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Sexual Harassment in the Workplace: How Arbitrators Decide

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SEXUAL HARASSMENT IN THE WORKPLACE: HOW
ARBITRATORS DECIDE

MOLLIE H. BOWERS¹
E. PATRICK MCDERMOTT²

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The authors thank W. Sue Reddick for her significant contributions to production of this article, and Robert Fronczak and Lawrence Simpson for their research efforts.

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I. INTRODUCTION

For thirty years courts and labor arbitrators have grappled with what constitutes sexual harassment and how to remedy such behavior. The Federal judiciary has developed case law on sexual harassment under Title VII of the Civil Rights Act of 1964. However, arbitrators addressing this issue under collective bargaining agreements have often treated similar fact patterns differently than jurists. A key reason for this difference is that litigation is essentially a zero sum game, the respondent is either guilty or not guilty. In contrast, labor arbitrators decide culpability first, and then consider the appropriate remedy. Regardless of whether an arbitrator elects to apply external law, he considers broader concepts of industrial jurisprudence in determining what the remedy shall be. This seems to create a chasm between arbitral treatment of sexual harassment allegations and that of Federal courts under Title VII.

In reconciling these separate paths for establishing standards of workplace conduct, the authors will provide a model that explains how arbitrators decide sexual harassment cases and how this model dovetails with the case law developed by the Supreme Court since 1986.

This analysis is intended to be useful to advocates in sexual harassment cases brought under a collective bargaining agreement, as well as to arbitrators and academicians. Guidance is provided for a variety of considerations such as selection of an arbitrator, framing the issue, effective use of requests for information, and much more.

II. CASE LAW ON SEXUAL HARASSMENT

Section 703(a) of Title VII makes it illegal for,
An employer -

- (1) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's ... sex.³

The terms *quid pro quo* and 'hostile work environment' do not appear in the statute. These terms first appeared in academic literature, found their way into decisions of the courts of appeal, and were mentioned for the first time by the Supreme Court in *Meritor Savings Bank v. Vinson*.⁴ The Court indicated that the use of the terms *quid pro quo* and hostile environment is helpful to the extent that they illustrate the distinction between cases where a threat is carried out and cases where offensive conduct, generally, is proven.

The concept of *quid pro quo* has been relatively clear from the outset. Defining under Title VII what conduct creates a hostile work environment has proven to be

³42 U.S.C. § 2000e2(a)(1) (2001).

⁴*Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986).

more elusive.⁵ In the *Meritor* decision, the Supreme Court set forth tests to determine whether the conduct complained of produces a hostile environment. The Court held, “For sexual harassment to be actionable, it must be sufficiently severe or pervasive to alter the conditions of [the victim’s] employment and create an abusing working environment.”⁶ These are stringent tests, as demonstrated in the Paula Jones case.⁷

The *Meritor* decision was clarified by the Supreme Court in *Harris v. Forklift Systems Inc.*⁸ The Court again addressed the definition of a hostile work environment stating, “[w]hen the workplace is permeated with ‘discriminatory intimidation, ridicule, and insult’ that is ‘sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment,’ Title VII is violated.”⁹ This reinforced the stringency of the test for hostile work environment and gave some guidance for decision-making.

In the two most recent sexual harassment cases decided by the Supreme Court, *Burlington Industries, Inc. v. Ellerth*,¹⁰ and *Faragher v. City of Boca Raton*,¹¹ the Court continued to discuss what conduct constitutes both *quid pro quo* and hostile environment sexual harassment. In *Burlington Industries*, the Court held that

if an employer demanded sexual favors from an employee in return for a job benefit, discrimination with respect to terms or conditions of employment was explicit. Less obvious was whether an employer’s sexually demeaning behavior altered terms or conditions of employment in violation of Title VII.¹²

The Court also reiterated that a hostile environment claim required a showing of “severe or pervasive” conduct”, citing its earlier decisions in *Oncale v. Sundowner Offshore Services, Inc.*,¹³ and in *Harris*.¹⁴ The *Faragher* decision addressed

⁵See Stephen M. Crow & Clifford M. Koen, *Sexual Harassment: New Challenges for Labor Arbitrators*, ARB. J., June, 1992, at 6-18, wherein it is noted that “the definition of sexual harassment may remain unresolved for several years.”

⁶*Meritor Sav. Bank v. Vinson*, 477 U.S. at 67, quoting *Henson v. Dundee*, 682 F. 2d 897, 904 (CA 11 1982); see also, *Faragher v. City of Boca Raton*, 524 U.S. 775, 786 (1998). (Emphasis added)

⁷*Jones v. Clinton*, 990 F. Supp. 657 (E.D. Ark. 1998).

⁸*Harris v. Forklift Sys. Inc.*, 510 U.S. 17 (1993).

⁹*Id.* at 21.

¹⁰*Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 752 (1998).

¹¹*Faragher v. City of Boca Raton*, 524 U.S. 775, 788 (1998).

¹²*Burlington Indus.*, 414 U.S. at 752.

¹³*Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75 (1998). Until *Oncale*, the primary focus of both judicial and arbitral decision-making in sexual harassment cases was on women victims in supervisor-subordinate, co-worker, and client-employee relationships. This changed with *Oncale*, which held that Title VII also covered same sex sexual harassment.

¹⁴414 U.S. at 754. The Court in *Burlington Indus.* went out of its way to state that it expressed no opinion about whether “a single unfulfilled threat is sufficient to constitute discrimination in the terms or conditions of employment.”

standards established earlier by the Court, noting that they were sufficiently demanding to ensure that Title VII did not become a general civility code.¹⁵

While case law on hostile work environment was developed by the Supreme Court in the 1980's and 1990's, various Federal district courts and courts of appeal separately came to their own conclusions about what constituted severe or pervasive conduct that altered the terms and conditions of a plaintiff's employment. This meant that courts provided different results on similar fact patterns. Thus, the determination of what constituted a hostile environment has been at least a two-decade long "work in progress."

III. MODEL OF ARBITRAL DECISION-MAKING IN SEXUAL HARASSMENT CASES

Under a collective bargaining agreement, an arbitrator's mandate is to determine whether the employer had just cause for the discipline imposed; not whether the complainant's legal rights had been violated. As in any just cause case, an arbitrator must decide, based on evidence and testimony, whether the employer proved the alleged conduct took place, and if proven, whether the penalty fits the offense and what the remedy shall be. This would seem to imply that arbitrators are precluded from considering external law in making decisions.

Some years ago, the National Academy of Arbitrators (NAA) engaged in extended, sometimes heated, discussion on this topic. For most NAA arbitrators, and perhaps other arbitrators, that debate may now be moot. The text of arbitral decisions clearly reflects arbitrator recognition that external law and the content of collective bargaining agreements are parallel paths for resolution of workplace disputes. No workplace issue shows the influence of external law on arbitral decision-making as clearly as sexual harassment.

Analysis of arbitral sexual harassment cases published in the last five years in *Labor Arbitration Reports*¹⁶ and in *Labor Arbitration Awards*¹⁷ showed that the preponderance of such cases involved, as in court cases, an allegation of hostile work environment. The published awards show some interesting dichotomies in how arbitrators view the relationship between conduct and the appropriate penalty. For example, awards reveal the following offense-penalty pattern:¹⁸

<u>Offense:</u>	<u>Penalty:</u>
Obscene	Discharge
Vulgar	Suspension
Foreplay	Unforgivable
Horseplay	Forgivable
Touching	Discharge
Verbal/Visual Abuse	Suspension

It can be argued that these arbitral dichotomies are consistent with the way Federal courts define what constitutes severe or pervasive conduct that alters the terms and conditions of another person's employment. Where arbitrators encounter

¹⁵*Faragher*, 524 U.S. at 788.

¹⁶The Bureau of National Affairs, Inc. (Washington, D.C.).

¹⁷Commerce Clearing House, Inc. (Chicago, Illinois).

¹⁸ANITA CHRISTINE KNOWLTON, NATIONAL ACADEMY OF ARBITRATORS, JUST CAUSE AND THE SEXUAL HARASSER: WHAT IS THE APPROPRIATE REMEDY? 3 (1993).

conduct that they consider either severe or pervasive, the tendency appears to be to uphold the employer discipline, including termination. Conversely, where less offensive conduct occurred; for example, sexual harassment that would not be considered severe or pervasive under Federal law, arbitrators appear to review more closely the array of procedural issues that may arise in just cause cases. This approach establishes a two-tier process of arbitral decision-making that parallels court determinations of whether a severe or pervasive hostile environment sufficient to prove illegal conduct under Title VII exists.¹⁹ The threshold determination is the severity and/or pervasiveness of the conduct at issue.

For the purpose of this discussion we will refer to those cases where arbitrators find either *quid pro quo* or severe or pervasive conduct, and is so offensive as to alter a victim's terms and conditions of employment, as Type I cases. Type II will refer to those cases that involve only charges relating to creation of a hostile work involvement.

Our analysis shows that in Type I cases, as in serious workplace violence, theft, or other major transgressions, arbitrators tend not to engage in deep analysis of contextual factors and procedural issues where an employer proves a serious transgression has occurred. Instead, arbitrators generally deal with such severe or pervasive sexual harassment as a zero-sum process, if the allegation is proven the penalty is upheld.

