SEXUAL HARASSMENT AND LABOR ARBITRATION

*Susan A. Fitzgibbon**

Unlawful discrimination in employment, the topic of this Colloquium, is usually perceived in terms of the right of the employee to be free from discrimination and the corresponding obligation of the employer not to discriminate. The degree of sophistication in legal approaches to discrimination determines the scope of the definition of discrimination. For instance, discrimination extends from rather obvious forms, such as a refusal to hire or differences in pay based on race, sex, religion, etc. to more subtle forms, such as a work environment which is "less pleasant" for one of these protected groups than it is for other groups. Obviously, a work environment is molded by direct actions of the employer (such as unilaterally promulgated work rules) and by actions of employees. Even if the employer is making a good faith effort to run a "non-discriminatory work place," the behavior of some of its employees may tend to frustrate that effort.

In the United States the concept of hostile environment has become a firm part of the regulatory scheme aimed at eradication of discrimination in employment. The legal relationships under this regulatory scheme involve the relationship between the victim of discrimination and the employer, that is, in practical terms, the victim's claim is against the employer. However, a legal relationship also exists between the employer and the perpetrator of harassment and it may be regulated contractually, as for example in union contracts. In an effort to eradicate discrimination, the employer may get involved in a dispute with an employee who allegedly performed an act of harassment, even without a claim by the victim against the employer.

My talk will focus on one aspect of discriminatory sexual harassment in the workplace and particularly on the role of labor arbitration in achieving an environment free from harassment. I believe that the role of extra-judicial decision making in the area of discrimination is one of the features which distinguishes the United States approach

* Assistant Professor of Law, Saint Louis University; Assistant Director, Center for Employment Law, Saint Louis University.

from approaches in a number of European countries. As you probably know, Alternative Dispute Resolution (ADR), that is, resolution of disputes by methods other than courts, has enjoyed widespread popularity in the United States over the last decade. But, as will be seen, ADR is not without its critics. Consideration of the ADR process of labor arbitration necessarily involves an explanation of how courts analyze and resolve these disputes. By way of this approach, I hope to impart a flavor of the current ADR debate as well as some understanding of United States employment discrimination law.

The specific question which I propose to explore in this talk is whether labor arbitration is an appropriate forum for resolution of problems of sexual discrimination, with a particular focus on sexual harassment. The bases of my interest in this topic also give me the advantage of a variety of perspectives—that of a woman, who is more often the victim of sexual discrimination;[1] that of a former personnel manager; and that of a current attorney and labor arbitrator.

As a starting point, it is worth noting that in the United States over ninety percent of all cases filed never reach trial.[2] This statistic applies to claims of discrimination, the majority of which, I would imagine, settle outside of court and the Equal Employment Opportunity Commission (E.E.O.C.).[3] Many of these discrimination cases are resolved in labor arbitration which is the final step in the grievance machinery under most collective bargaining agreements.[4]

In 1964 the U.S. Congress passed the famous Civil Rights Act,[5] Title VII of which prohibited employment discrimination on the basis of race, color, national origin, religion or sex.[6] However, the category of "sex" was added only at the last minute, in what has been politely described as "spirit of satire"[7] (I think that means as a joke) and

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[1] Because women are more often the victims of sexual harassment, I will use the female pronoun when referring to victims in this paper.

[2] Edwards, Alternative Dispute Resolution: Panacea or Anathema? 99 HARV. L. REV. 668, 670 (1986).

[3] Equal Employment Opportunity Commission, Section 705 of Title VII of the Civil Rights Act of 1964 Pub. L. No. 88-352; 78 Stat. 241 (as amended 1984).

[4] For example, 40 awards involving a discrimination issue were published in the Labor Arbitration Reports from March, 1983 to August, 1988.

[5] Civil Rights Act of 1964, Pub. L. 88-352; 78 Stat. 241.

[6] Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000(c)-2000(e)(17) (as amended 1984).

[7] M. Player, *Employment Discrimination Law* 201 (1988) (citing Vaas, Title VII: Legislative History, 7 BOST. C. IND. & COMM. L. REV. 431, 441 (1966)).

more pointedly described as an effort to torpedo the entire bill.[8]

Ten years after passage of the Act, in addition to bringing actions for wrongful discharge or failure to hire or promote on the basis of sex, women began to sue for sexual harassment.[9] Judges were at first wary of such claims which generally allege either that an employment benefit, such as a raise or promotion, is conditioned on granting sexual favors - so called, quid pro quo harassment - or that a hostile work environment exists, or both. One federal judge predicted the need for thousands more trial judges if a woman could make a federal case out of a drunken kiss by a supervisor at a holiday office party.[10]

