SEXUAL HARASSMENT IN THE WORKPLACE: CONFLICTS EMPLOYERS MAY FACE BETWEEN TITLE VII'S REASONABLE WOMAN STANDARD AND ARBITRATION PRINCIPLES

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This Article is dedicated to my husband, Darryl, for his unwavering support for all of my goals and achievements, and to my two children, Brittney and Michael, for always helping me keep life's trials and successes in proper perspective.

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INTRODUCTION

The 1991 Senate confirmation hearings for Supreme Court Justice Clarence Thomas brought the issue of sexual harassment to the forefront of American consciousness. For the thousands of women who are subjected to it on a daily basis,[1] however, sexual harassment is not a new phenomenon. The publicity which surrounded Thomas' confirmation caused many employers to recognize the need to sensitize employees about sexual harassment. In their attempts to eradicate sexual harassment from their workplaces and limit their liability to victims of harassment, employers primarily focused on educating their workers regarding what conduct constitutes sexual harassment, and informing employees as to what internal channels should be used to report harassment incidents.

Many employers, however, have not taken the steps necessary to ensure that they are not faced with conflicting obligations to the victims of harassment under Title VII of the Civil Rights Act of 1964 ("Title VII")[2] and to the alleged harassers under the terms of their collective bargaining agreements. Such conflicts arise because courts and arbitrators analyze sexual harassment cases differently. There is a growing trend within the courts to analyze certain Title VII sexual harassment claims and the effectiveness of an employer's remedy once the employer knows of the harassment from the perspective of a reasonable *woman*. In contrast, arbitrators reviewing a harasser's discharge tend to give little weight to the effect the grievant's conduct had — or will continue to have — on either the mythical reasonable woman, or the actual female complainant. Instead, the arbitrator's focus is on the harasser, the employer, and the terms of the collective bargaining agreement. Further, under the courts' reasonable woman standard, conduct may be classified as sexual harassment even when harassers do not realize their conduct is harassing. This is in direct contrast with arbitral standards, where the intent of the harasser is likely to be a key factor in the arbitrator's determination of whether the employer had just cause to terminate the harasser.

At least one federal appellate court has expanded the steps which an em-

1. The author recognizes that men as well as women can be victims of sexual harassment. Surveys indicate, however, that a higher percentage of female employees are subjected to sexual harassment than their male counterparts. *See* William A. Nowlin, *Sexual Harassment in the Workplace: How Arbitrators Rule*, 43 ARB. J. 31, 33 (Dec. 1988). In addition, this Article focuses in part on the impact of a reasonable *woman* standard on employers who are parties to collective bargaining agreements. For these reasons, the author refers to harassers as men, and their victims as women.

2. 42 U.S.C. § 2000e (1988).

ployer must take to eradicate sexual harassment to include a duty to either transfer or terminate a harasser when his mere presence would create a hostile work environment for a reasonable woman.[3] However, the collective bargaining agreement which covers the harasser may limit an employer's ability to comply with this directive without being held liable to the grievant in an arbitral proceeding. Thus, to satisfy Title VII law, an employer must focus on the *victim's* perspective in order to determine both whether sexual harassment exists, and whether the employer's remedy completely eradicates the harassment. Yet in order to ensure that its choice of remedy for the harassment does not violate the *harasser's* rights, the employer must look to its collective bargaining agreement and arbitral principles traditionally used to interpret those agreements.

This Article addresses the potential conflicts which may arise because of the difference in focus between courts which evaluate complaints brought by victims of harassment and arbitrators who evaluate complaints brought on behalf of the alleged perpetrators of harassment. Part I gives a brief overview of sexual harassment law under Title VII and discusses the differences between a reasonable person standard and a reasonable woman standard. Part II focuses on employers and discusses the principles under which an employer may be held liable for the harassment of an employee. Part II also examines the requirements which are imposed on employers by Title VII once they know about harassment occurring in their workplaces. Part III then discusses how some of the principles that arbitrators use can result in employers being faced with conflicting obligations. Part IV concludes by offering recommendations to enable employers to avoid potential conflicts.

I
THE LAW OF SEXUAL HARASSMENT

A. Sexual Harassment Defined

In Title VII of the Civil Rights Act of 1964, Congress declared it an unlawful employment practice for an employer to discriminate against any individual on the basis of his or her sex.[4] Although Title VII does not expressly state that sexual harassment constitutes discrimination on the basis of sex, both judicial decisions and the Equal Employment Opportunity Commission's (EEOC) Guidelines[5] declare such conduct to be within Title VII's prohibitions. Federal law recognizes two types of sexual harassment: "quid pro quo" harassment and "hostile work environment" harassment.[6] Quid pro

3. Ellison v. Brady, 924 F.2d 872, 883 & n.19 (9th Cir. 1991).

4. 42 U.S.C. § 2000e-2(a)(1) (1988).

5. 29 C.F.R. § 1604.11 (1992). Although the Equal Employment Opportunity Commission (EEOC) Guidelines are "not controlling upon the courts by reason of their authority, [they] do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986).

6. 29 C.F.R. § 1604.11(a)(2) (1992); *see also Vinson*, 477 U.S. at 65.

quo harassment is the grant or denial of an employment benefit based on sexual favors.[7] Hostile work environment harassment is based on sexual misconduct, irrespective of whether it is directly linked to the grant or denial of an economic benefit.[8] This type of harassment deprives an employee of her right to have her workplace free from discriminatory intimidation, ridicule, or insult which is so severe as to create a hostile workplace.

Title VII does not prohibit all conduct of a sexual nature in the workplace. Under Title VII, only *unwelcome* sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature constitute sexual harassment. Further, such conduct must be (1) explicitly or impliedly a term or condition of employment, (2) used as the basis for employment decisions affecting the harassed individual, or (3) have the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.[9] A wide variety of conduct may be considered sexual harassment, including, unwanted sexual advances (encompassing situations which began as reciprocal attractions, but cease to be reciprocal); reprisals or threats after a negative response to sexual advances; displaying sexually suggestive objects, pictures, cartoons, or posters; leering or sexual gestures; verbal abuse of a sexual nature; sexually explicit jokes or comments; sexually suggestive letters, notes, or invitations; and physical conduct such as assault, rape, attempted rape, impeding or blocking movements, and touching.[10]

B. Hostile Work Environment Sexual Harassment

To prove a hostile work environment claim against her employer, a complainant must show that (1) the conduct in question was unwelcome; (2) the harassment was based on sex; (3) the harassment was sufficiently severe or pervasive to create an abusive working environment; and (4) under agency law, the employer can be held liable for the harassing acts of its employee.[11] She does *not* have to show that she suffered an economic or tangible job detriment as a result of the harassment.[12] Conduct will be considered unwelcome when the complainant does not solicit or incite it, and considers the conduct undesirable or offensive.[13] A complainant can establish that harassment was based on sex simply by showing that her "gender is a substantial factor in the

7. 29 C.F.R. § 1604.11(a)(2).

8. 29 C.F.R. § 1604.11(a)(3) (1992).

9. 29 C.F.R. § 1604.11(a) (1992); *see also EEOC: Policy Guidance on Sexual Harassment* (BNA), DAILY LABOR REP. No. 645, at 19 (Mar. 19, 1990) [hereinafter *Policy Guidance*].

10. MARILYN I. PEARMAN & MARY T. LEBRATO, SEXUAL HARASSMENT IN EMPLOYMENT INVESTIGATOR'S GUIDEBOOK 12 (State Women's Program of the California State Personnel Board, Nov. 1984) [hereinafter INVESTIGATOR'S GUIDEBOOK].

11. Swentek v. USAIR, Inc., 830 F.2d 552, 557 (4th Cir. 1987) (citing Henson v. City of Dundee, 682 F.2d 897, 903-04 (11th Cir. 1982); Katz v. Dole, 709 F.2d 251, 254 (4th Cir. 1983)); *see also* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 72 (1986).

12. *Vinson*, 477 U.S. at 64.

13. *Henson*, 682 F.2d at 903; *see also Policy Guidance, supra* note 9, at 23.

discrimination, and that if the [complainant] had been a man she would not have been treated in the same manner."[14]

The required showing of severity or seriousness of the harassing conduct varies inversely with the pervasiveness or frequency of that conduct.[15] One exception to the requirement of showing a pattern of conduct is when there is an unwelcome, intentional touching of a woman's intimate body areas. In this instance, the EEOC has stated that it will presume this action is sufficiently offensive to alter the conditions of the complainant's working environment, thereby constituting a violation of Title VII. The employer then bears the burden of demonstrating that this unwelcome conduct was not sufficiently severe to create a hostile work environment.[16]

There is no strict liability for hostile work environment claims under Title VII; thus, employers are not automatically liable for the harassing acts of their employees.[17] Rather, there must be some basis under agency principles of law for holding the employer liable. If an employer had either actual or constructive knowledge of the harassment, but failed to take immediate and appropriate corrective action, the employer will be held directly liable.[18] Courts will consider as highly relevant an employer's knowledge that a male worker has previously harassed other female employees in their determination of whether the employer should have anticipated the complainant would be a victim of harassment.[19] Employers will also be held liable as principals for their employees' acts if the employer authorizes or ratifies the acts or creates an appearance that the acts are authorized.[20]

C. Standards for Determining Whether a Work Environment is Hostile

1. Traditional View: Reasonable Person Standard

Both the EEOC Guidelines and numerous court decisions prior to 1987 state that when one is determining whether sexual harassment is sufficiently

14. Andrews v. City of Philadelphia, 895 F.2d 1469, 1485 (3rd Cir. 1990) (citations omitted).

15. Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991); *see also* King v. Board of Regents, 898 F.2d 533, 537 (7th Cir. 1990); *Andrews*, 895 F.2d at 1484; Carrero v. New York City Housing Auth., 890 F.2d 569, 578 (2d Cir. 1989).

16. *Policy Guidance, supra* note 9, at 28-29.

17. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 72 (1986); *see also Policy Guidance, supra* note 9, at 31-32. This is in sharp contrast to a quid pro quo case, where an employer is strictly liable for a *supervisor's* harassment. *See* Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311, 1316 (11th Cir. 1989); *Policy Guidance, supra* note 9, at 32. The reason for the distinction is that in a quid pro quo case, the supervisor relies upon the apparent or actual authority furnished him by his employer to extort sexual consideration from an employee. *Steele*, 867 F.2d at 1316.

18. *Policy Guidance, supra* note 9, at 33; *see also* Hunter v. Allis-Chalmers Corp., 797 F.2d 1417, 1422 (7th Cir. 1986) ("[A]n employer who has reason to know that one of his employees is being harassed in the workplace by others on grounds of race, sex, religion, or national origin, and does nothing about it, is blameworthy.").

19. Paroline v. Unisys Corp., 879 F.2d 100, 107 (4th Cir. 1989).

20. Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1529 (M.D. Fla. 1991).

severe or pervasive to create a hostile environment, the harasser's conduct should be evaluated from the objective standpoint of a reasonable *person* in the victim's position.[21] Under this traditional view, if the challenged conduct would not substantially affect the work environment of a reasonable person in a similar environment under similar circumstances, no violation should be found.[22] The EEOC further states that whether or not the challenged conduct is of a sexual nature should also be determined from the perspective of a reasonable person. If a reasonable person would not find the conduct sexual in nature, there is no violation.[23] The EEOC notes that the reasonable person standard should consider the victim's perspective and not stereotyped notions of acceptable behavior.[24]

To determine whether or not an environment is hostile, the EEOC Guidelines state that the trier of fact must look at the record as a whole and at the totality of the circumstances.[25] Since hostile work environment harassment encompasses a variety of behaviors, many factors may affect a judge's determination of whether the environment was sufficiently hostile. Such factors include: (1) whether the conduct was verbal and/or physical; (2) the frequency of the conduct; (3) whether the conduct was hostile and patently offensive; (4) whether the alleged harasser was a co-worker or a supervisor; (5) whether others joined in perpetrating the harassment; and (6) whether the harassment was directed at more than one woman.[26] No one factor alone determines whether particular conduct violates Title VII.[27]

2. *Modern Trend: Reasonable Woman Standard*

At least four Circuits — the Third, Sixth, Eighth, and Ninth — as well as one district court in the Eleventh Circuit, have held that the standard which should be used to evaluate hostile work environment claims is not the perspective of a reasonable person, but rather that of a reasonable woman.[28] In support of the reasonable woman standard, each of the courts expressed the view that certain conduct may be offensive to women, even though many men would find the same conduct acceptable.[29]

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21. *Policy Guidance, supra* note 9, at 27.

22. *Id.* at 28.

23. *Id.* at 27-28.

24. *Id.* at 28.

25. 29 C.F.R. § 1604.11(b) (1992); *see also* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 69 (1986).

26. *Policy Guidance, supra* note 9, at 27.

27. *Id.* at 29.

28. *See* Burns v. McGregor Elec. Indus., Inc., 1993 U.S. App. LEXIS 6336, at 5 n.3; Ellison v. Brady, 924 F.2d 872, 879 (9th Cir. 1991); Andrews v. City of Philadelphia, 895 F.2d 1469, 1486 (3rd Cir. 1990); Yates v. Avco Corp., 819 F.2d 630, 637 (6th Cir. 1987); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1522 (M.D. Fla. 1991).

29. *Ellison*, 924 F.2d at 878 ("Conduct which many men consider unobjectionable may offend many women."); *see Andrews*, 895 F.2d at 1486 ("Although men may find these actions [obscene language and pornography in the workplace] harmless and innocent, it is highly possible that women may feel otherwise."); *Yates*, 819 F.2d at 630 n.2 ("We acknowledge that men

In *Ellison v. Brady*,[30] the Ninth Circuit maintained that were it only to examine whether or not a reasonable person would perceive conduct as harassing, it would run the risk of reinforcing the prevailing level of discrimination, thereby allowing harassers to continue their conduct merely because a particular discriminatory practice was common. In the Ninth Circuit's view, this approach would leave victims of harassment without a remedy.[31] The court therefore concluded that a reasonable woman standard was warranted "primarily because [it] believe[d] that a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women."[32] Because the discussion of the reasonable woman standard is more extensive in *Ellison* than in the other cases cited earlier, and due to the substantial reliance on *Ellison* in this Article, its facts are presented in detail below.

Kerry Ellison, a female Internal Revenue Service (IRS) employee in San Mateo, California, brought a Title VII sexual harassment claim against the IRS. Ellison alleged that the constant demands of Gray, a co-worker, to have a relationship with her despite her repeated rejections created a hostile work environment for her. Some of Gray's requests were transmitted in the form of bizarre love letters, one of which stated in part:

> I know that you are worth knowing with or without sex. . . . Leaving aside the hassles and disasters of recent weeks. I have enjoyed you so much over these past few months. Watching you. Experiencing you from O so far away. Admiring your style and elan. . . . Don't you think it odd that two people who have never even talked together, alone, are striking off such intense sparks . . . I will [write] another letter in the near future.[33]

Upon Ellison's complaint to her supervisor, Gray was ordered to leave Ellison alone and was subsequently transferred to an IRS office in San Francisco; however, Gray's union filed grievances on his behalf relating to the transfer. The IRS and the union settled the grievances in Gray's favor, allowing him to return to San Mateo following a six-month separation with the proviso that Gray promise not to bother Ellison further. When Ellison learned of Gray's impending return, she filed a formal complaint with the IRS alleging sexual harassment. She also obtained permission to transfer temporarily to San Francisco.