Our analysis of the Type II cases shows that arbitrators seem to address cases involving an allegation(s) of creating a hostile work environment in the same or a similar manner to that which they use in addressing just cause for discipline or discharge in other cases. In fact, the arbitral decision-making in such cases appears to follow the "Seven Tests of Just Cause" enunciated by Arbitrator Carroll Daugherty in 1966.²⁰ The "seven tests" Daugherty found applicable to just cause issues are:

Test 1. Did the company give the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?

Test 2. Was the company's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the company's business and (b) the performance that the company might properly expect of the employee.

Test 3. Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or an order of management?

Test 4. Was the company's investigation conducted fairly and objectively?

Test 5. At the investigation did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?

Test 6. Has the company applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?

¹⁹This model is similar to that set forth by arbitrator Whitley P. McCoy and discussed in EDNA ELKOURI & FRANK ELKOURI, *HOW ARBITRATION WORKS* 670-71 (4th ed., 1985); McCoy proposes that there are two general classes of offenses, serious offenses where no progressive discipline is required and less serious infractions where progressive discipline is appropriate.

²⁰*Enterprise Wire Co. v. Enterprise Indep. Union*, 46 Lab. Arb. (BNA) 359 (1966) (Daugherty, Arb.).

Test 7. Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the company.

The authors are aware that members of the National Academy of Arbitrators have debated, verbally and in print, the seven tests. It is not the purpose here to engage in that debate, but rather to explore how arbitrators have reached conclusions in sexual harassment cases.

Based upon our analysis, we have found, enunciated or not, that arbitrators who decide sexual harassment cases, apply, advertently or inadvertently, the 'seven tests', especially in Type II cases. We also found that arbitrators may rely upon external law in either a Type I or a Type II case. The results of this analysis, with illustrations of both types of cases, follow.²¹ Section A, Published Policy, addresses issues raised in Daugherty's Tests 1 and 2. Section B, Investigation of Allegations, addresses Tests 3, 4, and 5 and the issues of full investigation, proof of conduct, and burden of proof. Section C, Totality of the Record, addresses Tests 6 and 7 and the issues of repeat offenses, disparate treatment, past practice, and mitigation. The issues addressed in Section D, Other, while not directly related to the 'Seven Tests', are issues that are routinely considered by arbitrators in just cause cases. These issues are off duty/off premises conduct, estoppel, and societal perceptions.

A. Published Policy

Arbitrators consider a published policy on sexual harassment to be a work rule that is reasonably promulgated by the employer. There are occasions, however, when a provision of such policy may be questioned as affecting the due process rights of either the victim or the accused. These will be explored in Section B. Even in the absence of a published policy, arbitrators are tending to view the prohibition against *quid pro quo* sexual harassment as 'common sense', holding that a proven harasser 'knew or should have known' the behavior was inappropriate.

For example, in *American Federation of State County and Municipal Employees Local 473 v. Chief Judge of the Seventeenth Judicial Court*,²² the arbitrator addressed the situation of a grievant who was suspended for repeatedly making comments of a sexual nature to a female court reporter. The arbitrator noted, "[t]he grievant in this case is a sophisticated, intelligent, articulate man. Even without an explicit rule, he should have known that his leering comments to a co-worker and his attempts to corner and kiss her were inappropriate workplace behavior."²³ This case is classified as a Type I case because the repeated, improper comments, which could arguably support a finding of hostile work environment under Title VII, resulted in the arbitrator ignoring the fact that there was no rule prohibiting this conduct.

A second example of a Type I case is *Stark County Sheriff and Fraternal Order of Police Ohio Labor Council, Inc.*²⁴ This case involved a male correctional officer

²¹Citations for additional illustrative cases are listed as Endnotes.

²²*American Fed. of State, County and Mun. Employees Local 473 v. Chief Judge of the Seventeenth Judicial Court*, 94-1 Lab. Arb. Awards (CCH) 3597 (1993) (Nathan, Arb.).

²³*Id.* at 3603.

²⁴*Stark County Sheriff v. Fraternal Order of Police Ohio Labor Council, Inc.*, 105 Lab. Arb. (BNA) 304 (1995) (Heekin, Arb.).

who was discharged for threats, coercion, intimidation, and sexual harassment of fellow employees, including grabbing the crotch of a female officer. The arbitrator ruled that the correctional officer could be disciplined, despite the lack of a sexual harassment policy, because “the unacceptability of such extreme misconduct towards fellow employees, involving sexual terms which are commonly understood and to be so off-color as to make a joking context very implausible, precludes the necessity of a sexual harassment policy or specific prior notice in this case.”²⁵

Where Type II cases are concerned it appears that arbitral decision-making can be shaped by many factors, and is often unpredictable. Type II cases illustrate that there can be a ‘difference with distinction’ between the way arbitrators perceive, and seem to view, the distinction between Type I and Type II cases. Illustrative of this is *Prudential Life Insurance Company of America v. United Food and Commercial Workers International Union*.²⁶ In this case the insurance company issued a male agent a written letter of warning, stating that he violated the company’s policy on sexual harassment. On the days that he was required to report to the office, the agent had a habit of waiting in the parking lot for a particular female office worker, then walking her into the office, often making comments about her appearance, the way she walked, and the way she dressed. One morning, the agent also asked that the employee go dancing with him instead of going to work. The woman was married and was worried about how her husband would react if he found out about the grievant’s conduct. She reported the agent’s conduct to her manager, and the company decided subsequently to issue a disciplinary letter to the agent. The arbitrator concluded that the letter of warning sought to impose a higher standard of conduct than that established by Title VII. According to the arbitrator, the problem with the letter was that the policy relied upon was not clear as to whether it incorporated the Title VII standard or, in fact, set a higher standard of conduct. In so ruling, the arbitrator noted that while the company had the right to set a higher standard, it must provide notice of the rule so that any employee ‘knew or should have known’ the disciplinary consequences of his action. The arbitrator also reasoned that the discipline would stigmatize the employees, and that arbitrators apply additional scrutiny to such consequences. He ordered the company to rescind the warning letter stating, “Employers are not justified in taking disciplinary action against employees who do not know, or could not have reasonably known, at the time of their actions of the possible disciplinary consequences of such actions.”²⁷

In another Type II case, *American Protective Service, Inc. v. American Federation of Guards Local 1*,²⁸ a female employee was discharged for sending a series of graphic love letters to a male supervisor at work. The grievant’s knowledge of the company policy and her admission to sending the letters were important factors relied upon by the arbitrator in upholding her discharge, even though there was no physical touching or other more aggravated types of sexual harassment.

²⁵*Id.*

²⁶*Prudential Life Ins. Co. of Am. v. United Food and Commercial Workers Int’l Union*, 94-1 Lab. Arb. Awards (CCH) 3417 (1993) (Heinsz, Arb.).

²⁷*Id.* at 3422.

²⁸*American Protective Serv., Inc. v. American Fed’n of Guards Local 1*, 94-2 Lab. Arb. Awards (CCH) (1994) (Gentile, Arb.).

Other factors, which militated against the grievant, were that she was a short-term employee (a little over 5 months), some of the conduct complained of occurred while she was in a probationary status, and she had filed a complaint under the harassment policy. It is important to note that in some harassment cases poor management, a union's legal duty and/or lack of leadership can cause a case to rise to the arbitration level which 'should,' and but for these, have been resolved at a lower level in the grievance procedure.

City of Key West v. Individual Grievant,²⁹ provides yet another approach to Type II cases regarding published policy. A police captain with sixteen year's experience was suspended for twenty days and demoted for harassing and otherwise improper comments to a female officer. These comments included telling a female officer that "you should have an abortion," in response to her request for a Christmas Eve leave to spend time with her children, and to "bring in knee pads," pursuant to the officer's request for specific days off to further her education.³⁰ With respect to the Captain's first comment, the arbitrator held "Said behavior was conduct which unreasonably interfered with and created an intimidating, hostile, offensive working environment" for the victim.³¹ While acknowledging that the "knee Pads," comment was "improper" and "humiliating," the arbitrator held that just cause was lacking to discipline the grievant under City policy because "Said statement was not one which constituted sexual harassment. It was not utilized in a manner that was demonstrative of or in connection with employment or employment advances based or connected with sex or sexual harassment."³² A conclusion that could be drawn from this case, and others cited, is that male arbitrators, who clearly dominate the profession and, thus, hear the preponderance of cases, have a major influence in determining whether they view a case as Type I or Type II; regardless of the facts.

Another interesting aspect of Type II cases is revealed in the complex fact pattern of the case involving *T.J. Max v. Union of Needletrades*.³³ This case involved, *inter alia*, a claim of sexual harassment. One of the charges against a male employee was gross misconduct for making offensive comments to female employees, even though the affected employees disregarded the comments. The arbitrator found the grievant's conduct was gross or coarse but, under the employer's policy, his behavior did not rise to the level of sexual harassment—unreasonable inference with the individual's job performance or the creation of an intimidating, hostile or offensive work environment - because the behavior was disregarded by the women.

B. Investigation of Allegation

Incidents of alleged sexual harassment are replete with elements that can adversely affect an investigation and, thus, the due process rights of the grievant. Among the more obvious, victims may be reluctant to report offensive behavior at all, much less in a timely fashion believing, among other things, they can handle the

²⁹*City of Key West v. Individual Grievant*, 106 Lab. Arb. (BNA) 651 (1996) (Wolfson, Arb.).

³⁰*Id.* at 653.