The claims of sexual harassment occurred in an atmosphere of abundant media attention to the problem. Aside from the sensational aspects of stories of sexual harassment, e.g., swimsuit competitions for associates at a prominent law firm,[11] there were surveys indicating that incidents of sexual harassment were widespread and abundant. For example, one of the earliest studies conducted in 1976 by a women's magazine, Redbook, revealed that ninety percent of 9,000 women surveyed claimed to have been harassed on the job.[12] A subsequent, more scientific study by Redbook and The Harvard Business Review found that sixty-three percent of the women managers surveyed claimed that sexual harassment had occurred within their companies.[13] A more recent study of federal sector government employees covering the period of 1985-87 disclosed that forty-two percent of women and fourteen percent of the men surveyed claimed to have been victims of sexual harassment.[14] These studies and similar studies[15]

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[8] Nelson, *Sexual Harassment, Title VII, and Labor Arbitration*, 40 ARB. J. Dec. 1985, at 55, 57, 57 n.8.

[9] *See, e.g.*, Corne v. Bausch and Lombe, 390 F. Supp. 161 (D. Ariz. 1975), vacated, 562 F.2d 55 (9th Cir. 1977).

[10] Tomkins v. Pub. Serv. Gas and Elec. Co., 422 F. Supp. 553, 557 (D. N.J. 1976), rev'd 568 F.2d 1044 (3d Cir. 1977).

[11] Burleigh & Goldberg, *Breaking the Silence: Sexual Harassment in Law Firms*, 75 A.B.A. J. 46, 46 (1989).

[12] Nowlin, *Sexual Harassment in the Workplace: How Arbitrators Rule*, 43 ARB. J. 31, 33 (1988) (citing Safran, *What Men Do to Women on the Job: A Shocking Look at Sexual Harassment*, REDBOOK, Nov. 1976, at 149, 217-23).

[13] Nowlin, *supra* note 12, at 33 (citing Collins and Blodgett, *Sexual Harassment: Some See It . . . Some Won't*, HARV. BUS. REV., Mar.-Apr. 1981, at 79-97).

[14] *Sexual Harassment is Still a Problem in Government*, Wall St. J., June 30, 1988, at 10, col. 1.

[15] *See*, Sexual Harassment in the Federal Workplace: Is It a Problem?, Report of the U.S. Merit Systems Protection Board (Washington, D.C.: U.S. Government Printing Office, 1981); Gruber and Bjorn, *Women's Responses to Sexual Harassment: An Analysis of Sociocultural, Organizational, and Personal Resource Models*, 67 Soc. Sci. Q. 814-826 (1986).

demonstrate at least the perception that in the United States workplace sexual harassment occurs with some frequency and, I think, further demonstrates the existence of a real problem of yet undetermined proportions.

Realizing the existence of a real problem, a number of courts began to recognize claims of sexual discrimination based upon sexual harassment. For example in *Bundy v. Jackson*,[16] after allowing the plaintiff to prove that she was constantly being propositioned by supervisors and co-workers, the court held her employer liable under Title VII for creating or condoning a discriminatory work environment. In 1980, the E.E.O.C. also formally addressed the problem by issuing guidelines which provide that:

> Harassment on the basis of sex is a violation of Section 703 of Title VII. *Unwelcome* sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when [submission is made a term or condition of employment, or employment decisions are based on submission or rejection of such conduct (i.e., cases of quid pro quo harassment) or where] such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an *intimidating, hostile or offensive working environment*. . . .(emphasis added)[17]

The regulation continues by stating that the determination of whether sexual harassment has occurred will be made on a case-by-case basis, considering the "totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred."[18] Finally, the regulation notes circumstances under which an employer may be liable for sexual harassment by co-workers, as well as by a supervisory employee.[19]

With this background in mind, place yourself in the role of decisionmaker in the following hypothetical case: Mr. Caesar is the CEO of an Italian multinational corporation which has just merged with the Egyptian multinational corporation of which Ms. Cleopatra was CEO. Now working closely together, their relationship develops somewhat along historical lines. However, the hypothetical Cleopatra

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[16] 641 F.2d 934 (D.C. Cir. 1981).

[17] EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a) (1989).

[18] *Id.* at § 1604.11(b).

[19] *Id.* at § 1604.11(c), (d).

soon decides that she is the victim of sexual harassment and seeks to hold the company liable.

As decisionmaker, how will you determine whether or not Caesar's advances and the ensuing relationship were "unwelcome" as described in the E.E.O.C. guidelines? Is it a question of whether Cleopatra voluntarily submitted to sexual relations? Will you consider relevant and admissible evidence of Cleopatra's on-the-job suggestive attire or talk of dreams and sexual fantasies? Will you consider Cleopatra's previous sexual behavior? Assuming that no adverse employment consequences flowed from the relationship—that is, this is not a claim of quid pro quo sexual harassment—how will you determine whether in the "totality of the circumstances" an intimidating, hostile or offensive working environment existed?