The IRS rejected Ellison's complaint because it believed that Ellison had not described a *pattern* of sexual harassment which was covered by EEOC

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and women are vulnerable in different ways and offended by different behavior."); *Robinson*, 760 F. Supp. at 1507 ("Men and women perceive the existence of sexual harassment differently.").

30. 924 F.2d at 878.

31. *Id.*

32. *Id.* at 879.

33. *Id.* at 874.

regulations. The EEOC affirmed the IRS' decision on different grounds, stating that the IRS had taken adequate action to prevent a repetition of Gray's conduct. Ellison then filed suit in federal district court. The court granted the government's motion for summary judgment finding that Ellison had failed to state a prima facie case of sexual harassment due to a hostile working environment. Instead, the district court judge believed that a reasonable *person* would find Gray's conduct to be "isolated and genuinely trivial"[34] — an opinion not shared by Kerry Ellison or her female supervisor.

The Ninth Circuit reversed, stating that it could not say as a matter of law that Ellison's reaction to Gray's conduct was idiosyncratic or hypersensitive, because a reasonable *woman* could have had a similar reaction. Noting that there is a broad range of viewpoints among women as a group, and desiring to shield employers from having to accommodate the "idiosyncratic concerns of the rare hyper-sensitive employee," the court held that "a female plaintiff states a prima facie case of hostile environment sexual harassment when she alleges conduct which a reasonable *woman* would consider sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment."[35] In the court's view, under the newly adopted reasonable woman standard, Ellison had met her burden of alleging a prima facie case of hostile work environment sexual harassment. The *Ellison* majority stated that the reasonable woman standard does not establish a *higher* level of protection for women than men. Instead, its gender-conscious examination of sexual harassment will enable women to participate in the workplace on an equal footing with men.[36]

3. *The Difference Between the Two Standards*

The use of a reasonable woman standard is more than just a change in terminology. Rather, it reflects a growing willingness by courts adjudicating a female complainant's Title VII hostile work environment claim to focus on the actual life experiences of *women only*, rather than the actual life experiences of men and women combined. As noted by the *Ellison* majority, women are disproportionately victims of rape and sexual assault, and thus have a stronger incentive to be concerned with sexual behavior directed at them.[37]

An indication of the different perspectives between men and women can be gleaned from a 1981 report prepared by the Merit Systems Protection Board at the request of Congress (*MSPB Report*).[38] Based on an extensive

34. *Id.* at 876.

35. *Id.* (emphasis added).

36. *Id.*

37. *Id.* at 879 (citing UNITED STATES DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1988 299, tbl. 3.19 (1989)).

38. MSPB REPORT, SEXUAL HARASSMENT IN THE FEDERAL WORKPLACE: IS IT A PROBLEM? (1981), *cited in* FRANK ELKOURI & EDNA ELKOURI, HOW ARBITRATION WORKS 777-78 (4th ed. 1985).

survey of literature and case law on the subject of sexual harassment, the MSPB survey indicated that men and women generally agreed that the following behaviors, ranked in order of agreement, constitute sexual harassment: (1) letters, phone calls, or materials of a sexual nature; (2) pressure for sexual favors; (3) touching, leaning over, cornering, or pinching; and (considered less severe by the employees surveyed) (4) pressure for dates.[39] However, with regard to sexually suggestive looks or gestures, or sexual teasing, jokes, remarks, or questions, the survey indicated that men were *less* likely than women to think that these types of conduct also constituted sexual harassment, particularly if done by a co-worker.[40] Ironically, according to the *MSPB Report*, these are the most common forms of sexual harassment.[41]

Similarly, in *Robinson v. Jacksonville Shipyards, Inc.*,[42] the court found the testimony of two experts persuasive in deciding that women and men perceive sexual conduct in the workplace differently. As a result, the court concluded that under a reasonable woman standard, the complainant had established the existence of a hostile work environment. The first expert, Dr. Susan Fiske, testified that the sexual ambience of a work environment imposes harsher effects on women than on men. Dr. Fiske stated that as a general principle:

> [W]hen sex comes into the workplace, women are profoundly affected . . . in their job performance and in their ability to do their jobs without being bothered by it. The effects encompass emotional upset, reduced job satisfaction, the deterrence of women from seeking jobs or promotions, and an increase of women quitting jobs, getting transferred, or being fired because of the sexualization of the workplace. By contrast, the effect of the sexualization of the workplace is vanishingly small for men.[43]

Dr. Fiske further testified that research reveals that when men and women were questioned as to what their response would be to a sexual advance in the workplace, two-thirds of the men stated that they would be flattered. In sharp contrast, two-thirds of the women questioned said that they would feel insulted. The district court declared that Dr. Fiske's entire testimony provided a sound, credible theoretical framework for concluding that a sexualized working environment is abusive to a woman because of her sex.[44]

The second expert in *Robinson*, Ms. K.C. Wagner, testified that women respond to sexually harassing behavior in a variety of reasonable ways. The coping strategy which a woman selects depends on her personal style, the type

39. *Id.* at 777-78.
40. *Id.* at 778.
41. *Id.*
42. 760 F. Supp. 1486 (M.D. Fla. 1991).
43. *Id.* at 1505 (testimony of Dr. Susan Fiske) (transcript citations omitted).
44. *Id.*

of incident, and her expectation that the situation is resolvable.[45] Of the five coping strategies noted,[46] the formal complaint is the most rare because the victim of harassment fears an escalation of the problem, retaliation from the harasser, embarrassment in the process of reporting, and blame from the employer.[47] According to Ms. Wagner, the dearth of reported sexual harassment incidents should not be viewed as an absence of such incidents from the workplace. Furthermore, an effective policy for controlling sexual harassment cannot rely solely on the reporting of complaints from victims of harassment.[48] This testimony provided the court with an explanation for the variety of responses to harassing behavior, and also indicated why some women may not consider conduct to be sexual harassment, even though it would create a hostile work environment for most women.[49] Both *Ellison* and *Robinson* demonstrate the kinds of evidence which may be used as indicators of the differences in perception between a reasonable person standard and a reasonable woman standard in evaluating what types of conduct create a hostile work environment.

The change from a reasonable *person* standard to a reasonable *woman* standard had positive ramifications for Kerry Ellison. Under the reasonable *person* standard, Ellison did not have a case; under a reasonable *woman* standard, Ellison had stated sufficient facts to meet her burden of alleging a prima facie case of hostile work environment sexual harassment. Moreover, the court noted that the reasonable woman standard that it was adopting "classifies conduct as unlawful sexual harassment *even when harassers do not realize their conduct creates a hostile working environment.*"[50] Thus, even well-intentioned compliments could form the basis of a hostile work environment cause of action under Title VII if a reasonable woman would consider the comments sufficiently severe or pervasive as to alter a condition of her employment and create an abusive working environment.[51]

It is clear that the *Ellison* majority intended its reasonable woman standard to be different from the reasonable person standard previously used in Title VII hostile work environment sexual harassment cases. As the dissent recognized, the majority adopted a different standard "on the assumption that men do not have the same sensibilities as women."[52] It appears that focusing

45. *Id.* at 1506.

46. According to Ms. Wagner, among the coping methods which women use are: (1) blocking out the event; (2) avoiding the workplace of the harasser; (3) telling the harasser to stop; (4) engaging in joking or other banter to defuse the situation; and (5) threatening to make or actually making an informal or formal complaint. *Id.*

47. *Id.*; *see also* Michael Marmo, *Arbitrating Sex Harassment Cases*, 35 ARB. J. 35, 37 (Mar. 1980) (noting that if the harassment incident lacks an independent witness, a woman will often remain silent because she believes her plight will only get worse if she complains to management).

48. *Robinson*, 760 F. Supp. at 1506.

49. *Id.* at 1507.

50. Ellison v. Brady, 924 F.2d 872, 880 (9th Cir. 1991) (emphasis added).

51. *Id.*

52. *Id.* at 884.

on the perspective of a reasonable woman in the complainant's position should make it easier for women to successfully bring Title VII sexual harassment claims based on a hostile work environment, because it requires a judge to focus solely on how women would perceive the alleged harasser's conduct. What should be of great import to female employees is that the reasonable woman standard excludes their male counterparts' perceptions as to whether certain conduct constitutes sexual harassment.

II
EMPLOYERS' OBLIGATIONS UNDER TITLE VII

A. The Traditional View

To avoid liability under Title VII for hostile work environment sexual harassment, the employer must demonstrate that once it had actual or constructive knowledge of the harassment, it fully investigated the complainant's charge and took immediate and appropriate corrective action.[53] What constitutes immediate and appropriate corrective action is to be determined on a case-by-case basis, but in general, the employer's remedy must be "reasonably calculated to end the harassment[,]" while making the victim whole by restoring lost employment opportunities or benefits.[54] Court decisions also state that the employer's remedy should reflect the severity of the harassing conduct and may be assessed proportionately to the seriousness of the offense.[55]

The EEOC Guidelines encourage an employer to "take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under [T]itle VII, and developing methods to sensitize all concerned."[56] According to the Guidelines, an effective preventive program includes an explicit policy against sexual harassment which is clearly and regularly communicated to employees and effectively implemented.[57] The employer should have a procedure for resolving sexual harassment complaints which is designed to encourage victims to come forward, and should not require a victim to complain first to the offending supervisor.[58] Further, to the extent possible, the procedure should ensure confidentiality and provide effective remedies, including protection of victims and witnesses against retaliation.[59]

53. *Policy Guidance, supra* note 9, at 33-34; *see also* Ellison v. Brady, 924 F.2d 872, 881 (9th Cir. 1991); Katz v. Dole, 709 F.2d 251, 256 (4th Cir. 1983).

54. *Ellison*, 924 F.2d at 882; *Katz*, 709 F.2d at 256; *Policy Guidance, supra* note 9, at 38; *see also* Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311, 1316 (11th Cir. 1989) (stating that whether the sexual harassment ended after remedial action was taken is of special importance).

55. *See Ellison*, 924 F.2d at 882; Waltman v. International Paper Co., 875 F.2d 468, 478 (5th Cir. 1989); Dornhecker v. Malibu Grand Prix Corp., 828 F.2d 307, 309 (5th Cir. 1987); *see also Policy Guidance, supra* note 9, at 38.

56. 29 C.F.R. § 1604.11(f) (1992).

57. *Policy Guidance, supra* note 9, at 37.

58. *Id.*

59. *Id.*

In general, an employer's prompt and thorough investigation of a sexual harassment allegation, followed by disciplinary action against the offender and communication to the victim of both the action taken and assurances that the harassment would stop, has been considered sufficient remedial conduct.[60] In contrast, the mere existence of a grievance procedure and a policy against discrimination has been considered insufficient to insulate an employer from liability when the employer failed to adequately investigate a charge of sexual harassment, or required the victim to report the misconduct to a supervisor guilty of harassment.[61] Similarly, an employer's failure to communicate to employees and supervisors information about the nature and scope of sexually harassing behavior, a pattern of unsympathetic responses to sexual harassment complaints, or an employer's failure to impose harsher disciplinary measures once it is clear that mere oral warnings are insufficient to stop the harasser's conduct are likely to result in the employer being held liable for the harassing acts of its employees.[62]

B. The Ninth Circuit's View

In addition to adopting the reasonable woman standard for evaluating hostile work environment sexual harassment claims, the Ninth Circuit also clarified what constitutes "appropriate corrective action" by stating that the effectiveness of an employer's *response* to a harassment complaint must also be evaluated from a reasonable woman's perspective. In *Ellison*, the court stated that the effectiveness of an employer's remedy will depend on its ability to stop the harasser from engaging in further misconduct; however, in evaluating the adequacy of the remedy, the court may also consider the remedy's ability to persuade *other potential harassers* to refrain from unlawful conduct.[63] The part of the court's decision which may prove most troublesome for an employer is the court's directive that if the mere presence of the harasser would create a hostile work environment from the perspective of a reasonable woman, the employer will have to schedule the harasser to work at another location or during different hours, or if this is not possible, terminate the harasser.[64] The court stated that were it not to require the employer to remove a harasser from the workplace when his mere presence created a hostile work environment, then the employer would not have fully remedied the harassment.[65]

60. *See, e.g.*, Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311, 1316 (11th Cir. 1989); Swentek v. USAIR, Inc., 830 F.2d 552 (4th Cir. 1987); Barrett v. Omaha Nat'l Bank, 726 F.2d 424 (8th Cir. 1984).

61. *See, e.g.*, Yates v. Avco Corp., 819 F.2d 630 (6th Cir. 1987); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991); Sanchez v. City of Miami Beach, 720 F. Supp. 974 (S.D. Fla. 1989).

62. *See* Intlekofer v. Turnage, 973 F.2d 773 (9th Cir. 1992); Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991); *Robinson*, 760 F. Supp. at 1518-19.

63. *Ellison*, 942 F.2d at 882.

64. *Id.* at 883 & n.19.

65. *Id.*

The court also declared that it is *not* proper to inquire what a reasonable employer would do to remedy the sexual harassment. While employers are obligated by law to provide a workplace free from sexual harassment, they may be reluctant, for business reasons, to punish high ranking and highly productive employees who are guilty of sexual harassment.[66] The court further explained that asking what a reasonable employer would do runs the risk of reinforcing any prevailing level of discrimination by employers and fails to focus on the best way to eliminate sexual harassment from the workplace.[67] Thus, in a Title VII hostile work environment case, the employer cannot defend the adequacy of its response by providing evidence that *other* employers faced with similar situations have used the same remedy.

