

# A CLASH OF THE TITANS: JUDICIAL DEFERENCE TO ARBITRATION AND THE PUBLIC POLICY EXCEPTION IN THE CONTEXT OF SEXUAL HARASSMENT

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## I. INTRODUCTION

The issue of sexual harassment has permeated public consciousness since the emotionally-charged confirmation hearings of Clarence Thomas to the United States Supreme Court.<sup>1</sup> With this

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1. See, e.g., J. Pinkerton, *NORTHWEST ARK. BUS. TIMES*, Aug. 23, 1993, at 12-13 (reporting that sexual harassment cases rose exponentially in the year following the Clarence Thomas confirmation hearings with more than 10,000 claims filed with the Equal Employment Opportunity Commission); Ron Nissimov, *Sex Harassment Filings Up Since Thomas Hearings*, *HOUSTON CHRON.*,

widespread awareness, a renewed responsibility for employers to prevent and respond to sexual harassment in the workplace has emerged. In assuming this social responsibility, the employer also assumes legal liability to harassment victims under Title VII.<sup>2</sup> Yet the employer also risks potential liability to a wrongfully disciplined harasser, and collective bargaining agreements or other legal rights may shield the wrongfully accused from liability.<sup>3</sup> Under collective bargaining agreements, accused harassers faced with discipline or termination often are entitled to arbitration.<sup>4</sup> When deciding these cases, arbitrators use a "just cause" standard<sup>5</sup> for liability determinations. This often results in employers instituting a decreased severity of discipline.<sup>6</sup> In reviewing requests to vacate these arbitration decisions, the federal courts of appeals have had disparate decisions.<sup>7</sup> The appellate decisions take opposing positions based on two well established legal principles: judicial deference to arbitration finality<sup>8</sup> and the public policy exception.<sup>9</sup>

July 19, 1992, at 1 (reporting that sexual harassment complaints filed with the Equal Employment Opportunity Commission rose by 70% after the Clarence Thomas confirmation hearings); Jane Gross, *Suffering in Silence No More: Fighting Sexual Harassment*, N.Y. TIMES, July 13, 1992, at A1 (reporting that Anita Hill's accusation of sexual harassment against Supreme Court nominee Clarence Thomas directly increased public awareness of workplace misconduct).

2. See Equal Opportunity Act of 1972, 42 U.S.C. § 2000(e)(2)(a)(1) (1994), which mandates:

[I]t shall be an unlawful employment practice for an employer . . . 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 race, color, religion, sex, or national origin . . .

3. See Carrie A. Bond, Comment, *Shattering the Myth: Mediating Sexual Harassment Suits in the Workplace*, 65 FORDHAM L. REV. 2489, 2506-07 (1997) (discussing the ability of a plaintiff who has successfully sued under Title VII to bring legal claims as long as the statute of limitation does not bar the claim). A 1988 survey of Fortune 500 companies revealed that, "harassment costs a typical large company \$6.7 million each year due to absenteeism, turnover, and loss of productivity." Brian Stanko & Gerald J. Miller, *Sexual Harassment and Government Accountants: Anecdotal Evidence from the Profession*, PUB. PERSONNEL MGMT., June 1, 1996, at 219. Additionally, each company spends approximately \$200,000 on each investigated complaint that is found to be justified. *Id.*

4. See Norris Case, *Arbitration of Workplace Discrimination Claims: Federal Law and Compulsory Arbitration*, 14 TOURO L. REV. 839, 840 (1998) (discussing mandatory arbitration of discrimination claims).

5. Although judicial authorities have not defined "just cause" concretely, *Black's Law Dictionary* defines the term as "reasonable grounds, . . . a fair and honest cause, . . . legitimate cause, legal or lawful ground for action." BLACK'S LAW DICTIONARY 863 (6th ed. 1990). See *infra* notes 73-80 and accompanying text (discussing the just cause standard).

6. See VERN E. HAUCK, *ARBITRATING SEXUAL HARASSMENT CASES* 1-5 (1995) (describing arbitrator determinations and their use of the just cause standard).

7. See *infra* Part IV (chronicling the four decisions of the United States Courts of Appeal that have reviewed arbitration awards reinstating accused sexual harassers).

8. See *Stroehmann Bakeries, Inc. v. Local 776 Int'l Bhd. of Teamsters*, 969 F.2d 1436, 1443 (3d Cir. 1992) (upholding an arbitration award ordering reinstatement).

9. See, e.g., *Stroehmann Bakeries, Inc. v. Local 776, Int'l Bhd. of Teamsters*, 969 F.2d 1436

This Article explores these conflicting doctrines, and the ensuing controversy that frequently leaves employers unsure as to the appropriate action to take when dealing with acts of sexual harassment in the workplace. When courts blindly defer to arbitration rulings without meaningful consideration public policy considerations against sexual harassment, they fail to recognize the realities of the modern workplace.<sup>10</sup> Part II of this Article traces statutory and judicial development of federal sexual harassment laws. This section also examines the standards for the two types of sexual harassment liability found in Title VII. Part III discusses how arbitrators have treated employers' disciplinary actions against harassers, and explores the discipline standards arbitrators use in making their awards. Part IV chronicles four decisions of the United States Courts of Appeals that review arbitration awards that have reinstated accused sexual harassers. This section highlights the current split among these courts, although the cases are based on surprisingly similar facts. Part V describes the United States Supreme Court's deference to arbitration finality as developed in case law. Part VI describes the evolution of public policy as an exception to arbitration finality. Part VII analyzes the existing conflict between judicial deference to arbitration and the public policy exception. Finally, Part VIII concludes with considerations for both arbitrators and employers in dealing with the difficult issue of sexual harassment.

## II. THE DEVELOPMENT OF SEXUAL HARASSMENT JURISPRUDENCE

Title VII of the Civil Rights Act of 1964 defines sexual harassment as a violation of federal law.<sup>11</sup> The Equal Employment Opportunity Commission ("EEOC") administers Title VII and has promulgated a working definition of sexual harassment in the federal regulations.<sup>12</sup>

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(3d Cir. 1992) (affirming arbitration award ordering reinstatement of employee accused of sexual harassment); *Chrysler Motors Corp. v. International Union*, 959 F.2d 685 (7th Cir. 1992) (holding in part that an arbitrator's reinstatement of an employee who had been discharged for sexually assaulting a female co-worker was within the purview of the collective bargaining agreement and public policy); *Newsday, Inc. v. Long Island Typographical Union*, 915 F.2d 840 (2d Cir. 1990) (holding that an arbitrator's reinstatement of an employee discharged for sexually harassing female co-workers was vacated properly); *Communication Workers v. Southeastern Elec. Coop.*, 882 F.2d 467 (10th Cir. 1989) (holding that public policy concerns did not warrant overturning an arbitrator's decision to suspend an employee accused of sexual assault without pay rather than to discharge him).