The Supreme Court addressed similar questions and the issue of actionable sexual harassment based on a hostile work environment in the 1986 decision in Meritor Savings Bank v. Vinson.[20] In summary of the facts, Vinson claimed the bank was liable for sexual discrimination based on the conduct of her supervisor which included public fondling of Vinson and a sexual relationship over a four-year period.[21] During this time, Vinson received regular pay increases and promotions based solely on merit.[22] Essentially, Vinson claimed she submitted to her supervisor's sexual demands fearing that otherwise she would lose the job.[23]

Writing for the majority, Chief Justice Rehnquist concluded first, that a hostile working environment alone may constitute a violation of Title VII.[24] In light of the recent spate of five to four decisions, it should be noted that there were no dissenters in this conclusion.[25] Rehnquist observed that the alleged objectionable conduct had to be "sufficiently severe or pervasive" in order to state a claim of harassment.[26] The rest of the holding brings to mind the Caesar and Cleopatra hypothetical. The Court held that proof of voluntary participation in sexual relations would not relieve an employer of liability for harassment. Rather, the question is whether the victim indicated

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[20] 477 U.S. 57 (1986).

[21] *Id.* at 59-60.

[22] *Id.* at 60.

[23] *Id.*

[24] *Id.* at 65.

[25] In the concurring opinion, Justice Marshall asserts that an employer is strictly liable for acts of sexual harassment by a supervisor. *Id.* at 74-78.

[26] *Id.* at 67.

that the sexual advances were "unwelcome."[27] Finally, evidence of sexually provocative dress and/or publicly expressed sexual fantasies may be admissible and relevant to determining the existence of sexual harassment.[28] Thus in our hypothetical, Cleopatra's provocative dress and/or publicly expressed sexual fantasies may be admissible and relevant for this purpose.

In proposing the Caesar-Cleopatra hypothetical, I do not mean to belittle the serious nature of the claim of sexual harassment. Rather I raise it in conjunction with the Supreme Court's decision in *Meritor* to highlight the fact that sexual harassment claims present difficult, fact-sensitive questions and particularly tough credibility questions. For example, Vinson's supervisor completely denied any sexual relations with Vinson.[29] As you can see, the *Meritor* decision only slightly refined the E.E.O.C. guideline's test of sexual harassment based on a sexually hostile environment, thus leaving these matters for case-by-case evaluation. I submit that proper evaluation of these claims requires special knowledge and understanding of employment relations in general and the specific workplace in particular to determine credibility and whether the degree and pervasiveness of the conduct (which may range from obscene drawings to dirty jokes to sexual propositions on the job) rises to the level of an actionable hostile environment.

With this in mind I return to the question posed at the outset. Is the well established alternative dispute resolution process of labor arbitration a proper forum for resolving sexual harassment problems? Or, stated otherwise, do courts provide better process or results in these cases? I raise the question because some commentators have concluded that victims of sexual harassment prefer to take these claims to court,[30] and because some critics of ADR, such as Professor Owen Fiss of Yale Law School, assert that only courts are capable of dispensing "justice," particularly in cases raising public policy issues such as discrimination.[31]

At the outset of this inquiry the significance of another Supreme Court case must be noted. In the mid-1970s the Supreme Court

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[27] *Id.* at 68, 69.

[28] *Id.* at 69.

[29] *Id.* at 61.

[30] *See* Monat & Gomez, *Sexual Harassment: The Impact of Meritor Savings Bank v. Vinson on Grievances and Arbitration Decisions*, 41 ARB. J. 24, 29 (Dec. 1986); Nelson, *supra* note 8, at 61.

[31] Fiss, *Against Settlement*, 93 YALE L. J. 1073 (1984).

declared, in *Alexander v. Gardner-Denver, Co.*, that grievants who unsuccessfully pursue claims of discrimination in labor arbitration are not thereby barred from pursuing the same claim in court.[32] Thus, the grievant who chooses to pursue a claim of discrimination in arbitration may always proceed to court if dissatisfied with the result in arbitration.

In authorizing this trial de novo of Title VII claims, the Supreme Court specifically questioned whether an arbitrator could consider and apply external law in the absence of clear authority to do so in the parties' submission or the collective bargaining agreement.[33] This issue raises the additional question of whether the arbitrator is competent to interpret and apply external law. It should, however, be noted that in *Gardner-Denver*, the Supreme Court authorized the trial court to consider the previous arbitral disposition of the matter and to accord it "great weight. . .especially. . .where the issue is solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record."[34]

As to the handling of sexual harassment claims in arbitration, as previously noted, some commentators have concluded that victims of sexual harassment prefer to pursue these claims in court rather than through arbitration. This conclusion is based on the existence of relatively few reported arbitration awards concerning sexual harassment and the fact that in most of these cases the grievant is not the victim but the "harasser," who is grieving the discipline imposed by the employer for acts of sexual harassment.[35] While it is true that very few arbitration awards of sexual harassment have been published - approximately 125 since 1958[36] - and that in only a handful of these was the grievant the victim of harassment, these figures do not support the conclusion of a victim preference for resolution of harassment claims in the courts.