Applying these standards to Ellison's claim, the court held that since the IRS did not express strong disapproval of Gray's conduct, reprimand him, put him on probation, or inform him that repeated harassment would result in suspension or termination, it could not say that the IRS' response was reasonable.[68] The court asserted that Title VII demands more than an employer's mere request to the harasser to refrain from discriminatory conduct. Additionally, the court pronounced that it was unclear whether Gray's six-month cooling off period in another work location was either reasonably calculated to end the harassment or assessed in proportion to the seriousness of Gray's conduct. Further, the IRS' failure to request either Ellison's input or inform her of the grievance proceedings before agreeing to let Gray return to San Francisco showed an insufficient concern for the victim's interest in avoiding a hostile work environment.[69]

With this one case, the Ninth Circuit drastically affected the evaluation of both hostile work environment sexual harassment claims and an employer's response to those claims.[70] The *Ellison* majority recognized the potential impact of their decision by stating that it hoped that over time, both men and women would learn what conduct offends reasonable members of the opposite sex, and thereby bridge the current gap in perception between the sexes.[71] Of special importance to employers is the Ninth Circuit's subsequent holding in *Intlekofer v. Turnage*,[72] which unanimously held that the standard announced in *Ellison v. Brady* did *not* create a new rule of law. Accordingly, *Ellison* applies retroactively to cases that were filed before its date of decision. In order to comply with Title VII as interpreted by courts which employ the

66. *Id.* at 882 n.17.
67. *Id.* at 882 n.18.
68. *Id.* at 882.
69. *Id.* at 883.
70. The Ninth Circuit includes Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Northern Mariana Islands, Oregon, and Washington. Courts in these areas adjudicating Title VII hostile work environment claims are bound by *Ellison*. Other states which also use the reasonable woman standard (e.g., states in the Third and Sixth Circuits) may also decide to look to *Ellison* for guidance.
71. *Ellison*, 924 F.2d at 881.
72. 973 F.2d 773, 777, 781, 785 (9th Cir. 1992).

reasonable woman standard, employers may now have to take steps to remedy a female employee's hostile work environment that no previous court expressly required. As a result, employers must ensure that the obligations imposed on them by law are compatible with those imposed on them by their collective bargaining agreements.

III
LIMITATIONS IMPOSED ON EMPLOYERS BY COLLECTIVE BARGAINING AGREEMENTS

Most Title VII hostile work environment suits against employers are brought by the *victims* of sexual harassment; however, it is the sexual *harasser* who typically seeks arbitration of his grievances challenging the discharge or other disciplinary action imposed by his employer for his alleged misconduct.[73] Accordingly, an employer may have to defend itself in two different tribunals for action it has taken with respect to the same incident of sexual harassment. The victim of the harassment may sue the employer in court because she believes the employer's action disciplining the harasser was inadequate to remedy her hostile work environment. The harasser may also file a grievance against the employer if he believes the disciplinary action imposed upon him violates the terms of the governing collective bargaining agreement. An employer may thus find itself liable to the complainant if it fails to remedy the harassment in accordance with the law as stated in decisions such as *Ellison v. Brady*,[74] or liable to the harasser if its response conflicts with the terms of the collective bargaining agreement, even if that response satisfies the employer's duties to the complainant.

Additionally, the focus of the two tribunals is entirely different. As discussed previously, when courts adjudicate a complainant's Title VII claims, they focus on the harassing conduct and the employer's response from the perspective of a reasonable woman in the complainant's position. In contrast, when arbitrators decide whether to uphold a harasser's grievances, they focus on the harasser, the employer, and the terms of the governing collective bargaining agreement, *giving little weight to the effect of the grievant's conduct on the complainant or on a reasonable woman in the complainant's position*. Numerous employers are parties to collective bargaining agreements which impose a "just cause" limitation on an employer's right to discharge or discipline

73. ELKOURI & ELKOURI, *supra* note 38, at 781; Jonathan S. Monat & Angel Gomez, *Decisional Standards Used by Arbitrators in Sexual Harassment Cases*, 37 LAB. L.J. 712, 715 (1986); *see also* Marcia L. Greenbaum & Bruce Fraser, *Sexual Harassment in the Workplace*, 36 ARB. J., Dec. 1981, at 30, 35 (stating that between 1965 and 1981, 20 of 24 arbitration cases involving allegations of sexual harassment were brought by unions on behalf of male grievants who had been disciplined for sexual harassment). Victims are probably less likely to file a grievance concerning sexual harassment incidents because of the availability of an alternative remedy under Title VII.

74. 924 F.2d 872 (9th Cir. 1991).

employees.[75] Even in the absence of such a provision, many arbitrators will imply a just cause limitation into the collective bargaining agreement.[76]

Arbitrators vary in their views regarding the nature of their role in reviewing disciplinary penalties imposed by employers.[77] Some believe that determining what penalty should be imposed is properly a function for management. According to this view, an arbitrator should hesitate to substitute her judgment and discretion where management has acted in good faith, upon a fair investigation, and has fixed a penalty not inconsistent with that imposed in other like cases.[78] Other arbitrators state that they should not substitute their judgment for that of management unless they find the penalty is excessive, unreasonable, or an abuse of managerial discretion.[79] Still others believe that their role is more expansive, allowing them to determine whether the grievant was guilty of misconduct, and whether discharge was the proper penalty considering the habits and customs of industrial life and the standards of justice and fair dealing in the community.[80]

Where either the collective bargaining agreement or the submission agreement expressly limits the arbitrator's review to a specific issue (e.g., whether just cause existed for the grievant's discharge), the arbitrator may conclude that she is precluded from reviewing the harshness of the penalty imposed by the employer.[81] However, many collective bargaining agreements give the arbitrator express authority to modify disciplinary actions found to be improper or too severe.[82] Moreover, even if the agreement is silent in this regard, some arbitrators believe that this right is " 'inherent in the arbitrator's power to discipline and in [the] authority to finally settle and adjust the dispute.' "[83] The fact that most arbitrators do, in fact, modify penalties found to be excessive demonstrates their general belief that they possess such authority.[84]

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75. A typical just cause provision may state: "No employee shall be disciplined or discharged except for just cause;" or "The Employer retains the right to discharge a permanent employee for just cause such as incompetence, unsatisfactory performance of duties, and unexcused absenteeism." CHARLES S. LACUGNA, AN INTRODUCTION TO LABOR ARBITRATION 179 (1988).

76. ELKOURI & ELKOURI, *supra* note 38, at 652.

77. *Id.* at 664.

78. *Id.* at 664-65.

79. *Id.* at 665.

80. *Id.* at 665-66.

81. MARLIN M. VOLZ & E. GOGGIN, 1985-89 CUMULATIVE SUPPLEMENT TO ELKOURI & ELKOURI, HOW ARBITRATION WORKS 176 (4th ed. 1991).

82. ELKOURI & ELKOURI, *supra* note 38, at 667. A typical clause may state, "In any case involving the imposition of discipline, the arbitrator shall not substitute his or her judgment for that of the Company to modify the discipline imposed in the absence of finding that such discipline was unjustified." *Agreement Between Hydraulic Units, Inc. and Int'l Union United Auto., Aerospace and Agric. Implement Workers of Am. and Local Union No. 509* § 5.6 (May 16, 1987 - May 11, 1990).

83. ELKOURI & ELKOURI, *supra* note 38, at 668 (citing Harry H. Platt, *The Arbitration Process in the Settlement of Labor Disputes*, 31 J. AM. JUD. SOC. 54, 58 (1947)).

84. *Id.* at 668 n.95.

The following is an overview of some of the key principles which arbitrators typically use to review disciplinary action that an employer has taken against an employee, and how use of these principles can result in the employer facing conflicting obligations to the victim of harassment and the harasser. Disciplinary action which results in discharge of the harasser is of special significance, because this action creates the greatest potential conflict — and greatest liability — for an employer.

A. Interpretation of the Collective Bargaining Agreement

In resolving a grievant's rights, the arbitrator's role is to interpret and apply the provisions of the collective bargaining agreement.[85] Arbitrators use the same principles as courts in interpreting contract language, with a goal of ascertaining and giving effect to the mutual intent of the parties as it existed at the time the agreement was made.[86] Although most collective bargaining agreements include anti-discrimination clauses prohibiting discrimination based on race, color, creed, sex, age, national origin, physical handicap, Vietnam veteran status, or union membership (or lack thereof), many make no express reference to sexual harassment.[87] Similarly, although many agreements and plant rules list offenses such as gross insubordination, dishonesty, and use of drugs as grounds for immediate discharge without prior progressive discipline, most fail to expressly include sexual harassment.[88] At least one arbitrator has concluded that this indicates sexual harassment is not "a high priority bargaining item at this time."[89] Therefore, in construing the meaning of the collective bargaining agreement, an arbitrator may determine that at the time the employer and the union entered into the agreement, neither party believed that sexual harassment was sex discrimination or grounds for immediate discharge. In this situation, the arbitrator may order the grievant reinstated under the theory that the employer did not have just cause to discharge him under the terms of the collective bargaining agreement.

The arbitrator may also apply the principle that the expression of one or more offenses as grounds for immediate discharge must be taken as an exclusion of all other grounds.[90] Accordingly, the list of dischargeable offenses may be considered all-inclusive, thereby precluding discharge and requiring reinstatement if the agreement is silent with respect to sexual harassment. For

85. This type of arbitration is termed "rights arbitration" because it involves the interpretation or application of laws, agreements, or customary practices. The parties' dispute is thus one that relates either to the meaning or application of a particular provision of the collective bargaining agreement with respect to a specific situation that has occurred. ELKOURI & ELKOURI, *supra* note 38, at 98-99, 342.

86. *Id.* at 344, 348.

87. *See* William S. Rule, *Arbitral Standards in Sexual Harassment Cases*, 10 INDUS. REL. L.J. 12, 15 (1988).

88. *Id.* at 16.

89. *Id.*

90. ELKOURI & ELKOURI, *supra* note 38, at 355.

example, in *In re Sugardale Foods Inc.*,[91] even though the grievant had touched a female co-worker on her buttocks and in her crotch area, the arbitrator held that discharge was an inappropriate penalty where the employee handbook did not specifically address sexual harassment. The arbitrator found that the handbook only stated that " 'probable discharge without warning' would result from 'threatening or gross intimidation of other employees' or 'immoral conduct and indecency', but the grievant's conduct did not fall within either of these enumerated categories."[92]

B. Focus on the Grievant

In civil sexual harassment cases, the complainant is the plaintiff and the employer is typically the defendant. In direct contrast, in arbitration proceedings the harasser is the plaintiff; thus, the harasser's rights provide the measuring stick by which the arbitration is governed. As a result, an arbitrator may reinstate harassers even when their presence would create a hostile work environment for the complainant. A comparison of the Ninth Circuit's holding in *Ellison v. Brady*[93] with Arbitrator Bard's holding in *In re Kiam*[94] demonstrates how this conflict may arise.

In *Ellison*, the court stated that in considering a hostile work environment claim, a court must focus on the effect of the harasser's actions on the complainant and *not* on the intent of the harasser, because " 'Title VII is aimed at the consequences or effects of an employment practice and not at the . . . motivation of co-workers or employers.' "[95] However, when the employer in *In re Kiam* argued that *Ellison* required the arbitrator to focus on the effect of the grievant's actions on the complainant, the arbitrator completely rejected this position stating, "it is not [the complainant's] state of mind and her fear which we are dealing with in this arbitration, but the grievant's discharge[;] . . . [thus,] . . . the normal standards for just cause . . . must govern in this case."[96] He further noted that an arbitrator may be willing to consider the harm to the victim in cases where the employer does not have rules prohibiting sexual harassment, and it is thus necessary to determine whether the impact on the victim should have been self-evident to the harasser.[97] This limited consideration, however, still leaves the arbitrator's focus on the grievant and not the victim.

In addition, arbitrators typically will review the grievant's length of service, any past misconduct, and the discipline imposed to determine whether

91. 86 Lab. Arb. (BNA) 1017 (1986) (Duda, Arb.).
92. *Id.*
93. 924 F.2d 872 (9th Cir. 1991).
94. 97 Lab. Arb. (BNA) 617 (1991) (Bard, Arb.).
95. 924 F.2d at 880 (citing Rogers v. EEOC, 454 F.2d 234, 239 (5th Cir. 1971)).
96. *In re* Kiam, 97 Lab. Arb. (BNA) at 617.
97. *Id.*

discharge is the appropriate penalty.[98] Accordingly, if the grievant has an excellent past work record, an arbitrator is unlikely to uphold discharge for a first offense, even when it is serious in nature. In direct contrast, when a court is determining employer liability for a hostile work environment, it examines the adequacy of the employer's response to the harassment complaint. If the employer terminates the alleged harasser to limit its liability to the victim, a court may uphold the remedy as being adequate, even if the court does not believe discharge was required to remedy the situation. Thus, if its collective bargaining agreement fails to clearly state the penalty which will be imposed for sexual harassment in the workforce, an employer may be faced with competing standards of addressing sexual harassment complaints. As indicated above, an arbitrator is not determining the employer's obligation to the complainant, but the harasser's rights under the terms of the collective bargaining agreement.

For example, in *In re Consolidation Coal Co.*,[99] the employer gave the grievant a notice of its intent to discharge him after the grievant opened the door to the women's bath house and stood there for a few seconds observing two female co-workers who had just finished showering. Although the arbitrator found that the grievant's conduct was a blatant violation of the Employee Conduct Rules and required a severe penalty, the arbitrator stated that discharge would only be appropriate if the grievant had actually *entered* the bath house and walked around. From the complainants' perspectives, however, their work environment was no less hostile merely because the grievant stood still and watched them instead of moving about. The effect on the victims of the harassment was outrage at the grievant's audacity, as well as embarrassment due to the fact that other male co-workers knew what the grievant had done and found it amusing. In a Title VII suit governed by *Ellison*, the impact to the victims would be highly relevant; in the arbitration proceeding, this impact was given little, if any, weight.

C. Burden of Proof

In determining whether or not the employer had just cause to discipline the grievant, the arbitrator must decide whether the employer had sufficient proof establishing the grievant's wrongdoing.[100] Arbitrators remain unsettled about the requisite burden of proof which employers must meet in establishing the grievant's guilt.[101] Some arbitrators require proof beyond a reasonable doubt.[102] Others require (in order of decreasing standards of proof) either a

98. *See, e.g.*, Communications Workers v. Southeastern Elec. Coop., 882 F.2d 467 (10th Cir. 1989).

99. 79 Lab. Arb. (BNA) 940 (1982) (Stolenberg, Arb.).

100. ELKOURI & ELKOURI, *supra* note 38, at 661.

101. *Id.* at 662.

102. *See, e.g., In re* Hyatt Hotels Palo Alto, 85 Lab. Arb. (BNA) 11 (1985) (Oestreich, Arb.) (holding that due to the seriousness of the moral charges and their impact on the griev-

"clear and convincing evidence" standard,[103] or a "preponderance of the evidence" standard.[104] By comparison, a victim of sexual harassment bringing a Title VII claim only has to show that she was sexually harassed by a preponderance of the evidence.[105] Thus, an employer who fails to discipline an alleged harasser because the facts supporting the complainant's allegations were insufficient to meet either a *reasonable doubt* standard or a *clear and convincing* standard, may nonetheless find itself liable to the complainant, if based on a *preponderance of the evidence*, the court concludes the harassment occurred. Conversely, if the employer does discipline the harasser based on a preponderance of the evidence, the employer may be found liable to the grievant in an arbitration proceeding if the arbitrator uses either of the two higher standards and the facts supporting the charge of harassment are insufficient to meet these criteria.