10. See Jeffrey Sartes, *The Case of the Missing Women: Sexual Harassment and Judicial Review of Arbitration Awards*, 17 HARV. WOMEN'S L.J. 17, 30 (1994) (noting that an arbitration decision to reinstate the harasser is often a "slap in the face" to the harassed woman).

11. See Equal Employment Act of 1972, 42 U.S.C. § 2000(e)(2) (1994) (see footnote 2 for statute's text).

12. See Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a) (1996) that states:

The definition outlines two types of actionable sexual harassment.<sup>13</sup> The first type, *quid pro quo* harassment, occurs when the harasser makes actual employment decisions based on the victim's submission to, or rejection of, sexual demands.<sup>14</sup> This form of harassment predominantly occurs between a supervisor and a subordinate employee.<sup>15</sup> In these cases, the defendant violates Title VII because of the effect of the harassment on the terms and conditions of employment and the subsequent adverse economic impact on the victim.<sup>16</sup> The second type of harassment proscribed by the statute is a hostile work environment.<sup>17</sup> This occurs when the harasser's conduct consti-

[H]arassment 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 (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual; or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

13. See *id.*

14. 29 C.F.R. § 1604.11(a)(1)-(2) (1996).

15. See M. Jean Andrews & Jason D. Andrews, *Sexual Harassment: The Law*, 21(1) J. REHABILITATION ADMIN. 23, 29 (1997) (defining sexual harassment as situations in which a supervisor or manager demands sexual favors in exchange for job benefits, or the harassment has some other adverse "tangible effect" on the complainant's employment). There are two primary issues under dispute in a *quid pro quo* case: (a) whether the sexual advances or requests for sexual favors actually occurred, and (b) whether the claimant's rejection of the sexual advances caused the negative employment action taken against him or her. *Id.*

In comparison, Debra Goldstein simply defines *quid pro quo* harassment as "a situation in which an employee is confronted with sexual demands to keep a job or to obtain a promotion." Debra H. Goldstein, *A Basic Understanding of Sexual Harassment*, 57 ALA. L. REV. 105, 106 (1996). Goldstein notes that this type of harassment has three definitive characteristics:

[I]t involves someone in management who has the authority (whether implied or explicit) to act for the organization (i.e., a supervisor, team leader, manager, director, etc.); (2) [t]he employee suffers a tangible money/economic loss, such as the loss of a promotion, detail, transfer, training opportunity, raise, or actual or constructive discharge; and (3) [t]he organization usually will be liable for the conduct whether it knew or should have known of the conduct based upon the agency concept that an agency is liable for the acts of its agents.

*Id.* at 106.

A number of cases also have contributed to the definitional aspects of *quid pro quo* harassment. In *Spencer v. General Elec. Co.*, 894 F.2d 651, 658 (4th Cir. 1990), the court identified the elements of a *quid pro quo* claim under Title VII: the claimant is a member of a protected group under Title VII; the claimant-employee was subject to unwelcome sexual harassment by a supervisor; the harassment was based on sex; the claimant-employee's reaction to the harassment affected tangible aspects of employment such as compensation, terms, conditions, or privileges; and the employer knew or should have known of the harassment and took no effective corrective action. See also *Carrero v. New York City Hous. Auth.*, 890 F.2d 569, 579 (2d Cir. 1989) (finding *quid pro quo* sexual harassment after the plaintiff's refusal to submit to the supervisor's sexual demands resulted in inadequate training, unfair evaluations, and subsequent demotions).

16. See Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a) (1996).

17. 29 C.F.R. § 1604.11(a)(3) (1996).

tutes "unreasonable interference" with the victim's work environment.<sup>18</sup> Under this form of harassment, the hostile environment experienced in the workplace alters the victim's conditions of employment.<sup>19</sup>

Although courts are not bound to follow the EEOC's federal guidelines in defining sexual harassment,<sup>20</sup> authoritative decisions have adhered to the guidelines in interpreting section 703 of Title VII.<sup>21</sup> The EEOC guidelines establish the employer's standard of liability for acts of various persons within the workplace.<sup>22</sup> Primarily, the guidelines provide strict employer liability for actions of its agents and supervisors.<sup>23</sup> Additionally, employers are liable for conduct between fellow employees where the employer "knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action."<sup>24</sup> Liability also may extend to acts of non-

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18. *See id.*

19. *See* Andrews & Andrews, *supra* note 15, at 31 (defining hostile work environment as "unwelcome sexual conduct . . . whether or not it is directly tied to job opportunities, that is sufficiently severe or personal, unreasonably interferes with the victim's work performance, and creates an abusive work environment"). In the landmark decision of *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64 (1986), the Court, relying on the EEOC Guidelines, succinctly defined hostile work environment harassment as "conduct [that] has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." For a complete discussion of *Meritor* and its significance, *see infra* notes 50-52 and accompanying text.

The court in *Henson v. Dundee*, 682 F.2d 897, 903-05 (11th Cir. 1982), articulated the *prima facie* requirements for hostile work environment harassment that are nearly identical to those noted in *Spencer*, 894 F.2d at 658, for *quid pro quo* harassment except that the harasser need not be in a supervisory relationship to the victim to create a hostile environment. The court, however, dictated principles of "*respondeat superior*" as an element of the hostile work environment harassment requirements.

20. *See* General Elec. Co. v. Gilbert, 429 U.S. 125, 141-42 (1976) (stating that administrative interpretations of the Act by the enforcing agency, "while not controlling upon the courts . . . do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance" (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944))).

21. *See, e.g., Meritor Sav. Bank*, 477 U.S. at 64 (holding that Title VII was not limited to economic or tangible discrimination but also could include hostile or abusive work environment).

22. *See* Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006, 1020 (5th Cir. 1996) (explaining the EEOC Guidelines for an employer's liability for sex discrimination).

23. *See* Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(c) that states:

[A]n employer . . . is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence . . .

24. *Id.* § 1604.11(d) (1996); *see also* EEOC v. Hacienda Hotel, 881 F.2d 1504, 1515-16 (9th Cir. 1989) (holding employer liable for supervisor's sexual harassment because employer failed to take adequate remedial action); *Llewellyn v. Celanese Corp.*, 693 F. Supp. 369, 380-81 (W.D.N.C. 1988) (finding employer liable for sexual harassment committed by employees because supervisor's action of placing warning letter in harasser's personnel file was insufficient disciplinary action); *Zabkowicz v. West Bend Co.*, 589 F. Supp. 780, 785 (E.D. Wis. 1984) (holding employer liable to victim of sexual harassment because employer never conducted investigations or disciplined a single employee until after repeated complaints, and because the em-

employees based upon the same statutory standard established for the actions of co-workers.<sup>25</sup> In these third party cases, the EEOC guidelines provide for consideration of the degree of control and the legal relationship between the employer and the non-employee harasser.<sup>26</sup>

An employer may face dual liability under Title VII. First, employers face litigation from harassed employees.<sup>27</sup> Such a lawsuit entails the traditional equitable remedies given to harassment victims, in addition to monetary damages for tangible economic losses.<sup>28</sup> The congressional passage of the Civil Rights Act of 1991<sup>29</sup> has expanded liability, allowing recovery for both compensatory and punitive damages.<sup>30</sup> Second, employers face liability from discharged harassers levying wrongful termination charges.<sup>31</sup> Given these alternative liability threats, employers must act carefully in handling sexual harassment issues.

#### A. *Sexual Harassment Claims Based on Economic Damages*

Early court cases considering claims by victims of sexual harassment under the above-mentioned statutory provisions were based

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ployer held only occasional meetings regarding employer's policies on abusive language).

25. See, e.g., *Power v. Las Vegas Hilton Corp.*, 841 F. Supp. 1024 (D. Nev. 1992) (upholding female blackjack dealer's sexual harassment claim upon finding that casino fired her because she complained about casino customers' sexual remarks); cf. *Folkerson v. Circus Circus Enters.*, 107 F.3d 754 (9th Cir. 1997) (discussing circumstances under which an employer may be liable for sexual harassment for actions of a third party).

26. See Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(e) (1996) stating "[a]n employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action . . . ."

27. See generally *Jansen v. Packaging Corp. of Am.*, 123 F.3d 490 (7th Cir. 1997); *Torres v. Pisano*, 116 F.3d 625 (2d Cir. 1997); *Ortiz v. John O. Butler Co.*, 94 F.3d 1121 (7th Cir. 1996).

28. See Anita Bernstein, Comment, *Treating Sexual Harassment With Respect*, 111 HARV. L. REV. 445, 492-93 (1997) (describing remedies available to sexual harassment victims).

29. 42 U.S.C. § 1981(a) (1994).

30. See *id.* The 1991 Act places a cap on the total damages that courts may award to individual victims of sexual harassment. See 42 U.S.C. § 1981(a), (b)(3). The statute established the cap to correspond to the size of the employer's business. The cap ranges from \$50,000 for employers with 15 to 100 employees to \$300,000 for employers with more than 500 employees. See 42 U.S.C. § 1981(a)(b)(3)(A)-(D).

31. See, e.g., *Chrysler Motors Corp. v. International Union*, 959 F.2d 685 (7th Cir. 1992) (upholding an arbitration award of reinstatement for a wrongfully discharged grievant accused of sexual harassment); *Kestenbaum v. Pennzoil Co.*, 766 P.2d 280 (N.M. 1988) (affirming decision in favor of wrongfully terminated plaintiff discharged for sexual harassment); *Clover Park Sch. Dist. v. International Union of Operating Eng'rs*, 89 Lab. Arb. (BNA) 76, 80 (1987) (Boedecker, Arb.) (sustaining wrongful termination and ordering reinstatement and back pay to grievant charged with sexual harassment).

primarily on economic damages.<sup>32</sup> Initially courts were unwilling to allow actions under Title VII.<sup>33</sup> Such courts found that individual sexual harassment victims' claims were not the types of discriminatory employment practices that the Act proscribed.<sup>34</sup> By the late 1970's however, federal courts routinely found harassers and their employers liable when the sexual harassment interfered with the victim's salary or employment status.<sup>35</sup> *Williams v. Saxbe*,<sup>36</sup> the earliest case find-

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32. See generally William L. Woerner & Sharon L. Oswald, *Sexual Harassment in the Workplace: A View Through the Eyes of the Courts*, 41 LAB. L.J. 786, 786-93 (1990) (discussing early sexual harassment suits and their outcomes). In the earliest reported case of sexual harassment, *Barnes v. Train*, 13 Fair Empl. Prac. Cas. (BNA) 123, 124 (D.D.C. 1974), the plaintiff sought job reinstatement after her employer abolished her position allegedly because of her refusal to have an affair with her supervisor. The district court granted summary judgment to the employer, finding that "alleged retaliatory actions of the plaintiff's supervisor taken because plaintiff refused his request for an 'after hours affair' are not the type of discriminatory conduct contemplated by the 1972 Act [the Equal Employment Opportunity Act of 1972, § 11, 42 U.S.C. § 2000(e)(16)]." *Id.* See also *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161 (D. Ariz. 1975), vacated, 562 F.2d 55 (9th Cir. 1977) (discussing plaintiffs' claim for economic damages after repeated verbal and physical sexual abuse caused them to resign).

33. See *Tompkins v. Public Serv. Elec. & Gas Co.*, 422 F. Supp. 553, 556 (D.N.J. 1976) (stating "[t]he abuse of authority by supervisors of either sex for personal purposes is an unhappy and recurrent feature of our social experience . . . . It is not, however, sex discrimination within the meaning of Title VII even when the purpose is sexual.").

On appeal, the United States Court of Appeals for the Third Circuit overturned the district court finding actionable sexual harassment under Title VII when direct employment consequences flowed from the sexual advances. See *Tompkins v. Public Serv. Elec. & Gas*, 568 F.2d 1044 (3d Cir. 1977), rev'g 422 F. Supp. 553 (D.N.J. 1976).

34. See *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161 (D. Ariz. 1975), vacated, 562 F.2d 55 (9th Cir. 1977) (dismissing plaintiff's claim under Title VII because no right to relief existed under the Act for the complaint alleged). Having determined that the legislative history of the Civil Rights Act of 1964 showed that the Act provides equal access to the job market, the court traced employment factors such as wages, hours, pensions and classification, as factors that had been subject to the Act's coverage. The court then stated:

[I]n all of the above mentioned cases the discriminatory conduct complained of, arose out of company policies. There was apparently some advantage to, or gain by, the employer from such discriminatory practices . . . . In the present case, [the supervisor's] conduct appears to be nothing more than a personal proclivity, peculiarity or mannerism.

*Id.* at 163.

The court then summarily discharged the complaint:

It would be ludicrous to hold that the sort of activity involved here was contemplated by the Act because to do so would mean that if the conduct complained of was directed equally to males there would be no basis for suit. Also, an outgrowth of holding such activity to be actionable under Title VII would be a potential federal lawsuit every time any employee made amorous or sexually oriented advances toward another. The only sure way an employer could avoid such charges would be to have employees who were asexual.

*Id.* at 163-64.

