged influence on the police department, expressed his ability to affect her career and indicated he would cancel her calls for backup. However, sexual harassment was not found where a police sergeant snapped a female dispatcher’s bra strap. The sergeant never asked for sexual favors and the act did not create an intimidating, offensive or hostile environment. The sergeant was then reinstated.

A newspaper’s district representative was rightfully suspended for two weeks without pay and one week with pay, and counseling ordered for the one week paid suspension. He was then reassigned to a different district for harassing several female paper carriers who were legally independent contractors. Although the Grievant was aware of the company’s sexual harassment policy, he argued that it did not apply to the independent carriers. However, the arbitrator found the Grievant functioned as a “supervising employee vis-à-vis the independent contract carriers.” Moreover, because the Grievant’s activity had led to one

266. See id. at 251.
268. Id.
269. Id.
273. Id.
274. Id.
276. Id.
277. Id. at 50.
278. Id. at 52.
complainant quitting and at least four other carriers having their work environments altered, the grievance was denied.279

In a similar case, a leadman with twenty-three years of service was rightfully discharged for harassing conduct, which included sexual innuendo, unwanted compliments of complainants’ physical attributes, continual talk of sexual matters and sexual bragging and moaning.280 One complainant testified she believed that the Grievant had withheld work gloves and committed other retaliatory measures because she refused to talk to him.281 Five women made complaints against the Grievant while the Grievant made only “bland denials of ever saying the things . . . reported . . . [i]ndeed, the Grievant continued his harassing behavior even [after] he had promised [the] Foreman . . . that he would cease.”282 The Union argued that the Grievant’s numerous years of service should mitigate any disciplinary measures and the arbitrator agreed on issues of minor misconduct.283 In his decision, however, the arbitrator wrote:

seniority is not a mitigating factor when determining discipline appropriate for intentional major misconduct that directly and repeatedly violates a written prohibition, particularly when the miscreant has been instructed to cease and desist. [The Grievant] intentionally used his position of power to create a hostile working environment for the women to whom he assigned work. His conduct comprises an abuse of the grossest sort, an abuse that violated company policy and the law prohibiting sexual harassment.284 The discharge was found to be justifiable.285

In a different case, a male employee crossed the line from being friendly to harassing when he repeatedly made unwelcome comments and stared at coworkers.286 Yet, the male worker’s one-day suspension was reduced to a reprimand because although he had previously been

279. Id. at 52-53.
281. Id. at 374.
282. Id.
283. Id.
284. Id. at 374-75.
counseled, he had never been formally reprimanded.\textsuperscript{287} Moreover, there was evidence the worker had made a real effort to change.\textsuperscript{288} In still another case, an employee with twenty-two years of service was reinstated where his foreman also engaged in harassing behavior and where the worker had no prior disciplinary record.\textsuperscript{289}

On the other hand, an arbitrator found that “factors of long-term employment . . . the lack of notice of policy on sexual harassment and a sexually-charged work environment should be considered in the matter of a discharge of an employee.”\textsuperscript{290} However, the arbitrator agreed with other arbitrators that “no warning is required where the offense is legally and morally wrong or, put another way, a warning would be appropriate . . . unless conduct is so clearly wrong that specific reference (to a rule) is not necessary.”\textsuperscript{291} Therefore, discharge was upheld where the Grievant admitted to asking female coworkers to answer a sexual behavior questionnaire and where the Grievant went so far as to ask three separate women if they would masturbate him, watch him masturbate and if they masturbated.\textsuperscript{292}

In a case of male-on-male sexual harassment, discharge was upheld where a homosexual Grievant with a previous suspension for sexual harassment created an offensive environment because he persistently and repeatedly recounted his sexual exploits to his male coworkers.\textsuperscript{293}

\textsuperscript{287} See id.; see also Minn. Mining & Manuf. Co. v. Int’l Union of Operating Eng’rs Local 501, 113 Lab. Arb. Rep. (BNA) 402, 409 (1999) (Grabuskie, Arb.) (reinstating a Grievant whose behavior was inappropriate but had not been given a formal warning); Consol. Edison Co. v. Utility Workers Union of Am., Local 1-2, 113 Lab. Arb. Rep. (BNA) 342, 345 (1999) (Jensen, Arb.) (holding that the Grievant’s suspension was valid where his comments to his coworkers went beyond the “shop talk rule”).

\textsuperscript{288} Norfolk Naval Shipyard, 104 Lab. Arb. Rep. (BNA) at 992.

\textsuperscript{289} See Metro. Transit Comm’n v. Amalgamated Transit Union, Local 1005, 106 Lab. Arb. Rep. (BNA) 360, 361, 364 (1996) (Imes, Arb.); see also Safeway, Inc. v. United Food & Commercial Workers Union, Local 870, 108 Lab. Arb. Rep. (BNA) 787, 794-95 (1997) (Staudohar, Arb.) (mitigating a discharge to a suspension where the Grievant appeared to have “finally gotten the message” that his derogatory statements were inappropriate and that he should be given one final chance); KIAM v. UAW Local 241, 97 Lab. Arb. Rep. (BNA) 617, 617 (1991) (Bard, Arb.) (finding that where an employee persisted with unwelcome advances and contact with coworker, discharge was too severe given weakness of written sexual harassment policy and lack of progressive discipline).


\textsuperscript{291} Id. (citation omitted).

\textsuperscript{292} Id. at 339, 341.

The coworkers offered independent and corroborative evidence that the Grievant told sexually explicit stories after he was repeatedly asked to stop. The Grievant was accused of blocking aisles with his body, blowing kisses, dancing in sexually explicit poses and pinching a coworker on the buttocks. The Grievant threatened at least one coworker with reprisal for complaining to a supervisor. The Union argued the Grievant suffered disparate treatment because there was no discipline for other workers who engaged in alleged misconduct and because there was no evidence of any complaints against them.

In another case involving male-on-male sexual harassment, a new employee was victimized by three other employees when he was called into an office. The door was closed and the lights turned off; meanwhile, one of the Grievant’s tugged at the victim’s shorts and encouraged the second Grievant to “get him.” Management subsequently terminated the two employees that assaulted the new hire but not the third employee who departed after luring the victim into the office. The Grievants maintained that horseplay of a sexual nature occurred in the past and was always tolerated without punishment. The arbitrator noted the behavior progressed to a physical assault and the victim maintained a real fear. However, the arbitrator noted that there were mitigating factors; the assault did not include any sexual acts and there was no intent to cause actual physical harm. Moreover, the arbitrator acknowledged that management had tolerated horseplay in the past. Therefore, just cause was found for suspension but not discharge. The Grievants were reinstated at the same seniority and with the same benefits but without back pay.

295. Id.
296. Id.
297. See id. at 357-58; see also Dep’t of Veterans Affairs, 113 Lab. Arb. Rep. (BNA) at 968.
299. Id. at 781.
300. Id. at 776-77.
301. Id. at 780.
302. Id. at 782-83.
304. Id.
305. Id. at 784.
306. Id.
Using a "reasonable homosexual" standard, an arbitrator found that there was sexual harassment and a reasonable discharge. The Grievant made a graphic remark to a homosexual coworker which "was intended to demean the physical intimacy of a male homosexual relationship; had Grievant made the same statement to a female coworker, using a vernacular description of female genitalia, the offensive nature of the statement would have been unmistakable." Moreover, company policy explicitly incorporated a local ordinance prohibiting "derogatory, degrading or demeaning words addressed toward an employee's sexual or affectional preferences.

Discharge was too severe where one employee referred to an outside contractor employee as a "lying homo, queer." The remarks were not recounted in the contract employee's written statement. In addition, the contract employee was inexplicably not present at arbitration for cross-examination and the alleged offender had not made similar remarks to anyone else. Thus, the Grievant was reinstated without back pay.

One arbitrator considered the conduct of the alleged victims in assessing work environments. Serious sexual harassment did not occur when a male employee repeatedly made coarse and sexual comments to female coworkers because the female employees generally either disregarded his statements or "blew him off." The Grievant was reinstated with back pay and benefits and given his first written warning.

308. Id. at 1166-67.
309. Id. at 1161-62.
311. Id.
312. Id. at 577, 579.
313. Id. at 581.
314. See T.J. Maxx v. Union of Needletrades, 107 Lab. Arb. Rep. (BNA) 78, 84, 88 (1996) (Richman, Arb.); see also Paragon Cable Manhattan v. IBEW, Local 3, 100 Lab. Arb. Rep. (BNA) 905, 908-09 (1993) (Dreisen, Arb.) (holding that the use of the word "fucking" was abusive but did not rise to the level of sexual harassment where coworker admitted to saying "God Dammit" in response); City of St. Paul v. AFSCME, Local 1842, 100 Lab. Arb. Rep. (BNA) 105, 114, 116 (1992) (Berquist, Arb.) (reducing the Grievant’s five-day suspension in part because the only two witnesses to the Grievant's inappropriate joke did not consider it intimidating, hostile or offensive); Pac. Union Club v. Hotel Employees Local 2, 94 Lab. Arb. Rep. (BNA) 1217, 1220 (1990) (Knowlton, Arb.) (reducing the Grievant's termination to a two-week suspension because to some extent, the Grievant’s behavior was provoked by the victim).
316. Id. at 90.
Similarly, in another case a male employee was reinstated despite the comments he made about a female coworker with whom he had a relationship. Although the contract worker acknowledged that he made advances to the female employee, the arbitrator overturned the discharge. The discharge was not only overturned because the advances had been made by the contract worker, not the Grievant, but also because the female coworker had made derogatory comments about the Grievant. The Grievant was reinstated with half of his lost wages less interim earnings.

On the other hand, sexual harassment was found where a male employee with eighteen years of service made numerous comments of a sexual nature to a female coworker and where both parties previously engaged in improper conduct. However, the female worker decided to stop the exchanges and warned the Grievant to stop because she was finding his continued conduct harassing. Warnings from an outside vendor were also ignored. Because of a history of other disciplinary problems, the Grievant’s discharge was sustained.

The pattern of a harasser’s behavior rather than a single incident of potential harassment is sometimes considered by arbitrators. In one case, a long-time employee’s termination for creating a hostile

---


319. Id.

320. Id. at 443.

321. See Hughes Family Mkts., Inc. v. UFCW Local 770, 107 Lab. Arb. Rep. (BNA) 331, 335 (1996) (Prayzich, Arb.); see also Nat’l Beef Packing Co. v. United Food & Commercial Int’l Union Local Lodge 340, 103 Lab. Arb. Rep. (BNA) 1004, 1006 (1994) (Levy, Arb.) (deciding that “where there are undertones of mutual and reciprocal ‘playfulness’, it is incorrect to suggest that the only conduct to be considered is that of the one who has been accused”).


