Arbitrating Sexual Harassment Grievances: A Representation Dilemma for Unions

Reginald Alleyne†

In a period of little over fifty years, labor unions have used the labor arbitration forum for thousands of employee grievances over alleged violations of governing collective bargaining agreements.¹ Most of these have involved discharge and discipline matters, disputes over economic wage rates and pay, and seniority grievances.² Although the subject matter and fact patterns of arbitrated grievances vary widely,³ private sector grievances share one attribute: they deal with subjects not generally found on state and federal court dockets, in that neither state common law nor statutory law includes typical collective bargaining agreement topics. The enactment of federal and state antidiscrimination statutes is beginning to erode the separation of grievance arbitration issues from traditional courtroom disputes. Collective bargaining agreements are now written to parallel some statutory language, particularly antidiscrimination clauses.

A new problem associated with this trend is that the arbitrator who interprets one of these clauses must consider the extent to which the statute should govern how the parallel clause in the collective bargaining agreement is to be interpreted.⁴ The issue has divided arbitrators, courts,

† Richard Huber Distinguished Visiting Professor of Law, Boston College Law School; Professor of Law Emeritus, University of California Law School, Los Angeles. I thank Yvette Politis, a third-year law student at Boston College Law School, for providing valuable research assistance in the preparation of this Article for publication.

³ See id.
⁴ See Laura J. Cooper & Dennis R. Nolan, Labor Arbitration: A Coursebook 61 (1994) (noting that the range of possible interpretations is narrower than it first appears).
Collective bargaining agreement clauses banning discrimination, especially sex discrimination, create a unique problem for unions in their joint administration of the agreements. Outside the context of collective bargaining, the association of labor arbitration with sexual harassment claims fosters an image of grievances filed by women claiming to be victims of sexual harassment. However, sexual harassment grievances in labor arbitration overwhelmingly involve men challenging disciplinary action or discharge for sexual harassment conduct. This presents a public relations dilemma for unions. It also generates ill-will among union-represented female employees toward their male counterparts—female employees probably wonder why their unions champion the cause of accused harassers while doing little for those making claims as sexual harassment victims. While unions use the grievance arbitration process to defend accused sexual harassment perpetrators, they provide almost no grievance arbitration assistance for alleged harassment victims. This creates the perception that unions are insensitive to the interests of female employees.

Why do fewer victims than aggressors bring their claims to the labor arbitration forum? Is it male-dominated union leadership? Is it the language of collective bargaining agreements? Perhaps it is the result of efforts to avoid inter-employee conflict within bargaining units. Perhaps the low number of victim-based arbitrated grievance claims is due to inadequate labor arbitration remedies for sexual harassment victims. The explanation appears to be a combination of all of these possibilities.

In the union-represented workplace, adjudication of sexual harassment claims brings together an accused perpetrator and an alleged victim, both of whom are sometimes represented by the same union, regardless of whether the two employees are in the same or a different bargaining unit. In that


setting, the conflict between the two union members generates competing representation obligations for the union in its effort to represent both sides fairly. How the conflict is resolved depends initially on the types of sexual harassment provisions, if any, the collective bargaining agreement provides.

I. EFFECT OF THE AGREEMENT

A grievance arbitration conflict between two opposing parties in a sexual harassment claim is less likely to arise if the governing collective bargaining agreement does not contain a clause explicitly prohibiting sexual harassment. Many recent collective bargaining agreements do, however, contain general discrimination clauses—almost all of which include sex discrimination.

These clauses can be used to force an alleged harassment victim to arbitrate her claim, because a sex discrimination clause may be interpreted to include sexual harassment. This interpretation parallels the Supreme Court's interpretation of Title VII of the Civil Rights Act to include sexual harassment.

On the other hand, it is certainly arguable that a clause in a collective bargaining agreement need not be interpreted in the same manner that

7. See BASIC PATTERNS IN UNION CONTRACTS (14th ed. 1995), which provides a statistical breakdown of the kinds of clauses found in collective bargaining agreements, including the percentage of agreements containing a particular clause. Basic Patterns does not include sexual harassment in its list of categories covered by collective bargaining agreements. Some agreements include them, but their numbers are apparently too small to register as statistically significant.

8. Discharge and discipline clauses are present in 98% of collective bargaining agreements. See id. at 7. Specific grounds for discharge are present in 82%. See id. Sexual harassment is not listed as a ground for discharge in any of the 400 collective bargaining agreements selected for the Basic Patterns compilation. See id. Antidiscrimination clauses covering race, sex, color, creed, national origin, and age are found in 87% of agreements. See id. at 127.