D. Knowledge and Past Enforcement of Rules Prohibiting Sexual Harassment

Under *Ellison*,[106] a court could find an employer liable for the sexual harassment of one of its female employees, even if the harasser did not realize his conduct created a hostile work environment for the complainant. In order to limit their liability, employers may thus decide pursuant to *Ellison*, to impose disciplinary action, including discharge, on the harasser whether or not the harasser knew of the effect his actions had on the complainant. Arbitrators, however, consider the concept of "just cause" to include a *requirement* that "employees be informed of a rule, [any] infraction of which may result in suspension or discharge, unless conduct is so clearly wrong that specific reference is not necessary."[107] Accordingly, where an employer has a rule prohibiting the disputed conduct, but has ignored violations of the rule in the past, many arbitrators will find that an employer did not have just cause for discharging a grievant who violated the rule.[108] The rationale supporting this widely recognized arbitral principle is that lax enforcement may lead employees to assume that their employer condones certain conduct which is openly practiced, such

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ant's ability to find employment elsewhere, the degree of proof must be beyond reasonable doubt).

103. *See, e.g., In re* Shell Pipe Line Corp., 97 Lab. Arb. (BNA) 957 (1991) (Baroni, Arb.) (noting that although the union endorses the preponderance of the evidence standard, the arbitrator customarily applies the higher clear and convincing test as the standard of proof in sexual harassment cases).

104. *See, e.g., In re* Dayton Power & Light Co., 80 Lab. Arb. (BNA) 19 (1982) (Heinsz, Arb.).

105. *See* Spencer v. General Elec. Co., 894 F.2d 651, 656 (4th Cir. 1990); Rabidue v. Osceola Refining Co., 805 F.2d 611, 621 (6th Cir. 1986).

106. Ellison v. Brady, 924 F.2d 872, 880 (9th Cir. 1991).

107. *In re* Lockheed Aircraft Co., 28 Lab. Arb. (BNA) 829, 831 (1957) (Hepburn, Arb.); *see also In re* Kiam, 97 Lab. Arb. (BNA) 617, 627 (1991) (Bard, Arb.) ("A fundamental component of the just cause standard is that employees must be told what kind of conduct will lead to discipline.").

108. *In re* Kiam, 97 Lab. Arb. (BNA) at 623-24.

as the display of nude pictures of women or an atmosphere pervaded with sexual innuendo. Further, just as a woman bringing a Title VII hostile work environment claim may impute to her employer knowledge of any harassing conduct which is openly practiced in the workplace,[109] so too may a discharged grievant rely on the open practice of harassment to impute knowledge of the harassment to the employer, and by inference, its sanction of the misconduct.[110]

Therefore, although in general an employer is not required to post plant rules as a condition precedent to its right to discipline employees for violation of those rules, where the nature of the prohibited conduct is such that employees may not know the conduct is improper, rules must be communicated to employees in some manner.[111] Furthermore, if an employer is going to point to a rule as the basis for discharging an employee, many arbitrators believe that there must be no doubt in the minds of the employees as to the existence and nature of the rule.[112] Thus, an employer's failure to provide clear notice to its employees of its rules against sexual harassment *prior* to taking disciplinary action against a harasser will likely result in the employer's action being overturned in an arbitration proceeding. For example, in *In re Kiam*,[113] the arbitrator did not uphold an employer's decision to discharge the grievant for his continual attempts to woo a co-worker, despite her demands that he leave her alone. The arbitrator held that the grievant's actions were not so clearly and self-evidently wrong as to justify discharge, especially since (1) the employer's policy was directed to *victims* of harassment rather than to the *perpetrators*; (2) the policy failed to define, describe or provide examples of harassment; (3) the employer's enforcement of the policy was lax; and (4) the grievant was not warned that his further attentions toward the complainant could lead to his discharge.

E. Industrial Due Process and Procedural Requirements

An arbitrator may also refuse to sustain an employee's discharge *solely* because the employer failed to make a reasonable and objective investigation of the charge before imposing disciplinary action, or did not follow the procedural requirements which the collective bargaining agreement expressly requires for discharge and discipline cases.[114] This may result in the arbitrator ordering either reinstatement of the harasser with or without backpay, or reducing the penalty from discharge to a suspension. Therefore, even though a court may find that the employer's response to the complainant's charge of sexual harassment was appropriate, an arbitrator may refuse to uphold the employer's action in disciplining or discharging the grievant because the em-

109. *Policy Guidance*, *supra* note 9, at 33-34.
110. ELKOURI & ELKOURI, *supra* note 38, at 684.
111. *Id.* at 556.
112. *Id.* at 557.
113. 97 Lab. Arb. (BNA) 617 (1991) (Bard, Arb.).
114. ELKOURI & ELKOURI, *supra* note 38, at 673.

ployer failed to afford the grievant proper due process. For example, in *In re King Soopers, Inc.*[115] and *In re DeVry Institute of Technology*,[116] the arbitrators refused to sustain discharges of employees who had harassed co-workers because the discharges were not preceded by an investigation, and despite the fact that the grievant in *DeVry* received warnings that further misconduct would result in discharge.

Most arbitrators also limit their review of the employer's reasons for discharging an employee to facts that the employer knew at the time it decided to terminate the grievant.[117] Information acquired subsequent to the termination but before the arbitration hearing generally will not be considered in determining just cause.[118] Further, if the collective bargaining agreement limits consideration of an employee's past record to a specified period, then the arbitrator will ignore a grievant's prior similar offenses.

F. Corrective or Progressive Discipline

In *Ellison*,[119] the court stated that it agreed with numerous decisions holding that not all harassment warrants dismissal; rather, remedies should be assessed proportionately to the seriousness of the offense. However, in ruling on a complainant's hostile work environment claim, a court does not decide whether an employer's decision to terminate a harasser was the *appropriate* penalty, but whether that response was an *adequate* method of preventing further harassment from occurring. Thus, a court may hold that an employer who terminates the harasser after determining that he is guilty of sexual harassment is not liable to the complainant because the employer took adequate corrective action.

Arbitrators also follow the view that the degree of penalty should be proportional to the seriousness of the offense,[120] and consider employee offenses to fall within two general categories: extremely serious offenses, which usually justify summary discharge without the necessity of prior warnings or attempts at corrective (also known as progressive) discipline, and less serious offenses, which call for some milder form of penalty aimed at correction.[121] This dis-

115. 86 Lab. Arb. (BNA) 254 (1985) (Sass, Arb.).

116. 87 Lab. Arb. (BNA) 1149 (1986) (Berman, Arb.).

117. ELKOURI & ELKOURI, *supra* note 38, at 676; OWEN FAIRWEATHER, PRACTICE AND PROCEDURE IN LABOR ARBITRATION 303-06 (2d ed. 1983); *see also* United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 40 n.8 (1987) (noting that labor arbitrators often state that the correctness of a discharge must stand or fall upon the reason given at the time of discharge).

118. *See, e.g.*, Chrysler Motors Corp. v. International Union, 748 F. Supp. 1352, 1356 (E.D. Wis. 1990), *aff'd*, 959 F.2d 685 (7th Cir. 1992) (upholding an arbitrator's ruling that several sexual harassment incidents which came to light after the grievant's discharge could not be considered in determining whether the discharge was for good cause).

119. Ellison v. Brady, 924 F.2d 872, 882 (9th Cir. 1991) (citing Dornhecker v. Malibu Grand Prix Corp., 828 F.2d 307, 309 (5th Cir. 1987)).

120. ELKOURI & ELKOURI, *supra* note 38, at 670.

121. *Id.* at 671 (citing Huntington Chair Corp., 24 Lab. Arb. (BNA) 490, 491 (1955) (McCoy, Arb.). As stated in *Huntington Chair*, examples of extremely serious offenses which can justify summary discharge include stealing, striking a foreman, and persistent refusal to obey a

tinction is drawn because discharge is regarded as the most serious industrial penalty because the employee's job, seniority and other contractual benefits, and reputation are at stake.[122] A corrective discipline system "incorporates the view that employers should discharge only those employees who, even after warnings and other forms of discipline, are unable to improve their work performance or eliminate their difficulties at work."[123] Although a court may find discharging the harasser was an adequate remedy — thereby relieving the employer of liability to the complainant — an arbitrator may rule that under a corrective discipline system, discharge was inappropriate and order the grievant reinstated.

In a corrective discipline system, the second and third offenses are usually made cumulative in terms of the degree of severity of penalty which is imposed for each subsequent proven offense. Generally, the following levels of discipline are provided: one or two oral warnings, one or two written warnings, suspension without pay, and discharge.[124] With corrective discipline, employees are thus provided with some measure of protection from sudden and arbitrary discharge.[125] In addition, the "significant societal interest in the rehabilitation of workers who err in the workplace" is also served.[126] Accordingly, arbitrators have to determine whether the grievant is guilty of the offense charged and, if so, whether the act he committed is serious enough to justify discharge.[127]

There is considerable divergence of thought as to the role of corrective discipline.[128] Some arbitrators have held that corrective discipline is inherent in the concept of just cause and thus not something for which the union must bargain.[129] Under this view, unless the collective bargaining agreement expressly provides that employees will be discharged for the first offense, an employer will always have a duty to use corrective discipline and may only discharge an employee as a last resort. Other arbitrators state that corrective discipline is a matter to be negotiated between the parties; hence, in the absence of an express clause providing for corrective discipline, arbitrators

legitimate order. Examples of less serious offenses which call for a lesser penalty are tardiness, absence without permission, careless workmanship, and insolence. *Id.*

122. ELKOURI & ELKOURI, *supra* note 38, at 661; THOMAS H. OEHMKE, EMPLOYMENT, LABOR & PENSION ARBITRATION § 2.9 (1989); LACUGNA, *supra* note 75, at 178.

123. Martha S. West, *The Case Against Reinstatement in Wrongful Discharge*, 1988 U. ILL. L. REV. 1, 62; *see also In re* McCorkle Machine Shop, 97 Lab. Arb. (BNA) 774 (1991) (Kilroy, Arb.) ("The purpose of progressive discipline is to bring deficiencies in conduct and performance to the attention of an employee. If warnings fail, suspension is justified until discharge becomes the only alternative to an employee who fails to get the message.").

124. ELKOURI & ELKOURI, *supra* note 38, at 671; West, *supra* note 123, at 62 n.302.

125. West, *supra* note 123, at 51.

126. Stead Motors of Walnut Creek v. Automotive Machinists Lodge No. 1173, 886 F.2d 1200, 1213 (9th Cir. 1989), *cert. denied*, 495 U.S. 946 (1990).

127. ELKOURI & ELKOURI, *supra* note 38, at 663 (citing Southern Bell Tel. & Tel. Co. v. CWA., 25 Lab. Arb. (BNA) 85, 87 (1955) (Alexander, Schedler, Whiting, Arbs.)).

128. *Id.* at 671.

129. *See, e.g., In re* Kiam, 97 Lab. Arb. (BNA) 617 (1991) (Bard, Arb.).

should decline to read one into the contract.[130] If, however, the employer has a corrective discipline system, but fails to apply it in the grievant's case, an arbitrator will not sustain the discharge unless the employer can show that there are no circumstances which indicate that the grievant can be rehabilitated by corrective discipline.[131]

Arbitrators have usually upheld discharges when the grievant is found to have made unwelcome physical contact with another employee.[132] In some cases, however, the arbitrator has ordered reinstatement of the grievant despite finding him guilty of sexual harassment, believing that discharge was too severe a penalty and thus an unreasonable and arbitrary act of the employer. For example, in *GTE Florida, Inc. v. Local 824, IBEW*,[133] the arbitrator held that although the grievant took a female co-worker down from a ladder, bent her backwards over a desk, and made sexual remarks to two other female employees, his conduct was not particularly egregious. Therefore, some form of corrective discipline and/or rehabilitation was warranted instead of discharge.

Reinstatement has also been ordered in cases involving only verbal harassment, apparently because verbal harassment is viewed as much less serious than cases involving physical contact.[134] In *Dow Chemical Co. v. Local 102, International Ass'n of Meat & Frost Insulators*,[135] despite proof that the grievant had sexually harassed three female co-workers and violated the employer's well-publicized policy against sexual harassment, the arbitrator held that discharge was inappropriate. In the arbitrator's view, the discipline was not progressive: the grievant's misconduct was limited to banter and sexual innuendo, and the employer's second warning letter was similar in tone and seriousness to the first, and thus did not constitute a clear and forceful final warning. Arbitrators though have routinely upheld discharge in cases where the harasser was warned previously, the course of conduct extended over a lengthy period of time, the harassment was combined with an otherwise poor work record, or the circumstances were aggravated.[136]

Arbitrators have also ordered reinstatement of a grievant, despite finding that the grievant had created a hostile work environment for the complainant, because they believed that corrective discipline called for the *minimum* penalty necessary to correct unacceptable conduct.[137] An arbitral decision ordering reinstatement under these circumstances may prove problematic for an employer who is faced with a duty, pursuant to *Ellison v. Brady*,[138] to either

130. ELKOURI & ELKOURI, *supra* note 38, at 672.
131. *Id.* at 672-73.
132. Nowlin, *supra* note 1, at 31, 38; *see also* Marmo, *supra* note 47, at 39-40.
133. 92 Lab. Arb. (BNA) 1090 (1989) (Cohen, Arb.).
134. Marmo, *supra* note 47, at 40.
135. 95 Lab. Arb. (BNA) 510 (1990) (Sartain, Arb.).
136. *See* Nowlin, *supra* note 1, at 39 and cases cited therein.
137. *See, e.g., In re* Kiam, 97 Lab. Arb. (BNA) 617 (1991) (Bard, Arb.); *In re* Hyatt Hotels Palo Alto, 85 Lab. Arb. (BNA) 11 (1985) (Oestreich, Arb.).
138. 924 F.2d 872 (9th Cir. 1991).

transfer or terminate a harasser whose mere presence creates a hostile work environment from the perspective of a reasonable woman. For example, in *In re Kiam*,[139] the arbitrator found that the grievant had created a hostile work environment for a female co-worker through his letters, flowers, and other gifts, as well as his continual attempts to contact her while off duty. Nonetheless, the arbitrator held the harasser's conduct was not so egregious as to preclude application of corrective discipline instead of discharge. Further, although the employer had given the grievant a warning letter after the grievant failed to stop and the woman complained again, the supervisor's statement to the grievant that "as a gentleman you have to stop and leave her alone" was considered an inadequate warning to justify discharge, particularly since the employer never informed the grievant that he was violating a policy against sexual harassment, or that further misconduct could lead to his discharge.[140]

Similarly, in *In re Hyatt Hotels Palo Alto*,[141] the arbitrator stated that a fifteen-day suspension, rather than discharge, was the appropriate penalty for an assistant banquet manager who had exposed himself to two female employees. The collective bargaining agreement provided that no regular employee could be discharged except for just cause — which included willful misconduct — and that prior to discharge, the employee must be given a written warning and a reasonable opportunity to correct his deficiency.[142] The arbitrator held that although the employer had met its burden of proving beyond a reasonable doubt that the grievant was guilty of sexual harassment and creating a hostile and intimidating environment for the complainants, the penalty of discharge was excessive. In reaching this decision, the arbitrator relied on the hotel's lack of a published sexual harassment policy; the existence of an adequate harassment complaint procedure; the fact that the complainant waited at least four years before lodging a complaint with management; the lack of prior warnings to the grievant; and the lack of evidence which would suggest the grievant was beyond rehabilitation. Given the corrective discipline approach, the arbitrator stated the grievant was entitled to a warning and counseling because, whenever possible, the employer has a duty to correct its employees' unacceptable behavior.