³¹*Id.*

³²*Id.*

³³*T.J. Max v. Union of Needletrades*, 107 Lab. Arb. (BNA) 78 (1996) (Richman, Arb.).

conduct on their own. Peer, and other types of pressure, may prevent witnesses from coming forward or encourage them to embellish their accounts of the incident. Perception may play a large role in how the behavior is interpreted. The accused may be viewed as 'guilty' until proven innocent. Any one of these elements, and a host of other similar issues, increase the risk that reversible error will be found or the penalty will be reduced.

A complex example of a Type I case that addresses the issue of the company's investigation is found in *Quaker Oats Company v. Retail Wholesale & Department Store Union Local 110*.³⁴ In this case, a male employee was discharged for allegedly sexually harassing a female co-worker by grabbing her breasts on several occasions and her buttocks on one occasion. The union's defense included a claim that the employer's investigation was "insufficient."³⁵ The arbitrator upheld the discharge finding, *inter alia*, that the employer "interviewed all of the people who regularly worked on the same line with Ms. [C] and the grievant. The few it did not talk to were people who were on the line for only a part of the time that [C] claimed she was harassed."³⁶ He further held that "an investigation cannot be condemned merely because it did not include inquiry into every possible lead or a meeting with everyone who might have a shred of evidence that was relevant. The Company's inquiry, while short of perfect, was adequate under the circumstances."³⁷

This conclusion was buttressed by the Arbitrator's conclusions on the sufficiency of evidence supplied by the employer. The evidence noted by the arbitrator included: (a) credible, corroborating testimony of [E], a female employee of an independent contractor, who did not know and had not conferred with the complainant, but had been discouraged from complaining about the grievant's behavior by her supervisor, (b) the independent testimony of both the complainant and the corroborating witness [E] that neither of them complained to the employer "because they did not want the Grievant to lose his job; they only wanted to be left alone," and (c) the testimony of the complainant that she was afraid to complain to "management because she had struck the Grievant and used vulgar language toward him, and she thought she might be punished for her behavior."³⁸ The male arbitrator concluded that, "Their behavior is reminiscent of Anita Hill and is equally confusing to a male such as the Arbitrator, however, it is not the behavior of a woman who had decided to invent a story about the Grievant to get him fired."³⁹ A back door rationalization for the decision, despite the Arbitrator's findings, was completed in his notice that the complainant's and [E]'s testimony was supported by "the report from a fellow employee who was not called as a witness at the arbitration hearing

³⁴*Quaker Oats Co. v. Retail Wholesale & Dep't Store Union Local 110*, 95-1 Lab. Arb. Awards (CCH) 3188 (1993) (Bernstein, Arb.).

³⁵*Id.* at 3191.

³⁶*Id.*

³⁷*Id.*

³⁸*Id.*

³⁹95-1 Lab. Arb. Awards (CCH) at 3192.

that the Grievant had stated [to] that she preferred grabbing [C]'s breasts to those of [E]."⁴⁰

Certain cases fall clearly in the Type II category. In some Type II cases employers have shown a tendency to accept the statements of the accuser, standing alone, as 'proof' that the harassment occurred. In *District of Columbia Public Schools v. Washington, D.C. Teachers Union*,⁴¹ a teacher was terminated for alleged sexual harassment of a student. Only the accuser and three witnesses, all identified by the accuser, out of a class of nearly thirty witnesses, were interviewed during the investigation. Those witnesses could not corroborate the accuser's allegations and she, in the Arbitrator's view, had an "adolescent's view" of what constituted harassment (i.e., felt "uncomfortable"). The Arbitrator noted that, "... the Grievant is not without rights. It is one function of arbitration and the duty of the Arbitrator to ensure that he [the Grievant] has been afforded the right of due process, and has been treated in conformity with the Law and the Labor Contract..."⁴²

The arbitrator also wrestled with the meaning of the charge itself, stating,

[p]art of the problem here is the nature of the charge itself—sexual harassment. The definition has evolved considerably over the past ten years, and it has received more public attention and commentary than most other charges. To some individuals, including certain officials involved in this case, it is an offense that has no degrees of seriousness—every sort of sexual harassment is equally heinous. This Arbitrator disagrees with that position.⁴³

Utilizing a Type II approach, the Arbitrator then found that, as with other standards of conduct, there are "major" and "minor" offenses of sexual harassment. The facts of this case caused the Arbitrator to find that the teacher had engaged in inappropriate behavior, but that the proper discipline was not termination. The penalty was reduced to a suspension for the school year in which the conduct occurred.

The potential notoriety and liability associated with a claim of sexual harassment may be so anxiety producing that an employer rushes to judgment, believing she/he "already knows" the accused is capable of the alleged conduct. These are not reasons for disciplining a grievant before the investigation commences. Beliefs about the validity of a complaint should not be basis for determining, *a priori*, that an investigation is unwarranted.

Another permutation of the due process trap is to immediately credit the accused and *not* the accuser. In a Type II case, a captain who was a seventeen year veteran of the police force, with an excellent record, was suspended for ten days because he did not report a clerk's sexual harassment complaint against a lieutenant because he believed the clerk was a disgruntled employee and discounted the complaint. The Department had a clear rule requiring that the complaint be reported to internal

⁴⁰*Id.*

⁴¹*District of Columbia Pub. Sch. v. Washington, D.C. Teachers Union*, 105 La. Arb. (BNA) 1037 (1995) (Johnson, Arb.)

⁴²*Id.* at 1039.

⁴³*Id.*

affairs. Additionally, the grievant chose, in violation of another policy and “common sense,” “to identify the accuser to the alleged perpetrator” which “only served to pour fuel on the fire.”⁴⁴ The Arbitrator upheld the suspension, but reduced it to four days based on the grievant’s tenure, work record, and the initial decision at the divisional level.⁴⁵

Due process considerations and timeliness of the complaint were facts in the Type II case of *Avis Rent A Car Shuttlers v. Teamsters Local 355*,⁴⁶ A male lead driver was alleged to have sexually harassed a female co-worker by making lewd remarks, suggestive comments, and by touching her. The victim delayed considerably in reporting the conduct because she said she thought she could handle it on her own. When the complaint was received, the grievant was suspended and then demoted permanently. However, the company did not ask the grievant for his version and it refused his request for a copy of the charges made against him. The grievant did stop the conduct at issue when he was notified by management that his conduct was considered to be sexual harassment.

The arbitrator upheld the grievance, finding that the company did not conduct a proper investigation. He relied heavily on the contract, citing a provision requiring the company to give at least one prior warning in writing before a discharge or suspension is meted out. The suspension was set aside by construing the contract language as providing a guarantee of “due process,” including the opportunity to be aware of the charges and to defend oneself before discipline is imposed. The permanent demotion was deemed to be excessive and was reduced to a demotion up and to the date of the issuance of the arbitrator’s award.

In a like case, *Firestone Rubber and Latex Co. v. Oil, Chemical and Atomic Workers International Union Local 4-836*,⁴⁷ a male employee was discharged for verbally abusing female and other co-workers. The arbitrator applied the “seven tests” in concluding that the discharge was without just cause because the company did not conduct a fair and objective investigation because no effort was made to obtain the grievant’s response to the allegations and because no effort was made to consider problems that prompted the employee complaints, the veracity of such complaints, or verification from the accused that the grievant actually committed the actions complained of.

1. Due Process Rights

Arbitrators pay close attention to the due process rights of the grievant and the victim in both Type I and Type II cases. *ABTCO, Inc. v. International Woodworkers Local III-260*,⁴⁸ is a Type I case which illustrates this point. A union steward

⁴⁴*City of Houston v. Houston Police Officers Union*, 107 Lab. Arb. (BNA) 1070, 1075 (1996) (Sherman, Arb.).

⁴⁵*Id.* at 1076.

⁴⁶*Avis Rent A Car Shuttlers v. Teamsters Local 355*, 105 Lab. Arb. (BNA) 1057 (1995) (Wahl, Arb.).

⁴⁷*Firestone Rubber and Latex Co. v. Oil, Chemical and Atomic Workers Int’l Union Local 4-836*, 107 Lab. Arb. (BNA) 276 (1996) (Koenig, Arb.).

⁴⁸*ABTCO, Inc. v. International Woodworkers Local III-260*, 104 Lab. Arb. (BNA) 551 (1995) (Kanner, Arb.).

attempted to settle a female employee's complaint of sexual harassment to prevent discipline of her harasser who was a fellow bargaining unit member. The company learned independently of the harassment and discharged the harasser, who was subject to a "Last Chance Agreement" due to earlier insubordinate and dishonest conduct. The union charged management with interfering in internal union business. The arbitrator disagreed, upholding the termination. He stated that once the company learned of the possible violation of the sexual harassment policy, it had an absolute right to act to enforce the policy and protect the due process rights of the victim. Failure to do so could subject the company to unwarranted liability from suit by the female employee.

The arbitrator also addressed the grievant's claim that he was unaware of the company's sexual harassment policy and did not know that pinching the female co-worker on the buttocks constituted a violation thereof, stating "I am of the view that a notice proscribing sexual harassment need not be published or posted by the employer in the first instance. There are certain rules of conduct so well known that the employees are deemed aware of them. Misconduct such as theft, drinking on the job, and insubordination, etcetera [sic] need not be codified by written rules and disseminated to employees."⁴⁹

Due process concerns also arise in Type II cases like *Renton School District v. Service Employees International Union Local 6*.⁵⁰ District policy insulated accusers from identification to the grievant and to the union until the arbitration hearing. A school custodian was accused of making inappropriate sexual comments to various teachers and cafeteria aides. The arbitrator employed Daugherty's just cause analytical framework, and also integrated the case law of *Meritor* and *Hensen* into her analysis. She ruled that the grievant was guilty of sexual harassment and upheld his disciplinary demotion. She also found, however, that the district's refusal to identify the complaining co-workers or provide the details of the complaint until arbitration was a denial of due process. Noting there was no harmful error to the grievant, the arbitrator awarded him backpay to make up for his demotion up to the date of the arbitration.