9. See Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986). Meritor held that Title VII's ban against sex discrimination includes a sexual harassment ban, even when the harassment did not result in the loss of a job or income. Lower courts had divided over the issue by treating workplace sexual harassment as not being work related. See Corne v. Bausch & Lomb, 390 F. Supp. 161 (D. Ariz. 1975); see also Miller v. Bank of America, 418 F. Supp. 233 (N.D. Cal. 1976). Some courts do not characterize sexual harassment as sex discrimination because the sex roles could have been reversed. See Corne, 390 F. Supp. at 161. Moreover, some courts consider sexual harassment a cause of action properly pursued as a personal injury tort under state law. See Tompkins v. Public Serv. Elec. & Gas Co., 422 F. Supp. 553 (N.J. 1976). In Corne, the court further held that the alleged harassing conduct did not benefit the employer and therefore could not be a cause of action under the federal statute. See Corne, 390 F. Supp. at 161. The pioneering work advocating sexual harassment as a cause of action under statutory and constitutional law is CATHERINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN (1979).
courts interpret comparable statutory language.\textsuperscript{10} Even though sex discrimination clauses in collective bargaining agreements are now common, there are few published labor arbitration decisions about victims' harassment grievances.\textsuperscript{11} The absence of explicit collective bargaining agreement language concerning sexual harassment is at least a partial explanation for the dearth of victim-based sexual harassment grievances. This leaves open the independent question, not itself directly treated in this Article, of whether unions should seek to press for the inclusion of sexual harassment clauses in collective bargaining agreements.

A. Inter-Employee Conflict

Lurking here are a union's legitimate concerns about inter-employee conflicts which have the potential to deleteriously affect the union's ability to represent employees. The conflict arises when sexual harassment claims embrace bargaining unit members who are alleged harassment victims and bargaining unit members who are accused harassers. The dimensions of the problem may be illustrated with two related hypothetical scenarios.

Assume that a collective bargaining agreement contains a clause prohibiting sexual harassment. Also, assume that the agreement contains a clause prohibiting discipline and discharge except for just cause. Mary files a grievance alleging a violation of the agreement's sexual harassment clause, asserting that "Joe sexually harassed me, continues to do so, and the company refuses to do anything about it." Her union takes the grievance to arbitration and wins. The company compensates Mary and fires Joe, who then files a grievance contending that he was discharged without just cause. What should the union do? If it takes Joe's grievance to arbitration, the company will point to the arbitrator's award and argue that a decision sustaining Joe's grievance would conflict with the arbitrator's decision in Mary's case. This is a conflict that an arbitrator would find difficult to ignore.\textsuperscript{12}

In the second hypothetical, suppose that Joe is immediately discharged because of Mary's sexual harassment allegations. Joe then files a grievance over his discharge and, simultaneously, Mary files a grievance claiming sexual harassment by Joe. Now the union's dilemma deepens. One determinative issue is common to both grievances: did Joe sexually


\textsuperscript{11} See Basic Patterns in Union Contracts, supra note 7.

harass Mary? Taking both grievances to arbitration would itself generate irreconcilable conflict. The union’s dilemma is further compounded by the possibility of lawsuits against it for refusing to take either grievance to arbitration. If, in good faith, the union refused to take Mary’s sexual harassment grievance to arbitration, she might file a breach of the duty of fair representation claim against the union. If, in good faith, the union refused to take Joe’s case to arbitration, Joe might then sue the union for breach of the duty of fair representation. Although it is unlikely the union would lose both duty of fair representation cases, it would have to expend considerable resources to defend against one or both.

If a collective bargaining agreement addresses victim-based sexual harassment, a union could not conscientiously resolve the conflict by refusing to take any accused harasser’s discipline or discharge case to arbitration. Nor could a union appropriately take all alleged harassment victims’ grievances to arbitration on the sometimes advanced assumption that all accusations of sexual harassment are valid, because the claimant would not otherwise suffer the burdens associated with prosecution of the claim. If resolution of the potential conflict exists, it lies somewhere between these two unacceptable polar extremes.

II. REMEDIES AND PROCEDURES FOR SEXUAL HARASSMENT CLAIMS

Collective bargaining agreement provisions are generally not those for which large sums of money are awarded when the agreement is found to have been breached. Consequently, this feature, together with long-
standing tradition and practice, limits labor arbitration monetary remedies to easily calculated, sum-certain, make-whole amounts. The victim-based sexual harassment grievance does not fit that common category of grievance. Given the grievous harm so often suffered by victims of sexual harassment, a cease and desist order alone would often be inadequate. It would certainly be inadequate as compared with what a judge or jury might award in a comparable Title VII case, except in those cases where very minor harassing conduct has taken place. Punitive damages are virtually unheard of in labor arbitration cases, as are damages for pain and suffering and for emotional distress. Labor arbitrators are still uncertain whether interest should be awarded on back pay. In addition, a labor arbitrator may be reluctant to find that an employer engaged in conduct prohibited by a federal or state statute, in addition to having breached the collective bargaining agreement.