323. Id.

324. Id.

325. See GTE Cal., Inc. v. Communications Workers of Am., 103 Lab. Arb. Rep. (BNA) 343, 350 (1994) (Grabuskie, Arb.); see also W. Lake Superior Sanitary Dist. v. Minn. Arrowhead Dist. Local 96, 94 Lab. Arb. Rep. (BNA) 289, 294 (1990) (Boyer, Arb.) (stating that “the Grievants were engaged in a series of behaviors that were not only inappropriate, but potentially disruptive of its operation and effort to achieve ‘teamwork’, [and] were incontrovertibly perceived by victim as harassing and singularly predicated upon her status as the only female employed at the site”); Philip Morris v. Int’l Ass’n of Machinists & Aerospace Workers Lodge No. 10, 94 Lab. Arb. Rep. (BNA) 826, 828 (1990) (Baroni, Arb.) (deciding that the year-long pattern of an offensive work environment, objectionable remarks and behavior that was directed at a coworker and her husband was in violation of the company policy).
environment was upheld because he continued making gender-based and derogatory comments after a complaint was filed against him and he was suspended twice for other types of harassment. Although the harassment was found not to be sexually explicit, it was gender-based and therefore fell under the company’s sexual harassment policy. Moreover, his continuing behavior toward a coworker after she filed a complaint was a form of retaliation. Although the arbitrator acknowledged that any of the comments taken alone appeared harmless, “where the pattern is at a level where employees go out of their way to avoid him, or dread coming to work, a serious problem exists that cannot be ignored.” Even after suspensions and a verbal warning, the Grievant “continued to create a hostile environment for other employees.”

Discharge was improper where a school bus driver made unwanted advances to a substitute teacher, including coming to her home with food after a dinner invitation had been declined. At the time of the incidents, the bus driver was on a twenty-day suspension for inappropriate conduct involving a group of female students and their female chaperone. The driver had a previous ten-day suspension on his record. The twenty-day suspension clearly stated a “future infraction of this nature, or any nature, will result in . . . termination of employment . . .” However, the arbitrator reversed the discharge because the Grievant “did not engage in any inappropriate touching, did not use any intemperate language, and did not make any threats . . . [and almost] all his other contacts with [the complainant] occurred in public places, where the presence of others suggested that she had no reason to fear for her personal safety.”

In a case involving sexual innuendo, a school district had just cause in issuing a formal written warning but not suspending a math teacher who admittedly used sexual innuendo to gain the interests of his students. However, the same teacher refuted the contention that asking
a student to get up on her desk and do a cheer in her cheerleading outfit had any sexual connotation.\textsuperscript{337} In his decision, the arbitrator stated that the Grievant

is not insensitive to realities such as how sex appeal is openly used as a tool in advertising and innumerable other aspects of life, including the design of most cheerleading outfits for females, [but] the District retains the right to eliminate the use of sexual innuendo by the Grievant, even where it may be used at least in part as a device to pique the students' interest.\textsuperscript{338} However, given the teacher's unblemished record, his one-day suspension was converted to a written warning.\textsuperscript{339}

Another arbitrator found that a single employee's conduct created an "intimidating, hostile and offensive" environment.\textsuperscript{340} There was evidence of racial slurs, foul language, gender-based comments and statements that "employees must join the union" combined with other comments like "accidents do happen on the woodyard."\textsuperscript{334} In addition, the Grievant was rude to customers and desired to be the boss in a "team concept shop."\textsuperscript{342} Moreover, the female employee who filed the complaint did not do so previously out of fear for her job.\textsuperscript{343} In a different case, a male package driver's discharge was justifiable when he harassed female customers.\textsuperscript{344} The Grievant verbally harassed and exposed himself to the customers.
However, in another case where a Grievant was previously counseled and subsequently apologized for referring to a female subordinate as a "cry baby bitch," the Grievant was found unjustly terminated. The company found some form of harassment had occurred and warned the Grievant that any retaliation would result in termination. Subsequent to filing an internal grievance with the Union, the Grievant was terminated for retaliation. However, the arbitrator found that whatever occurred in the second incident was not sexual harassment because the Grievant was only doing his job as foreman by telling two male employees and one female employee, who were talking together, to return to work. The arbitrator found the company assumed the internal Union grievance was filed in retaliation. Moreover, the Grievant “had no way of knowing that [this retaliation] meant that he had lost his right to file internal Union charges, or that doing so would be considered as retaliation.”

In another case, an employee was discharged for making a potentially sexually suggestive and offensive comment over an intercom system. The comment was directed at a single coworker and audible in two plants for all to hear. Another employee in a different case was justifiably discharged where he made numerous unwanted physical contacts and where he publicly commented on a letter written to him by his victim at the employer’s suggestion. On the other hand, an arbitrator failed to find that there was sexual harassment or a hostile environment where a female worker was terminated for documented poor work performance over a two-year period. Although there were bathing suit postcards displayed in the store break room, including a wet T-shirt contest postcard, the arbitrator found that they were neither

347. Id. at 796.
348. Id. at 795.
349. Id. at 793.
350. Id. at 795.
352. Id. at 795.
354. Id. at 325.
pornographic nor extreme because the Grievant never complained about the postcards prior to her discharge.\textsuperscript{357}

A police captain was found unjustly demoted to patrol officer as discipline for two comments he made in a single shift to one female officer.\textsuperscript{358} In reference to a shift request that would have allowed her to spend more time with her children, the captain told the officer, "you should have had an abortion."\textsuperscript{359} In response to another scheduling change to allow the officer to attend classes and advance her education, the captain stated, "bring in knee pads if you want something around here."\textsuperscript{360} The arbitrator found no evidence of sexual harassment but noted that the statements constituted improper conduct.\textsuperscript{361} The knee pads comment was not harassment because it was "not utilized in a manner that was demonstrative of or in connection with employment or employment advances based or connected with sex or sexual harassment."\textsuperscript{362} Moreover, demotion is only appropriate where an employee is found lacking in competence and qualifications.\textsuperscript{363} Therefore, the arbitrator reduced the demotion to a thirty-day suspension while reinstating the Grievant to his former rank and making him whole concerning "any and all salary, emoluments and benefit losses."\textsuperscript{364} The Grievant was also made subject to the "verbal instruction and cautioning . . . available to the Employer."\textsuperscript{365}

A college public safety officer improperly exploited his power when he inappropriately touched the arm of an upset female student.\textsuperscript{366} The officer also asked this female student and another female student for dates.\textsuperscript{367} Although both students complained, the arbitrator found no wrongdoing because the Grievant did not pursue the issue after the dates were refused.\textsuperscript{368} Moreover, one of the girls offered inconsistent accounts of the events.\textsuperscript{369} Noting the Grievant was an officer, the arbitrator stated that based on the "power relationship, the mere fact of physical touching

\begin{itemize}
  \item \textsuperscript{357} \textit{Id.} at 897.
  \item \textsuperscript{358} City of Key West, 106 Lab. Arb. Rep. (BNA) 652, 653-54 (1996) (Wolfson, Arb.).
  \item \textsuperscript{359} \textit{Id.} at 653.
  \item \textsuperscript{360} \textit{Id.}
  \item \textsuperscript{361} \textit{Id.}
  \item \textsuperscript{362} \textit{Id.}
  \item \textsuperscript{363} City of Key West, 106 Lab. Arb. Rep. (BNA) at 654.
  \item \textsuperscript{364} \textit{Id.} at 655.
  \item \textsuperscript{365} \textit{Id.}
  \item \textsuperscript{367} \textit{Id.} at 49.
  \item \textsuperscript{368} See \textit{id.} at 49-50.
  \item \textsuperscript{369} \textit{Id.} at 50.
\end{itemize}
was inherently coercive and improper.\textsuperscript{370} Although the arbitrator believed the claims by the Grievant that he did not intend any harm, he found just cause for the discipline.\textsuperscript{371} However, weighing all the factors, the Grievant’s discharge was reduced to a four-month suspension without pay.\textsuperscript{372}

**E. Offensive Telephone Calls**

A county employee, with an unblemished disciplinary record, was recorded making a phone call of a “sexually explicit, invitational, and of a homosexual”\textsuperscript{373} nature to a local man during working hours from a county office phone.\textsuperscript{374} The employee acknowledged the call but denied any harassing intent, indicating he was only attempting to discern the man’s sexual orientation because he “seemed to want to be a friend.”\textsuperscript{375} Still, the employee was prosecuted and found guilty of misdemeanor harassment.\textsuperscript{376} Subsequently, the county suspended the employee for two weeks and placed him on a one-year probation during which any disciplinary problems would yield immediate discharge.\textsuperscript{377} Although there were some questions about the nature of the county’s investigation, the reliance on the court conviction as the major investigative method was reasonable.\textsuperscript{378} Questions were also raised about the applicability of the sexual harassment policy to the bargaining unit because it was published two years after the CBA was signed.\textsuperscript{379} The arbitrator found just cause for discipline despite management’s noted omission.\textsuperscript{380} However, the one-year probation was overturned because it violated the employee’s “contractual right for a cause assessment when quite different misconduct occurs.”\textsuperscript{381}

\textsuperscript{370} Id. (citation omitted).
\textsuperscript{371} State Univ. of N.Y., 110 Lab. Arb. Rep. (BNA) at 50.
\textsuperscript{372} Id.
\textsuperscript{374} Id.
\textsuperscript{375} Id. at 566 (citation omitted).
\textsuperscript{376} Id.
\textsuperscript{377} Id. at 565.
\textsuperscript{378} Jasper County Bd. of Supervisors, 101 Lab. Arb. Rep. (BNA) at 567.
\textsuperscript{379} Id. at 566.
\textsuperscript{380} Id. at 568.
\textsuperscript{381} Id.
F. Offensive Letters

An arbitrator decided sending letters drafted by a female off-duty employee to her supervisor's spouse at home when she was away from work was sexual harassment. The letters described the supervisor's alleged sexual comments. In addition, there was evidence of the supervisor sexually harassing the Grievant. However, given that it was unlikely that the Grievant would have engaged in the harassing activity absent any inappropriate treatment by the supervisor, the discipline was reduced from a discharge to an unpaid suspension.

The discharge of a female short-term employee was upheld in another letter writing case. The Grievant had written nine anonymous letters to a supervisor of a different department, at least one of which included language indicating the likelihood of harassment. The letter stated, "I want to apologize if this is uncomfortable for you or is causing an uneasy[n]ess [sic]." Moreover, the supervisor testified he felt the letter writer "had some type of 'fatal attraction' towards him and he wanted it stopped." One coworker even testified that she felt the Grievant was stalking the supervisor. The arbitrator noted that the Grievant was rightfully discharged because she indicated that she understood the sexual harassment policy both by signing the policy and by filing her own harassment complaint in a different unrelated matter.

An employee who had written an inappropriate comment on a seminar evaluation form was disciplined with a written reprimand and warning, although a three-day suspension was set aside. Among other contentions, the Union maintained there was a violation of the Grievant's free speech rights. However, the arbitrator found that the government as an employer can regulate employee speech in different

---

383. Id. at 185.
384. Id. at 185, 187-88.
386. Id. at 163.
387. Id.
388. Id.
389. Id.
392. Id. at 1198.
ways than the government as a sovereign. Moreover, although the sexual harassment policy in place referred only to interactions between employees, the arbitrator found that the Grievant’s conduct fell under the general just cause standard. Still, the arbitrator found the discipline too harsh for a first offense and therefore adjusted the penalty. Moreover, in another case, discharge was reduced to reinstatement without back pay for an employee with no disciplinary record who sent pornographic e-mails from home to his work account and from his work computer to coworkers.