Another type of due process concern arises when an accuser refuses to testify. Arbitrators may elect to draw a negative inference, even if the complainant alleges fear of physical harm. This negative inference can be drawn against the claim itself, or may be found in the arbitrator's review of the penalty. In *Metropolitan Council Transit Operations v. Amalgamated Transit Union Local 1005*,⁵¹ the arbitrator found the grievant guilty as charged, but reduced his suspension from thirty to fifteen days because the only direct testimony was the grievant's own admission against interest. The complainant alleged she was fearful for her life due to reported threats and other incidents to discourage her involvement in the arbitration. The arbitrator allowed her affidavit into evidence, but credited only those allegations that were admitted by the grievant in his testimony to produce a Type II remedy.

⁴⁹*Id.* at 554.

⁵⁰*Renton Sch. Dist. v. Service Employees Int'l Union Local 6*, 102 Lab. Arb. (BNA) 854 (1994) (Wilkinson, Arb.).

⁵¹*Metropolitan Council Transit Operations v. Amalgamated Transit Union Local 1005*, 106 Lab. Arb. (BNA) 68 (1996) (Daly, Arb.).

Double jeopardy has also been addressed in Type II cases. In *USAF 82 MSSO/MSCE Base, Sheppard AFB, Texas v. National Federation of Federal Employees Local*,⁵² a federal agency suspended a training instructor for sexual harassment eleven months after it had issued him an oral admonishment for the same offenses. The arbitrator found the agency did not have the right, under any applicable law, rule, regulation, or the collective bargaining agreement, to cancel the admonishment and then issue a second disciplinary action. The same principle applied in *All West Container Company v. Graphic Communications Union, District Council No. 2*.⁵³ An employer suspended a male employee for sexual harassment one year after it had issued him a verbal warning for the same incident. The arbitrator rescinded the suspension that he considered to be double jeopardy.

2. Burden of Proof

A burden of proof determination is likely to be influenced by the standards of behavior in the workplace. In less salient cases involving the claim of sexual harassment, whistles and hoots in the workplace cannot be translated into a *bona fide* case of sexual harassment when it is shown that this behavior is displayed to mixed sex employees on a regular and repetitive basis, and is tolerated, not only by the employees (many of whom engage in such behavior) but also by the employer. This is a problem, if recognized by the employer, that needs to be solved by putting employees and the union on notice that such behavior will not be tolerated, and by giving a reasonable period to comply.

In *Penn Hills, PA School District and Amalgamated Transit Union Local 1552, 107 LA 566 (O'Connell)*, a Type II case, the arbitrator held that the grievant engaged in annoying behavior and exhibited poor judgment, but was not guilty of sexual harassment because there was no touching or harassing language. The grievant, a male bus driver, had been discharged for misconduct with a substitute teacher. He tried to engage her in conversation, asked her for dates, and even showed up at her residence uninvited. The arbitrator converted the discharge into a suspension that included the upcoming Fall semester.

3. Proof of Conduct

Determining whether the offense alleged is proven is an essential part of investigation. Many sexual harassment cases involve an accuser's word against that of her/his alleged harasser, the so-called "he said, she said" incidents. Credibility determinations are key in shaping an arbitrator's decision in both Type I and Type II cases. Motive, corroboration, past incidents of similar conduct, and rational reasoning are among the factors arbitrators credit in making credibility determinations.

Vista Chemical Company v. Oil, Chemical and Atomic Workers International Union Local 4-555,⁵⁴ is a Type I case. A recently assigned eighteen year old female

⁵²*USAF 82 MSSO/MSCE Base, Sheppard AFB, Texas v. National Fed'n of Fed. Employees Local 799*, 107 Lab. Arb. (BNA) 1089 (1997) (Stephens, Arb.).

⁵³*All West Container Co. v. Graphic Communications Union, District Council No. 2*, 109 Lab. Arb. (BNA) 1208 (1997) (Riker, Arb.).

⁵⁴*Vista Chem. Co. v. Oil, Chem. and Atomic Workers Int'l Union Local 4-555*, 104 Lab. Arb. (BNA) 818 (1995) (Nicholas, Arb.).

security guard accused a male employee of sexual harassment by asking personal questions about her life and her fiancée, asking if she would accept a gift, hugging her at the guardhouse and continuing to bother her. The grievant had been accused of sexual harassment by five other female security guards over the three years preceding these events. The company investigated one of these allegations and, when the grievant denied any wrongdoing, no further action was taken. The arbitrator began his work by establishing the standard of proof required for the company to prevail. He said sexual harassment is a serious allegation to which a stigma is attached and, thus, the standard of proof that has to be met is “clear and convincing,” rather than a “preponderance” of the evidence.⁵⁵ The arbitrator went on to state,

I am left with the distinct impression that [the accuser] did not fictionalize the charges she makes against the Grievant. Indeed, I find no motive whatsoever for [the accuser] to have done so. She hardly knew the Grievant, and for her to concoct such a story against Grievant does not come with a logical foundation.⁵⁶

He then moved easily to the conclusion that “the severest discipline available, summary discharge” was the appropriate penalty. The arbitrator went on to add, “To say that sexual harassment is serious misconduct borders on understatement. Given the development of civil rights law in recent years and the potential for liability which Company faces from permitting such conduct to go unchecked in its workplace, I must concur with Company’s position that discharge was the only *reasonable response* to Grievant’s actions.”⁵⁷

Rational reasoning and corroboration were central factors in a Type I case involving *City of Orlando Police Department v. Individual Grievant*.⁵⁸ The arbitrator applied the ‘clear and convincing’ standard, but acknowledged that “Impressions of credibility are ephemeral at best, and must reside in the subjective eye of the beholder.”⁵⁹ In this case, the accuser made significant admissions against interest, telling the grievant she loved him.

She admitted she believed a friendship with a superior officer would help her career and that [grievant] was in a position to further her career. Until the day in late February when she told [the grievant] she would not leave her husband, she apparently never once told [him] his attentions were unwelcome. At that point, I would conclude that [the accuser’s] complaint of sexual harassment would fail to meet the test set forth in *Henson and Meritor Savings Bank v. Vinson*, 477 U.S.⁶⁰

⁵⁵*Id.* at 821.

⁵⁶*Id.* at 822.

⁵⁷*Id.* (emphasis added).

⁵⁸*City of Orlando Police Dep’t v. Individual Grievant*, 109 Lab. Arb. (BNA) 1174 (1998) (Sweeney, Arb.).

⁵⁹*Id.* at 1182.

⁶⁰*Id.*

In a split decision, the arbitrator did rule in the accuser's favor where the charges of hostile work environment are concerned. Factors which contributed to this result included: controversion of the grievant's testimony by a superior officer about why the accuser was subjected to a special evaluation "following an outstanding regular evaluation by a period of a few weeks;" "sudden and dramatic changes in [the accuser's] work environment, her removal from her position as Assistant Squad Leader;" "[the accuser's] testimony is detailed, containing content which must have been personally embarrassing and includes [so many] unlikely instances . . . that I cannot accept the premise that she invented these incidents in an effort to discredit her supervisor," and testimony by another female officer that she had been subjected to similar offensive conduct by the grievant.⁶¹

Hughes Family Markets, Inc. v. United Food and Commercial Workers Union Local 770,⁶² is a classic "he said, she said" case, where the grievant also had the advantage of being a long service employee. A Service Manager's testimony about the accuser's nervousness, request to accompany her to her vehicle, and personal observation of the grievant staring at her were important in establishing the accuser's credibility. Additionally, the grievant had received a written warning three years before "for making sexual comments to a female" employee who no longer worked for the employer.⁶³ The arbitrator upheld the grievant's discharge, concluding "The 'pattern' aspects of the Grievant's alleged behavior" adversely affected the accuser "in her role as a worker."⁶⁴

The next two cases illustrate that just cause for discipline exists when it is proven that an employee has harassed a member of the public. A male train conductor was discharged in a Type I case involving the *Chicago Transit Authority v. Amalgamated Transit Union Local 308*.⁶⁵ He enticed a female passenger to get into his unoccupied car at a station and proceeded to expose himself, attempted to fondle her, tried to remove her clothes, and when the passenger refused to give oral sex, masturbated to ejaculation. The passenger exited the train at the next stop and reported the conductor to the police, who arrested him. The conductor initially denied everything but when ejaculation stains were found on his uniform, the grievant admitted his behavior to management. The arbitrator found the passenger's testimony was credible, whereas the grievant's was not and he admitted to lying during the disciplinary investigation, and denied the grievance.

EPA v. American Federation of Government Employees Local 3347,⁶⁶ is a Type II case wherein a government agency meted out a three-day suspension to a male team leader for making inappropriate sexual remarks to a female contractor's

⁶¹*Id.*

⁶²*Hughes Family Mkts., Inc. v. United Food and Commercial Workers Union Local 770*, 97-1 Lab. Arb. Awards (CCH) 3853 (1996) (Grabuskie, Arb.).