Because labor arbitration proceedings are geared toward the resolution of relatively minor disputes, virtually no formal discovery beyond the production of documents exists. Additionally, formal rules of evidence are generally not applicable. In contrast, contested sexual harassment allegations often raise complex, emotional issues. For example, credibility issues may arise when liability and damages are determined. The procedural informality of labor arbitration, together with the burden of proof that a union must satisfy in a victim-based sexual harassment proceeding, would disadvantage the grievant who alleges sexual harassment.

provided in collective bargaining agreements or by arbitrators. See id. at 132. Other arbitrators, as cited by Hill and Sinicropi, equate the arbitrator's remedial power with that of a court in a breach-of-contract dispute. See HILL & SINICROPI, supra, at 4.


17. The average jury award in a sexual harassment case appears to be $250,000. See Elizabeth Larson, Flirting with Dangerous Precedents, WALL ST. J., June 7, 1996, at A12.

18. See HILL & SINICROPI, supra note 15, at 436-47. A consensus rationale among labor arbitrators, as summarized by Hill and Sinicropi, appears to be that the nature of the ongoing joint relationship would suffer if punitive damages were permitted, and that too much power would be conferred on the arbitrator authorized to award punitive damages who, at the same time, remains insulated from judicial review.

19. See id.

20. See id. at 450-60. Notwithstanding the decisions in favor of awarding interest on awards of back pay and other benefits, decisions to the contrary continue to be the norm. See id. at 458.

21. See id. at 3-5.

22. The settled procedural rule in labor arbitration hearings is that the union bears the burden of proof for all grievances except those involving discipline or discharge. See id. at 41. In a grievance involving an accused harasser, the employer would thus bear the burden of proof. In a grievance brought by an alleged victim (a non-discipline case), the burden of proof would be on the union. Consequently, if the evidence in a labor arbitration case were balanced evenly, the alleged harassment victim should lose and the accused perpetrator
In a recent arbitration decision, *Boone County Board of Education v. Boone County Educational Association*, an arbitrator interpreted one of the now rare but possibly increasing number of collective bargaining agreement clauses explicitly prohibiting sexual harassment. The clause provided that "[t]he Board and the Association shall foster a work environment free of hostile, demeaning, intimidating or harassing behavior, including sexual harassment as those terms are defined in law."

Harassment was an issue in this case, though not sexual harassment. A school teacher claimed that her school’s principal criticized her work performance with a loud and intimidating voice that others could have heard. The teacher testified that she felt threatened by the physical setting and the manner in which she was addressed; that the principal’s demeanor was aggressive, antagonizing, and intimidating; and that she was humiliated, shocked, and fearful. She also contended that the harassment caused her to weep. The arbitrator sustained the grievance but limited the awarded remedy to a finding that the principal violated the collective bargaining agreement by fostering a work environment which was not “free of hostile, demeaning, intimidating or harassing behavior... as those terms are defined in law.”

The arbitrator awarded the grievant no money and did not provide a formal cease and desist order. The union had somewhat vaguely asked the arbitrator for an appropriate remedy. The absence of an available and easily applied make-whole formula, from which a specific sum could be derived, may have been the basis for the arbitrator’s penniless remedy.

So firmly established is the labor arbitration practice of awarding no more than sum-certain, make-whole amounts, that not even a collective bargaining clause adopting statutory standards for discrimination grievances would likely change the practice. For example, in a dispute over the interpretation of a clause prohibiting sexual discrimination as provided by law, an arbitrator opined:

That brief phrase [as provided by law] is too slender a reed on which to rest a theory of full incorporation. While agreeing to prohibit sex discrimination, and thus to arbitrate grievances alleging sex discrimination, the Company did not necessarily mean to vest arbitrators with the power to award compensatory and punitive damages that are virtually unknown in labor arbitration.

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24. Id. at 118.
25. Id.
So comparatively weak are the remedies available to sexual harassment victims in the labor arbitration forum, that it may not only be in the best interests of unions, but also in the best interests of harassment victims, that unions not pursue their claims of serious sexual harassment in the labor arbitration forum unless the sexual harassment victim has lost her job or some other employment benefit as a consequence of the harassment. If the victim lost her job or some employment benefit due to harassment, the victim's remedial interests would fall within the class of employees whose grievances contest discipline and discharge or other conditions of employment as violations of the collective bargaining agreement.