If this same case were to arise today, under *Ellison*,[143] Hyatt Hotels Palo Alto would have a duty to transfer or terminate the grievant if his mere presence would create a hostile work environment for a reasonable woman in the complainants' positions. Given the severity of the offense and the harasser's status as the manager, it is quite likely that in this particular case, the manager's mere presence would create a hostile work environment. Further, due to the nature of the grievant's responsibilities as banquet manager, it is unlikely that Hyatt Hotels Palo Alto had the means to transfer the manager to a

139. 97 Lab. Arb. (BNA) at 617.
140. *Id.*
141. 85 Lab. Arb. (BNA) at 17.
142. *Id.* at 15.
143. Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991).

different shift, or even a different hotel. Thus, pursuant to *Ellison*, the hotel's only recourse would be termination — which is what happened here. Nonetheless, as indicated by this case, an arbitrator could order the manager reinstated.

In re Kiam and *In re Hyatt Hotels Palo Alto* show the importance of an employer's compliance with its *affirmative duty* to educate its workforce about sexual harassment, as well as to provide proper warnings to employees who are found guilty of sexual harassment. The employer is likely to have fewer incidents of sexual harassment in its workforce because employees will know what conduct constitutes sexual harassment and to whom they should report any incidents. In addition, the employer's decision to discharge an employee who is guilty of sexual harassment is more likely to be upheld in arbitration because the grievant will have received adequate notice, warning, and an opportunity to correct his behavior prior to the incident for which he is ultimately dismissed.

G. Equal and Non-Discriminatory Treatment

In any court case, including one brought by a female victim of harassment, the court focuses on resolving the dispute between the specific parties before it. Thus, in assessing the appropriateness of an employer's response to a charge of harassment, the court determines whether the employer took sufficient action to correct the complainant's hostile work environment. Arbitrators, however, generally follow the principle that enforcement of rules and assessment of penalties must be exercised in a consistent manner. Therefore, employees who engage in the same types of misconduct must be treated essentially the same unless there is a reasonable basis — such as differing degrees of fault or an employee's length of service — for assessing different penalties.[144] Disparate treatment is an affirmative defense, and the burden is on a grievant who has been discharged for sexual harassment to show that he was treated differently than another employee under the same or similar circumstances.[145]

In addition to determining how the employer before her disciplined employees in the past for the same offense, an arbitrator will often look to reported arbitral decisions to see what penalty was imposed by other arbitrators in similar cases.[146] Although published awards are not binding, it is widely recognized that prior awards — even under *other* collective bargaining agreements — do have value and should be given some weight.[147] Further, they often help an arbitrator formulate her own conclusions, thereby reducing "discriminatory application of similar provisions" across an industry.[148]

144. ELKOURI & ELKOURI, *supra* note 38, at 684.

145. *In re* Shell Pipe Line Corp., 97 Lab. Arb. (BNA) 957 (1991) (Baroni, Arb.).

146. ELKOURI & ELKOURI, *supra* note 38, at 415.

147. *Id.* at 418 (reporting that 77% of 238 arbitrators who were surveyed believe that precedential awards should be considered).

148. *Id.* at 416 (citing Maurice H. Merrill, *A Labor Arbitrator Views His Work*, 10 VAND. L. REV. 789, 797-98 (1957)); *see also* Boys Markets, Inc. v. UFCW, 88 Lab. Arb. (BNA) 1304

This arbitral principle of determining the appropriateness of the grievant's discharge by comparing the penalties assessed by other employers in similar situations presents more problems for an employer that is subject to *Ellison v. Brady*.[149] As noted above, the *Ellison* court expressly stated that it was inappropriate to ask what a reasonable employer would do to remedy sexual harassment in its workplace, because that would run the risk of reinforcing any prevailing level of discrimination by employers and fail to focus directly on the best way to eliminate harassment.[150] Further, under *Ellison*, a court can use the likelihood that the remedy will stop harassment both by the person charged as well as by other potential harassers as a factor in its assessment of the reasonableness of an employer's response.[151] Termination of an employee is likely to act as a strong deterrent to other potential harassers in the employer's workforce. Although a court may find that the employer was justified in terminating the grievant, an arbitrator may find that the employer treated the grievant disproportionately to other employees who have been guilty of sexual harassment, and order the grievant reinstated.

An arbitrator's use of this principle may prove problematic if an employer intends to take a hard stance on sexual harassment by discharging employees found guilty of misconduct. The employer may find that its hard-stance position is undermined where an arbitrator orders reinstatement of a grievant based on a less severe punishment imposed in the published cases that the arbitrator reviewed. For example, in *GTE Florida, Inc. v. International Brotherhood of Elec. Workers, Local 824*,[152] the arbitrator held that the penalty of discharge was inappropriate because the grievant's acts of sexual harassment were less severe than those described in cases where discharge was *not* upheld. Similarly, in *Boys Markets, Inc. v. UFCW, Local 770*,[153] the arbitrator ordered reinstatement of a grievant who had been discharged for moving his finger in an upward direction between the buttocks of a female co-worker. The arbitrator stated that discharge was an inappropriate penalty on these facts when compared to the penalties imposed in ten published sexual harassment cases, some of which also involved unwelcome touching.

This potential conflict can be minimized by expressly stating in the collective bargaining agreement that the arbitrator may *not* review cases involving other employers to determine the appropriateness of the discipline imposed.

(1987) (Wilmoth, Arb.) (stating that reviewing decisions in other cases is appropriate to an arbitrator's fashioning of a suitable remedy because it prevents an arbitrator from imposing her own brand of industrial justice upon the parties). In some cases, an arbitrator may uphold an employer's decision to discharge an employee if she determines from reviewing published decisions that discharges have been sustained in cases involving *less* serious conduct than the case before her. *See, e.g., In re* Shell Pipe Line Corp., 97 Lab. Arb. (BNA) 957, 962 (1991) (Baroni, Arb.).

149. 924 F.2d 872 (9th Cir. 1991).

150. *Id.* at 882 n.17; *see infra* notes 62-71 and accompanying text.

151. *Ellison*, 924 F.2d at 882.

152. 92 Lab. Arb. (BNA) 1090, 1094 (1989) (Cohen, Arb.).

153. 88 Lab. Arb. (BNA) 1304, 1306 (1987) (Wilmoth, Arb.).

In addition, a clause may be included which allows the arbitrator to consider the employer's duty to remedy a hostile work environment under both federal and state laws. Where the collective bargaining agreement and the law conflict, the agreement should provide that the law governs, provided the employer has complied with all other requirements imposed by the agreement (such as clearly informing its employees about sexual harassment, conducting a fair and adequate investigation, and providing adequate warning to its employees of the consequences of engaging in harassing conduct). This in no way limits the arbitrator's ability to review the disciplinary action which the employer has imposed against its *own* employees in the past for the same conduct with which the grievant is charged. This ensures that the grievant is not being treated in an unequal or discriminatory fashion when compared to his coworkers.[154]

H. The Role of External Law

One obvious question is whether external law supersedes the collective bargaining agreement in situations where an employer's duty under Title VII to remedy a complainant's hostile work environment conflicts with the employer's obligations to the harasser under the collective bargaining agreement. The answer is, in many instances, no! This is particularly true if the employer enters into an agreement which conflicts with *established* law. If an employer located in the Ninth Circuit entered into a collective bargaining agreement which results in the employer having conflicting obligations to the victim of harassment and the harasser, a court may hold that the conflict was of the employer's own making. The employer, therefore, cannot look to the court for relief if an arbitrator orders the reinstatement of a grievant found guilty of sexual harassment. Since, under the holding of *Intlekofer v. Turnage*,[155] the requirements of *Ellison v. Brady*[156] apply retroactively, even employers that signed collective bargaining agreements before *Ellison* are subject to its holding.

The issue of conflicting obligations imposed on an employer by law and the employer's collective bargaining agreement was presented to the United States Supreme Court in *W.R. Grace & Co. v. Local Union 759*.[157] The employer (Grace) entered into a conciliation agreement with the EEOC after the EEOC determined there was reasonable cause to believe that Grace had violated Title VII by discriminating in the hiring of African Americans and women. The conciliation agreement provided that if layoffs were required, Grace

154. *See, e.g., In re* Schlage Lock Co., 88 Lab. Arb. (BNA) 75, 79 (1987) (Wyman, Arb.) (upholding grievant's discharge and stating that a company's lack of consistency in imposing discipline for similar offenses could lead to an unfavorable award, although in the case before the arbitrator, the record clearly showed that dismissal had been the penalty imposed by the company in *all* sexual harassment cases).

155. 973 F.2d 773 (9th Cir. 1992).

156. 924 F.2d 872 (9th Cir. 1991).

157. 461 U.S. 757 (1983).

would maintain the existing proportion of women in the bargaining unit.[158] Subsequent to signing this agreement, Grace signed a new collective bargaining agreement with its union which specified that the plant's system of layoffs would continue to be based on the seniority of affected employees. After Grace laid off employees pursuant to the conciliation agreement, several men who would have been protected under the seniority provisions of the collective bargaining agreement filed grievances. Grace sought to enjoin arbitration of the grievances, and a federal district court held that the conciliation agreement should prevail with respect to the layoffs.[159]

The union appealed the court's determination, and while the appeal was pending, Grace laid off more employees following the terms of the conciliation agreement. The Fifth Circuit reversed the district court's decision, stating that the seniority system in the collective bargaining agreement could not be modified without the union's consent.[160] In response to this decision, Grace reinstated the male employees to their former positions. An arbitrator ordered backpay awards for three reinstated grievants, stating that the collective bargaining agreement did not make any exception for good-faith violations of the seniority provisions, and that Grace had operated at its own risk in breaching the agreement. Grace instituted an action to overturn the arbitral award on the grounds that the public policy of complying with judicial orders prevented enforcement of the seniority provisions.[161]

The Supreme Court held that a court may not enforce a collective bargaining agreement which, *as interpreted by the arbitrator*, is contrary to public policy.[162] The Court further stated that the question of public policy is one for resolution by the courts; however, the public policy must be "well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests."[163] Applying these principles to *Grace*, the Court held that the enforcement of the agreement as interpreted by the arbitrator did not compromise the public policy against violating judicial orders. The Court noted that Grace was faced with a dilemma: it could follow the conciliation agreement as mandated by the district court and risk liability under the collective bargaining agreement, or it could follow the collective bargaining agreement and risk both a contempt citation and Title VII liability. The dilemma, however, *was of the company's own making*, since Grace had voluntarily committed itself to two conflicting obligations.[164] Additionally, the Court noted that the arbitral

158. W.R. Grace v. Local Union 759, 461 U.S. 757, 760 (1983).

159. *Id.* at 761 & n.2.

160. *Id.* at 762.

161. *Id.* at 764.

162. *Id.* at 766 (holding that courts may not enforce contracts which are contrary to public policy, and recognizing that collective bargaining agreements are simply contracts between employers and unions); *see also* Stroehmann Bakeries, Inc. v. Local 776 Int'l Bhd. of Teamsters, 969 F.2d 1436, 1441 (3rd Cir. 1992).

163. *W.R. Grace*, 461 U.S. at 766.

164. *Id.* at 766-67.

award did not mandate layoffs or require that layoffs be conducted according to the collective bargaining agreement. The award merely held that Grace was liable for breaching the seniority provision of the agreement and that the grievants were entitled to damages for this breach. This result was not unfair in light of Grace's prior discrimination against women, which was bound to result in some readjustments and losses. Grace had placed this burden upon itself, and not the union members, by the terms of the collective bargaining agreement.

In *United Paperworkers International Union v. Misco, Inc.*,[165] the Supreme Court reaffirmed and clarified the *Grace* public policy exception to the general judicial deference given arbitral awards. In *Misco*, an employer challenged an arbitrator's award which ordered reinstatement of a grievant who had been discharged for violating a disciplinary rule against using or possessing drugs in the workplace. The employer argued that the reinstatement of the employee violated the public policy against operating dangerous machinery while under the influence of drugs. The District Court vacated the arbitrator's decision and the Court of Appeals affirmed, but the Supreme Court reversed, stating that in reviewing an arbitral award, courts may *not* reconsider the merits of an award even if the award is based on errors of fact, or misinterpretation of the collective bargaining agreement.[166]

The Court further declared that justifying a public policy exception to enforcement of an arbitral award requires violation of some *explicit* public policy which can be ascertained by reference to laws and legal precedents. Applying these principles, the Court held that it was improper for the lower courts to vacate the arbitrator's award, because there is no explicit public policy against operating machinery while under the influence of drugs. Instead, the lower courts' formulation of public policy was based on general considerations of supposed public interests, an impermissible basis for invoking the public policy exception. Accordingly, the Court ordered reinstatement of the arbitrator's award.[167]

Under the standards articulated in *Grace* and *Misco*, if an employer is faced with conflicting obligations as a result of a clash between requirements imposed by law and the employer's collective bargaining agreement, the employer may nonetheless have to bear the cost of this conflict. A court may find that despite the well defined public policy against sexual harassment in the workplace as ascertained by reference to Title VII and case law such as *Ellison*

165. 484 U.S. 29 (1987).

166. *Id.* at 36-38. The rationale for this deference to arbitral awards is that it is the *arbitrator's* decision which the parties have bargained for in executing the collective bargaining agreement, not the judiciary's. Further, an employer's agreement to submit all grievance disputes to arbitration is generally considered to be quid pro quo for the union's agreement not to strike. Thus, deferring to the parties' agreement expresses Congress' belief that this is the best way to maintain industrial peace. *See also* Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 455 (1957).

167. United Paperworkers Int'l Union v. Misco Inc., 494 U.S. 29, 44 (1987).

arising under it, the employer has voluntarily placed conflicting liabilities upon itself.