First of all, only approximately ten percent of the arbitral decisions rendered are ever published.[37] According to ethical standards of the

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[32] 415 U.S. 36, 51 (1974).

[33] *Id.* at 53.

[34] *Id.* at 60 n.21.

[35] Nelson, *supra* note 8, at 61-62.

[36] This rough estimate is based on statistics cited in Nelson, *supra* note 8, at 61-62 and on the author's own count of cases in Volumes 80-90 of Labor Arbitration Reports.

[37] The Publication of Arbitration Awards, 28 Proc. Ann. Meeting Nat'l Acad. Arb. 208, 208-09 (1975).

National Academy of Arbitrators, both parties must agree to publication.[38] Even then, the publishing services do not print every decision submitted. I think that it is fair to conclude that one or another of the parties will usually prefer not to publish the details of the sexual harassment and the decision.[39] Unlike contractual interpretation decisions such as those regarding contracting out or overtime payments, and unlike individual discipline grievances involving even fighting or theft, sexual harassment cases may find parties more sensitive to public disclosure of embarrassing details of the claim which may be detrimental to the reputation and public image of both. Of course, one of the obvious advantages of resolving disputes outside of court is avoidance of unwanted publicity.

The small number of sexual harassment claims in arbitration may also reflect a larger phenomenon, namely, the victim's reluctance to report or take action to stop the sexual harassment.[40] The disparity in the large number of women surveyed who allegedly suffered sexual harassment and the small number of complaints made to the EEOC each year (approximately 5,000) supports this conclusion.[41] It even appears, for example, that women attorneys are afraid to complain of sexual harassment in law firms.[42] Clearly, this phenomenon cannot be construed to indicate a preference for any dispute resolution system.

Advocates of both the argument that victims of sexual harassment prefer the judicial system and the related implication that victims' rights are not properly protected in arbitration also point to the fact that *very* few victims actually pursue these claims in arbitration and that in the overwhelming majority of cases the grievant is the party accused of harassment.[43] However, this focus on who brings the grievance is, in the words of one commentator, "a distinction without a difference."[44] Where the grievant is the alleged harasser disputing the discipline given, the victim or someone acting for the victim has

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[38] Code of Professional Responsibility for Arbitrators of Labor-Management Disputes of the National Academy of Arbitrators, the American Arbitration Association, and the Federal Mediation and Conciliation Service, 44-45 (1984).

[39] Nelson, *supra* note 8, at 62; Rule, *Arbitral Standards in Harassment Cases*, 10 INDUS. REL. L. J. 12, 16 (1988).

[40] Nelson, *supra* note 8, at 61.

[41] Nowlin, *supra* note 12, at 33.

[42] Burleigh & Goldberg, *supra* note 11, at 52.

[43] Monat & Gomez, *supra* note 30, at 29; Nelson, *supra* note 8, at 61.

[44] Nelson, *supra* note 8, at 61.

reported the harassment and the employer has taken action.[45] In other words, the private system of dispute resolution culminating in arbitration worked in that the employer acted to stop or punish the offending conduct. As such, the identity of the grievant is immaterial to the substance of the claim or to the implications for the parties or public policy.[46] Moreover, regardless of who is the grievant, the arbitrator decides the same issues as would arise in a court case.[47]

A different concern for proper handling of sex discrimination claims through labor arbitration is a fear of union complicity in the discrimination which could result in a decision not to pursue the claim or to pursue the claim in a less than vigorous manner.[48] A recent study rejected this criticism because no evidence has been offered to demonstrate that this sort of union prejudice is a widespread problem.[49] On an unscientific basis I would suggest that union prejudice against women, where it previously existed, is fading simply with the passage of time. For example, there are currently many women attorneys who represent union clients. This fact could indicate a lack of union prejudice or, at least, serve as a provision against discriminatory conduct based on sex by the union. Furthermore, every union has a duty of fair representation, breach of which is actionable in court or in an unfair practice charge to the NLRB.[50] Union officials are particularly keen to avoid unfair representation claims which are costly in terms of time, money and politics. Thus, criticism of labor arbitration of sexual discrimination claims on this ground lacks merit.