These cases arise in a number of contexts. The most prominent type of case may be the harassment-related constructive discharge. In a constructive discharge, a victim of either hostile environment or quid pro quo sexual harassment is disciplined or discharged as a direct consequence of the harassment. Over the past several years courts have interpreted constructive discharge cases to include those discharges that appear to be voluntary resignations but are actually the consequence of unlawfully motivated treatment on the job.27 Unions are now taking some harassment-based constructive discharge cases to arbitration and winning.28 Discharges so motivated are unlawful under Title VII of the Civil Rights Act of 196429 and also breach the collective bargaining agreement's just cause clause.30 The case for avoiding the kinds of conflicts exemplified by the Mary-Joe hypothetical scenarios is further strengthened when one considers the limited scope of labor arbitration remedies for sexual harassment and the consequences of the labor arbitration forum's informality.

(BNA) 295 (1995) (Nolan, Arb.). The arbitrator also said that there is a strong argument that mental distress damages should never be awarded. See id. (citing HILL & SINICROPI, supra note 15).

28. See, e.g., Oakland Unified Sch. Dist. v. Oakland Sch. Employees Ass’n, 81 Lab. Arb. Rep. (BNA) 1237 (1983) (Griffin, Arb.). There is a class of cases falling somewhat between constructive discharge and real discharge cases. This class includes cases in which an employee does not quit but is discharged for poor work performance. Arbitrators will sustain a grievance when it is established that the work performance was poor for reasons related to sexual harassment. See, e.g., Exxon Co. v. Baton Rouge Oil & Chem. Workers Union, 105 Lab. Arb. Rep. (BNA) 846 (1995) (Caraway, Arb.).
29. See Blake v. C & A Gitto, Inc., No. 4:96CV161-DJS, 1998 WL 47 DLR A-3 (E. D. Mo. Mar. 3, 1998) (federal court upholding a $257,000 jury award for a waitress whose supervisor’s harassment made her work so intolerable that she was forced to quit her job).
A. Potential for Union-Employer Collusion

This Article has so far assumed that unions have a genuine interest in the welfare of both alleged harassment victims and alleged harassment perpetrators. The assumption is valid when applied to most labor unions. This assumption, however, may not apply to every union. Some unions may be more interested in protecting the interests of white males, who may comprise the bulk of the bargaining unit, against sexual harassment allegations. The Supreme Court was contemplating union-employer collusion in general discrimination cases, when it made the following statement in Alexander v. Gardner-Denver.\footnote{415 U.S. 36 (1974).}

A further concern is the union’s exclusive control over the manner and extent to which an individual grievance is presented.\ldots In arbitration, as in the collective bargaining process, the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit.\ldots Moreover, harmony of interest between the union and the individual employee cannot always be presumed, especially where a claim of racial discrimination is made.\ldots And a breach of the union’s duty of fair representation may prove difficult to establish.\ldots In this respect, it is noteworthy that Congress thought it necessary to afford the protections of Title VII [of the Civil Rights Act of 1964] against unions as well as employers.\footnote{Id. at 58 n.19 (citations omitted).}

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\item[31] 415 U.S. 36 (1974).
\item[32] Id. at 58 n.19 (citations omitted). This clear warning about the potential for union-employer collusion in arbitration cases involving allegations of racial discrimination is, in this author’s view, the dominant rationale for the holding in Gardner-Denver. The case holds that a statutory discrimination claim should not be dismissed from federal court solely because the plaintiff lost a prior arbitration grievance involving the same allegations of discrimination. The collusion rationale distinguishes Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991), which involved no union, and hence, no possibility of union-employer collusion. See also David E. Feller, Compulsory Arbitration of Statutory Discrimination Claims Under a Collective Bargaining Agreement: The Odd Case of Caesar Wright, 16 Hofstra Lab. L.J. 53 (1998). This article was published after the Supreme Court decided Wright v. Universal Maritime Service Corp., 119 S. Ct. 391 (1998). In Wright, the U.S. Supreme Court held that in order to be effective, a collective bargaining agreement’s waiver of an employee’s right to judicial relief for a statutory claim had to be clear and unmistakable. The Court did not decide, as many had expected it to decide, whether such a waiver is enforceable. Professor Feller’s views were incorporated in a Wright case amicus brief written by Professor Feller for the National Academy of Arbitrators. See Brief of the National Academy of Arbitrators as Amicus Curiae in Support of Petitioner, Wright v. Universal Maritime Serv. Corp., 119 S. Ct. 391 (1998) (No. 97-889), available in 1998 WL 221374. Professor Feller argues that the Supreme Court should reject the collusion rationale of Gardner-Denver and adopt his view that the arbitration clause at issue in the Wright case did not include a “clear and unmistakable waiver.” Wright, 119 S. Ct. at 397.
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The *Gardner-Denver* case was decided in 1974, before sexual harassment was considered sexual discrimination that violated Title VII. Nonetheless, the Supreme Court's language on the potential for union-employer collusion in the arbitration of racial discrimination grievances would likely be employed by the Court in a sexual harassment context. For example, consider the following hypothetical scenario. A female employee, W, in a male-dominated and newly sex-integrated bargaining unit, files a grievance alleging sexual harassment by a male member of the bargaining unit. The union, sympathetic to the workplace values of its predominantly male constituency, is reluctant to take her grievance to arbitration. However, the union is also reluctant to face a breach of the duty of fair representation lawsuit. It believes, with good reason, that W will file one if the union refuses to invoke arbitration for her. Faced with these conflicting considerations, the union does the one thing that will avoid the lawsuit and also satisfy its male constituents. It takes W's case to arbitration with insufficient vigor to win, but with enough apparent vigor to mask its intention to lose. The employer has reason to believe that the union is not determined to win the case and knows the reasons why. The arbitrator denies the grievance. The decision is "final and binding." Sexist male workers are satisfied. The union is satisfied that its core constituency is satisfied. The employer is satisfied with the result. W is either unaware of the union's lack of a full effort on her behalf, or is aware of both it and the nearly insurmountable obstacles standing in the way of proving it. No breach of the duty of fair representation action is filed against the union.