G. Relationship to the Workplace

1. Off-Site Conduct

Arbitrators have found harassing conduct need not be committed at the workplace to be considered sexual harassment. For example, one arbitrator upheld discipline against a campus security officer for off-duty contacts with a female work-study student who previously had filed harassment charges against the officer.

2. Relationship of the Harasser to the Workplace

Arbitrators have found the harasser may be a supervisor, subordinate, employee, outside visitor to the workplace or employee relating to a non-employee.

393. Id. at 1199 (citing Waters v. Churchill, 511 U.S. 661, 671 (1994)).
394. Id. at 1200-01.
395. Id. at 1201.


IV. PROCEDURAL AND EVIDENTIARY PROBLEMS IN SEXUAL HARASSMENT CASES

A. Limitations of the Collective Bargaining Agreement

Certain provisions in a CBA can prevent a sexual harassment case from being arbitrable. For example, in *University of California, Davis v. AFSCME*, 403 a male probationary employee was terminated for allegedly poor job performance. 404 He filed a grievance claiming the discharge was a direct reprisal for his harassment complaints. 405 The Grievant believed he was harassed because of his sexual orientation. 406 The arbitrator deemed the grievance nonarbitrable because of limitations in the CBA. 407 Even though the Grievant asserted that a hostile environment impaired his work performance, the CBA did not obligate the employer to provide a non-hostile work environment. 408 The agreement also stated that the release of a probationary employee from employment was not grievable or arbitrable. 409 The contractual limitations were clear and binding. 410

Lax enforcement of a sexual harassment policy can lead to discipline if management finds the policy has been violated. In *Simkins Industries v. United Paperworkers International Union, Local 214*, 411 a male leadman claimed disparate treatment of Union members compared to management members for similar activity. 412 The arbitrator questioned "whether the discipline of management employees can furnish the basis for a disparate enforcement claim." 413 Even if it can, the arbitrator found rigorous discipline for management employees. 414 As for the Grievant’s claim of lax enforcement, the arbitrator cited the Grievant’s own testimony that the alleged acts warranted discharge and nullified the lax enforcement defense. 415 However, the contract did not limit arbitration in

404. Id. at 533.
405. Id. at 532.
406. Id.
407. Id. at 534.
408. Univ. of Cal., 100 Lab. Arb. Rep. (BNA) at 534.
409. Id.
410. Id.
412. Id.
413. Id. at 557.
414. Id.
415. Id.
ABTCO, Inc. v. International Woodworkers of America, Local III-260.\(^{416}\) The Grievant’s claims of lax enforcement by management was discounted because the Grievant was under a Last Chance Agreement (“LCA”) where any violation of company rules would call for discharge.\(^{417}\)

In one case, the CBA was violated by management because it denied due process by suspending the Grievant before an investigation was started and failed to give “prior warning notice of a complaint against [the] employee to the union and the employee in writing before [he was] discharged.”\(^{418}\) The suspension was therefore nullified.\(^{419}\) Moreover, discipline was not even imposed until six months after the most recent incident, during a period that the Grievant had not committed any harassing acts because he had been warned by a fellow employee that his behavior could bring charges.\(^{420}\)

In another case, a company believed arbitration was time-barred by the CBA despite a judge’s order.\(^{421}\) The arbitrator ultimately wrote, the Judge “specifically directs that the ‘matter shall proceed to arbitration’ per... the Collective Bargaining Agreement.”\(^{422}\) This judicial interpretation was sufficient for the arbitrator to decide the matter was not time-barred.\(^{423}\)

### B. Evidentiary Problems

When evidentiary problems are raised, they are often the essential determinants in the outcome of a case. For example, the evidentiary problem of hearsay was raised in a case in which a male employee was suspended for thirty days.\(^{424}\) He was accused of repeatedly harassing a female coworker with offensive comments concerning her body and sex life.\(^{424}\) After filing a grievance, the complainant received threats on her

---

\(^{417}\) Id. at 554.  
\(^{419}\) Id.  
\(^{420}\) Id.  
\(^{422}\) Id.  
\(^{423}\) Id.  
\(^{425}\) Id. at 69-70.
life.\textsuperscript{426} Subsequently, out of fear, she did not testify at the arbitration hearing.\textsuperscript{427} Her refusal to testify prompted the Union to argue that the evidence against the Grievant was hearsay.\textsuperscript{428} Although such evidence is not always excluded from arbitration, the arbitrator indicated that a ruling cannot be based on hearsay if the evidence pertains to "pivotal" or "contested" facts.\textsuperscript{429} Here, the arbitrator was able to rely on evidence that was not hearsay.\textsuperscript{430} For instance, the Grievant admitted to making some of the offensive comments.\textsuperscript{431} Moreover, the female complainant had testified in two previous arbitration hearings concerning related allegations of sexual harassment.\textsuperscript{432} The arbitrators in both of the prior cases found the complainant to be a credible witness.\textsuperscript{433} As a result, the current arbitrator decided that there was sufficient evidence for a fifteen-day, rather than a thirty-day, suspension.\textsuperscript{434} Even though the arbitrator believed the hearsay evidence was likely to be true, the hearsay pertained to such significant elements which were unacceptable as the basis for a decision.\textsuperscript{435}

On the other hand, when the only claimant was anonymous and failed to appear at the hearing, the arbitrator did not agree with the Union that the grievance should be sustained.\textsuperscript{436} He wrote, "[t]he Employer's case does not fail and is not subject to dismissal because of the Claimant's failure to disclose her identity and appear for testimony .... To so hold would ... discourage employees from reporting sexual harassment as they see it."\textsuperscript{437} In another case dealing with hearsay evidence, an arbitrator did not bar testimony where the hearsay did not vary greatly from the Grievant's testimony.\textsuperscript{438} In addition, the hearsay testimony was more about the Grievant's

\begin{itemize}
\item \textsuperscript{426} Id. at 71.
\item \textsuperscript{427} Id.
\item \textsuperscript{428} Id. at 71-72.
\item \textsuperscript{430} Id. at 73.
\item \textsuperscript{431} Id.
\item \textsuperscript{432} Id.
\item \textsuperscript{433} Id.
\item \textsuperscript{434} Metro. Council Transit Operations, 106 Lab. Arb. Rep. (BNA) at 73.
\item \textsuperscript{435} Id.
\item \textsuperscript{436} City of St. Paul v. AFSCME, Local 1842, 100 Lab. Arb. Rep. (BNA) 105, 115 (1992) (Berquist, Arb.).
\item \textsuperscript{437} Id.
\item \textsuperscript{438} Cub Foods Inc. v. United Food & Commercial Workers Union Local 653, 95 Lab. Arb. Rep. (BNA) 771, 772 (1990) (Gallagher, Arb.).
\end{itemize}
actions, when the real issue was the Grievant’s motivation.\(^{439}\)

Furthermore, in another case, an arbitrator drew an “adverse inference” where a federal employer failed to produce testimony for an accused supervisor who was away on sick leave and not expected to return.\(^{440}\)

No credible evidence was presented that the supervisor was too sick to appear, that he would not be returning or that he did not commit the acts alleged.\(^{441}\)

A problem concerning after-acquired evidence arose in a case involving a food clerk at a grocery store.\(^ {442}\) The Grievant was discharged for making sexual comments to female coworkers and rubbing himself against them.\(^{443}\) Following the Grievant’s discharge, another female coworker presented additional complaints against him.\(^{444}\) The arbitrator considered this to be after-acquired evidence, which should not be a factor in the ruling.\(^{445}\) The only relevant evidence was the evidence known to the company when it made the termination decision.\(^{446}\)

Regardless, the arbitrator found enough available evidence to deny the grievance.\(^{447}\) Furthermore, because the Grievant did not testify, the evidence entered against him was accepted as fact.\(^{448}\)

Double jeopardy was raised as a possible evidentiary problem in a grievance brought by a civilian trainer at a military base.\(^{449}\) The trainer had been issued an oral admonishment for making offensive comments to his class, which contained female students.\(^{450}\) Eleven months later, the commander of the base retracted the oral admonishment and issued a three-day suspension.\(^{451}\) The explanation for the commander’s action was that the initial discipline was not harsh enough.\(^{452}\)

During the arbitration hearing, management cited other cases where discipline had been “proposed, canceled, and again proposed without being dismissed.

\(^{439}\) Id.


\(^{441}\) Id.


\(^{443}\) Id. at 719.

\(^{444}\) Id. at 720.

\(^{445}\) Id. at 722.

\(^{446}\) Id. at 721-22.


\(^{448}\) Id. at 721-22.


\(^{450}\) Id. at 1089-90.

\(^{451}\) Id. at 1089.

\(^{452}\) Id.
There is no administrative double jeopardy." However, the arbitrator found that this was not the situation in the instant case. The decision to issue the trainer an oral admonishment had been made by a deciding official, had been final and had been carried out. In addition, the chosen discipline was sufficient to remedy the problem. Following the admonishment, the Grievant received excellent reviews for his training. The arbitrator ordered the suspension to be rescinded and all back pay and lost benefits granted. Ultimately, the oral admonishment was reinstated.

An arbitrator found no violation of privacy or free speech where a municipal employer contracted with a handwriting expert to determine who wrote offensive comments on an anonymous seminar evaluation. The arbitrator found the anonymity policy applied to candor regarding constructive criticism regardless of "sexually offensive barbs." Moreover, as previously noted, a government as an employer has different concerns than a government as a sovereign, such as legitimate management concerns regarding sexual harassment. The arbitrator noted if the unsigned form contained threats of bodily harm, he doubted the Union would contest the investigation or its means.

An arbitrator did not find it compelling that a Grievant recalled information during a pre-polygraph interview that he failed to recall during an investigation. Although the state government employer interpreted these inconsistencies as incriminating, the arbitrator noted it is common for witnesses to recall information in advance of a polygraph. Although the arbitrator recognized it was possible the Grievant had not been completely truthful before the pre-test interview, he noted it was possible the Grievant had recalled additional information.