A criticism related to a concern expressed by the Supreme Court in *Alexander v. Gardner-Denver*[51] is that discrimination claims cannot be resolved in arbitration because few collective bargaining agreements contain anti-discrimination provisions on which to base a grievance or an arbitrator's decision.[52] Even without such a clause, harassment by a supervisor may violate the union security clause, the seniority

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[45] *Id.*

[46] *Id.*

[47] Monat & Gomez, *supra* note 30, at 26.

[48] Greenbaum & Fraser, *Sexual Harassment in the Workplace*, 36 ARB. J., Dec. 1981, at 30, 35.

[49] Willig, *Arbitration of Discrimination Grievances: Arbitral and Judicial Competence Compared*, Proceedings of the 39th Annual Mtg. Nat'l Acad. of Arbitrators, June 2-6, 1986, 101, at 105-06.

[50] Labor-Management Relations Act, § 301, 29 U.S.C. § 160, (1989); Miranda Fuel Co., 140 N.L.R.B. 181 (1962) *enf. denied*, 326 F.2d 172 (2d Cir. 1963).

[51] 415 U.S. 36 (1974).

[52] *See supra* note 48.

clause or any clause providing for fair and impartial treatment, while co-worker harassment may be deemed to violate an "implied working condition" promising an environment free of such harmful conduct.[53] Moreover, it is the view of many arbitrators that all collective bargaining agreements include notorious external law, such as anti-discrimination law. These arbitrators would follow anti-discrimination law principles even in the absence of such a clause in the collective bargaining agreement because a decision contrary to these laws would be unenforceable and the parties clearly did not bargain for an unenforceable result.[54] Furthermore, at least one arbitrator has recently (albeit, unscientifically) noted that many collective bargaining agreements prohibit discrimination based on sex, race, etc. and that a few even contain provisions which specifically address sexual harassment.[55] Finally, I am unaware of any evidence demonstrating that victims of sexual harassment are being forced to pursue judicial remedies because the grievance procedure and arbitration under the collective bargaining agreement were somehow foreclosed.

Moreover, it should be noted that although a dual remedy exists, grievants who lose in arbitration are not flocking to court. Statistics indicate that few sex discrimination cases are relitigated and even fewer are reversed.[56] Hence, claims that victims of sexual harassment prefer courts because there are so few sex harassment awards and fewer still brought by victims or because of deficiencies in the union or the collective bargaining agreement lack merit. The next question is arbitral competence to handle these claims. I believe this question breaks into two parts; first, competence to interpret and apply external law, and second, competence in fact finding and decision making.

As to the question of arbitral competence to interpret and apply external law, the author of a 1985 study concluded that grievants

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[53] Nelson, *supra* note 8, at 65. *See also* United Elec. Supply Co. v. Int'l Bhd. of Elec. Workers Local 1, 82 Lab. Arb. (BNA) 921 (1984) (Madden, Arb.) in which the arbitrator observes that the employer has a duty to prevent abuse from other employees.

[54] Howlett, The Arbitrator, the NLRB, and the Courts, Proceedings of the 20th Annual Mtg. Nat'l Acad. of Arbitrators, Feb. 23 - Mar. 3, 1967, 67 at 83; *but cf.* Meltzer, *Ruminations About Ideology, Law, and Labor Arbitration*, *id.* at 1.

[55] Rule, *supra* note 39, at 15. *See also* Meijer, Inc. v. United Food and Commercial Workers Local 951, 83 Lab. Arb. (BNA) 570 (1984) (Ellmann, Arb.) (wherein employer had a widely-disseminated policy prohibiting sexual harassment).

[56] Willig, *supra* note 49, at 110 (citing study by Hoyman & Stallworth, *The Arbitration of Discrimination Grievances in the Aftermath of Gardner-Denver*, 39 ARB. J. 49 (1984)).

alleging discrimination receive the protection of the law through the arbitration procedure, that arbitrators consider federal and state anti-discrimination statutes and regulations and apply them accurately, and that the vast majority of awards comply with Title VII.[57] These conclusions were based on a number of surveys and studies of arbitration awards. One study scrutinized eighty-six discrimination awards and found that arbitrators cited federal or state anti-discrimination law or EEOC guidelines in fifty percent of the opinions and cited court decisions in forty percent of the opinions.[58] A subsequent study by Monat and Gomez of thirty-six sexual harassment cases found that most of the arbitrators "cited or followed the E.E.O.C. guidelines on type and quantity of sex-related conduct necessary for a finding of sexual harassment."[59] These and an additional study[60] reaching similar conclusions demonstrate that arbitrators are capable of applying external law in discrimination cases in a thoroughly competent fashion.