**B. Classifying Sexual Harassment Issues**

One way to view the grievance-handling conflict in its sharpest contours is to classify various kinds of sexual harassment claims. One can then identify the sexual harassment claim in which the case for conflict is demonstrably stronger than it might be in other cases. For example, a case involving an accused harasser who is a supervisor or manager would not

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33. Professor Feller has commented on the potential conflict between a union's collective responsibilities and an individual's federal statutory rights. He argues that the conflict is not necessarily present, "particularly where the union has successfully negotiated a provision fully incorporating statutory rights." Feller, supra note 32, at 77-78. Professor Feller's reliance on a negotiated statutory rights provision is misplaced because it does not take the scenario far enough. The collusion potential noted in *Gardner-Denver* arises at the stage of implementation of the contractual statutory right, when the union takes to arbitration a statutory discrimination claim in a setting where the union has complete control over how a case is presented to an arbitrator. In overwhelming numbers, no doubt, unions would vigorously and in good faith pursue an individual's statutory claim in the grievance arbitration forum. The potential for the noted conflict should be avoided, even if only one union might follow the hypothetical scenario.
create conflict problems for the union. At least in the private sector, neither a supervisor nor a manager could be a member of a union bargaining unit.\textsuperscript{34} The union could pursue the sexual harassment victim's grievance without the possibility of a conflict with another bargaining unit member's interests. The kind of conflict illustrated by the hypothetical cases is certainly avoidable if the alleged harasser is not a bargaining unit member but a supervisor or manager who is charged with quid pro quo harassment. The quid pro quo claim involves a demand for sexual favors in exchange for good treatment on the job, or to avoid poor treatment on the job.

In contrast, the union's internal conflict might be unavoidable if the alleged harassment is not quid pro quo, but is instead hostile environment harassment by a co-employee member of the bargaining unit.\textsuperscript{35} Because bargaining unit non-supervisors are more likely than non-bargaining unit supervisors and managers to engage in hostile environment sexual harassment, the potential for inter-employee conflict and the union's entrapment in its crossfire is heightened in hostile environment cases.

Another factor to be considered in analyzing the potential for inter-employee conflict is the lineup of parties in sexual harassment cases. In the victim's grievance, she and the union together oppose the employer. She and the union say that the victim was sexually harassed. The employer says that the victim was not harassed, or, that the victim was harassed but the employer was not at fault. For the accused's discipline-context grievance, the victim and the employer are in harmony. Both say that there was sexual harassment and that the accused was the harasser. The union and the employer remain at odds in a familiar adversarial relationship: defending a bargaining unit member against allegations of misconduct leading to discipline or discharge. It is the difference between the victim-employer harmony (in the disciplined-harasser grievance), and the victim-employer opposition (in the accused-harasser grievance) that creates nearly irremediable problems of conflict for a union.