⁶³*Id.* at 3855.

⁶⁴*Id.* at 3860.

⁶⁵*Chicago Transit Auth. v. Amalgamated Transit Union Local 308*, 94-1 Lab. Arb. Awards (CCH) 4271 (1994) (Stallworth, Arb.).

⁶⁶*EPA v. American Fed'n of Gov't Employees Local 3347*, 102 Lab. Arb. (BNA) 1046 (Smith, Arb.).

representative. The grievant denied making some comments and asserted that the representative took others out of context. The arbitrator denied the grievance, stating that although this is a ‘he said, she said’ case, the grievant’s testimony was not credible, whereas the contractor’s representative had no motive to lie about the matter.

Same sex harassment was the subject of a Type I case in *Hughes Aircraft Company v. Electronic and Space Technicians Local 1553*.⁶⁷ The grievant denied every allegation made by his co-workers. The arbitrator upheld the discharge stating, “If the grievant is to be believed, the three employees must have gone to great lengths and efforts to coordinate their detailed testimonies regarding the Grievant’s behavior.”⁶⁸ The arbitrator also noted that a union witness and a manager’s notes both corroborated the “detailed, specific and consistent” testimony of the three complaining employees.⁶⁹ She concluded that “the Grievant’s denial of every one of these incidents testified to by other witnesses is, in light of all these considerations, simply not credible.”⁷⁰

Arbitrators deciding Type II cases tend to rely on more subtle elements of just cause in determining whether a grievance should be sustained or denied. For example, when the grievant did not testify at the hearing, the arbitrator drew a negative inference in *Safeway, Inc. v. United Food and Commercial Workers Union Local 588*.⁷¹ A male food clerk was discharged for sexually harassing female employees; such conduct including improper touching and inappropriate comments. The arbitrator upheld the discharge stating that the evidence of the grievant’s actions, as presented by the female employees and other witnesses, was unrebutted and therefore must be accepted as fact.

Extensive analysis of the evidentiary record was not the primary concern of the arbitrator in *Grievant v. City of Austin*,⁷² because “[t]he record plainly demonstrates that this has already been established.”⁷³ A male police lieutenant was suspended and demoted for sexual harassment of, and immoral conduct toward, a female police dispatcher. These officers had been dating but the dispatcher sought to break off the relationship. When the grievant did not comply, a meeting was held and the chief of police gave the grievant a formal letter of warning, which was also placed in the lieutenant’s personnel file. It was subsequently proven that he made calls to the dispatcher’s home. The arbitrator concurred with the chief’s assessment that this constituted “insubordination, in violation of Department Rule 60” because the lieutenant has been “on notice that he was to refrain from having any further contact

⁶⁷*Hughes Aircraft Co. v. Electronic and Space Technicians Local 1553*, 94-2 Lab. Arb. Awards (CCH) 4798 (1993) (Bickner, Arb.).

⁶⁸*Id.* at 4804.

⁶⁹*Id.*

⁷⁰*Id.*

⁷¹*Safeway, Inc. v. United Food and Commercial Workers Union Local 588*, 105 Lab. Arb. (BNA) 718 (1995) (Goldberg, Arb.).

⁷²*Grievant v. City of Austin*, 95-1 Lab. Arb. Awards (CCH) 3395 (1995) (Fogelberg).

⁷³*Id.*

with the dispatcher.”⁷⁴ The thirty-day suspension was upheld, but the grievance was sustained with respect to demotion.

C. Totality of Record

The totality of the record is an important consideration in determining whether the discipline meted out is appropriate for a proven sexual harassment offense and should, therefore, be sustained. This is especially pertinent in Type II cases. Whether the grievant’s total record with the company exacerbates or mitigates the complaint is unique to each case. For example, a grievant with an active record of discipline for another unrelated offense(s) may be subject to the next level of progressive discipline, up to and including discharge, even if this is the first sexual harassment offense. Conversely, a discharge is the likely result for repeated harassment offenses, especially if corrective action is of no avail. This is true even if progressive discipline is not adhered to and/or other mitigating factors are in a grievant’s favor. As in other just cause cases, disparate treatment and past practice can also influence an arbitrator’s decision whether the discipline is appropriate for a proven offense.

In *GTE California Inc. v. Communication Workers*,⁷⁵ a grievant with years of service with the company was terminated for creating a hostile work environment. He had previously been given two five-day suspensions, one for verbal abuse and one for sexual harassment. The grievant’s earlier comments included anti-Filipino, anti-white, anti-female, and age discriminatory remarks. He continued to make hostile and offensive comments to fellow employees, but he did not make any clearly discriminatory or sexually hostile comments. The arbitrator concluded “[i]t is clear that any of these comments alone made by the grievant appear relatively harmless, however, where the pattern is at a level where employees go out of their way to avoid him, or dread coming to work, a serious problem exists that cannot be ignored.”⁷⁶ The arbitrator also considered that the company had a duty to provide an harassment free workplace and that the grievant was aware of the policy but “continued to create a hostile environment” by his comments.⁷⁷ The arbitrator considered the grievant’s prior discipline, together with his unabated behavior, and upheld the discharge.

Recidivism and notice were issues in *City of Las Vegas v. Las Vegas City Employees Association*.⁷⁸ The city discharged a male foreman who brushed his body against a female employee three times in one month and, on another occasion, hugged and kissed her as a ‘thank you’ for driving him home. The foreman had received a written reprimand for earlier harassing conduct and had been required to attend sexual harassment classes. In upholding the discharge, the arbitrator found

⁷⁴*Id.* at 3398.

⁷⁵*GTE California Inc. v. Communication Workers*, 103 Lab. Arb. (BNA) 343 (1994) (Grabuskie, Arb.).

⁷⁶*Id.* at 350.

⁷⁷*Id.*

⁷⁸*City of Las Vegas v. Las Vegas City Employees Assoc.*, 107 Lab. Arb. (BNA) 654 (1996) (Bergeson, Arb.).

these actions to constitute ample notice to the grievant of the impropriety of his conduct.

As illustrated by *Pacific Bell v. Communication Workers*,⁷⁹ arbitrators tend to treat repeat sexual harassment following counseling in the same manner as drug and alcohol abuse cases. When recidivism occurs after counseling, the stage is set for further discipline, usually discharge. Most arbitrators uphold the discharge in these instances.

As illustrated by *Pepsi Cola Bottling*,⁸⁰ these principles apply equally in cases where an employee harasses customers. In this case, a uniformed driver, prior to being terminated, had been warned several times, suspended twice, and had been issued a final warning about making sexual comments to and/or having physical contact with customers or employees of customers. Evidence was “abundant that Grievant established a pattern of engaging in inappropriate conduct of a sexual nature while performing his job.”⁸¹ In upholding the discharge, the arbitrator said “His [the grievant’s] conduct was more egregious since it involved customers of the Company,” and the incident which gave rise to his discharge “was the last straw.”⁸²

This case is even more significant because it addresses whether *quid pro quo* harassment can be found in circumstances involving customers. This arbitrator said, “The evidence shows that Grievant offered product to a couple of employees of customers for favors. These offers were declined and no product ever changed hands. I agree with the Union that this allegation falls short of just cause for discharge.”⁸³

An important ‘mixed’ case involving prior discipline for lateness and failure to perform assigned duties by a uniformed driver, and for sexual harassment of a company customer’s female employee was cause for discharge according to the arbitrator in *Golden States Foods Corporation v. International Brotherhood of Teamsters Local No. 104*.⁸⁴ With respect to both matters, the arbitrator took judicious note that none of the previous discipline was grieved and, thus, was not at issue in the instant case. Based upon the grievant’s prior discipline, the totality of the record, and his self-serving testimony, the arbitrator concluded that the grievant “knew or should have known” what behavior was expected of him not only at the worksite but equally in terms of the standards expected of him in dealing with customer employees. She further noted that the grievant had bid on a route from which he had been removed because of previous harassment complaints. Notwithstanding the fact that management had restored grievant to the route, the arbitrator chastised the grievant for even bidding on the route.

⁷⁹*Pacific Bell v. Communication Workers*, 98-1 Lab. Arb. Awards (CCH), 5795 (1997) (Oestreich, Arb.).

⁸⁰*Pepsi Cola Bottling*, 97-2 Lab. Arb. Awards (CCH) 993 (1997) (Thornell, Arb.).

⁸¹*Id.* at 994.

⁸²*Id.*

⁸³*Id.*

⁸⁴*Golden States Foods Corp. v. International Bhd. of Teamsters Local No. 104*, 97-2 Lab. Arb. Awards (CCH) 4412 (1997) (Rivera, Arb.).

From our analysis of *Iowa (Department of Transportation) v. American Federation of State, County and Municipal Employees, Iowa Council*,⁸⁵ we see that arbitrators appear to give considerable weight to disparate treatment in sexual harassment cases. Here, the grievant had made sexual comments, told jokes of a sexual nature, and made sexual innuendoes to female co-workers. The allegations were supported by credible testimony and the grievant was issued a ten-day suspension. Another male employee participated in the same behavior but received a written reprimand. The arbitrator reduced the grievant's suspension to a written reprimand, stating that the company failed to apply its rules, orders, and penalties evenhandedly.