453. Id. at 1090, 1092.
455. Id. at 1092-93.
456. Id. at 1093.
457. Id. at 1089, 1093.
458. Id. at 1094.
461. Id. at 1198.
462. Id. at 1199.
463. Id. at 1198.
465. Id.
since initially being questioned.\textsuperscript{466} Therefore, little weight was granted to the employer’s negative inference.\textsuperscript{467} However, in another case, an arbitrator found no mitigation for the Grievant when the company refused to administer a lie-detector test because “the weight of arbitral authority gives little or no weight to lie detector tests,” and the company’s refusal did not preclude the Grievant from taking the test.\textsuperscript{468}

An arbitrator drew a negative inference where an accused employee failed to produce a telephone bill, which could have been easily produced to show a harassing telephone call was never made.\textsuperscript{469} The arbitrator chose to infer that the offending call was listed on the bill.\textsuperscript{470} In the same case, a Spanish speaking Grievant claimed he could only understand English words and not phrases.\textsuperscript{471} However, his testimony about conversations and that he twice corrected his interpreter discounted his claim.\textsuperscript{472} In another case involving a police officer and his employer, one arbitrator fully discounted the testimony of an expert witness because he was a Union official.\textsuperscript{473} Therefore, the witness was not independent and bore “no responsibility for the discipline of a department under his command.”\textsuperscript{474}

\textbf{C. Posture of the Parties}

Labor arbitration cases involving sexual harassment usually originate when employees who are accused of sexual harassment file a grievance disputing any disciplinary measures imposed. For example, a male delivery driver was terminated for making obscene and offensive sexual remarks to a customer.\textsuperscript{475} In response, he brought a grievance protesting his discharge.\textsuperscript{476} The arbitrator ultimately upheld the discharge

\begin{thebibliography}{99}
\footnotesize
\item 466. \textit{Id.}
\item 467. \textit{Id.}
\item 470. \textit{Id.} at 83.
\item 471. \textit{Id.} at 88.
\item 472. \textit{Id.}
\item 474. \textit{Id.}
\item 476. \textit{Id.}
\end{thebibliography}
by concluding that the Grievant’s testimony lacked credibility and the charges maintained were serious.\(^\text{477}\)

Most arbitration cases involve sexual harassment brought by employees claiming they have been unjustly disciplined. However, in rare cases, the Grievant is the alleged victim of sexual harassment. In one case, a housekeeper at a hotel brought a grievance against her employer because she was terminated from her position.\(^\text{478}\) The housekeeper claimed her termination was in retaliation of her charges for sexual harassment against the hotel owner.\(^\text{479}\) Although the arbitrator concluded that it was not necessary to determine whether sexual harassment had taken place, he concluded that the housekeeper’s termination was a retaliatory measure.\(^\text{480}\) Ultimately, the grievance was sustained.\(^\text{481}\)

In another case concerning an alleged retaliation, the Grievant was found to be the victim of sexual harassment rather than the perpetrator.\(^\text{482}\) A female administrative support specialist claimed that she was laid off and denied the opportunity to transfer to a different position because she made several sexual harassment complaints.\(^\text{483}\) She had been subjected to offensive sexual remarks and sexually explicit items around the office.\(^\text{484}\) Just twenty days after the Grievant issued another complaint, management notified the Grievant of her layoff.\(^\text{485}\) The arbitrator concluded that no retaliation had occurred: The management personnel responsible for her layoff and the denial of her transfer request were not aware of her history of sexual harassment complaints.\(^\text{486}\) The arbitrator found that the Grievant was laid off for purely business reasons and that she clearly was not qualified for the transfer she requested.\(^\text{487}\) Therefore, the grievance was denied.\(^\text{488}\)


\(^{479}\) Id. at 1012.

\(^{480}\) Id. at 1015.

\(^{481}\) Id. at 1016.


\(^{483}\) Id.

\(^{484}\) Id.

\(^{485}\) Id. at 294.

\(^{486}\) Id. at 297.


\(^{488}\) Id. at 296.

\(^{489}\) Id. at 297.
In another case, a female employee was transferred after she complained of sexual harassment. The female transferred employee brought a grievance to protest the company's action. This Grievant had been involved in a consensual relationship with a male coworker for a few years. When she tried to break off the relationship, conflict ensued and the Grievant filed a sexual harassment complaint. Upon investigation, the company concluded that there was no sexual harassment but merely a problem with a romantic relationship. Because the two employees could no longer work peacefully together, one needed to be transferred. The company decided to transfer the female employee to another classification and shift because she had less seniority. She filed her grievance because she faced a potential loss in pay as a result of the transfer. The arbitrator ultimately sustained the grievance and reasoned that removing the complainant from her position was an inadequate response to a claim of sexual harassment by a coworker.

D. Burden of Proof and Degree of Proof Necessary

Arbitrators have differed on what standard of proof is required in sexual harassment cases. According to one authority, the different standards utilized by arbitrators can be summarized as follows:

Some arbitrators 'require a mere preponderance, while others use a higher standard calling for convincing and substantial proof inconsistent with any reasonable theory of innocence.' A compromise position is to require proof by 'clear and convincing evidence.' The rationale for a heightened standard of proof is that allegations of sexual harassment are 'serious and potentially damaging to the reputation of the accused.'

491. Id.
492. Id.
493. Id.
494. Id.
496. Id.
497. Id. at 431-32.
498. Id. at 434.
Another authority distinguishes among three common quantums of proof: beyond a reasonable doubt, preponderance of the evidence and clear and convincing evidence.\(^{500}\) Beyond a reasonable doubt finds its basis in the criminal conviction standard, where guilt “must be so conclusive that impartial, reasonable and experienced persons would be morally certain of the guilt of the accused.”\(^{501}\) Preponderance of the evidence “requires the party bearing the burden of persuasion [the employer in discipline cases] to convince the tribunal that, more likely than not, its version of the facts is correct.”\(^{502}\) Clear and convincing evidence is considered a compromise standard.\(^{503}\) However, some arbitrators believe that proof standards are irrelevant in arbitration and “consciously refuse to apply any standard to the quantum of proof issue.”\(^{504}\)

The cases analyzed for this article exemplify the different amounts of proof required by arbitrators. In the 110 cases involving some quantum of proof, forty-one decisions (37.27\%) relied on the preponderance of the evidence, twenty-five (22.73\%) relied on clear and convincing evidence and five (4.54\%) relied on proof beyond a reasonable doubt.\(^{505}\) However, in thirty-nine cases (35.45\%) the burden of proof was unclear.\(^{506}\) If included, the authors relied on the arbitrator’s standard when assigning decisions by their use of one of the three categories. Otherwise, the authors discerned the applied standard from the prevailing language of the opinion. However, in thirty-nine cases the required burden of proof was simply unclear.\(^{507}\)

For example, one arbitrator applied a preponderance of the evidence standard in sustaining a grievance filed by alleged victims dissatisfied with a company’s discipline of a supervisor.\(^{508}\) Although the company found the charges inconclusive, the arbitrator found that the Union proved the charges by a preponderance of the evidence.\(^{509}\) Still, noting that the CBA did not allow for an arbitrator to impose

\(\text{\footnotesize Source: }\) Donald and Ralston: Arbitral Views of Sexual Harassment: An Analysis of Arbitration C 2003

\(\text{\footnotesize Published by Scholarly Commons at Hofstra Law, 2003}\)
discipline on supervisors, the company was only ordered to continue their practice of keeping the supervisor away from the victims.  

A clear and convincing standard is often used in sexual harassment cases or other situations where "the charged misconduct has a stigmatizing effect." In measuring the evidence against this standard, the arbitrator weighs the credibility and open demeanor of the witnesses against that of the accused. Another arbitrator noted the preponderance standard is sufficient in non-disciplinary cases, but only when dealing with issues of just cause for discipline is a clear and convincing evidence standard necessary. However, arbitration does not demand the criminal standard of proof beyond a reasonable doubt. In one case, however, an arbitrator did find the evidence presented proved allegations beyond a reasonable doubt but noted that only a clear and convincing standard was necessary. 

In a case involving sexual harassment that took place at a company conference, an arbitrator used a preponderance of the evidence standard rather than a proof beyond a reasonable doubt standard, in spite of the Union’s request for a the latter. At the conference, an employee made sexual advances to three different women. The employee kissed, poked and grabbed these women. He even got on top of one woman after entering her hotel room. Incidents involving two of the women were corroborated by eyewitnesses. The Grievant himself also admitted to some of the allegations. The arbitrator believed that the holding rested on the credibility of the parties. In particular, he felt the testimony of 

510. Id. at 302.
512. Id. at 822.
517. Id. at 610-11.
518. Id.
519. Id. at 612.
520. Id. at 612-13.
522. Id. at 609.
two of the women and of the eyewitnesses was consistent and credible.\textsuperscript{523} Therefore, sufficient proof was established and the discharge of the Grievant upheld.\textsuperscript{524}

In another case, the issue of credibility was a deciding factor in the ultimate outcome.\textsuperscript{525} A Grievant had been suspended for three days without pay for making inappropriate sexual comments to a contractor's employee with whom he had been working.\textsuperscript{526} Although the alleged comments were made when the two parties were alone together, the arbitrator found the female employee to be more credible than the Grievant.\textsuperscript{527} She had no motive to invent her complaints and the Grievant had even complimented her work while speaking with others.\textsuperscript{528} The arbitrator also felt there was convincing evidence that the Grievant violated one of the employer's rules by implicitly requesting the contractor to assign the complainant to work on an audit with him.\textsuperscript{529} Therefore, the grievance was denied.\textsuperscript{530}

In another case, credibility and motives were factors in the discharge of a Grievant who made sexual comments, offensive gestures and inappropriate sounds to a female subordinate.\textsuperscript{531} The Grievant also denied certain work opportunities to this female employee after she made her complaints known.\textsuperscript{532} The arbitrator described this case as an essential credibility battle.\textsuperscript{533} The arbitrator could determine no motive for the complainant to bring harassment charges.\textsuperscript{534} Even the Grievant could not think of other motives the complainant might have maintained.\textsuperscript{535} In addition, at least one eyewitness testified that the Grievant made a "humping" motion behind the accuser's back.\textsuperscript{536} During the time she was being harassed, the female employee told others what

\textsuperscript{523} Id. at 612-13.

\textsuperscript{524} See id. at 614; see also City of Norwich v. Int'l Bhd. of Police Officers, Local 324, 101 Lab. Arb. Rep. (BNA) 6, 7 (1993) (Cain, McBride, Pizzi, Arb.) (holding that the victim's testimony was credible and convincing, therefore, the grievance should be denied).

\textsuperscript{525} United States EPA v. AFGE Local 3347, 102 Lab. Arb. Rep. (BNA) 1046, 1050 (1994) (Smith, Jr., Arb.).

\textsuperscript{526} Id. at 1048.

\textsuperscript{527} Id. at 1050.

\textsuperscript{528} Id. at 1049-50.

\textsuperscript{529} Id.

\textsuperscript{530} United States EPA, 102 Lab. Arb. Rep. (BNA) at 1051.


\textsuperscript{532} Id. at 251.

\textsuperscript{533} Id. at 253.

\textsuperscript{534} Id.