C. Weighing Competing Grievant Interests

In the workplace sexual harassment setting, to whom is the union's assistance most valuable? To the accused and discharged harasser, or to the alleged victim of sexual harassment? If the availability of a remedy is

\textsuperscript{34} See National Labor Relations Act, 29 U.S.C. §§ 152(2)-(3) (1978) (defining employer and employee, respectively, and excluding supervisors from the Act's coverage). Managers are also excluded from National Labor Relations Act coverage. Sometimes the exclusion of supervisors is noted in the collective bargaining agreement. See, e.g., Beacon Journal v. Akron Newspaper Guild, 114 F.3d 596 (6th Cir. 1997) (overturning arbitration award that included newly promoted supervisors in bargaining unit in face of explicit exclusionary clause).

\textsuperscript{35} See id.
the criterion, the answer may be easy. The harassment victim may file a claim, in state or federal court, alleging violation of Title VII of the Civil Rights Act or a comparable state statute. In the private sector, the discharged harasser has virtually no remedy except through the grievance-arbitration process because no federal statute and no state statute, except in Montana, provides a just cause standard for a private sector employee’s dismissal from employment.

D. Unique Qualities of Harassment Grievances

Most employee grievances pit a bargaining unit member against an

36. To the extent that employers require individual employees to waive the right to trial and accept arbitration instead, the kind of sexual harassment claim typified by the Mary-Joe hypothetical might be forced to arbitration by the Supreme Court’s decision in Gilmer, as extended by the Fourth Circuit decision in Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875 (4th Cir. 1996). The Austin case held that employees covered by collective bargaining agreements with discrimination clauses are precluded from bringing statutory discrimination lawsuits if they have not used the grievance arbitration procedure to seek relief. See 78 F.3d at 885. But see Alphonse Hotel Corp. v. Tran, 54 F.3d 115 (2d Cir. 1995). Other circuits have reached different results, holding that a union cannot waive an individual’s right to pursue a statutory claim in a judicial forum. See Penny v. United Parcel Serv., 128 F.3d 408, 414 (6th Cir. 1997); Brisentine v. Stone & Webster Eng’g Corp., 117 F.3d 519, 526-27 (11th Cir. 1997); Fryner v. Tractor Supply Co., 109 F.3d 354, 363 (7th Cir. 1997); Varner v. National Super Mkts., Inc., 94 F.3d 1209, 1213 (8th Cir. 1996). The issue in these cases involving arbitration under collective bargaining agreements is not the same as the issue resolved by the Supreme Court’s decision in Gardner-Denver. There, an employee who was an unsuccessful labor arbitration grievant in a racial discrimination case was held not to have waived his right subsequently to pursue his statutory discrimination allegations in federal district court under Title VII of the Civil Rights Act of 1964 by first using arbitration. In the Courts of Appeals decisions noted above, the first attempted forum was not labor arbitration, as in Gardner-Denver, but a judicial forum. It therefore remains to be determined whether the Supreme Court will treat labor arbitration as a remedy to be exhausted before a judicial remedy may be sought for a statutory claim. The idea that a union, as distinguished from an individual employee, may waive an employee’s right to judicial relief appears to be extraordinary. Given the almost uniform criticism of Gilmer by commentators and—albeit sub silentio—by lower federal courts, its extension to a collective bargaining agreement to which an individual employee, through a third-party beneficiary, is not a party, seems unwarranted. See Reginald Alleyne, Statutory Discrimination Claims: Rights “Waived” and Lost in the Arbitration Forum, 13 HOFSTRA LAB. L.J. 381 (1996); Ann C. Hodges, Protecting Unionized Employees Against Discrimination: The Fourth Circuit’s Misinterpretation of Supreme Court Precedent, 2 EMPLOYEE RTS. & EMP. POL’Y J. 123 (1998); see also Joseph R. Grodin, Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of Gilmer, 14 HOFSTRA LAB. L.J. 1 (1996); Donna Meredith Matthews, Note, Employment Law After Gilmer: Compulsory Arbitration of Statutory Antidiscrimination Rights, 18 BERKELEY J. EMP. & LAB. L. 347, 386-87 (1997); but see Wright, supra note 32.


38. See Bornstein, supra note 10, at 109, 119.
employer representative. No inter-employee contest is involved. It is true that seniority grievances place bargaining unit employees in competition with each other. However, no grievances do so with the level of emotion generated by sexual harassment grievances. Seniority grievances pit one bargaining unit employee against another bargaining unit employee, but they are not grievances in which competing employees make accusations of other employee misconduct. Nor are seniority grievances those in which the grievances are taken to arbitration for a junior employee who is affected by a union's prosecution of a seniority grievance. Unlike other grievances normally channeled to the grievance-arbitration process, sexual harassment claims involve intentional acts of misconduct.