35. See *Miller v. Bank of America*, 600 F.2d 211 (9th Cir. 1979) (holding that a supervisor is liable for his conduct if he is authorized to hire or fire employees); *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977) (mandating that a supervisor's sexual advances violate the Equal Employment Opportunity Act of 1972 if the female employer was fired for rebuffing those advances); *Williams v. Saxbe*, 413 F. Supp. 654 (D.D.C. 1976). Although the Court of Appeals vacated in *Williams v. Saxbe*, 587 F.2d 1240 (D.C. Cir. 1978), on procedural grounds, the district court reaf-

ing liability, is factually typical of many cases finding *quid pro quo* sexual harassment. In *Williams*, a female victim rebuffed sexual advances of her male supervisor and subsequently became the victim of harassment, humiliation, poor performance appraisals, and ultimately, termination.<sup>37</sup> Interpreting the statute broadly, the court concluded that the Equal Employment Opportunity Act's purpose is to eliminate all artificial barriers to employment.<sup>38</sup> The court determined that the discriminatory activities in the case at hand occurred as a result of the plaintiff's sex and the plaintiff's refusal of sexual advances.<sup>39</sup> As a result of this determination, the court found a violation of Title VII based on the resulting adverse employment actions against the plaintiff.<sup>40</sup>

### B. Sexual Harassment Claims Based on Non-Economic Damages

Title VII claims for hostile environment sexual harassment, which often sought non-economic damages, were slow in gaining judicial acceptance.<sup>41</sup> Early decisions acknowledged that a sexual harassment claim based on a hostile work environment accusation could exist, but courts were unwilling to allow claims based only on unwelcome sexual advances.<sup>42</sup> However, federal courts increasingly recognized violations based solely on a discriminatory work environment claim under Title VII.<sup>43</sup> Initially in the context of sexual harassment, courts

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firmed the central holding of the case in *Williams v. Civiletti*, 487 F. Supp. 1387 (D.D.C. 1980) (finding defendant liable under Title VII because plaintiff's dismissal was a result of her rejection of sexual advances made by defendant).

36. 413 F. Supp. 654 (D.D.C. 1976); see also *Williams v. Civiletti*, 487 F. Supp. 1387 (D.D.C. 1980) (reaffirming the central holding of *Williams v. Saxbe*).

37. *Williams*, 413 F. Supp. at 655 (D.D.C. 1976) (concluding that sex discrimination under Title VII includes retaliatory actions taken by a male supervisor in response to a female employee's rejection of his sexual advances).

38. See *id.* at 658 (stating that, "there . . . can be no question that the statutory prohibition of § 2000e-16(a) [Equal Employment Opportunity Act of 1972] reaches all discrimination affecting employment which is based on gender").

39. See *id.* at 662 (observing that there was evidence that plaintiff was fired because she rebuffed defendant's advances).

40. *Id.* at 663.

41. See, e.g., *Reichman v. Bureau of Affirmative Action*, 536 F. Supp. 1149 (M.D. Pa. 1982) (holding that plaintiff insufficiently represented claims to warrant claim action certification); *Hoseman v. Technical Materials, Inc.*, 554 F. Supp. 659 (D.R.I. 1982) (finding that employer had sufficient reason to discharge plaintiff); *Walter v. KFGO Radio*, 518 F. Supp. 1309 (D.N.D. 1981) (finding that plaintiff failed to show discrimination in his claim).

42. See *Reichman*, 536 F. Supp. at 1177 (proclaiming that, "[e]ven assuming that the advances were unwelcome, we find no violation of Title VII").

43. See, e.g., *Cariddi v. Kansas City Chiefs Football Club*, 568 F.2d 87 (8th Cir. 1977) (ruling on a claim based on national origin); *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971) (finding a Title VII violation based on race); *Compston v. Borden Inc.*, 424 F. Supp. 157 (S.D. Ohio 1976) (ruling on a claim based on religion).



did not find Title VII violations when the harm to the complaining employee was strictly emotional or psychological.<sup>44</sup> In *Bundy v. Jackson*,<sup>45</sup> the United States Court of Appeals for the District of Columbia became the first federal appellate court to hold that in the absence of economic impact, a plaintiff could base a successful claim of sexual harassment under Title VII on the psychological and emotional impact on the work environment.<sup>46</sup> In reaching this conclusion, the court relied on precedent established in other Title VII litigation.<sup>47</sup> Subsequent cases following the *Bundy* decision also allowed claims for sexual harassment in hostile work environment situations.<sup>48</sup>

### C. United States Supreme Court Sexual Harassment Decisions

The United States Supreme Court ultimately defined sexual harassment under Title VII in *Meritor Savings Bank v. Vinson*.<sup>49</sup> The *Meritor* Court concluded that Title VII was not limited to economic or tangible discrimination, but could include claims of a hostile or abusive work environment.<sup>50</sup> Rather than creating a strict liability standard, the Court reasoned that actionable sexual harassment "must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"<sup>51</sup> The *Meritor* Court also clarified that the appropriate standard for a sexual harassment claim is whether the alleged sexual advances were unwelcome.<sup>52</sup>

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44. See *Walter v. KFGO Radio*, 518 F. Supp. 1309 (D.N.D. 1981) (refusing to find a violation of Title VII, reasoning that the victim must prove some impact on the terms and conditions of her employment). The court narrowly construed "terms and conditions" to encompass only salary, benefits, and promotions. Absent a showing by the victim of some impact on these specific areas of employment, the court would not find a violation. See *id.* at 1318.

45. 641 F.2d 934 (D.C. Cir. 1981).

46. See *Bundy*, 641 F.2d at 953 (holding that psychological and emotional harm alone could constitute a Title VII action).

47. The *Bundy* court cited *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971), extensively. *Bundy*, 641 F.2d at 944. In *Rogers*, the court stated that terms, conditions, or privileges of employment are "an expansive concept which sweeps within [other] protective ambits the practice of creating a working environment heavily charged with ethnic or racial discrimination." *Rogers*, 454 F.2d at 238. The court explicitly ruled that congressional intent is to broadly eliminate all forms of employment discrimination. *Id.* at 248.

48. See *Henson v. Dundee*, 682 F.2d 897 (11th Cir. 1982) (articulating the *prima facie* requirements for hostile environment harassment).

49. 477 U.S. 57 (1986).

50. See *Meritor*, 477 U.S. at 66 (1986) (establishing that the creation of an offensive work environment by discriminating against Hispanic clients in front of Hispanic employees is a violation of Title VII).

51. See *id.* at 67 (quoting *Henson v. Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)).

52. *Id.* at 68 (stating that "[t]he correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary").