\textsuperscript{535} Id. at 252.

was occurring but she refused to identify her harasser.\textsuperscript{537} The arbitrator found her conduct reasonable and understandable because she was concerned about retaining her job.\textsuperscript{538} For these reasons, the female employee was found more credible than the Grievant.\textsuperscript{539} Thus, the arbitrator decided there was sufficient proof to deny the grievance.\textsuperscript{540}

At times, arbitrators fail to find sufficient proof for all charges made against an employee. In one case, a college security officer had been issued a letter of reprimand for contacting a female student.\textsuperscript{541} The student accused the officer of sexual harassment after the officer had been previously warned to stay away from her.\textsuperscript{542} The arbitrator found that one of the charges in the letter of reprimand was sufficiently proven but the other charge could not be upheld.\textsuperscript{543} The second charge concerned an unprofessional conversation the Grievant held with one of the student's friends.\textsuperscript{544} However, neither the Grievant nor the friend testified about the conversation.\textsuperscript{545} Therefore, the charge could not be sustained using a preponderance of the evidence standard.\textsuperscript{546} The arbitrator ordered the unproven charge stricken from the letter of reprimand because it depended only on the proven charge.\textsuperscript{547} In another case, an arbitrator found a company merely assumed there was an internal Union investigation and a fine was requested in retaliation for harassment charges.\textsuperscript{548} In fact, the company never even asked the Union or the Grievant about the internal investigation and no fine was ever sought.\textsuperscript{549}

In one case, an arbitrator weighed the Grievant's demeanor in his decision.\textsuperscript{550} Although the Grievant lacked social grace, the arbitrator

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{537} Id. at 252.
\item \textsuperscript{538} Id. at 253.
\item \textsuperscript{539} Id.
\item \textsuperscript{540} See id. at 255; see also Hughes Family Mkts. v. UFCW Local 770, 107 Lab. Arb. Rep. (BNA) 331, 334, 336 (1996) (Prayzich, Arb.) (holding Grievant was properly discharged after being put on notice); Dominick's Finer Foods, Inc. v. UFCW, Local 1540, 101 Lab. Arb. Rep. (BNA) 982, 991-93 (1993) (Winograd, Arb.) (holding where consensual verbal banter escalated to an unacceptable assault, the Grievant's discharge was proper).
\item \textsuperscript{542} Id. at 1194.
\item \textsuperscript{543} Id. at 1195-96.
\item \textsuperscript{544} Id. at 1197.
\item \textsuperscript{545} Id.
\item \textsuperscript{546} Vt. State Colls., 100 Lab. Arb. Rep. (BNA) at 1197.
\item \textsuperscript{547} Id.
\item \textsuperscript{549} Id.
\end{enumerate}
\end{footnotesize}
failed to find an intent to harass the alleged victim.\textsuperscript{551} The arbitrator found the Grievant misinterpreted the accuser's conversation with him and had a reasonable misunderstanding of the events.\textsuperscript{552} Still, the arbitrator considered the effects of the Grievant's conduct on the accuser and converted the discharge to a suspension.\textsuperscript{553} In another case, the demeanor of the accusing witnesses was considered because it "appeared to the arbitrator to be consistent with the veracity of their testimony. Several of them were reduced to tears during the course of their testimony. Others appeared tense at the spectacle of having to relive the events in question."\textsuperscript{554} In contrast, the Grievant was defensive during the questioning of his own advocate.\textsuperscript{555} The arbitrator denied the grievance.\textsuperscript{556}

In another case, an arbitrator failed to believe an accuser's charges of sexual harassment.\textsuperscript{557} The accuser increased the seriousness of the charges at each stage of the process.\textsuperscript{558} Although the Grievant previously had been disciplined for consensual sexual conduct, the accuser was clearly the aggressor and had filed false accusations.\textsuperscript{559} The arbitrator compared the credibility of the accuser to that of the Grievant, whose account was supported by witnesses including management staff.\textsuperscript{560} Moreover, the arbitrator could not understand the progressive nature of the accusations.\textsuperscript{561} Although the accusations approached an attempted sexual assault, the accuser appeared undisturbed just moments after the alleged incident.\textsuperscript{562} Also, the arbitrator found it unbelievable that the Grievant would suddenly attempt a sexual assault against his accuser when all evidence indicated she had been pursuing him despite his refusals.\textsuperscript{563} Although the arbitrator did suggest the Grievant may have

\begin{itemize}
  \item \textsuperscript{551} Id. at 571.
  \item \textsuperscript{552} Id.
  \item \textsuperscript{553} Id. at 571-72.
  \item \textsuperscript{555} Id.
  \item \textsuperscript{556} See id. at 558; see also El Paso Elec. Co. v. Local 960, IBEW, 109 Lab. Arb. Rep. (BNA) 1086, 1091-92 (1998) (Allen, Jr., Arb.) (holding that the accuser had no reason to falsify her complaint); City of Las Vegas v. Las Vegas City Employees Ass'n, 107 Lab. Arb. Rep. (BNA) 654, 658 (1996) (Bergeson, Arb.) (holding the accuser was more credible because her testimony was consistent with being traumatized).
  \item \textsuperscript{558} Id.
  \item \textsuperscript{559} Id. at 902, 904.
  \item \textsuperscript{560} Id. at 902-03.
  \item \textsuperscript{561} Id.
  \item \textsuperscript{562} King Soopers, 100 Lab. Arb. Rep. (BNA) at 903.
  \item \textsuperscript{563} Id. at 902.
\end{itemize}
extricated himself from the incident promptly, he found reasonable the Grievant's hope that his accuser would stop her activity when asked to do so and that the Grievant was trying to preserve the dignity of both the accuser and himself.\textsuperscript{564}

The Grievant's claim lacked credibility when he stated he had no recollection of exposing himself and that he only was guilty of poor judgment for mixing painkillers and three beers during lunch.\textsuperscript{565} The arbitrator based this decision on the testimony of the Grievant's supervisor, who had known the Grievant for twenty-five years and who stated that the Grievant appeared normal at the time of the incident.\textsuperscript{566}

In another case, credibility was found suspect where a part of the Grievant's defense included that English was his second language and that he did not fully understand what he was saying within the context of the accused harassment.\textsuperscript{567} However, the arbitrator noted the Grievant twice corrected his interpreter about his testimony, which brought into question his actual level of understanding.\textsuperscript{568} In another case, credibility of an accuser was brought into question not because of the potential that she was lying, but because her testimony revealed "that her understanding of what constitutes sexual harassment [was] exaggerated."\textsuperscript{569} The accuser was a minor alleging harassment by a teacher.\textsuperscript{570} The accuser stated, "situations like this are on TV and in the news, and I didn't want it to be like that."\textsuperscript{571} Although the arbitrator noted that some of the teacher's comments were "double-entendres," he found no evidence of harassment and reduced the discharge to suspension.\textsuperscript{572}

In one case, the Union argued for a stricter standard of proof because of the unique circumstances.\textsuperscript{573} The Grievant, a stockroom worker, had been terminated for grabbing the crotch and buttocks of a

\textsuperscript{564} Id. at 903.
\textsuperscript{566} Id. at 1158.
\textsuperscript{568} Id.
\textsuperscript{570} Id. at 1037, 1039, 1040.
\textsuperscript{571} Id. at 1039 (citations omitted).
\textsuperscript{572} Id. at 1040.
female coworker. The Union argued that this Grievant had thirty-seven years seniority, led an exemplary work and personal life and was incapable of doing what was alleged. The Union asked the arbitrator to apply a clear and convincing evidence standard rather than a preponderance of the evidence standard. However, the arbitrator concluded that grievances involving long-term employees do not warrant a different evidentiary standard. The arbitrator saw "no room, nor basis in arbitral authority, for multi-level proof standards." Therefore, credibility of the testimony would be the determining factor. The arbitrator found the female accuser to be straightforward and sincere, and the Grievant to be equivocating and inconsistent. The arbitrator also took into account that the Grievant's testimony was self-interested because his employment was at stake, while the accuser's testimony was disinterested. Therefore, the grievance was denied.

In a case involving an assault by two male employees on another male employee, the arbitrator was confronted with the conflicting testimony of the accused employees, the alleged victim and the witnesses. The complainant alleged that two coworkers lured him into a room, turned the lights off and closed the door. One Grievant pulled at the complainant's shorts while the other Grievant stood around and encouraged the behavior. The complainant was threatened with sexual assault. The arbitrator found proof of the events by the corroborating testimony of one of the Grievants. The circumstances of the incident were confirmed; however, there was no proof of the Grievant's intent. Furthermore, because of contradictory claims, the complainant's credibility was also in doubt. The manner in which the assault occurred indicated to the arbitrator that the incident was not just

574. Id. at 737-38.
575. Id. at 740.
576. Id.
577. Id. at 742.
579. Id.
580. Id.
581. Id. at 743.
582. Id.
584. Id. at 781.
585. Id.
586. Id. at 777.
587. Id. at 781.
589. Id.
horseplay, as the Grievants attested. The arbitrator concluded that the Grievants fully intended to terrify and humiliate an unpopular employee. In addition, the testimony of a third employee, which the Union presented as disinterested, was found to be without credibility because this employee brought the complainant to the room where he was accosted. Therefore, the arbitrator decided to rule in favor of a suspension. The discharge of the two Grievants was not upheld because sexual horseplay was a common and accepted practice at the workplace.

V. REMEDIES

A. Reassignment or Demotion of Employees

In some cases, Grievants accused of sexual harassment dispute their reassignment or demotion. For example, a school custodian had been demoted for unwelcome sexual advances towards female teachers and aides. The accused insisted that his remarks were innocuous banter. The arbitrator ultimately concluded that the Grievant violated the employer’s sexual harassment policy. The custodian’s intent was irrelevant; the recipients of his remarks were offended. However, the arbitrator found that the Grievant was not given due process because neither the Grievant nor his union was supplied with the names of the accusers until arbitration. The employer also forbade the union from providing the Grievant with full disclosure of the charges made against him. Therefore, neither the Grievant nor the union may have been able to represent adequately his case. Despite the violations of due process, the arbitrator was able to establish misconduct and uphold the

590. Id. at 783.
591. Id.
592. Id. at 781.
594. Id. at 783-84.
596. Id. at 855-57.
597. Id. at 857.
598. Id. at 860.
599. Id.
601. Id. at 862.
602. Id. at 863.
Arbitral Views of Sexual Harassment

603. Id. at 864.
604. Id.
606. Id. at 1058-59.
607. Id. at 1059.
608. Id.
609. Id. at 1060.
611. Id. at 1059-60.
612. Id.
614. Id.
615. Id.
new coworkers, who maintained greater seniority but lesser earnings. In sustaining the Union’s grievance, the arbitrator concluded that the city had violated the CBA and the good faith understanding between the union and city management. The city was instructed to adjust the complainant’s pay rate to that of other employees in her new department. In this decision, it was instrumental that the city failed to consult with the Union about its determination of the complainant’s pay rate, thereby breaching the CBA.