Sexual harassment victims are often emotionally scarred by the experience. Few other acts of workplace misconduct have as much potential to adversely affect the quality of work performed by victims of the misconduct. Sexual harassment also has the distinguishing feature of being one of a small number of types of workplace misconduct for which an employer can be found in violation of a statute carrying potentially heavy monetary penalties. Employers constantly remind arbitrators of this by raising the dubious argument in disciplined-harasser grievances that to reinstate the grievant would place the employer in violation of Title VII of the Civil Rights Act, because it is the employer's obligation under Title VII to rid its workplace of those contributing to an environment of harassment. This aspect of victim-based sexual harassment claims further distinguishes them from other grievances that implicate no more than a breach of the collective bargaining agreement. The labor arbitrator ordinarily interprets collective bargaining agreement clauses as having no statutory implications. In the victim-based sexual harassment setting, however, the interpreted sexual harassment clause, whether explicit or derived from a sexual discrimination clause, may also answer the question of whether the employer has violated state law, federal law, or both. Thus, the question is posed as to whether a labor arbitrator might be more reluctant to find that the employer engaged in particular conduct if that conduct would have violated a federal or state statute under which large remedial sums are available.

39. Quid pro quo harassment by a supervisor or manager is immediately attributable to the employer. See Davis v. City of Sioux City, 115 F.3d 1365 (8th Cir. 1997). In cases alleging hostile environment, an employer is liable only if the employer knew or should have known of the hostile environment. See id. For an excellent analysis of the supervisor-status issue, see Burnett & Sons, 102 Lab. Arb. Rep. (BNA) 743 (1994) (Concepcion, Arb.); see also Burlington Indus. v. Ellerth, 118 S. Ct. 2257 (1998); Faragher v. City of Boca Raton, 118 S. Ct. 2275 (1998).
E. Screening Disciplined Harasser Grievances

Among other means, a union operates in the interests of harassment victims by attempting to limit its defense of accused sexual harassers to cases in which it is satisfied that an accused harasser was properly accused. This is the screening process ordinarily associated with grievance arbitration. However, the effectiveness of this process in sexual harassment discipline grievances is questionable. Are unions taking the wrong cases to arbitration? Published cases suggest that the answer might be yes. A review of these cases reveals a somewhat disproportionate number of cases in which the union's position in favor of an accused harasser was not sustained by the arbitrator. Perhaps even more revealing than the statistics is the weight of the evidence against the grievant in some of these cases.

Caution must be exercised here, as societal attitudes concerning the seriousness of sexual harassment have undergone dramatic changes in the last ten years. Labor arbitrators seem to have followed the societal trend. In 1986 and 1987, for example, some arbitrators were sustaining grievances of disciplined sexual harassers who were found to have engaged in what would today be regarded as high-level harassment activity. In a 1987 case, *Boys Market v. United Food and Commercial Workers Local 770*,40 the grievant had moved his fingers in an upward motion between a female employee's buttocks. In a 1986 case, *Sugardale Foods, Inc. v. Local 17A United Food and Commercial Workers*,41 the grievant was discharged for touching a woman's crotch area. Arbitrators reinstated both grievants. Also, in the early and middle 1980s, some arbitrators tended to accept mitigating circumstances arguments made in explanation of a discharged grievant's admittedly harassing conduct. In *AFG Industries, Inc. v. Aluminum, Brick, and Glass Workers International Union*,42 a 1985 decision, the arbitrator reinstated a grievant who, while at a company outing, threw beer on a female employee, broke one of her wrists, and sprained the other. The arbitrator reinstated the grievant on the ground that the company had failed to provide adequate supervision of employees, especially in light of the presence of alcoholic beverages. Toward the end of the 1980s, in a 1989 case, *GTE Florida v. International Brotherhood of Electrical Workers, Local 824*,43 an arbitrator reinstated an employee who had been discharged for three incidents of sexual harassment which included: (1) grabbing a female employee, bending her over a table and nuzzling her neck; (2) telling a female employee that the grievant was

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enticed by her appearance; and (3) telling a female employee, "You make my tongue hard." Recently decided labor arbitration cases suggest that arbitrators would likely reach different conclusions now and would likely sustain discharges in cases presenting similar facts.  

Courts seem to review arbitrators' sexual harassment decisions with stricter scrutiny than that usually given to final and binding arbitration decisions. In addition, arbitration decisions in sexual harassment cases are more likely to be set aside than in other cases. Interestingly, in most of the decisions that were set aside, the arbitrator decided in favor of the accused harassers in spite of strong evidence of serious harassing conduct. Arbitrators would do well to follow the federal Equal Employment Opportunity Commission's Guidelines on Sexual Harassment, and they are increasingly doing so. The Guidelines provide:

[U]nwelcome, intentional touching of a female worker's intimate body areas is sufficiently offensive to alter the conditions of her working environment and constitute a violation of Title VII. More so than in the case of verbal advances or remarks, a single unwelcome physical advance can seriously poison the victim's working environment.