Despite the Court's pronouncement in *Meritor*, lower courts continued to struggle with hostile environment claims.<sup>53</sup> In *Rabidue v. Osceola Refining Co.*,<sup>54</sup> the Sixth Circuit Court of Appeals was unwilling to sustain the plaintiff's harassment claim despite the use of vulgar language directed toward female employees and the presence of nude photographs in the workplace.<sup>55</sup> Presented with surprisingly similar facts, a federal district court in *Robinson v. Jacksonville Shipyards, Inc.*,<sup>56</sup> held that pornographic posters and pictures contributed to an actionable hostile work environment.<sup>57</sup>

In an attempt to reconcile these decisions and further develop its holding in *Meritor*,<sup>58</sup> the Supreme Court held in *Harris v. Forklift Systems, Inc.*<sup>59</sup> that harassing conduct need not "seriously affect [an employee's] psychological well-being"<sup>60</sup> or lead the plaintiff to "suffer injury"<sup>61</sup> to be actionable as an "abusive work environment."<sup>62</sup> The Court also stated that all circumstances must be considered in making a determination as to whether a hostile or abusive environment existed.<sup>63</sup> Finally, the Court refused to adopt the reasonable woman

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53. See *Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6th Cir. 1986) (affirming that employer was not liable for any pre-acquisition discrimination); *Scott v. Sears, Roebuck & Co.*, 798 F.2d 210, 213-14 (7th Cir. 1985) (holding that verbal abuse and being slapped on the buttocks by co-workers was "not so severe, debilitating, or pervasive" as to create an actionable claim under a hostile environment assertion).

54. 805 F.2d 611 (6th Cir. 1986).

55. See *Rabidue*, 805 F.2d at 615. The court stated:

To accord appropriate protection to both plaintiffs and defendants in a hostile and/or abusive work environment sexual harassment case, the trier of fact, when judging the totality of the circumstances impacting upon the asserted abusive and hostile environment placed in issue by the plaintiff's charges, must adopt the perspective of a reasonable person's reaction to a similar environment under essentially like or similar circumstances. Thus, in the absence of conduct which would interfere with that hypothetical reasonable individual's work performance and affect seriously the psychological well-being of that reasonable person under like circumstances, a plaintiff may not prevail on asserted charges of sexual harassment anchored in an alleged hostile and/or abusive work environment regardless of whether the plaintiff was actually offended by the defendant's conduct.

*Id.* at 620.

56. 760 F. Supp. 1486 (M.D. Fla. 1991).

57. *Robinson*, 760 F. Supp. at 1539-41.

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

59. 510 U.S. 17 (1993).

60. *Harris*, 510 U.S. at 22.

61. *Id.*

62. *Id.*

63. See *id.* at 23 (listing several relevant factors, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance" or psychological well-being).

standard urged by lower courts and commentators.<sup>64</sup> Instead, Justice O'Connor, writing for a unanimous court, stated simply that "Title VII bars conduct that would seriously affect a reasonable person's psychological well-being . . . ."<sup>65</sup> Despite this limitation,<sup>66</sup> the *Harris* decision reinforced the Court's strong position against hostile work environment sexual harassment, regardless of economic or serious psychological damage.<sup>67</sup>

### III. ARBITRATION OF SEXUAL HARASSMENT CASES

Given these judicial pronouncements and the EEOC guidelines, the expansive liability faced by employers is clear.<sup>68</sup> With liability measured on a case by case basis,<sup>69</sup> the employer must deal firmly and swiftly with specific incidents of workplace harassment.<sup>70</sup> Just as the actions of employers take a variety of disciplinary forms, of which

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64. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 20 (1993) (noting that the Court mentioned the reasonable woman standard used by lower courts but never adopted the standard in its holding). In *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991), the Ninth Circuit adopted a reasonable woman standard for courts to assess hostile environments. The court reasoned that a reasonable woman standard is necessary "because we believe a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women." *Id.* at 879. Prior to the *Harris* decision, several commentators advocated the reasonable woman standard. See Nancy S. Ehrenreich, *Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law*, 99 YALE L.J. 1177 (1990) (explaining the analytical weakness of the reasonable woman standard); Kathryn Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 VAND. L. REV. 1183 (1989) (asserting that although changes have been made, gender equality is far from being achieved). However, following the *Ellison* decision, many writers maintained that the standard would impose increased liability on employers. See Howard A. Simon & Ellison V. Brady, *A "Reasonable Woman" Standard for Sexual Harassment*, 17 EMPLOYEE REL. L.J. 71 (1991) (arguing that adoption of the reasonable woman standard would probably result in increased sexual harassment complaints).

65. *Harris*, 510 U.S. at 22.

66. At least one commentator has argued that the *Harris* Court's failure to explicitly reject the reasonable woman test of *Ellison*, 924 F.2d 872 (9th Cir. 1991), may lead some courts to continue to apply the standard in hostile work environment sexual harassment cases. See Andrews & Andrews, *supra* note 15, at 38.

67. See Sarah E. Burns, *Evidence of a Sexually Hostile Workplace: What Is It and How Should It Be Assessed After Harris v. Forklift Systems, Inc.*, 21 N.Y.U. REV. L. & SOC. CHANGE 357 (1994-1995) (discussing the impact *Harris* had in resolving the disagreements among the circuits).

68. A recent study by the Center for Women in Government at the State University of New York at Albany found that total monetary damages awarded in sexual harassment cases processed by the EEOC doubled between 1992 and 1993, more than 1500 employees received \$25.2 million from their employers in 1993 in the form of back pay, remedial relief, promotions, reinstatements and punitive damages. See *Study Finds Sexual Harassment Awards from EEOC Doubled from 1992 to 1993*, 1994 Daily Lab. (BNA) No. 100, at D-9 (May 26, 1994). The study also found that the number of awards rose by 15.4% between 1992 and 1993 while the dollar amount of awards soared by 98%. See also *Sexual Harassment: Prompt, Effective Responses Minimize Work Disturbances and Legal Liability*, MGMT. POLICIES & PERSONNEL L., Nov. 1994.

69. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (holding that the standard for liability in sexual harassment cases must be on a case by case basis).

70. See *Harris*, 510 U.S. at 22 (holding that a workplace environment, polluted with sexual abuse, does not have to be psychologically injurious).

termination is the most severe,<sup>71</sup> arbitrators give varied treatment to employers.<sup>72</sup>

As previously noted, sexual harassment claims are becoming increasingly important in the arbitration forum.<sup>73</sup> One commentator stated that, "[m]ost sexual harassment cases arrive in arbitration as just cause cases, brought by employees disciplined by management because of a complaint of sexual harassment, usually made by another employee, or, in a few cases, made by a customer, client patron, or citizen."<sup>74</sup> In approaching these cases, arbitrators are directed to look to the essence of the collective bargaining agreement,<sup>75</sup> which most often contains a just cause standard<sup>76</sup> for discipline.<sup>77</sup> The just

71. See William Nowlin, *Sexual Harassment in the Workplace: How Arbitrators Rule*, 43 ARB. J. 31, 34 (1988) (identifying eight different types of just cause disciplinary cases pertaining to sexual harassment). These include:

[U]nwanted sexual advances; creating a hostile environment; consensual relationships that have soured; harassment of non-employees; female employees harassing male co-workers; same-sex harassment; sexual harassment that provoked misconduct by a worker and resulted in discipline; and cases involving unwanted physical conduct, and that this latter type of case most frequently leads to discharge.