In a different case, a female complainant was transferred to another classification and shift to separate her from a male coworker she accused of sexual harassment. The arbitrator sustained the grievance brought by the female employee who protested the company’s action. The company failed to find sexual harassment because the complainant and the alleged harasser had a consensual sexual relationship in the past. However, the arbitrator did not entirely agree with the company’s conclusion because the female employee had tried to end the relationship. The arbitrator decided that, regardless of whether the female employee’s allegations were true, the company improperly responded to her sexual harassment claim. Management’s solution was to transfer the female complainant. The company thought this could serve as a message to other victims of sexual harassment. However, the arbitrator noted that victims would not be encouraged to come forward with their complaints because they would not feel protected from retaliation. Therefore, the arbitrator found that transferring the female Grievant on the basis of lack of seniority was not an effective remedy because women in industrial settings typically have less seniority than their male counterparts. The grievance was sustained and the female Grievant was restored to her previous classification.

616. Id. at 608.
617. Id.
619. Id.
621. Id. at 431, 433.
622. Id. at 434.
623. Id. at 434.
624. Id.
B. Restoring the Harasser to the Workplace

In a case where a harasser was reinstated to his former position, the arbitrator instructed that the accused teacher be returned to his classroom as long as particular restrictions were applied. A male teacher was terminated for hugging some of his female students. He engaged in inappropriate touching but the contact was clearly not sexual. He also addressed his female students improperly, calling them “babe” and “honey.” The teacher’s superiors held discussions warning him about his behavior. When the behavior persisted, the teacher was terminated. Reinstatement was ordered because the arbitrator found the teacher’s intentions were not sexual. In light of the testimony and psychological evaluations, the arbitrator found that the teacher considered physical contact to be part of his nurturing teaching method. Psychological tests also indicated that the teacher would be able to change his behavior. The teacher maintained a good record as an educator and the arbitrator felt that if he understood the importance of respecting students’ boundaries, the inappropriate behavior would cease. Therefore, he was reinstated but with a “no-touch” policy, where any further improper touches would be grounds for a dismissal.

Similarly, a discharge was overturned where a police officer had contact with a former girlfriend who filed a sexual harassment claim against him. The girlfriend voluntarily contacted the officer even though the officer had been ordered to stay away from her. The arbitrator found discharge was too severe. The officer was off-duty during the incident and the CBA made clear that officers could not be disciplined for off-duty conduct except in the case of serious crimes.

631. Id. at 1000.
632. Id. at 1002.
633. Id. at 996.
634. Id.
636. Id. at 1002-03.
637. Id. at 1000, 1002.
638. Id. at 1001.
639. Id. at 1002.
642. Id. at 646.
643. Id. at 647-48.
644. Id.
The arbitrator ordered the officer be reinstated and made whole. In another case, the harasser was awarded back pay after being subjected to double jeopardy. The harasser was first given a letter of reprimand that served as written notice that additional violations would result in his termination but was then discharged for the violation that led to the letter of reprimand.

C. Progressive Discipline and Modification of the Penalty

In grievances involving termination of employment, arbitrators have occasionally found that an employee’s actions deserve discipline less severe than the discharge initially imposed. This occurred in a case where a female employee who had been sexually harassed by her male supervisor sent an offensive letter to her supervisor’s wife describing his comments. The arbitrator found the mitigating factors to be persuasive enough to modify the female employee’s discharge. The Grievant not only had a clean work record in her fourteen years with the company but also received no prior discipline. Moreover, the discipline imposed on the supervisor for his sexual harassment was kept confidential. The arbitrator found the Grievant could have interpreted the absence of information to mean that any harassment on her part would not be punished. The arbitrator also found evidence of disparate treatment. Disciplinary actions taken by the company against the supervisor for sexual harassment were not as severe as the discipline for the discharged female employee. The Grievant was unrepentant and unaware of the gravity of her actions. Therefore, the arbitrator ordered

645. Id. at 648.
647. Id.
649. Id. at 183.
650. Id. at 187.
651. Id. at 185.
652. Id. at 186.
654. Id. at 187.
655. Id.
656. Id.
the Grievant reinstated, without back pay. In addition, any time lost was to be noted as a disciplinary suspension.

In another case, the arbitrator determined that demotion was too severe a penalty. The Grievant, a police captain, had been demoted from the rank of captain to patrolman and suspended for twenty days. He was accused of making offensive comments to a female officer under his command, saying that she “should have had an abortion” and she should “bring in knee pads” when she wanted something. The arbitrator found that the captain created a hostile work environment for the female officer but that it was not sexual harassment, as described in the police manual. The harassment did not involve employment or employment advances. The arbitrator concluded that the imposed discipline was too harsh under the guidelines in the manual. In addition, the Grievant was fully capable of performing his duties as police captain. The arbitrator found that a demotion would only be proper if he were deemed incompetent. The arbitrator ordered the Grievant to be reinstated as captain and receive back pay for lost wages. However, because the Grievant violated the police manual by creating a hostile work environment, the arbitrator issued a thirty-day suspension.

A firefighter was unjustly disciplined where he was denied a promotion after previously being demoted because of a sexual harassment complaint. The promotion was denied because the “city felt [a promotion] would have an adverse impact on female firefighters,” even though the Grievant had not engaged in any further misconduct. Although the promotion denial was not listed as a

---

657. Id. at 188.
660. Id. at 652.
661. Id. at 653.
662. Id.
663. Id.
665. Id.
666. Id.
667. Id. at 655.
668. Id.
670. Id. at 398.
671. Id. at 398-99.
In another case, an arbitrator found that the Grievant had been disciplined too harshly. The Grievant was a leadman in a manufacturing plant, a position with additional responsibility but not requiring supervisory authority. One of the Grievant’s coworkers brought a Penthouse magazine into the plant, which was viewed by the Grievant and other employees. The company held that the Grievant, as leadman, should have interrupted the viewing of the magazine and reported the incident. The leadman’s responsibilities during incidents of a sexual nature were clearly explained in the employer’s sexual harassment policy. The arbitrator concluded that the Grievant did not carry out his duties and found the penalty of a three-day suspension without pay too severe. The Grievant was a first time offender with no prior disciplinary record. Moreover, the other employees involved, including the one who brought the magazine, received a lesser penalty. The Grievant’s role in the incident was merely passive. Therefore, the arbitrator ordered the discipline to be reduced to a verbal warning and awarded the Grievant back pay for his three-day suspension.

D. Discharge Proper

Certain circumstances are often taken into account where arbitrators rule for the discharge of an employee. The severity or frequency of sexual offenses and the prior suspensions or warnings persuade arbitrators to uphold discharges. In one case, an arbitrator upheld a
dismissal because of the seriousness of a Grievant’s past offense. The Grievant’s behavior included not only harassing three women by poking and grabbing them, but also getting on top of one woman. The behavior was so offensive that the termination of employment was deemed justified.

In another case, the frequency rather than the severity of offenses influenced a discharge being upheld. After a Grievant had undergone two previous suspensions for verbal harassment and discriminatory comments, he continued to harass certain individuals indirectly. During a meeting, he publicly berated one of his accusers, which resulted in his discharge. The Grievant’s termination was supported by the arbitrator, who viewed the repeated warnings as important evidence. The Grievant had not reacted to the warnings by changing his behavior, but instead he found indirect and subtle ways to continue the harassment. If considered individually, the Grievant’s harassing comments would not constitute serious offenses. However, as a pattern they were debilitating to the complainants. His demeaning comments created a negative work environment. Therefore, the arbitrator ruled that the company had just cause to terminate the Grievant.

Evidence of previous warnings given to an offending employee has prompted arbitrators to uphold discharges. In one case, a Grievant had been disciplined for sexual harassment within the previous year. On imposition of a three-day suspension, the employer warned the Grievant that any further conduct of this type would result in stronger discipline. A few months later, the Grievant began harassing another female employee. When she complained, the Grievant received a

684. Id. at 613-14.
685. Id. at 614.
686. Id. at 610-12, 614.
688. Id. at 350.
689. Id. at 348.
690. Id. at 350.
691. Id.
693. Id.
694. Id.
696. Id. at 251-52.
697. Id. at 254.
698. Id.
warning from the company. After continued discriminatory behavior, the Grievant was terminated because he had received adequate notice and warning; the grievance was ultimately denied.

In another case where an employee had been previously suspended, the Grievant, a homosexual male employee, was discharged for sexually harassing three male coworkers. Four years prior to the instant case, the Grievant was suspended for harassing another male coworker. At that time, he was informed that the company would not tolerate any more of his inappropriate behavior. During the arbitration hearing, the coworkers’ testimonies concerning the Grievant’s sexually explicit and intimidating comments were very consistent. The arbitrator found that the Grievant had committed sexual harassment by any standard and held that the employer had just cause to terminate the Grievant.

A male delivery driver was discharged after making offensive sexual remarks to a female bartender and her mother at the bar where he was making a delivery. The Grievant also made disparaging remarks about the bar’s business practices while the bar’s customers were able to overhear. The arbitrator upheld the Grievant’s discharge mainly because the Grievant’s conduct in a public setting could damage the reputation of the bar. Furthermore, the driver’s comments about the customer’s business could be considered defamatory. The arbitrator took into account a suspension three years earlier. The female bartender’s testimony about the Grievant’s behavior was also deemed more credible than the Grievant’s own testimony. The conduct would have been offensive to “any reasonable person.”

699. Id. at 253.
702. Id. at 355.
703. Id.
704. Id. at 358.
705. Id.
707. Id. at 1218.
708. Id. at 1221.
709. Id.
710. Id.
712. Id. at 1222.
In a case previously mentioned where a male stockroom worker with thirty-seven years seniority was discharged for grabbing the crotch and buttocks of a female coworker, the arbitrator ruled that discharge was proper.\(^{713}\) Although the arbitrator noted that seniority is often a mitigating factor in harassment cases, other factors contributed to a ruling upholding the termination.\(^{714}\) The Grievant had undergone prior disciplinary measures during his employment and his testimony concerning the sexual harassment episode was not credible.\(^{715}\) Moreover, it was evident that the Grievant did not take sexual harassment seriously.\(^{716}\) The arbitrator felt that weakening the punishment would send a message to other company employees that sexual harassment would be forgiven if you were deemed a “good ole boy.”\(^{717}\)

In another case, a male corrections officer was terminated for engaging in sexual activity with a female coworker while on duty.\(^{718}\) The coworker charged the officer with sexual harassment, alleging he forced her to participate in sexual acts.\(^{719}\) The officer filed a grievance claiming the sexual relationship was consensual and that he had been subjected to disparate treatment because the female coworker was not dismissed.\(^{720}\) The arbitrator concluded that just cause existed for the Grievant’s discharge because the charges of sexual activity while on duty were adequately proven.\(^{721}\) In addition, the Grievant had been given fair notice that such conduct might result in termination of employment.\(^{722}\) The repeated offenses were so serious that the employer’s trust in the Grievant was destroyed.\(^{723}\) There was no disparate treatment because the female coworker suffered from mental disorders that may have prevented her from consenting to the sexual activity.\(^{724}\) The employer took sufficient steps to verify her claim of mental disorders.\(^{725}\) Therefore, there was no basis to overturn the Grievant’s termination.\(^{726}\)

\(^{714}\) Id. at 741, 743.
\(^{715}\) Id. at 743.
\(^{716}\) Id at 742-43.
\(^{717}\) Id. at 743.
\(^{719}\) Id. at 702.
\(^{720}\) Id. at 701.
\(^{721}\) Id. at 707.
\(^{722}\) Id. at 708.
\(^{723}\) Id. at 707, 708-09.
\(^{724}\) Id. at 704, 708.
\(^{725}\) Id. at 708.
\(^{726}\) Id. at 709.
Arbitrators have also found grounds for discharge solely on the creation of a hostile work environment. For example, a female employee was discharged for sending unwelcome, anonymous, sexually explicit letters to a male supervisor. In determining whether the Grievant’s discharge was proper, the arbitrator took into consideration the length of the Grievant’s employment. The Grievant was a short-term employee who was only employed for five months. The Grievant was clearly familiar with the company’s sexual harassment policy because she had filed an unrelated complaint of her own. The Union argued that the Grievant’s conduct was not as serious as other sexual harassment offenses, such as physical advances. However, the arbitrator found that the Grievant’s actions were serious enough to create an abusive environment for the supervisor and termination was upheld.