Moreover, the arbitrator is *not* required to consider external law unless either the submission agreement or the collective bargaining agreement states that the arbitrator is to do so. In *Alexander v. Gardner-Denver Co.*,[168] the Supreme Court stated that although an arbitrator may properly look to external law in interpreting an *ambiguous* collective bargaining agreement, where the agreement conflicts with external law, the arbitrator must follow the *agreement*. Additionally, a court may not invalidate an arbitrator's award based on a mere ambiguity in the arbitrator's opinion which permits an inference that the arbitrator *may* have exceeded her authority.[169] "This is especially true when it comes to formulating remedies[,]" because the parties have bargained for an arbitrator bringing her "informed judgment to bear in order to reach a fair solution to a problem."[170] A reviewing court is therefore prohibited from rejecting an arbitrator's choice of punishment merely because it disagrees with it.[171]

Arbitrators are divided on the question of whether Title VII should be considered in resolving grievances; however, many do consider Title VII doctrine in deciding cases.[172] Arbitrators have looked to Title VII and case law arising under it to assert that sexual harassment is against the law, or to determine what types of conduct constitute sexual harassment.[173] If, however, an employer's obligations under Title VII conflict with obligations imposed on the employer by a collective bargaining agreement, the arbitrator can determine that she would exceed her authority by considering the employer's Title VII obligations in the absence of an express provision to do so in either the collective bargaining agreement or the submission agreement.

Additionally, merely because an employee has violated the law by sexually harassing a co-worker, "violation of the law is not per se the standard by which the [a]rbitrator is obligated to judge the grievant's behavior, [but] only one standard by which the [a]rbitrator may judge the reasonableness of the work rule" in fulfilling her duty to determine the grievant's rights under the collective bargaining agreement.[174] Consequently, although *Ellison* dictates that when a harasser's mere presence creates a hostile work environment, the employer has a duty to remove the harasser from the complainant's workplace

168. 415 U.S. 36, 56-57 (1974) (holding that an employee may pursue both arbitration under the collective bargaining agreement and her statutory right to trial under Title VII of the Civil Rights Act of 1964).

169. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 598 (1960).

170. *Id.* at 597.

171. *Id.* at 598.

172. ELKOURI & ELKOURI, *supra* note 38, at 382.

173. *See, e.g., In re* Kiam, 97 Lab. Arb. (BNA) 617 (1991) (Bard, Arb.) (noting that the grievant's conduct constituted sexual harassment as defined by Title VII and Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986)).

174. *Id.* at 625.

by either transferring or terminating him (when transfer is not possible),[175] if the arbitrator determines that her interpretation of the collective bargaining agreement prohibits the employer from discharging the grievant, the arbitrator can refuse to consider *Ellison* and order the grievant reinstated. Similarly, even without *Ellison*'s termination requirement, if an employer determines that the best method of both remedying the complainant's hostile work environment and protecting itself from liability to the complainant is to terminate the harasser, the arbitrator may determine that the termination violates the terms of the collective bargaining agreement.

Therefore, under the *Grace* and *Misco* standard, an arbitrator's award may be overturned only if (1) the arbitrator bases the award on her own personal notions of right and wrong, did not act within the confines of the authority granted, or acted with fraud or dishonesty; (2) the award does not draw its essence from the collective bargaining agreement; or (3) *enforcement* of the agreement as interpreted by the arbitrator would violate a well defined and dominant public policy that can be ascertained by reference to laws and legal precedents.[176] Of these three grounds, the reason most often cited by a court refusing to uphold an arbitral award is that the award does not draw its essence from the collective bargaining agreement because it violates the agreement's clear language.[177] Although the Fourth Circuit uses the "essence" standard as the legal means to set aside awards with which it disagrees, most courts of appeals construe this standard more narrowly and will overturn an award only if it clearly violates the express, unambiguous terms of the collective bargaining agreement.[178]

Examples of arbitration results that so offend public policy that they should be set aside by a court are not readily found, either in general or with respect to sexual harassment cases;[179] therefore, employers should not rely on this exception to save them from potentially conflicting obligations to the complainant and a sexual harasser. The author has found only four cases in which employers sought to have an arbitral award reinstating an employee found guilty of sexual harassment vacated because it violated a public policy against sexual harassment in the workplace: *Chrysler Motors Corp. v. International Union Allied Industrial Workers Local 793*,[180] *Communication Workers v. Southeastern Electric Cooperative*,[181] *Newsday, Inc. v. Long Island Typographi-*

175. Ellison v. Brady, 924 F.2d 872, 883 & n.19 (9th Cir. 1991).

176. United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 38 (1987); W.R. Grace & Co. v. Local Union 759, 461 U.S. 757, 766 (1983).

177. VOLZ & GOGGIN, *supra* note 81, at 4.

178. *Id.* at 4-5.

179. Delta Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l, 861 F.2d 665, 670 (11th Cir. 1988); *see also* Chrysler Motors Corp. v. International Union, Allied Indus. Workers, Local 793, 748 F. Supp. 1352, 1364 (E.D. Wis. 1990) (noting that the law in this area is unsettled and rapidly evolving), *aff'd*, 959 F.2d 685 (7th Cir. 1992).

180. 959 F.2d 685 (7th Cir. 1992).

181. 882 F.2d 467 (10th Cir. 1989).

cal Union,[182] and *Stroehmann Bakeries, Inc. v. Local 776, International Brotherhood of Teamsters*.[183] Although the reasoning of these cases is not entirely consistent, some general principles emerge.

First, a reviewing court must accept the facts as found by the arbitrator in determining whether the arbitrator's interpretation of the collective bargaining agreement violates public policy.[184] If the arbitrator determines that the grievant can be rehabilitated through corrective discipline, a reviewing court cannot determine for itself that the grievant is likely to engage in similar misconduct in the future.[185] Second, the party seeking to have the arbitral award vacated on public policy grounds (typically the employer) must show that the policy at issue is "well defined" and "dominant" and that it can be ascertained "by reference to the laws and legal precedents and not from general considerations of supposed public interests."[186] In sexual harassment cases, this requirement is easily met because there is a well defined and dominant public policy against sexual harassment that can be ascertained from Title VII, *Meritor Savings Bank, FSB v. Vinson*,[187] and other case and statutory law that prohibits employees from committing — and employers from tolerating — sexual harassment in the workplace. Moreover, in *Misco*, the Supreme Court noted that voluntary compliance with Title VII was an important public policy meeting the *Grace* criteria.[188]

Third, the party seeking to vacate the arbitral award must show that there is a sufficient link between enforcement of the award and violation of some public policy.[189] In determining whether this link mandates overturning the award, the court focuses on whether *reinstatement* of the discharged employee violates public policy, *not* whether the employee's *past conduct* violates public policy.[190] "Courts cannot merely determine there is a 'public policy'

182. 915 F.2d 840 (2d Cir. 1990).

183. 969 F.2d 1436 (3rd Cir. 1992).

184. Chrysler Motors Corp. v. International Union, Allied Indus. Workers, Local 793, 748 F. Supp. 1352, 1359 (E.D. Wis. 1990), *aff'd*, 959 F.2d 685 (7th Cir. 1992).

185. United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 44-45 (1987) (applying this principle to the facts, the Court stated that even if the arbitrator had found that the grievant had *possessed* drugs on Misco's property, but also made a factual determination that the grievant could be trusted not to *use* drugs while on the job, a court could not upset the award merely because in its own view it disagreed with this finding and believed that public policy regarding plant safety was threatened).

186. W.R. Grace v. Local Union 759, 461 U.S. 757, 766 (1983) (citations omitted).

187. 477 U.S. 57 (1986).

188. 484 U.S. at 43.

189. Chrysler Motors Corp. v. International Union, Allied Indus. Workers, Local 1793, 748 F. Supp. 1352, 1359 (E.D. Wis. 1990), *aff'd*, 959 F.2d 685 (7th Cir. 1992).

190. *Id.* at 1360 (citing Stead Motors v. Automotive Machinists Lodge No. 1173, 886 F.2d 1200, 1212 (9th Cir. 1989) (plurality opinion) (en banc)); *see also Chrysler Motors Corp.*, 959 F.2d at 687 ("The public policy doctrine allows this court to decide de novo whether the arbitrator's reinstatement of [the grievant] violates public policy."); BPS Guard Serv., Inc. v. International Union Ltd. Plant Guard Workers, Local 228, 735 F. Supp. 892, 896 (N.D. Ill. 1990) (in a discharge case involving a nuclear security plant officer who left her station without relief, the court stated, "[t]he critical inquiry is not whether the underlying act for which the employee

against a particular sort of behavior in society generally and, irrespective of the findings of the arbitrator, conclude that reinstatement of an individual who engaged in that sort of conduct in the past would violate that policy."[191] " 'It is only if the grievant is likely to engage in wrongful conduct which violates public policy in the future that his reinstatement could be said to violate public policy.' "[192] As stated previously, the arbitrator's judgment about the ability of the grievant to reform is a factual finding which courts cannot review.

Two of the four cases adhered to the above principles: *Chrysler Motors Corporation v. International Union*[193] and *Communications Workers v. Southeastern Electric Cooperative*[194] In the other two cases, the courts' reasoning is questionable in light of the standards articulated by the Supreme Court in *Grace* and *Misco*; nonetheless, the courts could have vacated the arbitral awards on other grounds.

In *Chrysler Motors Corp.*, an employer discharged the grievant following fifteen months of employment after a female co-worker complained he had sexually harassed her by grabbing her breasts "to see if they were real."[195] *After* the grievant was discharged, the employer continued its investigation and discovered that the grievant had engaged in four other incidents of similar misconduct prior to the grieved incident. However, the arbitrator held that he would not consider the prior incidents in his determination of whether the employer had just cause to discharge the grievant because the employer had not been aware of these prior incidents when it terminated the grievant. The arbitrator then reviewed other arbitral decisions involving allegations of employee misconduct and concluded that in most of the cases where discharge was upheld, the employee had been warned or previously disciplined for prior misconduct.[196]

Further, his review of other cases also persuaded the arbitrator that while serious offenses such as stealing or striking a foreman usually justified summary discharge, less serious offenses called for a milder form of penalty.[197] Although the arbitrator considered sexual harassment to be a serious offense, it was not serious enough to warrant immediate discharge without prior attempts at corrective discipline. Consequently, the arbitrator reduced the penalty to a thirty-day suspension and ordered the grievant reinstated. Upon the employer's appeal to the district court, the court relied heavily on a Ninth Circuit *en banc* plurality opinion, *Stead Motors v. Automotive Machinists*

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was disciplined violates public policy, but whether there is a public policy barring reinstatement of an individual who has committed a wrongful act").

191. *Chrysler Motors Corp.*, 748 F. Supp. at 1360 (quoting *Stead Motors*, 886 F.2d at 1212).

192. *Id.* at 1362 (quoting *Stead Motors*, 886 F.2d at 1217).

193. 959 F.2d 685 (7th Cir. 1992).

194. 882 F.2d 467 (10th Cir. 1989).

195. 748 F. Supp. at 1355.

196. *Id.* at 1356.

197. *Id.*

Lodge Number 1173,[198] and concluded that the public policy against sexual harassment does not make it illegal to employ a person who sexually assaulted or harassed a co-worker on one occasion.[199] The court also noted that "most courts have refused to vacate an arbitrator's award of reinstatement on public policy grounds — particularly when the arbitrator has found that the employee received no prior warnings or discipline; or that the employee could be rehabilitated; or that the employer had a progressive discipline policy."[200]

Chrysler appealed, arguing that since employees could be terminated for striking a supervisor (usually a man), but could not be terminated for sexually harassing a woman, enforcement of the arbitral award would create an inappropriate double standard based on sex.[201] In affirming the district court's decision, the Seventh Circuit held that Chrysler's argument had no merit. The arbitrator had merely determined that the grievant was subject to rehabilitation and unlikely to commit a future act that would violate public policy. The court noted that while it did not condone the grievant's behavior,

> it was within the purview of the collective bargaining agreement and public policy for the arbitrator to order his reinstatement. . . . The parties [had] bargained for evidentiary matters and factual findings to be made by an arbitrator, and [the] reviewing court [could] not disregard those factual determinations or supplement them with its own.[202]

Citing *Misco*, the court also stated that "[w]here it is contemplated that the arbitrator will determine remedies for contract violations that he finds, courts have no authority to disagree with his honest judgment in that respect."[203]

Similarly, in *Communications Workers*,[204] the court affirmed a lower court decision which held that the public policy of protecting women against sexual abuse did not warrant vacating an arbitrator's decision ordering reinstatement of an employee accused of sexually assaulting a customer. The arbitrator found that during the grievant's nineteen years of employment, he did not receive any warnings for sex-related offenses, making corrective discipline,

198. 886 F.2d 1200 (9th Cir. 1989) (*en banc*) (plurality opinion) (refusing to vacate an arbitral award ordering reinstatement of an auto mechanic who failed to correctly tighten lug nuts, even though the mechanic had previously been warned for the same offense). In *Stead Motors*, nine of eleven justices believed there was no well defined, dominant, and explicit public policy which was grounded in laws and legal precedents in favor of the proper maintenance and repair of motor vehicles; thus, there was no judicial basis for overturning the award. Five justices gave an extensive review of their understanding regarding the parameters of the public policy exception to granting judicial deference to arbitral awards, and it was upon this view which the district court in *Chrysler Motors Corp.* heavily relied. *Id.*

199. *Chrysler Motors Corp.*, 748 F. Supp. at 1363.

200. *Id.* at 1361.

201. Chrysler Motors Corp. v. International Union, Allied Ind. Workers of Am., AFL-CIO, 959 F.2d 685, 688 (7th Cir. 1992).

202. *Id.*

203. *Id.* (citations omitted).

204. Communications Workers v. Southeastern Elec. Coop., 882 F.2d 467 (10th Cir. 1989).

not discharge, appropriate. The court noted that the arbitrator had " 'brought his informed judgment to bear in order to reach a fair solution to the problem[ ]' " and that the court was not free to substitute its judgment for the arbitrator's.[205]

In the remaining two cases, *Newsday, Inc. v. Long Island Typographical Union*[206] and *Stroehmann Bakeries, Inc. v. Local 776, International Brotherhood of Teamsters*,[207] the courts ordered the arbitrators' awards vacated because they violated the public policy against sexual harassment. In *Newsday*, the court affirmed a district court order vacating an arbitral award that ordered reinstatement of a grievant who was discharged in 1988 for sexually harassing female co-workers.[208] The grievant had first been discharged in 1983 for sexual harassment, and despite his reinstatement by Newsday four days later, he filed a grievance for the suspension. The arbitrator upheld the suspension as not violating the governing collective bargaining agreement and warned the grievant that further sexual harassment would be grounds for immediate discharge.[209] In 1988, a female employee complained that the grievant had sexually harassed her by intentionally brushing against her back and buttocks. Upon investigation of this complaint, Newsday discovered that the grievant had engaged in two other incidents of harassment *subsequent to his suspension* which had not been reported by the victims.[210] In light of these three incidents and the prior warning, Newsday discharged the grievant.