*Id.* at 34.

72. See Chris Baker, Comment, *Sexual Harassment v. Labor Arbitration: Does Reinstating Sexual Harassers Violate Public Policy?*, 61 U. CIN. L. REV. 1361, 1364 n.24 (1993) (stating that the varied treatment of employers results, in part, from the deference provided to arbitrators). The author notes that:

[W]hen creating the common law of the shop, and as long as the collective bargaining agreement permits, the arbitrator can take into account "such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, and his judgment whether tensions will be heightened or diminished" by the award.

*Id.* (citing *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960)).

73. See *Dayton Power & Light Co. v. Utility Workers Union of America, Local 175*, 80 Lab. Arb. (BNA) 19, 20 (1982) (Heinsz, Arb.) (noting the importance of an employee's work conduct).

74. Nowlin, *supra* note 71, at 34.

75. See *United States Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960) (explaining the approach that arbitrators should take in a sexual harassment case).

76. See *supra* note 5 for an explanation of the just cause standard.

77. See FRANK ELKOURI & EDNA ASPER ELKOURI, *HOW ARBITRATION WORKS* 652 (4th ed. 1985) (asserting that collective bargaining agreements often contain a just cause standard for discipline); see also Donald S. McPherson, *The Evolving Concept of Just Cause: Carroll R. Daugherty and the Requirement of Disciplinary Due Process*, 38 LAB. L.J. 387, 391 (1987) (illustrating that the standard for just cause and its tie to the requirement of disciplinary due process has been a subject of controversy in the arbitration community); Harry T. Edwards, *Due Process Considerations in Labor Arbitration*, 25 ARB. J. 141, 144 (1970) (asserting that some arbitrators are unwilling to add a formalized due process requirement to a contract that otherwise does not contain one). However, Professor McPherson describes application and widespread use of the seven tests for due process written and utilized by Carroll R. Daugherty in a series of influential arbitration decisions. In *Enterprise Wire Co. v. Enterprise Indep. Union*, 46 Lab. Arb. (BNA) 359, 363 (1966) (Daugherty, Arb.), Daugherty explains the seven tests as follows:

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

cause standard allows the arbitrator to consider factors such as severity of the incident, past incidents, the harasser's disciplinary record, the harasser's length of employment service, and the deterrence and prognosis for rehabilitation of the harasser.<sup>78</sup> Although supportive of employer efforts to eliminate sexual harassment, arbitrators utilizing the due process standard of just cause have overturned or reduced to suspension more than half of the employer termination actions.<sup>79</sup> Using the just cause standard, arbitrators will generally sustain a termination only where a "pattern of sexual harassment exists, sexual harassment is excessive, or where sexual harassment insidiously pervades the working environment."<sup>80</sup>

The Supreme Court has articulated factors to determine whether sexual harassment based on a hostile work environment exists.<sup>81</sup> As a typical case illustrates, an employee termination was sustained when a male employee engaged in a pattern of sexual harassment towards three female co-workers, despite the fact that one female failed to

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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?

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 order of management?

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

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

6. Has the company applied its rules, orders, and penalties even-handedly and without discrimination to all employees?

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?

Although not universally accepted in their entirety, elements of these tests appear in nearly every arbitration decision.

78. See HAUCK, *supra* note 6, at 1-5 (discussing factors that arbitrators examine to diminish the likelihood of judicial review).

79. See HAUCK, *supra* note 6, at 1-5 (observing that arbitrators are more likely to rule in favor of management, but the reduced supervision is an example of the flexibility inherent in arbitration).

80. See HAUCK, *supra* note 6, at 1-5. Other commentators support this view; see also Nowlin, *supra* note 71, at 34, and Jonathan S. Monat & Angel Gomez, *Decisional Standards Used By Arbitrators in Sexual Harassment Cases*, 37 LAB. L.J. 712, 715 (1986) (noting that arbitrators routinely uphold discharge as an appropriate remedy in the following circumstances: "when the harasser has been warned; when the course of conduct extended over a lengthy period of time; when the sexual harassment was combined with an otherwise poor work record; and when the circumstances of the harassment were aggravated").

81. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993) (listing factors to help courts determine whether a hostile work environment exists, including "the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance").

complain.<sup>82</sup> Likewise, an employee's discharge was upheld when his continuous obscene gestures and comments to female co-workers adversely affected production.<sup>83</sup> The arbitrators in these cases used a typical just cause analysis in reaching their decisions.<sup>84</sup>

Reviewing these just cause factors gives some insight into how arbitrators weigh such difficult and emotional cases. In a typical service record case, the discharge of an employee of twenty-five years for sexual harassment was overturned despite his momentary touching of a female co-worker in the crotch and buttocks.<sup>85</sup> Conversely, the discharge of a probationary employee was sustained when the employee engaged in sexual harassment coupled with poor performance and high absenteeism.<sup>86</sup> These cases illustrate the key role that the service record of the harasser will play in the arbitrator's decision. Despite the prevalence of the service record as a judicial consideration, the harasser's personal attributes are not explicitly included in the Supreme Court's list of potential factors to be considered in sexual harassment cases.<sup>87</sup>

Severity of the incident is another factor which will influence the decision of arbitrators.<sup>88</sup> A twenty-day suspension for soliciting oral sex from a co-worker was sustained,<sup>89</sup> as was the termination of a long-

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82. See *Shell Pipe Line Corp. v. Texas-Gulf Fed'n*, 97 Lab. Arb. (BNA) 957, 961 (1991) (Baroni, Arb.) (holding that the employer properly discharged a male employee for sexual harassment based on evidence that he engaged in a pattern of sexual and verbal abuse of at least three different female contract workers, notwithstanding that one victim failed to verbalize her objection).

83. See *Hannaford Bros., Co. v. Northeast Freighthandlers Ass'n*, 93 Lab. Arb. (BNA) 721, 730 (1989) (Chandler, Arb.) (holding that the employer properly discharged a male employee for sexual harassment that created a hostile work environment).

84. See *Shell Pipe Line Corp. v. Texas-Gulf Fed'n*, 97 Lab. Arb. (BNA) 957, 963 (1991) (Baroni, Arb.) (applying "just cause" analysis in an arbitration where grievant "engage[d] in both physical and verbal sexual harassment"); *Hannaford Bros., Co. v. Northeast Freighthandlers Ass'n*, 93 Lab. Arb. (BNA) 721, 723 (1989) (Chandler, Arb.) (finding that management had "just cause" to discipline grievant for obscenities and harassment in the workplace).