In another case, a male plant worker was terminated for making a sexually offensive and intimidating remark over an intercom. The remark was directly addressed to a female coworker with whom he just had an argument. The terminated worker filed a grievance to protest the discharge. During the arbitration hearing, testimony from other employees confirmed that the incident occurred as the female worker had alleged. The arbitrator concluded that the Grievant violated the company’s sexual harassment policy. This policy reserved the right of the company to discharge employees for intolerable offenses. During the hearing, the Union did not question whether the Grievant’s actions were intolerable. Ultimately, the arbitrator ruled that the Grievant’s behavior clearly created a hostile work environment for the female coworker and denied his grievance.

728. Id. at 164.
729. Id.
730. Id.
731. Id.
734. Id. at 325.
735. Id. at 323.
736. Id. at 325.
737. Id. at 327.
739. Id. at 327.
740. Id.
In another case involving a hostile environment, a grievance was brought by a leadman in a manufacturing plant.\textsuperscript{741} The company had discharged the Grievant for harassing at least five female employees by making sexual comments and offensive noises with sexual connotations.\textsuperscript{742} Some of the female employees also accused the Grievant of retaliating for their complaints.\textsuperscript{743} When some of the female workers protested and asked the Grievant to stop his offensive behavior, he responded by assigning harder work.\textsuperscript{744} The Grievant denied the accusations but the arbitrator did not find him to be credible.\textsuperscript{745} The Union argued for leniency because the Grievant had been employed with the company for twenty-three years.\textsuperscript{746} However, the arbitrator found that "[s]eniority is not a mitigating factor when determining discipline appropriate for intentional major misconduct that directly and repeatedly violates a written prohibition."\textsuperscript{747} There was evidence weighing against the Grievant, including a previous warning given to him by the foreman to stop his harassing behavior.\textsuperscript{748} The arbitrator found that the Grievant’s conduct did not improve following the warning.\textsuperscript{749} Subsequently, the Grievant created a hostile work environment for the female complainants and he clearly violated the company’s sexual harassment policy.\textsuperscript{750} Therefore, the grievance was denied.\textsuperscript{751}

E. Suspension Proper

Suspension was upheld where a Grievant was not the harasser but the accused’s temporary supervisor.\textsuperscript{752} The arbitrator concluded that the Grievant encouraged the harasser to expose himself to a female employee and then lied about his role in the incident.\textsuperscript{753} The Grievant displayed incompetence in his duties as a temporary supervisor; thus, the

\begin{itemize}
  \item \textsuperscript{742} Id. at 373-74.
  \item \textsuperscript{743} Id. at 374.
  \item \textsuperscript{744} Id.
  \item \textsuperscript{745} Id. at 373-74.
  \item \textsuperscript{746} Int'l Extrusion Co., 106 Lab. Arb. Rep. (BNA) at 374.
  \item \textsuperscript{747} Id.
  \item \textsuperscript{748} Id.
  \item \textsuperscript{749} Id. at 374-75.
  \item \textsuperscript{750} Id.
  \item \textsuperscript{751} Int'l Extrusion Co., 106 Lab. Arb. Rep. (BNA) at 374.
  \item \textsuperscript{752} City of Phoenix v. AFSCME Local 2384, 102 Lab. Arb. Rep. (BNA) 879, 885 (1994) (Wyman, Arb.).
  \item \textsuperscript{753} Id. at 884-85.
\end{itemize}
forty-hour suspension was upheld. In a case involving a contractor’s employee, the Grievant’s three-day suspension was upheld. Although the Grievant had a good record, including awards for his work, the arbitrator found that his defense lacked credibility. The remedy of suspension was proper.

In a case involving two male employees who accosted another male employee and threatened him with sexual assault, the arbitrator found that the employer had just cause to suspend the two Grievants, but not to discharge them. The arbitrator took certain mitigating factors into account. First, the Grievants made a sexual threat but no sexual crime was committed. Second, the arbitrator found that the two Grievants intended to frighten the employee but not to cause him physical harm. Third, the arbitrator accepted testimony establishing that sexual horseplay was a common and accepted practice at the workplace. Moreover, although such horseplay was technically forbidden, even supervisors had been involved in such conduct in the past. The arbitrator did not uphold the discharges of the two Grievants because of the mitigating factors. However, because the Grievants intended to cause real fear, the arbitrator found that their suspension was proper but ordered they be reinstated with back pay.

F. Analysis of Cases: Arbitrators, Harassing Acts and Discipline

The following are several tables that reflect a collection and analysis of the cases discussed in this article. They provide more insight into arbitrators’ decisions relative to the harassers’ years of service, type of harassing act, arbitrators’ age, gender and years of arbitration experience.

754. Id. at 885.
756. Id. at 1049-50.
759. Id. at 783.
760. Id.
761. Id.
762. Id.
764. Id. at 783-84.
Table 1: Harasser’s Years of Service and Type of Discipline/Outcome

<table>
<thead>
<tr>
<th>Years of Service</th>
<th>Discharge</th>
<th>Suspension</th>
<th>Reinstate Without Back Pay</th>
<th>Reinstate With Partial Pay</th>
<th>Transfer or Demote</th>
<th>Warning, Reprimand or Last Chance</th>
<th>Fully Restored to Workplace</th>
</tr>
</thead>
<tbody>
<tr>
<td>&lt;1</td>
<td>3</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2–5</td>
<td>5</td>
<td>3</td>
<td></td>
<td>2</td>
<td>1</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>6–10</td>
<td>7</td>
<td>2</td>
<td>3</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>11–15</td>
<td>4</td>
<td>2</td>
<td>1</td>
<td></td>
<td>1</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>16–20</td>
<td>3</td>
<td>3</td>
<td>3</td>
<td>2</td>
<td>2</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>21–25</td>
<td>6</td>
<td></td>
<td>3</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>26–30</td>
<td>2</td>
<td>2</td>
<td></td>
<td></td>
<td>1</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>30+</td>
<td>3</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>?</td>
<td>8</td>
<td>3</td>
<td>6</td>
<td>1</td>
<td>5</td>
<td>2</td>
<td></td>
</tr>
</tbody>
</table>

Table 1 presents data related to the harassers’ years of service and the outcome of arbitration. Some cases involved more than one Grievant and/or multiple actions, for example, reinstatement with partial pay and reassignment. Therefore, the data recorded here exceeds the total number of discipline-involved cases. Note that not all decisions included information revealing the number of years of service; therefore, these cases are recorded in the question mark row.

Several table elements are noteworthy. First, there does not appear to be any particularly favored status held by those with longer service, 11+ years. A total of forty-one discharges are recorded, with 43.9% (18 instances) of these falling within those employees with 11–30+ years of service and 26.83% (11 instances) within the 21–30+ years of service range. Although a long service record was cited as a mitigating factor in some cases, as noted earlier, several arbitrators specifically did not consider seniority—especially in more egregious cases—when weighing discharge against some lesser discipline. Moreover, with ninety-seven total disciplinary actions recorded, nearly 19% (18 instances) are discharges of those with 11+ years seniority, and over 11% (11 instances) are discharges of those with 21+ years seniority. However, those with fewer than five years seniority seem particularly...
likely to face discharge. Three of the four cases involving workers with less than one year’s service sustained discharge; 41.67% (5 instances) of those with two to five years of service sustained discharge. Moreover, over 53% (8 instances) of all discipline-imposed cases involving those with five years or less seniority resulted in discharge.

The data demonstrates that no seniority class appears to find discipline reversed with full restoration to the workplace more likely than any other. However, only about 5% (5 instances) resulted in full restoration for the Grievant.

By far, suspensions (37 instances, including reinstatements without back pay and with partial back pay) are the next most likely discipline imposed, occurring in over 36 percent of all discipline-related cases. All other outcomes combined (23 instances) represent just over 22%, and just over 18% of all discipline-imposed cases accounting for all but the five full-restorations.

Table 2: Type of Harassing Act and Type of Discipline/Outcome

<table>
<thead>
<tr>
<th>Harassing Act</th>
<th>Discharge</th>
<th>Suspension*</th>
<th>Transfer or Demote</th>
<th>Warning, Reprimand or Last Chance</th>
<th>Fully Restored to Workplace</th>
</tr>
</thead>
<tbody>
<tr>
<td>Proposition</td>
<td>4</td>
<td>6</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Physical Act**</td>
<td>20</td>
<td>13</td>
<td>3</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>Offensive Environment**</td>
<td>22</td>
<td>22</td>
<td>2</td>
<td>7</td>
<td>3</td>
</tr>
<tr>
<td>Telephone Calls</td>
<td>1</td>
<td>2</td>
<td></td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Letters</td>
<td>1</td>
<td>2</td>
<td></td>
<td>1</td>
<td></td>
</tr>
</tbody>
</table>

*Includes reinstatement with partial back pay or without back pay  

Table 2 presents the outcome of cases related to particular harassing acts. Some cases involved more than one act as a major component, for example, a sexual proposition may have occurred in the context of a physical act, kissing or groping.

Even a cursory glance reveals that physical acts or creating an offensive environment are most likely to result in discharge. Of the
thirty-nine instances relating to physical acts, over 51% (20 instances) resulted in discharge. Of the fifty-five total offensive environment cases, however, just 40% resulted in discharge.