The second prong of the inquiry into arbitral competence requires evaluation of the process and results of arbitration of sexual harassment claims in light of the broad guidelines set forth in *Meritor* to determine whether these claims are handled as they would be in court. The Monat and Gomez review of thirty-six sexual harassment arbitration decisions demonstrated that arbitrators "routinely" resolve the basic questions raised in *Meritor* of credibility, severity of the harassment, and employer responsibility.[61] Commentator Nelson, after reviewing published cases from 1982-85 concerning sexual harassment, similarly concluded that arbitrators apply the same criteria, reach the same conclusions and protect sexually harassed employees as well as courts do.[62] For example, arbitrators have regularly admitted evidence of the behavior and background of the victim. This approach is confirmed by *Meritor*.[63] Further, arbitrators face the same problems as courts in determining credibility of witnesses, especially on the issue of whether a sexual advance was "unwelcome."[64] Although, as

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[57] *Id.* at 120.

[58] Oppenheimer & LaVan, *Arbitration Awards in Discrimination Disputes: An Empirical Analysis*, 34 ARB. J. 12 (1979).

[59] Monat & Gomez, *supra* note 30, at 27.

[60] Wolkinson & Liberson, *The Arbitration of Sex Discrimination Grievances*, 37 ARB. J. 35 (1982).

[61] Monat & Gomez, *supra* note 30, at 26.

[62] Nelson, *supra* note 8, at 65.

[63] Monat & Gomez, *supra* note 30, at 27.

[64] *Id.* at 26-27; Nelson, *supra* note 8, at 64.

previously noted, these cases present difficult credibility assessments, it must be recognized that tough credibility questions have long been the subject of arbitration disputes and the daily fare of arbitrators.[65]

Meritor requires evaluation of the "degree" or the severity of the harassment. Arbitrators have long wrestled with this issue in determining whether just cause existed for the discipline imposed against the alleged perpetrator. While arbitrators quite consistently uphold the discharge of the harasser who engages in some form of unwanted physical contact, such as kissing, pinching, and touching,[66] the circumstances are evaluated in context.[67] For example, a woman complained of sexual harassment by a co-worker who touched her, sat on her desk, and tried to lift her skirt. While this might appear to be an open-and-shut case, the arbitrator properly considered evidence that the woman had previously welcomed and encouraged similar behavior from the grievant. Ultimately the arbitrator upheld the discipline (suspension) because he concluded that the employer had a right to prohibit the grievant's behavior regardless of the attitude of the woman co-worker, and because the employer had previously warned the grievant. The warning demonstrates that the complicity of the female employee did not affect the "injury" to the employer's protected interest in a workplace free of harassment.[68] On the other hand, the arbitrator in a different case did not hesitate to reinstate a grievant after finding that his off-color remark to a female co-worker was nothing more than a good natured effort to cheer her up.[69]

This last case also illustrates employer overreaction to the situation, but undoubtedly the employer overreacted out of concern for liability

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[65] Rule, *supra* note 39, at 16.

[66] Nowlin, *supra* note 12, at 38. *See also* King Soopers, Inc. v. United Food and Commercial Workers Union, Local 7, 86 Lab. Arb. (BNA) 254 (1986) (Sass, Arb.); New Indus. Techniques, Inc. v. Int'l Assoc. of Machinists and Aerospace Workers, Lodge 2676, 84 Lab. Arb. (BNA) 915 (1985) (Gray, Arb.); Zia Co. v. Laborers' Int'l Union of N. Am., Local 16, 82 Lab. Arb. (BNA) 641 (1984) (Daughton, Arb.); Care Inns, Inc. v. Gen. Drivers, Salesmen and Warehousemen's Local 984, 81 Lab. Arb. (BNA) 687 (Taylor, Arb.).

[67] Consider for example the case in which the arbitrator reduced the penalty of the worker who touched a female co-worker where this behavior consisted of taking her in his arms to dance upon hearing of her pregnancy. This case is reported by Nowlin, *supra* note 12, at 39 n.60.

[68] These facts, reasoning, and holding are from an unpublished arbitration decision on file with the author.

[69] Washington Scientific Industries v. Int'l Brotherhood of Teamsters, Local 970, 83 Lab. Arb. (BNA) 824 (1984) (Kapsch, Arb.).

for discrimination. Because the woman complained about the "unwelcome" remark by a co-worker on the job, the employer likely felt obligated to impose discipline to avoid liability. Even though the employer merely conformed with anti-discrimination law and regulations, the result was unjust. By weighing the facts and following the dictates of common sense, the arbitrator reached a fair conclusion.