85. See *Sugardale Foods, Inc. v. Local 17A*, 86 Lab. Arb. (BNA) 1017, 1022 (1986) (Duda Jr., Arb.) (finding that the employee handbook stated only that "probable discharge without warning would result from 'threatening or gross intimidation' or 'immoral conduct or indecency'" and that employee's conduct fell into neither category).

86. See *Tooele Army Depot v. International Ass'n of Machinists & Aerospace Workers*, Lodge No. 2261, 1978 Lab. Arb. Info. Sys. 14904, 14904 (St. Clair, Arb.) (1983).

87. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993) (holding that a court must consider "all the circumstances, including frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance").

88. See *supra* notes 72-74 and accompanying text for a discussion of arbitrators' analysis of severity of the incident.

89. See *Veterans Admin. Med. Ctr. v. American Fed. of Gov't Employees, Local 331*, 87 Lab. Arb. (BNA) 405 (1986) (Yarowsky, Arb.) (noting that employee's misconduct created so much fear and intimidation in the co-worker that she resigned from her position).

time male employee who admitted to repeatedly seeking sexual favors from three female co-workers.<sup>90</sup> In Texas, a five-day suspension was reduced to a written warning for a harasser who engaged in a one-time unwelcomed hug.<sup>91</sup> Arbitrators determine the severity of the incident and decide on a punishment accordingly.

Yet another element that illustrates the factor-weighting that arbitrators engage in is the employer's implementation of a sexual harassment policy, and the accused harasser's knowledge of that policy.<sup>92</sup> In some instances, a harasser's knowledge of the employer's policy, coupled with the harasser's awareness of potential termination for violating the policy, has served to sustain a termination.<sup>93</sup> An employer's strict and well-publicized policy against sexual harassment served to sustain a thirty-day suspension where a harasser engaged in unwanted touching, even though no evidence existed that the harasser had actually read the policy.<sup>94</sup> In comparison, discharges have been overturned based on the lack of a clear and forceful final warning.<sup>95</sup> Despite having a policy in place, failure to follow it or to make employees aware of their conduct in violation of the policy can directly lead to a reduction of the disciplinary action taken against the employee.<sup>96</sup> Arbitration decisions that support employers who have taken proactive steps to implement policies and educate employees

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90. See *Steuben Rural Elec. Corp. v. International Bhd. of Elec. Workers, Local 1249*, 98 Lab. Arb. (BNA) 337, 338 (1991) (La Manna, Arb.) (sustaining discharge even though grievant was never notified of sexual harassment policy and sexually permissive atmosphere pervaded company).

91. See *City of Corpus Christi*, 16 Lab. Arb. Info. Sys. 3951 (1988).

92. See *infra* notes 93-96 and accompanying text for a discussion of employers' implementation of sexual harassment policy and employees' knowledge of such policy.

93. See *Dayton Newspapers, Inc. v. Teamsters Local 957*, 100 Lab. Arb. (BNA) 48, 49 (1992) (Strasshofer, Arb.) (noting that the employer's sexual harassment policy was posted in area where grievant frequented and that he had received a copy of employee handbook containing the policy).

94. See *Michigan State Univ. v. AFSCME, Local 525*, 1281 Gov't Empl. Rel. (Warren, Hotham & Lamont) 1329, 1329 (1988) (Roumell Jr., Arb.) (denying the grievance of a Michigan State University maintenance worker suspended for thirty days for engaging in a pattern of harassment toward two female co-workers). The arbitrator concluded:

[T]he facts suggest [the petitioner] has taken too many liberties, is not aware of his boundaries, nor is he aware of the possible consequences of his actions . . . . These facts, coupled with a strong policy implemented by the University, weigh heavily on the spectrum between a minimum and a maximum penalty.

*Id.* at 1330.

95. See *Dow Chem. Co. v. International Ass'n of Heat & Frost Insulators & Asbestos Workers, Local 102*, 95 Lab. Arb. (BNA) 510, 514 (1990) (Sartain, Arb.) (holding that a second warning letter stating that employee's conduct was unacceptable was not sufficiently clear and forceful as a final warning would be).

96. See *In re County of Santa Clara*, 88 Lab. Arb. (BNA) 1226, 1230 (1987) (Concepcion, Arb.) (holding that employer's suspension of employee for inappropriate and reprehensible conduct required a warning and counseling).

are well supported by EEOC guidelines, as well as relevant case law encouraging employer activism.<sup>97</sup>

Although it is difficult to make generalizations about these arbitration decisions, those that are published suggest arbitrators' concerns with following the federal statutes that define and prohibit sexual harassment. *Dayton Newspapers, Inc. v. Teamsters, Local 957*<sup>98</sup> is illustrative of an arbitrator's decision who was aware of the public concern surrounding sexual harassment. After being made aware of the relevant statutes and representative case law,<sup>99</sup> the arbitrator acknowledged the employer's duty to provide a workplace free of sexual harassment.<sup>100</sup> Having weighed the evidence and credibility of the witnesses, the arbitrator found that the employer's suspension was sustainable by a preponderance of the evidence, was well-tailored to the offense, and constituted a reasonable attempt to solve an employee's behavioral problem without resorting to extremes.<sup>101</sup> Even though the arbitrator's assessment of the harasser's record and intentions were outside the *Harris* Court's articulated factors,<sup>102</sup> the arbitrator's reasoning evidenced considerations similar to those outlined by the Supreme Court for deciding sexual harassment cases.<sup>103</sup> When employers believe that arbitrators fail to make the appropriate type of reasoned analysis, some employers have been willing to appeal these decisions to federal court.<sup>104</sup> As the next section illustrates, this prac-

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97. See *infra* notes 231-46 and accompanying text for a further discussion of appropriate employer actions.

98. 100 Lab. Arb. (BNA) 48 (1992) (Strasshofer, Arb.).

99. The employer in *Dayton Newspapers* cited Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000(e), as defining sexual harassment and establishing employer liability. See *Dayton Newspapers, Inc.*, 100 Lab. Arb. (BNA) 48, 50 (1992) (Strasshofer, Arb.). The employer also cited *Henson v. City of Dundee*, 682 F.2d 897, 903-04 (11th Cir. 1982), which defined a sexually hostile work environment as one "normally characterized by harassment sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Dayton Newspapers, Inc.*, 100 Lab. Arb. (BNA) at 52.

100. See *Dayton Newspapers, Inc.*, 100 Lab. Arb. (BNA) at 51 (noting that the company had "gone to great lengths to comply with the [sexual harassment] law[s]").