Table 3: Arbitrator’s Age & Gender and Type of Discipline/Outcome

<table>
<thead>
<tr>
<th>Age</th>
<th>Discharge</th>
<th>Suspension</th>
<th>Reinstatement Without Back Pay</th>
<th>Reinstatement With Partial Pay</th>
<th>Transfer or Demote</th>
<th>Warning, Reprimand or Last Chance</th>
<th>Fully Restored to Workplace</th>
</tr>
</thead>
<tbody>
<tr>
<td>Male</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>30-39</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>40-49</td>
<td>6 1 1</td>
<td>1 1 1</td>
<td>1 1</td>
<td>1</td>
<td>1</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>50-59</td>
<td>10 8 9</td>
<td>1 1 2</td>
<td>1</td>
<td>2</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>60-69</td>
<td>12 3 3</td>
<td>1 1 2</td>
<td></td>
<td>2</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>70+</td>
<td>6</td>
<td></td>
<td>2 2 1</td>
<td>1</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>?</td>
<td>1 1 2</td>
<td>1</td>
<td>1</td>
<td>2</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Female</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>40-49</td>
<td>2</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>50-59</td>
<td>3 1 1</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>?</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>2</td>
</tr>
</tbody>
</table>

Table 3 presents data as related to arbitrators’ gender, age and the type of outcome. Age brackets for each gender are included only when an arbitrator within that age range was involved in at least one instance. Again, some cases involved more than one Grievant and/or more than one disciplinary action. Arbitrator ages were calculated or estimated from biographical data where possible, using either birth year or the year a bachelor’s degree was earned. This method is obviously limited, for example not all persons are 21–22 years of age when completing undergraduate study. However, it is the best proxy available in most cases. Seven male and three female arbitrators’ ages could not be discerned, and these arbitrators are recorded in the question mark rows of the chart.
Only twelve arbitral decisions out of 100 involved female arbitrators, and nine of these involved women aged 40–59 years; the other three arbitrators' ages are unknown. Any meaningful analysis of such a small population is difficult, at best. However, of the twelve instances of discipline, five (41.67%) involved discharge. Interestingly, among the twelve arbitral decisions by women, none involved a full reinstatement to the workplace. Again, a small sample precludes any meaningful conclusions.

Eighty-one arbitral decisions were rendered by men ranging from aged 30–70+ years, seven decisions were made by men of unknown age and only one decision was rendered by a man under 40 years of age. Collectively and by bracket, exactly 50% of decisions rendered by those age 40–49, 60–69 and 70+ years of age (6, 12 and 6, respectively) involved discharge. For males overall, discharge resulted in nearly 41% (36) of instances. Given the relatively even distribution of discharges versus other outcomes, it does not appear that arbitrators’ ages play a significant role in their decision-making. Indeed, all brackets 40–49 through 70+ made one or two decisions to fully reinstate a Grievant or issue a warning, reprimand or last –chance agreement.

Table 4: Arbitrator’s Years of Experience and Type of Discipline/Outcome

<table>
<thead>
<tr>
<th>Years of Experience</th>
<th>Discharge</th>
<th>Suspension</th>
<th>Reinstated Without Back Pay</th>
<th>Reinstated With Partial Pay</th>
<th>Transfer or Demote</th>
<th>Warning, Reprimand or Last Chance</th>
<th>Fully Restored to Workplace</th>
</tr>
</thead>
<tbody>
<tr>
<td>5–9</td>
<td>5</td>
<td>2</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>10–14</td>
<td>8</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>2</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>15–19</td>
<td>5</td>
<td>4</td>
<td>4</td>
<td></td>
<td></td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>20–24</td>
<td>8</td>
<td></td>
<td>1</td>
<td>1</td>
<td></td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>25–29</td>
<td>1</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>30+</td>
<td>3</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td></td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>?</td>
<td>11</td>
<td>9</td>
<td>7</td>
<td>4</td>
<td>1</td>
<td>8</td>
<td>2</td>
</tr>
</tbody>
</table>

Table 4 presents the arbitrators’ years of arbitration experience and outcome. Where possible, years of experience was calculated or estimated from biographical summaries. However, this data could not be gathered for all arbitrators. Where determinable, no arbitrator in the
sample had less than five years arbitral experience. Somewhat surprisingly, whereas only three arbitral decisions were rendered by arbitrators with 25–29 years of experience, seven were rendered by those with 30+ years of experience. Of course, some cases included multiple outcomes, for example, reinstatement with transfer.

Among those instances (58) where arbitrators’ experience could be discerned, a plurality (40) was rendered by those with 10–24 years experience. However, in 42 instances (42%) the arbitrators’ experience is unknown. Among instances where experience is known, discharges were involved in 30 instances, respectively distributed as follows: 16.67% (5 instances) in the 5–9 years bracket, 26.67% (8 instances) in 10–14 years the bracket, 16.67% (5 instances) in the 15–19 years bracket, 26.67% (8 instances) in the 20–24 years bracket, 3.33% (1 instance) in the 25–29 years bracket and 10% (3 instances) in the 30+ years bracket. Therefore, there does not appear to be any particular bias for discharge among any particular bracket. Although the distribution appears slightly weaker in relation to those with 25 or more years experience, those with 25–29 years experience represent only three decisions in total and those with 30+ years experience represent only seven decisions in total. Except for the 15–19 years bracket, which has eight decisions within the “suspension” and “reinstate without back pay” categories combined, all other categories have just one or two decisions at most in any given bracket, excluding the category for unknown years of experience.


<table>
<thead>
<tr>
<th>Years</th>
<th>Discipline Upheld</th>
<th>Discipline Reduced</th>
<th>Discipline Overturned</th>
</tr>
</thead>
<tbody>
<tr>
<td>1990–1994</td>
<td>31</td>
<td>16</td>
<td>3</td>
</tr>
<tr>
<td>1995–2000</td>
<td>25</td>
<td>24</td>
<td>8</td>
</tr>
<tr>
<td>1990–2000</td>
<td>56</td>
<td>40</td>
<td>11</td>
</tr>
</tbody>
</table>

Table 5 presents the overall results, whether discipline was upheld, reduced or overturned, in discipline-related cases from 1990–1994, 1995–2000 and 1990–2000. For the entire period, 1990–2000, discipline was upheld in 52.34% of cases, reduced in 37.38% and overturned in
10.28%. However, in the earlier period, 1990–1994, discipline was upheld in 62% of cases, reduced in 32% and overturned in 6%. In the later period, 1995–2000, discipline was upheld in 43.86% of cases, reduced in 42.1% and overturned in 14.04%.

Although general awareness of sexual harassment in the workplace has grown over the past decade, it is noteworthy that, on a percentage basis, discipline reductions and reversals increased in the later six years of the study period versus the earlier period, 1990–1994. Arguably, the media coverage of the Paula Jones and Monica Lewinsky matters concerning former-President Clinton have played some role in bringing sexual harassment issues into the general public discussion. However, this awareness has not seemingly been translated into stricter penalties by arbitrators. Indeed, a question for further research may be whether stricter sexual harassment policies, for example, zero-tolerance, or stricter policy interpretations by employers may be viewed as overly harsh by arbitrators. Are some acts and circumstances viewed as terminable by employers but as less serious by arbitrators? Regardless, full restoration to the workplace, as indicated by discipline being overturned, resulted in only very few instances. Without question, sexual harassment is generally held in dim view by arbitrators and worthy of some discipline, including termination when appropriate.

VI. CONCLUSION

This research suggests that labor arbitrators are in general agreement with the courts and the EEOC concerning the basic definitions of sexual harassment. However, arbitrators are in the unique position of reviewing most cases from the perspective of the alleged harasser rather than the victim. Once the harassing activity has been proven to the arbitrator, the type of harassing behavior becomes an important issue in determining whether the discipline assessed by management is appropriate. However, the quantum of proof required by arbitrators varies. Although there is a clear preference for a preponderance of the evidence standard, as compared to clear and convincing evidence or evidence beyond a reasonable doubt, in more than one-third of the cases reviewed, it is unclear what standard was used. When compared to physical contact, if the harassing activity is verbal or written in nature, lesser discipline under a progressive discipline system is more likely to be recognized by arbitrators as the appropriate response. However, if the harassing activity involves physical contact between the victim and the harasser, more severe
discipline, including discharge, is more likely to be recognized as being appropriate by the arbitrators.

In sum, the volume of reported arbitration cases related to sexual harassment would appear to show that employers are serious about addressing this behavior in the workplace, including discharging those culpable of such wrongdoing. In recent years, arbitrators are generally willing to support employers in these decisions provided that the employers meet the evidentiary burden and that the conduct in question is serious in nature, especially in incidents involving physical contact.
### Appendix A

<table>
<thead>
<tr>
<th>Preponderance of Evidence</th>
<th>Clear and Convincing</th>
<th>Beyond Reasonable Doubt</th>
<th>Unclear Proof Standard</th>
</tr>
</thead>
</table>

http://scholarlycommons.law.hofstra.edu/hlelj/vol20/iss2/2
<table>
<thead>
<tr>
<th>Preponderance of Evidence</th>
<th>Clear and Convincing</th>
<th>Beyond Reasonable Doubt</th>
<th>Unclear Proof Standard</th>
</tr>
</thead>
</table>
## Appendix B

### Hostile Environment-Related Cases

<table>
<thead>
<tr>
<th>Discipline Upheld</th>
<th>Discipline Reduced</th>
<th>Discipline Reversed</th>
</tr>
</thead>
</table>
### Hostile Environment-Related Cases

<table>
<thead>
<tr>
<th>Discipline Upheld</th>
<th>Discipline Reduced</th>
<th>Discipline Reversed</th>
</tr>
</thead>
<tbody>
<tr>
<td>113 Lab. Arb. Rep. (BNA) 129</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

### Physical Act-Related Cases

<table>
<thead>
<tr>
<th>Discipline Upheld</th>
<th>Discipline Reduced</th>
<th>Discipline Reversed</th>
</tr>
</thead>
<tbody>
<tr>
<td>104 Lab. Arb. Rep. (BNA) 691</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Appendix C
## Appendix D

### Proposition-Related Cases

<table>
<thead>
<tr>
<th>Discipline Upheld</th>
<th>Discipline Reduced</th>
<th>Discipline Reversed</th>
</tr>
</thead>
<tbody>
<tr>
<td>100 Lab. Arb. Rep. (BNA) 48</td>
<td></td>
<td></td>
</tr>
<tr>
<td>103 Lab. Arb. Rep. (BNA) 609</td>
<td></td>
<td></td>
</tr>
<tr>
<td>104 Lab. Arb. Rep. (BNA) 779</td>
<td></td>
<td></td>
</tr>
<tr>
<td>112 Lab. Arb. Rep. (BNA) 120</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

## Appendix E

### Letter-Related Cases

<table>
<thead>
<tr>
<th>Discipline Upheld</th>
<th>Discipline Reduced</th>
</tr>
</thead>
<tbody>
<tr>
<td>102 Lab. Arb. Rep. (BNA) 161 L</td>
<td></td>
</tr>
<tr>
<td>104 Lab. Arb. Rep. (BNA) 1196 L</td>
<td></td>
</tr>
<tr>
<td>113 Lab. Arb. Rep. (BNA) 833 L</td>
<td></td>
</tr>
</tbody>
</table>
### Appendix F

<table>
<thead>
<tr>
<th>Telephone-Related Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Discipline Reduced</td>
</tr>
<tr>
<td>107 Lab. Arb. Rep. (BNA) 78</td>
</tr>
</tbody>
</table>

### Appendix G

<table>
<thead>
<tr>
<th>Off Work Site-Related Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Discipline Upheld</td>
</tr>
<tr>
<td>---------------------</td>
</tr>
</tbody>
</table>