Arbitrators also routinely consider the totality of the circumstances and pervasiveness of the conduct in deciding sex harassment cases, again, as *Meritor* dictates. For example, in one case the pervasiveness in the workplace of horseplay of a sexual nature led the arbitrator to conclude that discharge for such behavior was too severe.[70] But in other cases, one where the perpetrator harassed a number of female co-workers with sexual comments[71] and another where the grievant continued to bother his female co-worker after being warned by the employer to leave her alone[72], the totality of the circumstances led to the arbitral conclusion that discharge was appropriate. Again by focusing mainly on the facts, the arbitrators produced fair decisions which also comply with *Meritor*.

Even more interesting is the fact that arbitrators employed the *Meritor* analysis and criteria before the Supreme Court decided *Meritor*. By applying the constantly developing body of arbitral principles to the facts in sexual harassment cases, arbitral analysis foreshadowed the analysis of the Supreme Court decision. Thus, even before *Meritor*, arbitrators were properly deciding sexual harassment cases under Title VII principles.[73]

The literature reviewing arbitral awards in sexual harassment claims and these examples demonstrate that in resolving these claims, arbitrators do just what judges do. That is, they apply similar criteria, and weigh the nature and circumstances of the harassment in order to reach a decision.[74] Thus, victims receive Title VII protection in arbitration and have no reason to prefer judicial to arbitral resolution

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[70] Meijer, Inc. v. United Food and Commercial Workers, Local 951, 83 Lab. Arb. (BNA) 570 (1984) (Ellmann, Arb.).

[71] United Electric. Supply Co. v. Int'l Bhd. of Elec. Workers Local 1, 82 Lab. Arb. (BNA) 921 (1984) (Madden, Arb.).

[72] IBP, Inc. v. United Food and Commercial Workers Int'l Union, AFL-CIO, Local 222, 89 Lab. Arb. (BNA) 41 (1987) (Eisler, Arb.).

[73] *See generally* Monat & Gomez, *supra* note 30. *See, e.g.*, Louisville Gas and Elec. Co. v. Int'l Bhd. of Elec. Workers Local 2100, 81 Lab. Arb. (BNA) 730 (1983) (Stonehouse, Arb.).

[74] Monat & Gomez, *supra* note 30, at 27, 29; Nelson, *supra* note 8, at 62.

of these claims. It should also be noted that arbitration decisions are widely disseminated in the workplace. Awards demonstrating that sex harassment will not be tolerated send a clear signal to workers as to acceptable behavior, and thereby have a conduct regulating effect on the workplace. Such a result further serves the ends of Title VII legislation.[75]

Having reached this conclusion, the question that remains is whether in these cases, arbitration offers any advantages over court? In other words, might the victim of harassment reasonably prefer arbitration to litigation? I believe the answer is yes.

No matter how long an arbitration hearing lasts or how much it costs, the process is certainly faster and cheaper than courts. An additional benefit to the victim, whether or not she is the grievant, is that the arbitration process costs her nothing because the cost is borne by the employer and the union. Another advantage of the arbitral forum is that it may serve to extend the coverage of Title VII. For example, in a number of cases the grievant was disciplined for harassing a customer or a client, that is, a non-employee who would have no standing to sue under Title VII.[76]

Aside from such utilitarian considerations, a genuine reason for preference is the expertise of arbitrators. In arbitration parties get to choose the decisionmaker, rather than being stuck with the next judge on the wheel no matter how unsympathetic to or inexperienced with these claims that judge might be. Certainly full-time arbitrators and part-time arbitrators who have been arbitrating for any length of time have far more experience in understanding and evaluating workplace behavior than judges who, in the scheme of things, must be generalists and who handle a very limited number of employment cases.

Arbitrators also have a great deal of experience in finding facts and it is generally believed that the informal arbitral process, unencumbered by rules of evidence, contributes to the ability to get to the truth of the matter.[77] I believe that the arbitral fact finding ability

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[75] *See, e.g.*, Meijer, Inc. v. United Food and Commercial Workers, Local 951, 83 Lab. Arb. (BNA) 570 (1984) (Ellmann, Arb.) wherein the arbitrator notes that the serious penalty will serve as renewed notice to all employees that sexual harassment will not be tolerated.

[76] Nowlin, *supra* note 12, at 36-37; Willig, *supra* note 49, at 117-18. *See, e.g.*, PEPCO v. IBEW, 83 Lab. Arb. (BNA) 449 (1984) (Kaplan, Arb.); County of Ramsey v. AFSCME, 86 Lab. Arb. (BNA) 249 (1984) (Gallagher, Arb.).