Although the Guidelines are not the equivalent of a statute, courts rely on them as an accurate interpretation of Title VII.


45. See, e.g., Stroehmann Bakeries, Inc. v. Local 776, Int'l Bhd. of Teamsters, 969 F.2d 1436 (3d Cir. 1992); Newsday, Inc. v. Long Island Typographical Union, 915 F.2d 840 (2d Cir. 1990). Other courts have sustained labor arbitrators' decisions on finality grounds, even though the arbitrators decided in favor of employees who were disciplined for proven serious sexually harassing conduct. See, e.g., Chrysler Motors Corp. v. International Union Allied Indus. Workers, 909 F.2d 248 (7th Cir. 1990); Communication Workers of Am. v. Southeastern Elec. Coop., 882 F.2d 467 (10th Cir. 1989); see also Jeffrey Sarles, The Case of the Missing Woman: Sexual Harassment and Judicial Review of Arbitration Awards, 17 HAV. WOMEN'S L.J. 17 (1994). Sarles argues that the public policy exception to the finality of labor arbitration awards, as implied by the Supreme Court in Misco, should apply to sexual harassment cases. See id. at 39-55.


F. Multi-Party Mediation

Some sexual harassment victims seek no more than an acknowledgment of wrongdoing by the perpetrator and a promise by the employer that it will prevent the harassment from happening again. In these cases, labor arbitration can provide an adequate remedy. However, many serious allegations of sexual harassment accompanied by a claim for substantial monetary relief are best resolved by mediator-assisted negotiations, possibly initiated at the union's request. Mediation of employment controversies is no longer limited to negotiations over contract terms. Modern mediation extends to individual adversarial disputes, including those in the grievance arbitration hierarchy.48

The employer, the union, the alleged harasser, and the alleged victim would be parties to the mediator-assisted negotiations. Questions to be resolved include that of the accused harasser's possible guilt, and whether, as part of any settlement, he should be disciplined in concurrence with the union, which would include a promise that the union would not support any future grievances filed by the disciplined employee. A range of possible disciplinary actions is possible, including the accused harasser's retention on a "last-chance basis," sometimes conditioned in part on his willingness to seek counseling for what might be an underlying reason for his harassing behavior.

The mediator could do much to temper the expectations of all parties and remind each of the seriousness of a potential lawsuit and the possibility of loss that accompanies a trial or arbitration. Mediation also has the advantage of embracing all parties to a harassment dispute, including the accused harasser, in contrast with the grievance arbitration process which cannot accommodate a single, consolidated multiparty proceeding. For example, the kind of interested-party intervention allowed by the Federal Rules of Civil Procedure in federal civil trials49 is unknown in labor arbitration. Parties to the collective bargaining agreement mutually decide which procedures will govern the labor arbitration process, and it is seldom in the interests of either side to permit third-party intervention of any kind.

Minor harassment claims would also benefit from an attempt to reach a negotiated settlement with the assistance of a mediator. Mediator-assisted negotiations could be a first, and perhaps last, dispute resolution step. The process would differ from that used for major harassment claims, however, in that labor arbitration would be used to resolve minor harassment claims if the dispute was not resolved by mediator-assisted negotiations. Major harassment claims would move to trial (and perhaps

further court-related settlement efforts) if multi-party mediation efforts were not successful.

Unions and employers who want to formalize mediation procedures for sexual harassment claims would probably join in the adoption of preventive-maintenance measures designed to discourage sexual harassment. These measures might include jointly sponsored sexual harassment sensitivity training, education on sexual harassment law, and jointly structured sexual harassment monitoring groups designed to identify and remedy early patterns of unlawful harassment, to which initial complaints of harassment could also be taken for informal resolution.

III. CONCLUSION

The resolution of conflicting grievances related to sexual harassment issues presents a complex dilemma for unions. This problem is compounded by a failure to recognize and acknowledge the potential for inter-employee conflict that is generated by a union’s duty to represent all bargaining unit members. It is overly simplistic to view the conflict simply as evidence of union insensitivity to the interests of female union members.

As this Article has sought to demonstrate, victim-based sexual harassment cases are unlike the grievances ordinarily addressed through the arbitration process. Unlike other grievances, which can only be resolved through arbitration, sexual harassment grievances can be remedied by judicial action. The informalities and esoteric culture of the labor arbitration forum make it ill-suited to address the kind of serious allegations of employee misconduct involved in sexual harassment claims. Sexual harassment claimants should avoid the labor arbitration forum for all but very minor claims.