Sometimes it appears that arbitrators stretch the limits of Type II analysis in deciding sexual harassment cases where disparate treatment is concerned. A case in point is *Metropolitan Transit Commission v. Amalgamated Transit Union Local 1005*.⁸⁶ The only female employee in the shop had been subjected to harassment for five years and was touched on the breast by a male co-worker. As a result of an EEOC investigation, the male co-worker and four other male employees were discharged. A total of thirteen disciplinary actions were taken against men in the shop due to their harassment of the complainant. The arbitrator was persuaded that the grievant committed the harassment alleged, but reinstated him without backpay because it was shown that a foreman received no discipline for similarly sexually harassing the victim. The arbitrator stated, "Zero tolerance for sexual touching is a commendable policy to follow, however, it is imperative that employees know this is the policy when it discovers management acting contrary to it. Consequently, while the Grievant's long service to the Employer and his prior record of no discipline would not normally be considered sufficient to mitigate the discipline by the Employer for his behavior, it is considered under these circumstances and determined that the discipline imposed should be something less than discharge."⁸⁷ This is a significant decision because it suggests that, like alcohol and drug testing applied only to bargaining unit members, the discipline may be reduced if the union can prove that management, or other employees, also engaged in the type of behavior that led to the complaint. This is especially true where mitigating circumstances are found.

Such circumstances were found by the arbitrator in *Simkins Industries Inc. v. United Paperworkers International Union Local 214*.⁸⁸ In this case a male leadman was discharged by the company for sexually harassing female employees. Five female employees alleged that the grievant harassed them, asserting also that he had influence with management. The union challenged the discharge, contending that the company treated supervisors who committed harassment more leniently than the grievant. The arbitrator disagreed, finding that the company dealt with management personnel involved in a fairly rigorous and fair fashion.

⁸⁵*Iowa (Department of Transportation) v. American Fed. of State, County and Mun. Employees, Iowa Council*, 94-2 Lab. Arb. Awards (CCH) 5227 (1993) (Clark, Arb.).

⁸⁶*Metropolitan Transit Comm'n v. Amalgamated Transit Union Local 1005*, 106 Lab. Arb. 360 (1996) (Imes, Arb.).

⁸⁷*Id.* at 364.

⁸⁸*Simkins Indus. Inc. v. United Paperworkers Int'l Union Local 214*, 106 Lab. Arb. (BNA) 551 (1996) (Fullmer, Arb.).

Arbitral consideration of the totality of the record can include consideration of past practice with varying results. For example, in *United Transportation Union Local No. 23 v. Santa Cruz Metropolitan Transit District*,⁸⁹ a male employee was suspended for ten-days because his remarks to a female supervisor created a hostile environment. The grievant took issue with his supervisor's report of his on-the-job vehicular accident by uttering offensive and obscene remarks to her. The union contended that since the supervisor declined to file a sexual harassment complaint, past practice supported a finding that no discipline should have been given. The arbitrator found that no past practice existed and upheld the grievant's discipline.

The case *Nebraska Department of Correctional Services v. Nebraska Association of Public Employees, AFSCME Local 61*,⁹⁰ produced a different result based upon past practice. Here the state terminated a male mental health counselor for failing to report an incident of sexual harassment when he was an on-site supervisor. Part of the union's attack on this penalty charged that all employees who harassed a fellow employee had not been discharged. The union also argued that the counselor's failure to report the incident did not warrant more severe discipline than the harasser received. The arbitrator agreed and reduced the discipline to a six-month disciplinary probation stating, "it is difficult to find that a single failure to report an incident of sexual harassment warrants more severe discipline than some instances of actual harassment."⁹¹ She also noted that the grievant had no prior record of discipline and that the degree of discipline imposed was not consistent with the principles of progressive discipline.

D. Other Pertinent Considerations

1. Off Duty/Off Premises Conduct

Sexual harassment that occurs off duty and/or off premises has been a particular challenge to the parties and to arbitrators. In discipline cases, most arbitrators require the employer to establish a nexus between the behavior at issue and the company's interests. The difficulty in establishing the requisite nexus between conduct and interest is reflected in the arbitral decisions made in sexual harassment cases.

In *Superior Coffee and Foods and Wholesale Delivery Drivers Local 848*,⁹² a Type I case involving egregious sexual harassment, a male salesperson was discharged for sexually harassing two female employees while off duty. The conduct occurred at a company sponsored social event two hundred miles from the company's offices. The arbitrator upheld the discipline stating, "[s]exual harassment at a Company-sponsored event like the . . . conference, would be work related."⁹³

⁸⁹*United Transportation Union Local No. 23 v. Santa Cruz Metro. Transit Dist.*, 94-2 Lab. Arb. Awards (CCH) 5192 (1994) (Pool, Arb.).

⁹⁰*Nebraska Dep't of Correctional Servs. v. Nebraska Assoc. of Pub. Employees, AFSCME Local 61*, 107 Lab. Arb. (BNA) 910 (1996) (Imes, Arb.).

⁹¹*Id.* at 916.

⁹²*Superior Coffee and Foods v. Wholesale Delivery Drivers Local 848*, 103 Lab. Arb. (BNA) 609 (1994) (Alleywe, Arb.).

⁹³*Id.* at 612.

The arbitrator also rejected efforts to have the penalty reduced because the grievant was drunk, stating: “Nor am I impressed with the rationale of the Union’s cited case, *AFG Industries*, that lack of employer supervision over a drunken sexual harasser can alone void a discharge for sexual harassment. My reliance on it would be misplaced, I believe, because it fails to hold the offending employee accountable for his own misconduct. Drunk sexual harassers and drunk drivers are equally accountable for the consequences of their conduct. Were it otherwise, an employee desiring to sexually harass another employee, and aware that to harass while sober would result in discharge, could drink 10 to 15 beers, as grievant here admitted doing, harass the employee and rely on drunkenness as a bar to discharge.”⁹⁴

Conversely, in *City of Toronto v. Fraternal Order of Police, Fort Steuben Lodge No. 1*,⁹⁵ a Type II case, the arbitrator overturned the discharge of a male police officer that “consorted” with a female civilian. The officer had been ordered by his superiors not to see the woman, but had ignored the order. The officer was found in a state of undress at the woman’s house. He was terminated for disobeying a direct order, inference in an official investigation, obstructing official business, and harassment. The arbitrator reinstated the officer, in part, because he was off duty when he was with the civilian. The arbitrator noted that the collective bargaining agreement barred the city from disciplining officers for off-duty conduct, except for serious crimes. The arbitrator concluded the officer’s actions failed to rise to the level of a serious crime, and thus, was beyond the reach of the city’s disciplinary jurisdiction.

Kelly Springfield Tire Co. v. United Rubber, Cork, Linoleum and Plastic Workers Local 746,⁹⁶ also addressed the issue of off duty conduct. In this case, the company discharged a male employee for sexually harassing a female co-worker by telephoning her at home and making ‘kissing sounds’ over a period of three months. The victim, with the assistance of the Sheriff’s department, eventually discovered the identify of the person making the calls. She reported this to the company and the grievant was discharged. The company based its defense on the *Meritor* and *Harris* cases, as well as on arbitral precedent. Analogous to the Paula Jones case, the arbitrator concluded that this off duty conduct did not measure up to the generally recognized standards for creating an intimidating, hostile or offensive working environment because there was no showing that the victim’s work performance was harmed by the grievant’s conduct. He sustained the grievance and reinstated the grievant with full seniority and benefits, but without backpay.

A contrasting decision is represented by *Michigan Department of Transportation v. United Technical Employees Association*.⁹⁷ A male employee was suspended for three days for writing offensive allusions to the upper torso of a female instructor on an off premises seminar evaluation form. The union protested the discipline, noting

⁹⁴*Id.* at 614.

⁹⁵*City of Toronto v. Fraternal Order of Police, Fort Steuben Lodge No. 1*, 102 Lab. Arb. (BNA) 645 (1994) (Duff, Arb.).

⁹⁶*Kelly Springfield Tire Co. v. United Rubber, Cork, Linoleum and Plastic Workers Local 746*, 94-1 Lab. Arb. Awards (CCH) 4693 (1993) (Britton, Arb.).

⁹⁷*Michigan Dep’t of Transp. v. United Technical Employees Assoc.*, 104 Lab. Arb. (BNA) 1196 (1995) (Kelman, Arb.).

that the instructor was not a state employee, but rather was an independent contractor and, thus, was not subject to the sexual harassment policy. The arbitrator considered *Meritor* and *Harris* in deciding the isolated remark constituted “verbal harassment”, but was not severe enough to create a hostile work environment under the law. He also found that “With or without a specifically applicable work rule, there is no unfairness” to the grievant, but ruled that progressive discipline should apply so the three-day suspension was reduced to a letter of warning.⁹⁸

It should also be noted that disciplinary action regarding off duty/off premises conduct may be constrained by external law, i.e., constitutional or statutory rights. For example, the State of New York has legislation that protects various types of conduct that employees engage in while off duty. Public employers may also face constitutional restraints.

2. Estoppel

The determination of another administrative agency usually will not be honored in an arbitration proceeding to determine whether just cause existed for discipline based upon allegations of sexual harassment. This is because the issue before the agency may not be the same and/or the legal standards, underlying law, and burden of proof are often different than in arbitration. Moreover, an arbitrator is empowered to decide the case pursuant to the contract, not administrative law. These are the same principles that apply in other just cause cases where an effort is made by either party to introduce evidence from a worker’s compensation or unemployment compensation proceeding.