[77] *See* Dunsford, *The Role of the Labor Arbitrator*, 30 SAINT LOUIS U.L.J. 109, 126-30 (1985); Edwards, Advantages of Arbitration Over Litigation, Proceedings of the 35th Annual Mtg. Nat'l Acad. of Arbitrators, 21, 24-25 (1983).

coupled with arbitral common sense gained from experience handling workplace disputes produces eminently fair results. For example, as previously noted, in seeking to comply with Title VII and avoid discrimination claims and liability, employers sometimes overreact to situations. In *Louisville Gas and Electric Company*[78] the employer, who was ostensibly following the letter of the law, suspended the grievant for asking a female coworker how she would like having her temperature taken with a piece of metal rod. Although this seems to be an offensive question, the arbitrator determined that the female employee was not offended, took the remark as a joke, and responded with a curse.[79] Moreover, the grievant made the same remark to a male employee which demonstrates that he was not singling out the woman.[80] In deciding to sustain the grievance, the arbitrator considered the fact that crude language exists in most shops and offices, that the victim was not, in fact, offended by the remark, that no intent to harass existed and this was not part of repetitive or persistent offensive behavior. The arbitrator employed the *Meritor* criteria and analysis (although the award occurred prior to *Meritor*) i.e., by considering unwelcomeness, severity, pervasiveness, and totality of the circumstances, to conclude that the employer overreacted. But with or without the existence of *Meritor*, I submit that on the facts, this case could not have been justly decided otherwise.

By contrast consider the decision in *Broderick v. Ruder*[81] in which a federal district court in Washington, D.C. concluded that S.E.C. Attorney, Broderick, had been the victim of reverse sexual harassment. The court based its finding of a pervasively sexually hostile environment mainly on the conduct of three male supervisors who were having affairs with other women in the office. As part of a court approved settlement of the matter, the S.E.C. agreed to have an impartial third party conduct an investigation into the situation as a basis for the S.E.C.'s determination of appropriate discipline for the male supervisors.[82] After extensive interviews with all involved, the team of investigators concluded that Broderick had *not* been the victim of sexual harassment.[83]

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[78] Louisville Gas and Elec. Co. v. Int'l Bd. of Elec. Workers Local 2100, 81 Lab. Arb. (BNA) 730 (1983) (Stonehouse, Arb.).

[79] *Id.* at 733.

[80] *Id.* at 732.

[81] 685 F. Supp. 1269 (D. D.C. 1988).

[82] Broderick v. Ruder, 46 Empl. Prac. Dec. (CCH) p. 38,042.

[83] Burleigh & Goldberg, *supra* note 11, at 51.

Commenting on the case recently in a speech at Saint Louis University School of Law, Judge Harry Edwards[84] of the United States Court of Appeals for the D.C. Circuit noted that two prominent attorneys, a man and woman, conducted the investigation and wrote the report. Edwards further observed that the investigators were clearly able to compile a more extensive record than the trial court and that, unlike the court, the investigators could recall witnesses to clarify crucial points. In other words, unencumbered by rules of evidence and other restrictive trappings of court, the investigators were able to discover the facts and get to the truth. The Broderick case prompted Judge Edwards to conclude that whenever possible, sexual harassment cases should *not* be decided by formal litigation and that litigation of these claims is best avoided. I find Judge Edwards' conclusion particularly significant not only because he is currently a federal appellate judge, but also because prior to joining the court he was an eminent labor law scholar who taught at the University of Michigan and at Harvard Law School, and who was a well known labor practitioner, arbitrator, and a member of the National Academy of Arbitrators. Thus, Judge Edwards' exhortation to avoid litigation of these matters merits attention. In reaching this conclusion, Edwards stated what has been obvious to arbitrators for years: "in handling claims of sexual harassment, legal niceties are relevant but common sense will do."[85]

In conclusion, I believe that labor arbitration is an appropriate forum for resolution of sexual harassment problems. The arbitration process serves the parties and society in resolving these "public law" matters. Whether the victim is the grievant or has prompted the employer to discipline the harasser, she receives the benefit of punishment of the perpetrator and, one hopes, an end to the harassment. The victim, the company, and the union each benefit from resolving the dispute quickly, in private, and at less expense than in court. The company and the union have the benefit of choosing their decision maker, and all involved benefit from the arbitrator's experience and expertise in labor disputes. Even the alleged perpetrator benefits from the process because the arbitrator will judge the discipline by a "just cause" standard which affords substantive and procedural protection.

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[84] Address by Judge Harry Edwards, U.S. Court of Appeals (D.C. Cir.), Recent Developments in Employment Discrimination Law, St. Louis University School of Law (March 3, 1989). (Judge Edwards' remarks are on file with the author).

[85] *Id.*

Finally, society benefits and the purpose of Title VII is served because the harassment is punished and the award places everyone in the workplace on notice that this behavior will not be tolerated. Thus, from all perspectives, arbitration is as valuable as litigation in the resolution of sexual harassment claims and in fulfilling the purposes of Title VII. Because arbitrators decide cases on their facts and follow the dictates of common sense, they have produced and will continue to produce eminently fair results in these cases.