The arbitrator found that the three incidents occurred as reported, but held the offenses did not constitute grounds for immediate discharge; instead, corrective discipline should be applied.[211] The arbitrator then held that since the grievant had not been disciplined for the two *unreported* incidents which had occurred subsequent to his suspension, discharge for the third offense was not progressive. He thus ordered the grievant reinstated with a warning that any further misconduct would be grounds for immediate discharge. On Newsday's appeal, the district court held the arbitral award violated a clear and well defined public policy against sexual harassment because it required an employee who is a "chronic sexual harasser" to be reinstated.[212]

In affirming the district court's decision to vacate the arbitral award, the Second Circuit stated:

> [The arbitrator's] award of reinstatement completely disregarded the public policy against sexual harassment in the workplace. The arbitrator has also disregarded [the previous arbitrator's] ruling that any

205. *Id.* at 469-70.
206. 915 F.2d 840 (2d Cir. 1990).
207. 969 F.2d 1436 (3rd Cir. 1992).
208. 915 F.2d at 842.
209. *Id.*
210. At the time the incidents occurred, the victims were new employees and concerned about the repercussions of filing complaints. *Id.*
211. Newsday, Inc. v. Long Island Typographical Union, 915 F.2d 840, 843 (2d Cir. 1990).
212. *Id.*

> further acts of harassment by [the grievant] would be grounds for discharge. Instead, [the] award condones [the grievant's] latest misconduct; it tends to perpetuate a hostile, intimidating and offensive work environment. [The grievant] has ignored repeated warnings. Above all, the award prevents Newsday from carrying out its legal duty to eliminate sexual harassment in the work place.[213]

The Second Circuit erred both in impliedly affirming the district court's conclusion that the grievant was a "chronic sexual harasser" and in stating that the arbitrator should have considered the public policy against sexual harassment in reaching his decision. As the court stated in *BPS Guard Services*, "[i]n determining whether to vacate an arbitrator's reinstatement of an employee who has been discharged for misconduct that arguably violates public policy, district courts have also focused on the likelihood that the misconduct will recur[ ]."[214] This determination by a court conflicts with the standard for judicial review of arbitral awards articulated in *Misco*.[215] There, the Supreme Court stated that a grievant's amenability to discipline is a factual determination to be made by the *arbitrator*, and moreover, if additional facts are to be found, the arbitrator should find them.[216] Thus, the district court's conclusion that the grievant was a "chronic sexual harasser" is a factual finding that was within the arbitrator's province to determine in the first instance.

Additionally, in *Grace*,[217] the Supreme Court held that "the question of public policy is ultimately one for resolution by the courts[,]" not the arbitrator. Under this analysis, the Second Circuit was incorrect in stating that the *arbitrator* should have considered the public policy against sexual harassment in reaching his decision. Nonetheless, it was proper for the *Second Circuit* to consider whether compliance with the arbitral award ordering the grievant reinstated would violate the public policy against sexual harassment. The court could properly conclude that because the award ordered the grievant reinstated after he had engaged in sexual harassment following his suspension and a warning that future harassment would result in immediate discharge, the award violated public policy by decreasing the ability of the employer to successfully prevent sexual harassment from occurring in its workforce.

The court also could have held that the arbitrator's award was improper because it seemed to be based on the arbitrator's own personal notions of right and wrong, and did not draw its essence from the collective bargaining agreement that provided for discharge as a final step in progressive discipline.[218] Here, the arbitrator was prohibiting the employer from discharging the griev-

213. *Id.* at 845.

214. BPS Guard Servs., Inc. v. International Union, 735 F. Supp. 892, 896 (N.D. Ill. 1990).

215. United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29 (1987).

216. *Id.* at 44-45.

217. W.R. Grace & Co. v. Local Union 759, 461 U.S. 757, 766 (1983).

218. *Id.* at 765-66.

ant solely on the grounds that the employer had failed to discipline the grievant for harassing two new female employees subsequent to his suspension and warning. The employer, however, lacked knowledge of these occurrences because the victims failed to report them until the employer's investigation into the grievant's *third* incident. The court could have determined that the arbitrator's reliance on the failure of the employer to discipline the grievant for two *unreported* incidents constituted the arbitrator's own brand of industrial justice, because the effect of such an award would require an employer to continually ask all of its female employees if they had been sexually harassed in the last week, month, or year by an employee previously disciplined for harassment. Otherwise, the employer could not be assured that it would be able to discharge an employee such as the grievant who had been previously warned discharge would be the penalty for further harassment.

In the final case, *Stroehmann Bakeries, Inc.*[219] the arbitrator ordered a grievant reinstated with full backpay after he had been discharged for allegedly grabbing the breasts of a female employee who worked for one of his employer's customers. The arbitrator found that the employer had neither adequately investigated the charge before discharging the grievant nor met its burden of showing the harassment had occurred. Based *solely* on this finding, the arbitrator determined that the grievant had not been afforded the procedural protection of industrial due process in accordance with the terms of the governing collective bargaining agreement and that discharge was therefore improper.[220] Upon Stroehmann's appeal, the district court framed the central issue before it as "whether the arbitrator's reasoning process, language, tone, considerations, and award violate public policy."[221] The court then noted that the most notable omission in the award was that the arbitrator had expressly refused to make a factual determination of whether the employer, faced with the facts presented, reasonably believed that the grievant had committed an assault.[222]

Moreover, in the court's opinion, the award also failed to explain how or why the investigation was deficient, and contained "disturbing comments which indicate a clear disposition towards [the grievant]."[223] Specifically, the district court believed based on the arbitrator's comments that the arbitrator had considered the fact that the victim lacked a social life, had a female roommate, no boyfriend, weighed 225 pounds, and was in the arbitrator's opinion, unattractive and frustrated. Additionally, the arbitrator had noted the griev-

219. Stroehmann Bakeries, Inc. v. Local 776, Int'l Bhd. of Teamsters, 969 F.2d 1436, 1452 (3rd Cir. 1992) (dissenting opinion).

220. The collective bargaining agreement required that "higher management . . . investigate and collect the facts before a final and official dismissal is declared." *Id.* at 1449 (Becker, J., dissenting).

221. Stroehmann Bakeries, Inc. v. Local 776, Int'l Bhd. of Teamsters, 762 F. Supp. 1187, 1188 (M.D. Pa. 1991).

222. *Id.*

223. *Id.* at 1189.

ant was married, had children, and the situation was having a detrimental effect on his marriage. Accordingly, the court held the arbitral award reinstating the grievant violated public policies against sexual harassment in the workplace and sexual assault and abuse in general, and vacated the award.[224] The court, however, did *not* decide whether the grievant should be reinstated, but ordered that the case be decided by another arbitrator in order to "further another public policy that requires labor disputes to be resolved properly and impartially."[225]

Over a strong dissent, the Third Circuit affirmed the district court's holding on three grounds. First, the appellate court stated that an arbitrator's award ordering reinstatement of an employee accused of sexual harassment without an arbitral determination of whether the harassment had in fact occurred violated a well defined and dominant public policy favoring voluntary employer *prevention* of sexual harassment in the workplace.[226] The two-justice majority believed that reinstatement under these circumstances did not discourage sexual harassment from occurring, but rather would undermine an employer's ability to fulfill its obligations under Title VII to prevent and sanction sexual harassment in the workplace.[227]

Second, the court stated that the arbitrator's interpretation of the clause relating to industrial due process "neither considered nor respected public policy. Instead his interpretation violated it."[228] The court also dismissed, as being without merit, the union's argument that the district court had not given enough weight to industrial due process concerns.[229] The court acknowledged that a just cause provision in a collective bargaining agreement did trigger an industrial due process analysis;[230] however, in the majority's opinion, the arbitrator's conclusion that Stroehmann had denied the grievant industrial due process was "unfounded."[231] According to the court, nothing the union had presented to it, or had discovered through its own research, demonstrated that Stroehmann disregarded industrial due process in reaching its decision to discharge the grievant.[232]

Finally, the Third Circuit stated that although it believed that both Stroehmann and the district court took some of the arbitrator's comments out of context and exaggerated them, the order remanding the case to a different arbitrator was within that court's discretion because the order was not based on arbital bias, but rather on public policy grounds. The majority did believe, however, that the arbitrator's comments about the complainant's personal

224. *Id.* at 1189-90.
225. *Id.*
226. Stroehmann Bakeries, Inc. v. Local 776, Int'l Bhd. of Teamsters, 969 F.2d 1436, 1442 (3rd Cir. 1992).
227. *Id.*
228. *Id.* at 1444.
229. *Id.*
230. *Id.* at 1444 n.6.
231. *Id.* at 1445.
232. *Id.* at 1444.

characteristics did show he was biased toward the grievant.[233]

As noted by the dissent, the majority erred in two ways. First, although there is a well defined and public policy favoring prevention of sexual harassment in the workplace, *reinstatement* of the grievant in the absence of a finding of whether or not the harassment occurred does not violate this policy, *when the failure to make such a finding is due to the fact that the employer did not adequately investigate the allegation or sustain its burden of proof.* Rather, the arbitrator's decision puts the onus on the employer to ensure that it has adequately investigated all charges *before* disciplining an employee who has been accused of sexual harassment. The Third Circuit's view allows an employer to inadequately investigate a complaint of harassment, terminate the alleged harasser to limit the employer's liability to the complainant, and then be held unaccountable to the alleged harasser who, similar to the grievants in *Communication Workers*[234] and *Chrysler Motors Corp.*,[235] may be amenable to corrective discipline if he is found to have sexually harassed the complainant. Moreover, the court's holding does not properly place the burden of proof on the employer to adequately prove the harassment occurred, thereby giving it just cause to discharge its employee. Instead, the holding improperly places the burden of proof on the accused to show that he did *not* sexually harass the complainant.

The majority also erred by stating the arbitrator should have considered public policy in reaching his decision. As stated previously, under *Grace*,[236] the courts and not the arbitrators are charged with resolving questions of public policy. Thus, while it was proper for the Third Circuit to consider the important public policy of preventing sexual harassment in the workplace, it would not have been proper for the arbitrator to have considered it. Additionally, the arbitrator was not required to make a finding as to the reasonableness of the employer's belief that the grievant was guilty of sexual harassment. "Arbitrators have no obligation to the court to give their reasons for an award."[237] In this instance, the arbitrator could properly rule that the employer did not have just cause to terminate the grievant because the adequacy of the employer's investigation is an implicit consideration in a "just cause" standard for discharge.[238]

In *Stroehmann*, the Third Circuit made its own factual determination that the grievant had been afforded industrial due process, based on both facts presented by the union and its own research. Under the *Grace* and *Misco* standards, this is not within the proper purview of a court reviewing an arbitral decision on public policy grounds. The mere fact that the majority disagreed with the arbitrator's *factual* determination that Stroehmann's

233. *Id.* at 1446.
234. Communication Workers v. Southeastern Elec. Coop., 882 F.2d 467 (10th Cir. 1989).
235. Chrysler Motors Corp. v. International Union, 959 F.2d 685 (7th Cir. 1992).
236. W.R. Grace & Co. v. Local Union 759, 461 U.S. 757, 766 (1983).
237. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 598 (1960).
238. *See supra* note 118 and accompanying text.

investigation had been inadequate does not provide suitable grounds for the court to set aside that finding, "[n]or does the fact that it is inquiring into a possible violation of public policy excuse a court for doing the arbitrator's task."[239] Although the Third Circuit noted the "unobjectionable general proposition that arbitrators' awards that reinstate discharged employees are not subject to judicial interference if the employer did not afford the employee industrial due process[,]"[240] the court circumvented this principle by factually determining for itself that in the instant case, industrial due process had been given the grievant.

Nonetheless, as noted by the district court, an arbitrator's award may be overturned if it is based on her own brand of industrial justice.[241] Here, there was evidence from which the court could conclude that the arbitrator's award was based on his own notions of right and wrong, and not solely on the facts before him, even if the arbitrator's statements were exaggerated for trial purposes. The fact that the arbitrator appeared to have viewed the complainant as "unattractive and frustrated" is irrelevant either to a determination of whether the grievant was guilty of sexually harassing her, or whether the employer was justified in terminating him. Similarly, the grievant's marital and parental status and the effect of the allegations of harassment on the grievant's marriage have no place in the arbitral process. Thus, as noted by the dissent, the majority did not have to rely on the public policy exception to vacate the award, but could have simply relied on the arbitrator's failure to rely on the collective bargaining agreement as the basis for his decision.[242]

Although limited in number, the above cases suggest that where an arbitrator fulfills her duty to interpret a grievant's discharge in light of the collective bargaining agreement and concludes that discharge was unwarranted, a court is unlikely to vacate an arbitral award on public policy grounds. Therefore, employers should ensure that their collective bargaining agreements clearly specify what the employees' obligations are to the employer, the penalty for violating these obligations, as well as the employer's obligations to its employees. The employer also must ensure that it then fulfills its obligations both to the victims of harassment and to the alleged harassers, under both federal law *and* the collective bargaining agreement, in order to limit the number of potential conflicts which it otherwise may face.

IV
RECOMMENDATIONS TO EMPLOYERS TO AVOID POTENTIAL CONFLICTS

Employers should take measures both to prevent sexual harassment from

239. United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 44-45 (1987).

240. Stroehmann Bakeries, Inc. v. Local 776, Int'l Bhd. of Teamsters, 969 F.2d 1436, 1445 (3rd Cir. 1992).

241. *Enterprise Wheel*, 363 U.S. at 597.

242. *Stroehmann*, 969 F.2d at 1451 (dissenting opinion).

occurring and to remedy any detriment the victim suffered from the sexual harassment. Preventive measures include adopting an explicit policy against sexual harassment that is communicated to all employees, giving notice to all employees of the employer's intent to enforce that policy, and including provisions in the collective bargaining agreement that state how grievances relating to sexual harassment will be arbitrated. If sexual harassment nevertheless occurs, the employer must act in a way that is equitable to both the complainant and the alleged harasser. This means conducting a fair and thorough investigation, applying corrective discipline where the conduct is not egregious, and ensuring that the victim of harassment is made whole by restoring to her any lost opportunities and benefits.

If an employee knows that effective avenues of complaint and redress are available, then these avenues become part of the work environment. Additionally, if the employer can demonstrate that once it received a sexual harassment complaint it took steps to eliminate the harassment, made all victims whole, and instituted preventive measures, then the EEOC usually will close the charge because of the employer's prompt remedial action.[243] However, the mere existence of a grievance procedure and a *general* policy against discrimination will not suffice, because a policy that fails to specifically address sexual harassment also fails to alert employees about their employer's interest in correcting this form of discrimination.[244]

A. Promulgation of a Policy Against Sexual Harassment

Employers can most effectively protect their employees from sexual harassment — and themselves from liability — by developing, communicating, and enforcing a strong policy against sexual harassment.[245] An effective sexual harassment policy is one that includes: (1) a clear statement from the employer that sexual harassment will not be tolerated; (2) a definition of sexual harassment, including its three basic elements — that the conduct or communication is unwelcome, it is of a sexual nature, and it impacts the victim's work environment; (3) examples of prohibited conduct; (4) the development of appropriate sanctions and communication to all employees of those sanctions; (5) the development of a procedure for resolving sexual harassment complaints which is designed to encourage victims to come forward, including a provision that does not require a victim to complain first to her supervisor; (6) a statement that while confidentiality will be assured as much as possible, total confidentiality cannot be guaranteed in light of the employer's duty to fully investigate the incident; (7) effective remedies designed to make the victim whole; and (8) provisions for protecting both the victim and witnesses against

243. *Policy Guidance*, *supra* note 9, at 56; *see also* 29 C.F.R. § 1604.11(d) (1992) ("[A]n employer is responsible for acts of sexual harassment [between fellow employees] in the workplace where the employer . . . knows or should have known of the conduct, *unless it can show that it took immediate and appropriate corrective action.*") (emphasis added).

244. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 72-73 (1986).

245. 29 C.F.R. § 1604.11(f) (1992).

retaliation.[246]

A sample policy statement meeting these criteria follows:

Company Policy Against Harassment

This Company prohibits, and will not tolerate, harassment of an individual because of that individual's sex, race, religion, national origin, physical handicap, or age. Any individual who believes that he or she has been subjected to such harassment should immediately report that harassment to the Company.

Sexual harassment means *unwelcome* conduct or communication of a sexual nature, when any *one* of the following three factors is met:

1. Submission to that conduct is made either explicitly or implicitly a term or condition of the individual's employment;

2. Submission to sexual activity or a rejection of the request for sexual favors becomes a basis for a decision concerning an individual's employment; or

3. The conduct unreasonably interferes with the individual's work performance or creates an intimidating, hostile, or offensive work environment.

Types of conduct which may be considered sexual harassment include unwelcome sexual advances or requests for sexual favors, verbal or physical conduct of a sexual nature, posters, cartoons, or pictures of a sexual nature, continuous requests for dates after the recipient states he or she is not interested, name calling, suggestive comments, and lewd talk.

Sexual harassment is measured from the viewpoint of a reasonable woman if the victim is a woman, or a reasonable man if the victim is a man. *It is not the intent of the person engaging in the activity that determines what constitutes sexual harassment, but rather, the effect the activity has on the victim.* Thus, well-intentioned compliments may be considered sexual harassment if a reasonable person of the same sex as the recipient would perceive it to be harassing, whether or not the compliment-giver intended to harass.

If any employee believes that he or she is the victim of any type of harassment, including sexual harassment, that employee should immediately report the incident to an immediate supervisor. If the immediate supervisor is involved in the reported conduct, or if for some reason the employee feels uncomfortable about making a re-

246. *Id.*; *In re* Kiam, 97 Lab. Arb. (BNA) 617, 627 (1991) (Bard, Arb.) (citing Judith Bevis Langevin, *Preventing Sexual Harassment in the Workplace, in* MINNESOTA STATE BAR CONTINUING LEGAL EDUCATION EMPLOYMENT HANDBOOK FOR 1989 (1989); *see also Policy Guidance, supra* note 9, at 54.

port to that level, the report should be made to the Personnel Director, _____, at extension _____, or his/her assistant, _____, at extension _____.

The Company will investigate any such report and will take whatever corrective action is deemed necessary, including *disciplining, transferring, or discharging any individual* whom the Company believes, based on a preponderance of the evidence, has violated this prohibition against harassment. *If in the Company's opinion, the conduct is particularly egregious, the Company will discharge an individual found guilty of harassment, even if it is his or her first offense.*

Confidentiality will be assured to the extent possible, but cannot be fully guaranteed, due to the employer's obligation to fully and fairly investigate each incident reported. However, under no circumstances is an employee to be treated unfavorably due to his/her reporting of sexual harassment, or his/her cooperation in the Company's investigation of reported incident(s) of sexual harassment. Any employee who believes that he/she has been retaliated against because of his/her efforts to eliminate sexual harassment from the workplace should report this to an immediate supervisor. If the immediate supervisor is involved in the retaliation or, if for some reason the employee feels uncomfortable about making a report to that level, the report should be made to the Personnel Director, _____, or his/her assistant, _____. Persons found guilty of retaliation will also be subject to disciplinary action, including discharge.

The Company clearly does not tolerate harassment on the basis of any of the categories discussed in this policy and will take appropriate disciplinary action whenever such harassment is demonstrated. In addition to any disciplinary action imposed by the Company for harassment, any individuals engaging in such conduct contrary to Company policy may also be personally liable in any legal action brought against them.

Any employee who has questions regarding this policy may call the Personnel Director, _____, at extension _____.[247]

The employer's policy should be communicated in a manner which is designed to reach all employees, both supervisory and non-supervisory. If the employer has been lax about taking steps to prohibit sexual harassment in the past, the policy should also expressly state that, effective immediately, the employer intends to enforce its policy. In addition to posting the policy in conspicuous places, the employer should reissue the policy to all personnel each year to refresh employees' memories regarding the seriousness of the employer's position, as well as to remind employees what conduct constitutes

247. Adapted from MAUREEN MCCLAIN, EMPLOYMENT TERMINATION LAW: A PRACTICAL GUIDE FOR EMPLOYERS 24-25 (1987).

sexual harassment. New employees should also be given a copy of the policy when they begin work. Personnel directors or consultants should conduct awareness sessions for all supervisors to educate them both about the employer's policy and about the remedial action they are required to implement should they become aware of any sexual harassment. Supervisors should also be made aware of their affirmative duty to address any conduct which is openly practiced in the workplace that may be considered sexual harassment from a reasonable woman's perspective.

B. Collective Bargaining Agreement

In addition to promulgating and distributing a strong policy against sexual harassment, the employer must ensure that its collective bargaining agreement reflects that policy.[248] Specifically, in addition to an antidiscrimination clause, the employer and union should include a provision that expressly prohibits sexual harassment and references the employer's policy governing this misconduct. If the agreement lists offenses which constitute grounds for immediate discharge, sexual harassment should be added to the list. Additionally, the agreement should state that the parties intend to comply with all antidiscrimination laws — both federal and state — and that any provision found to conflict with the law is void. Such a clause clearly authorizes any arbitrator reviewing a grievance brought on behalf of an employee who has been disciplined or discharged for sexual harassment to consider external law and the requirements which may be imposed upon the employer by court decisions such as *Ellison v. Brady*.[249]

The collective bargaining agreement should also limit the discretion of the arbitrator with respect to formulating or reviewing remedies.[250] Thus, the agreement can either vest unreviewable discretion in management to discharge an employee once it proves by a preponderance of the evidence that the employee is guilty of sexual harassment or, alternatively, state that in reaching her decision, the arbitrator is *not* to consider published opinions and compare

248. The National Labor Relations Act requires an employer to bargain in good faith with respect to wages, hours, and other terms and conditions of employment. 29 U.S.C. § 158(d) (1988). In addition to wages and hours, discharges are within the area of mandatory bargaining. ELKOURI & ELKOURI, *supra* note 38, at 464 (citing NLRB v. Bachelder, 8 L.R.R.M. 723 (7th Cir. 1941)). As stated in *In re* Jacobs Mfg, Co., 94 N.L.R.B. 1214, 1219-20, (1951), *aff'd*, 196 F.2d 680 (2d Cir. 1952), however, "the duty to bargain implies only an obligation to *discuss* the matter in question in good faith with a sincere purpose of reaching some agreement. It does not require that either side agree, or make concessions." Thus, prior to implementing any of the recommendations suggested herein, employers have a duty to bargain in good faith with their unions regarding these suggestions. If, however, the parties bargain to impasse on any matter, an employer "is privileged to take unilateral action consistent with its proposals in bargaining." ELKOURI & ELKOURI, *supra* note 38, at 469.

249. 924 F.2d 872 (9th Cir. 1991).

250. In United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 41 (1987), the Supreme Court noted that the parties to a collective bargaining agreement may limit the discretion of the arbitrator when it comes to formulating remedies. *See also* VOLZ & GOGGIN, *supra* note 81, at 5.

the actions taken by the employer before her with actions taken by other employers for similar offenses. If the employer chooses the latter option, the agreement should allow the arbitrator to consider whether the employer's actions were proportionate to those it has taken in the past against other employees found guilty of the same or similar offense, unless the employer has given clear notice that it intends to impose harsher penalties for sexual harassment than it has done in the past. By so doing, an employer will not be inhibited in its efforts to eradicate sexual harassment from its workplace by the failure of other employers to take an equally hard stance against such misconduct.[251]

Finally, the employer and union should consider providing in the collective bargaining agreement special arbitration procedures for grievances which are brought by employees who have been disciplined for sexual harassment.[252] For example, in the agreement, the employer and union could expressly limit the arbitrator's jurisdiction solely to a determination of the following four issues:

> (1) Was the employer's policy against sexual harassment effectively communicated to the grievant?
> (2) Has the employer fulfilled its obligations pursuant to the collective bargaining agreement to fully and fairly investigate the allegations against the grievant?
> (3) Based on a preponderance of the evidence, has the employer proven the grievant is guilty of sexual harassment?
> (4) Has the employer been diligent about enforcing its policy against sexual harassment in the past, and if not, did the employer give clear notice to employees of its intent to enforce its policy in the future?

If the answers to *all* of the above questions are "yes," then the collective bargaining agreement should specify the arbitrator has no jurisdiction to alter the employer's choice of remedy.

C. Investigation of Sexual Harassment Complaints

If despite the above efforts sexual harassment occurs, the employer must promptly act to fully investigate and remedy any ongoing illegal activity.[253]

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251. *See supra* note 154 and accompanying text.

252. *See, e.g., In re* Weyerhaeuser Co., 71 Lab. Arb. (BNA) 1215, 1216 (1978) (Carnes, Arb.) (noting that the employer and the union had by settlement agreement limited the arbitrator's jurisdiction in Title VII cases to the determination of specified questions).

253. *Policy Guidance, supra* note 9, at 51; *see also* Barrett v. Omaha Nat'l Bank, 726 F.2d 424, 426 (8th Cir. 1984) (within four days of receipt of the sexual harassment complaint, the employer fully investigated the charge, reprimanded the harasser for his grossly inappropriate conduct, placed him on probation for ninety days, and warned him that any further misconduct would result in his discharge); Swentek v. USAIR, Inc., 830 F.2d 552, 558 (4th Cir. 1987) (after victim complained, employer responded by fully investigating the complaint, and pursuant to its progressive discipline policy, issued a written warning to the harasser telling him to refrain from using foul language and to keep away from the complainant, with a warning that another substantiated complaint would result in his suspension).

When investigating a sexual harassment complaint, the employer must recognize that sexual harassment may be private and without eyewitnesses; thus, resolution of a sexual harassment claim often will depend on the credibility of the parties.[254] The employer should question the complainant and the alleged harasser in detail, and search for any corroborative evidence of any nature.[255] Often, employers fail to interview the alleged harasser because statements from several witnesses seem to clearly substantiate the victim's complaint. Although the investigation may suffice to determine the harassment occurred, the employer has lost an essential source of evidence which may reveal further information.[256] Additionally, failing to interview the alleged harasser may leave the employer open to the harasser's charges of unfairness which may influence an arbitrator in a unjust discipline grievance hearing.

In searching for corroborative evidence, the employer should question both supervisors and co-workers of the complainant. A complainant's account must be sufficiently detailed and internally consistent to be plausible, and lack of corroborative evidence where such evidence should logically exist will undermine the allegation.[257] Corroborative evidence does not have to be solely in the form of eyewitness testimony to the alleged conduct. The testimony of people who observed the complainant's demeanor immediately after the alleged incident occurred can be used as corroboration, as can the testimony of those with whom the complainant discussed the incident, such as coworkers, a doctor, or her counselor.[258]

D. Remedying a Hostile Work Environment

Numerous court and arbitral decisions state that an employer is not required to discharge all harassers.[259] Courts simply require that the employer's remedy be immediate and appropriate, and reasonably calculated to end the harassment.[260] Under the standard articulated by the Ninth Circuit in *Ellison*, however, the employer must also determine whether its remedy will prevent further misconduct from both the alleged harasser and other potential harassers, and whether the harasser's mere presence creates a hostile work environment from the perspective of a reasonable woman.[261]

The employer, though, cannot just focus on the victim of harassment, but must ensure that its actions are both fair to the alleged harasser and in accord with its collective bargaining agreement. To the extent that progressive disci-

254. *Policy Guidance, supra* note 9, at 43.
255. *Id.*
256. INVESTIGATOR'S GUIDEBOOK, *supra* note 10, at 9.
257. *Policy Guidance, supra* note 9, at 43.
258. *Id.* at 44.
259. *See, e.g.*, Ellison v. Brady, 924 F.2d 872, 881-82 (9th Cir. 1991); Barrett v. Omaha Nat'l Bank, 726 F.2d 424, 427 (8th Cir. 1984); *In re* Shell Pipe Line Corp., 97 Lab. Arb. (BNA) (1991) (Baroni, Arb.).
260. *See, e.g., Ellison*, 924 F.2d at 882; Katz v. Dole, 709 F.2d 251, 256 (4th Cir. 1983).
261. *Ellison*, 924 F.2d at 882-83.

pline is deemed appropriate, employees found guilty of harassment should be given *written* warnings informing them in what way their conduct violated the employer's policy against sexual harassment.[262] The warning must also inform the employee of the consequences of a subsequent substantiated complaint of sexual harassment. The employer must then ensure that it enforces its policy with warnings such that employees do not have an expectation that the employer condones sexual harassment. Finally, the employer's remedy must not discriminate on an arbitrary basis between employees found guilty of the same type of misconduct.

CONCLUSION

The modern trend of federal appellate courts adjudicating Title VII hostile work environment sexual harassment claims is to evaluate both the complainant's claims *and* the effectiveness of the employer's response from the perspective of a reasonable *woman*. This change from a reasonable person standard to a reasonable woman standard reflects an increased understanding by the judiciary that women and men often perceive sexual conduct in the workplace differently. In order to completely eliminate barriers for women in the workplace which may be imposed on female employees by their male counterparts, employers and courts must consider the work environment from a reasonable woman's perspective. Although many employers have taken steps to educate their workers regarding what conduct constitutes sexual harassment, most have not taken measures to ensure that they are not faced with conflicting obligations to the victim of harassment under Title VII case law, and to the harassers under their collective bargaining agreements and arbitral principles used to construe those agreements.

In addition to promulgating a strong, explicit policy against sexual harassment which defines sexual harassment, provides examples of prohibited conduct, states the penalties which will be imposed for violation of the policy, and is distributed to *all* employees, employers should also ensure that their collective bargaining agreements reflect their stance against sexual harassment. In particular, the agreement should include a clause which expressly prohibits sexual harassment, since an arbitrator may hold that a typical antidiscrimination clause or plant rules clause fails to give adequate warning to employees that sexual harassment is prohibited conduct. Additionally, the agreement should expressly state the boundaries of the arbitrator's jurisdiction in proceedings brought by grievants who have been disciplined or discharged for sexual harassment, to ensure that arbitrators do not vacate the employer's action solely because other arbitral decisions have not imposed a similar penalty for sexual harassment in the past.

262. *In re* Kiam, 97 Lab. Arb. (BNA) 617 (1991) (Bard, Arb.).