Potlach Corporation v. United Paperworkers International Local 1532,⁹⁹ a Type I case, illustrates these points. The company discharged a long service employee for sexual harassment of several female co-workers. The grievant filed for and was subsequently awarded unemployment compensation. At the arbitration hearing, the union argued that the unemployment agency ruling supported a finding that the company did not have just cause to terminate the grievant. The arbitrator upheld the discharge stating “As the arbitrator does not have the authority to interpret Arkansas unemployment law, the Arkansas Employment Security Department does not have the authority to interpret the collective bargaining agreement unless agreed to by the parties.”¹⁰⁰

3. Societal Perceptions

Over the last two decades, as the courts have struggled to define the concept of sexual harassment, societal perceptions of what constitutes such harassment have changed a great deal. Both courts and arbitrators have found navigating the waters of dispute resolution in sexual harassment cases a challenging task. As is evident elsewhere in this article, arbitral perceptions of sexual harassment have mirrored the crosscurrents.

⁹⁸*Id.* at 1200.

⁹⁹*Potlach Corp. v. United Paperworkers Int’l Local 1532*, 104 Lab. Arb. (BNA) 691 (1995) (Moore, Arb.).

¹⁰⁰*Id.* at 694.

In *International Mill Service v. United States Steelworkers, District 34*,¹⁰¹ a Type I case, a male employee was discharged because he repeatedly sexually harassed a female co-worker by using “sexually suggestive language” and engaged in “sexually explicit behavior.” At the arbitration hearing the grievant claimed he was only “teasing and playing” and treated the entire situation as a “big joke.” The arbitrator upheld the termination finding that “sexual jokes, posters, propositions, and the like that were loosely tolerated as a workplace norm 20 years ago are unacceptable and illegal today.”¹⁰²

In another type I case, *Indiana Gas Company, Inc. v. International Brotherhood of Electrical Workers Local 1392*,¹⁰³ a male service technician was suspended for inappropriate remarks and for the unsolicited touching of a female teenage customer during a service call. The technician had also made improper remarks to female employees on previous occasions. A critical feature of the hearing was that the teenager was not presented to testify, causing the union to claim that the company’s case was built on hearsay and arguing its disadvantage because she was not available for cross-examination. The arbitrator responded to the absence of the teenager by noting that management “had a very high hurdle to jump over to prove their case” in the teenager’s absence.¹⁰⁴ Addressing the merits of the case, the arbitrator said that “in recent years, people’s sensitivity to what is said to or about them has increased greatly” and that “People are more likely to take offense to remarks, and are more likely to complain about what they perceive to be offensive behavior.”¹⁰⁵ The arbitrator then tied these views to the nature of the company’s business by stating that “all employees, and in particular those who come into contact with customers, must be very careful about how they interact with customers, and/or the public at large while they are representing the Company.”¹⁰⁶ The grievance was denied.

Even same sex harassment was found to be unacceptable in a third example of a Type I case. In *City of Fort Worth v. Individual Grievant*,¹⁰⁷ a male supervisor was terminated because he approached a male trainee from behind, put his hands in the trainee’s front pants pockets, pulled him close, and held him in that position for 10 to 15 seconds. The grievant’s defense was that he was merely “goosing” the victim, that he was merely engaging in “horse play”, and that he was merely doing the same things that were done to him when he was a trainee twenty-two years ago. Integral to the arbitrator’s ruling was a city policy that stated explicitly that “No employee, either male or female, shall be subjected to unsolicited and unwelcome sexual

¹⁰¹*International Mill Serv. v. United States Steelworkers, Dist. 34*, 95-2 Lab. Arb. Awards (CCH) 4622 (1995) (Marino, Arb.).

¹⁰²*Id.* at 4626.

¹⁰³*Indiana Gas Co., Inc. v. International Bhd. of Elec. Workers Local 1392*, 106 Lab. Arb. (BNA) 117 (1997) (Imundo, Arb.).

¹⁰⁴*Id.* at 121.

¹⁰⁵*Id.* at 123.

¹⁰⁶*Id.*

¹⁰⁷*City of Fort Worth v. Individual Grievant*, 108 Lab. Arb. (BNA) 924 (1997) (Moore, Arb.).

overtures or conduct, either verbal or physical.”¹⁰⁸ The arbitrator recognized that horseplay can “be considered consensual on occasions,” but in order for that interpretation to apply “the victim of the horseplay must have laid a predicate prior to the action having been taken that he welcomed, invited or accepted the action directed towards him.”¹⁰⁹

The arbitrator also had to grapple with a claim of disparate treatment because another supervisor had received a three-day suspension two years ago for similar conduct. The matter of disparate treatment was overcome because the city was able to demonstrate to the arbitrator’s satisfaction that the previous incident created a “water shed,” the result of which was a thorough review of “policy regarding the elimination of hostile work environment” and sensitivity training for all employees.¹¹⁰ The incident complained of occurred after these things had occurred. In dismissing the grievance, the arbitrator concluded that the grievant’s conduct, “. . . cannot be excused because it was done to the Appellant when he was a Trainee, or that others did the same or [a] similar thing twenty-two years ago. Particularly so when the Appellant is charged with carrying out the prevention of sexual harassment for the City and had undergone sensitivity training merely eight months previously. The Victim was defenseless. As a practical matter a Trainee is not in a position to make an assertion against an officer during his/her training period where retention in the program or failing the program depends on subjective evaluation.”¹¹¹

Type II cases present a very different picture of the influence of societal perception on arbitral decision-making. In *Safeway, Inc. v. United Food and Commercial Workers Union Local 870*,¹¹² a male employee told dirty jokes which offended two female employees. Evidence was presented that these jokes were “enjoyed or shrugged off” by most employees, but offended a few young female employees. The arbitrator cited the *Meritor* and *Hensen* decisions in finding that the grievant created a hostile work environment, especially in view of the company’s published policy prohibiting sexual harassment. He also noted that the grievant was an outstanding employee for over twenty years, and had never been disciplined or warned about his jokes. Based upon arbitral precedent, the arbitrator concluded that in cases where the grievant did not touch the employee or engage in similar offensive conduct, but rather the harassment was limited to verbiage, termination was not the appropriate penalty. He also took note that the grievant testified that he had learned his lesson and that there had been a large outpouring of indignation over the grievant’s termination from male and female co-workers, retired management, and customers. The termination was reduced to a suspension based upon the grievant’s contrition and the appearance that there was a reasonable expectation of rehabilitation from this corrective action.

¹⁰⁸*Id.* at 927.

¹⁰⁹*Id.*

¹¹⁰*Id.*

¹¹¹*Id.* at 928.

¹¹²*Safeway, Inc. v. United Food and Commercial Workers Union Local 870*, 108 Lab. Arb. (BNA) 787 (1997).

The same result obtained in another Type II case involving *Safeway, Inc. v. United Food and Commercial Workers Union Local 7*.¹¹³ In this instance a male supermarket employee, with over eight years of service to the company, was discharged for sexual harassment. The employee had made various offensive comments to female employees in what he claimed was a joking manner. A month before the latest incident, the grievant had been suspended for five days for similar conduct. Until the suspension, the grievant had not been disciplined during his eight-year tenure for making similar “joking” comments. The arbitrator reduced the termination to a suspension because he was persuaded that the grievant recognized the seriousness of his offense and appeared to be capable of rehabilitation. According to the arbitrator, “The grievant must understand that he is a dinosaur in the modern workplace, and like a dinosaur (i.e., a sexual harasser), he will either change or be extinct in the near future.”¹¹⁴

E. Advice to Advocates

The information presented thus far has given you a framework for understanding key differences between Type I and Type II sexual harassment cases, shown how arbitral decisions parallel decision-making by the courts, and provided an in-depth look at how arbitrators decided such cases. As an advocate, it is your responsibility to make appropriate use of information like this when you represent either a union or an employer in a sexual harassment case. It is important to recognize that the advocate’s job begins well before a case ever reaches the hearing stage. The way you use such information during the preparation phase can have a major impact on the results you achieve whether in arbitration or in settlement before arbitration. As an advocate, you are, of course, under pressure from the party you serve to prevail if a sexual harassment case goes to arbitration. To help you make the best use of our analysis; we provide the following advice.

1. Selection of the Arbitrator

Parties to a collective bargaining agreement obtain arbitrators primarily in two ways. They ask for a panel from either the Federal Mediation and Conciliation Service (FMCS) or the American Arbitration Association (AAA) or they build an arbitrator(s) into their collective bargaining agreement. In either instance ‘homework’ is important, but may not be dispositive. Obviously the first part of this ‘homework’ is to find out if the arbitrators on the FMCS/AAA list, or the arbitrators suggested for inclusion in the agreement, have decided sexual harassment cases. The way an arbitrator has decided other types of cases may not necessarily be indicative of his/her reasoning in harassment cases. As illustrated by the foregoing analysis, perception, in addition to the facts, policy, and/or law, plays a role in the way arbitrators regard the misconduct alleged. If the answer is ‘yes’ then what you will want to examine carefully is the arbitrator’s reasoning, remembering that he/she can only decide based upon the evidence presented. Resist the temptation simply to look at an arbitrator’s win-lose record because this is the least reliable predictor of decision-making in any type of case. With respect to arbitrators whom the parties

¹¹³*Safeway, Inc. v. United Food and Commercial Workers Union Local 7*, 109 Lab. Arb. (BNA) 768 (1997) (DiFalco, Arb.).

¹¹⁴*Id.* at 774.

build into their collective bargaining agreements, it is evident that in so doing most parties do not even consider sexual harassment decision-making as a factor. It is worthwhile for parties to consider not only the traditional factors they have relied upon in building arbitrators into their agreement, but also this element of workplace behavior.

Reviewing arbitral awards is not always possible since the vast preponderance of awards is not published. For example, NAA arbitrators cannot submit any award for publication without the permission of both parties, and even when permission is obtained, both BNA and CCH make the final decision about which awards they will publish. Notwithstanding this limitation, advocates should always include a search for a published award in the preparation phase. They also need to utilize this information in a meaningful way by examining the arbitrator's reasoning.

A final note. As an advocate, you must be aware that men, historically and contemporaneously, have decided a preponderance of sexual harassment cases. This is understandable because men have and still dominate the neutral arbitration profession. As illustrated by the cases discussed in the foregoing analysis, this is no evidence that male arbitrators are more likely than female arbitrators to address the issue with detachment. An obvious fact is that sexual harassment cases, including same sex harassment, involve alleged misconduct by a male. In selecting arbitrators from either FMCS/AAA list or for inclusion in their agreement, wise advocates will recognize that the gender of the arbitrator, like his/her win-lose record is of *de minis* importance.

2. Opening Statement

The opening statement creates a road map for the arbitrator to follow in picking his/her way through the facts, evidence, and arguments. It is unwise to clutter this map with extraneous information, hyperbole, and sarcasm. These can confuse the arbitrator or cause him/her to turn off so their attention is not focused when an advocate does make an important point. It is incumbent upon advocates to carefully prepare a clear, concise, logical statement of the case.

When the grievant's advocate believes the client has strong arguments under the seven tests of just cause, the advocate should try to have the arbitrator decide separately the issues of culpability and appropriate penalty, i.e., if the conduct is proven, then the penalty was excessive for the offense. In other cases, an advocate must recognize when there is little to argue regarding the conduct at issue and focus the arbitrator's attention on defects in the administration of the discipline, i.e., investigation, disparate treatment, past practice, etc.

An advocate for the employer first needs to understand whether the conduct alleged falls under the Type I or the Type II category. If it can be shown that the conduct is clearly egregious, then it is easier to convince an arbitrator that severe discipline is warranted. In Type II cases an employer's advocate must pay more attention to justifying the penalty, demonstrating why it is appropriate for the offense proven, and surgically disposing of any possible challenges based upon disparate treatment, past practice, etc.

3. Arguing External Law

The external law of sexual harassment found in court decisions can be of assistance to advocates. For example, an advocate for the grievant may be able to find case law that contains a fact pattern similar to the allegations made by the

employer. The court may have held that such conduct was not severe or pervasive or did not alter the terms and conditions of the victim's employment. Although the standards of analysis for the law of the shop may differ from the external law, the use of sympathetic case law may be persuasive enough to change an arbitrator's perspective of the conduct and, thus, of the appropriate penalty for same. This is especially true if the employer's sexual harassment policy merely restates the external law. Arbitrator should be sympathetic to the argument that if the conduct at issue was not found to be sexual harassment by a court, then similar conduct under parallel policy should not be found to be sexual harassment. Parallel policy opens the door for the advocate to argue severity and pervasiveness, and most important, to argue that there is no evidence that the victim's terms and conditions of employment were in any way affected by the harassment at issue.¹¹⁵

4. Advantages of Remorse and of Telling the Truth

In cases where the grievant is clearly culpable and even the best prepared and most eloquent advocate cannot stem the tide, it is worthwhile to carefully consider preparing the grievant to show remorse, apologize, and promise that the conduct will not happen again. These can help convince an arbitrator that there is a reasonable expectation of rehabilitation and, thus, to opting for something less than discharge as appropriate penalty. Advocates should first make the employer establish its *prima facie* case by engaging in rigorous cross-examination executed in a way calculated not to victimize the accuser or antagonize the arbitrator. If the employer's case holds firm, then the advocate should be ready to consider remorse and apology when the grievant testifies. A remorseful grievant who has admitted the essential facts can mitigate against the penalty imposed if the employer appears to be vindictive, to have embellished the facts, failed to investigate properly, etc.

It does not take extensive research to discover the number of instances where the testimony of the alleged harasser makes the case worse, thus ensuring that the discipline will be upheld. Some arbitrators apply the "you lie, you die" credibility test and may be predisposed to give less weight to the seven tests of just cause if the grievant is sworn to tell the truth, and then obviously lies in testimony.

5. Do Not Testify if the Employer Fails to Provide Live Witness Testimony (i.e., Don't Fight Ghosts)

When the alleged victim will not testify,¹¹⁶ the first thing an advocate should do is research with the goal of selecting an arbitrator who will not take hearsay testimony and/or allow an affidavit that cannot be cross-examined. This advice should be taken very seriously because this type of case can be won or lost by the selection of the arbitrator.

If an arbitrator admits hearsay, which is permissible in arbitration, it is important for advocates to effectively and appropriately use objections to forestall admission of secondary and tertiary hearsay. Many arbitrators will sustain such an objection if it

¹¹⁵For a good example of how egregious sexual harassment may nevertheless be found by a court not to constitute illegal sexual harassment *see* Jones v. Clinton, 990 F. Supp 657 (E.D. Ark. 1998).

¹¹⁶*See supra* for discussion of Metropolitan Council Transit Operations v. Amalgamated Transit Union Local 1005, 106 Lab. Arb. (BNA) 68 (1996) (Daly, Arb.).

is made, but will not insert themselves if the advocate is silent. In the latter case, an advocate loses control over what goes into the record and frees the arbitrator to place whatever weight he/she deems appropriate on secondary and tertiary hearsay in fashioning an award.

When an arbitrator admits hearsay and/or affidavits, it is imperative that an advocate does everything reasonable to prevent the grievant from providing the corroborating testimony.¹¹⁷ If there are no other witnesses, then an advocate has to make a very important judgment call based upon his/her 'read' of the arbitrator at the hearing and the research done at the time of selection. In general, an advocate is probably in a better position if he/she argues that the employer has failed to provide direct evidence of the alleged offense, deprived the grievant of the due process right to cross-examine the accuser, and rest the case without calling the grievant. The one exception is when the advocate is convinced that the grievant did not engage in the conduct at issue and will easily exculpate him/herself by testifying. As experienced advocates know, this is seldom the case. If the employer does call corroborating witnesses, an advocate should actively question why the victim could not testify and hammer this point home in the closing arguments. Unless an employer can produce legitimate evidence that the victim was threatened, subjected to other substantial coercion, or minority status really justified failure to testify, many arbitrators tend to view employer arguments for not producing the victim as insincere.

6. Effective Use of Requests for Information

The grievant's advocate should make detailed information requests for all affidavits, correspondence, documents, and all other information that relates to the grievant's discipline and to any other employee, management or union, who has been disciplined for the same/or similar offense.¹¹⁸ While this is a legitimate endeavor, sometimes advocates use this as a 'fishing expedition.' Such activity is strongly discouraged and can be used by an employer to challenge the credibility of your request(s) and, potentially your case. However, when a legitimate request for information is denied, there is recourse in terms of filing an unfair labor practice charge and/or making this known to the arbitrator at the outset of the hearing. Advocates must be dutiful in informing the arbitrator of such denial at the outset of the case before testimony and evidence is presented. Most arbitrators will not allow an employer to use information in support of its case that it has denied to the grievant/union prior to the proceedings. More importantly, it is possible that a negative inference may even be from such denial. If, for any reason, an arbitrator admits evidence that you requested/haven't seen before, then it is incumbent upon an advocate to ask the arbitrator for time to read the information and, if appropriate, for

¹¹⁷It is worth mentioning a technical point with respect to affidavits that may or may not be persuasive to arbitrators. Both federal and state civil procedure requires that certain "magic words" be used in the attestation clause. It is often the case that these words are not used by employer advocates/attorneys in obtaining an affidavit. This failure can be fodder for a procedural argument, but surely no advocate should consider this as a pivotal consideration in an arbitrator's determination of the outcome of a case.

¹¹⁸It is difficult for an employer to argue that it has a "zero tolerance" policy that requires severe discipline, up to and including discharge, if other employees and/or members of management have not been treated similarly as evidenced by our discussion of disparate treatment in the foregoing analysis.

a recess or continuation to prepare a response. Most arbitrators will grant this request if the advocate makes it. If the advocate simply reacts with hostility, then he/she goes forward at their own peril. However, many arbitrators will draw a negative inference if an employer has withheld information legitimately requested. Advocates also should not forget that they have the option, in the preparation phase, to ask the arbitrator to subpoena information legitimately requested but denied by the employer. Once again, this reinforces the importance of good preparation and reinforces the link between preparation and the outcome of the case.

7. Keep Your Witnesses on the Team

A substantial amount of time often elapses between the issuance of discipline for sexual harassment and an arbitration hearing. An effective advocate should stay in regular touch with witnesses to make sure they stay on board and/or have not been subjected to intimidation, and to find out if they have additional information not reported initially, including recollection of other alleged witnesses. When a witness is left out in the cold and suddenly receives a call to testify, the witness is not prepared and recollections can fade or are blocked. Especially where the grievant has been discharged, an on-going relationship with a witness(es) still on the job can provide an important source of information that may be helpful to your case.