101. *Id.*

102. See *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993) (listing factors to help courts determine whether a hostile work environment exists).

103. See *Stroehmann Bakeries, Inc. v. Local 776, Int'l Bhd. of Teamsters*, 969 F.2d 1436 (3d Cir. 1992) (discussing that courts will judicially review arbitrators' decisions when the arbitration award goes against public policy); see also Laurie A. Tribble, Note, *Vacating Arbitrators' Awards Under the Public Policy Exception: Are Courts Second-Guessing Arbitrators' Decisions?*, *Stroehmann Bakeries, Inc. v. Local 776, Int'l Bhd. of Teamsters*, 38 VILL. L. REV. 1051, 1055 (1993) (noting that courts will examine the public policy aspects affected by an arbitrator's decision despite their normal deference to the arbitrator's decision).

104. See, e.g., *Stroehmann Bakeries, Inc. v. Local 776, Int'l Bhd. of Teamsters*, 969 F.2d 1436 (3d Cir. 1992) (holding that the arbitrator's decision to reinstate employee charged with sexual harassment was against company policy and public policy); *Chrysler Motors Corp. v. International Union*, 959 F.2d 685 (7th Cir. 1992) (affirming an arbitration award reducing grievant's



tice is uncommon, and the results have been mixed.

#### IV. JUDICIAL REVIEW OF ARBITRATION DECISIONS

Few arbitration decisions are presented for judicial review.<sup>105</sup> Only four cases challenging arbitrators' awards in sexual harassment cases have reached the United States Courts of Appeals.<sup>106</sup> A review of these cases, with two circuits sustaining arbitration awards<sup>107</sup> and two rejecting such awards,<sup>108</sup> highlights the contradictory views which cloud this area of the law. In *Chrysler Motors Corp. v. International Union*,<sup>109</sup> the Seventh Circuit sustained the arbitrator's decision citing the long held judicial deference to arbitration finality.<sup>110</sup> Although acknowledging the egregious nature of the act and the existence of a strong public policy against sexual harassment, the court reasoned that the arbitrator's decision to order reinstatement "was within the purview of the collective bargaining agreement and public policy."<sup>111</sup> Similarly, the Tenth Circuit in *Communication Workers v. Southeastern Electric Cooperative*<sup>112</sup> sustained the arbitrator's reduction from a termi-

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penalty to a 30-day suspension); *Newsday, Inc. v. Long Island Typographical Union*, 915 F.2d 840 (2d Cir. 1990) (affirming district court's order vacating arbitrator's reinstatement award for employee discharged due to disorderly conduct and sexual harassment); *Communication Workers v. Southeastern Elec. Coop.*, 882 F.2d 467 (10th Cir. 1989) (upholding arbitration decision to reinstate discharged employee charged with sexual assault).

105. See Deborah R. Willig, *Arbitration of Discrimination Grievances: Arbitral and Judicial Competence Compared*, in ARBITRATION 1986 CURRENT AND EXPANDING ROLES: PROCEEDINGS OF THE THIRTY-NINTH ANNUAL MEETING NATIONAL ACADEMY OF ARBITRATORS 101, 120 (Walter J. Gershenfeld ed., 1986) (noting that arbitral awards closely resemble judicial decisions).

106. See *Stroehmann Bakeries, Inc. v. Local 776, Int'l Bhd. of Teamsters*, 969 F.2d 1436 (3d Cir. 1992) (affirming arbitration award ordering reinstatement of employee accused of sexual harassment); *Chrysler Motors Corp. v. International Union*, 959 F.2d 685 (7th Cir. 1992) (holding in part that an arbitrator's reinstatement of an employee who had been discharged for sexually assaulting a female co-worker was within the purview of the collective bargaining agreement and public policy); *Newsday, Inc. v. Long Island Typographical Union*, 915 F.2d 840 (2d Cir. 1990) (holding that an arbitrator's reinstatement of an employee discharged for sexually harassing female co-workers was properly vacated); *Communication Workers v. Southeastern Elec. Coop.*, 882 F.2d 467 (10th Cir. 1989) (holding that public policy concerns did not warrant overturning an arbitrator's decision to suspend an employee accused of sexual assault without pay, rather than to discharge him).

107. *Stroehmann Bakeries, Inc. v. Local 776, Int'l Bhd. of Teamsters*, 969 F.2d 1436 (3d Cir. 1992); *Chrysler Motors Corp. v. International Bhd. Union*, 959 F.2d 685 (7th Cir. 1992).

108. *Newsday, Inc. v. Long Island Typographical Union*, 915 F.2d 840 (2d Cir. 1990); *Communication Workers v. Southeastern Elec. Coop.*, 882 F.2d 467 (10th Cir. 1989).

109. 959 F.2d 685 (7th Cir. 1992).

110. In *Chrysler Motors*, an employee, who admittedly grabbed the breasts of a female co-worker and then stated into the telephone, "Yup, they're real," was terminated by the employer. *Chrysler Motors Corp. v. International Union*, 959 F.2d 685, 686 (7th Cir. 1992). The arbitrator reduced this punishment to a thirty-day suspension despite evidence presented by the harassed employee that the terminated employee had intentionally groped and/or pinched female co-workers in at least four other incidents. *Id.*

111. *Id.* at 689.

112. 882 F.2d 467 (10th Cir. 1989).

nation to a one-month suspension for an electric company lineman accused of sexual assault.<sup>113</sup> The employer, in appealing the arbitration decision, urged the court that the "valid and well-defined" public policy of preventing 'assault and sexual oppression of women' must override the arbitrator's factual finding and award."<sup>114</sup> As in *Chrysler Motors*, the court acknowledged the importance of preventing sexual abuse in the workplace.<sup>115</sup> The *Communication Workers* court, however, concluded that the arbitrator fairly weighed the evidence and brought an "informed judgment to bear."<sup>116</sup> Given this finding, the court was unwilling to reconsider the evidence or disturb the decision.<sup>117</sup>

The decisions of the United States Courts of Appeals for the Second and Third Circuits sharply contrast with the decisions of the Seventh and Tenth Circuits.<sup>118</sup> In *Newsday, Inc. v. Long Island Typographical Union*,<sup>119</sup> the Second Circuit sustained the district court's decision vacating an arbitration award which granted a reduction of a harasser's termination.<sup>120</sup> Despite past infractions by the harasser, the arbitrator reinstated the harasser citing a lack of progressive discipline.<sup>121</sup> The district court vacated the arbitration award of reinstatement, holding it violated "an explicit public policy condemning sexual harassment in the workplace" established in Title VII, the fed-

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113. See *Communication Workers*, 882 F.2d at 470 (holding that the arbitrator considered the evidence in the case before reducing the punishment to a one-month suspension).

114. *Id.* at 469.

115. *Id.*

116. *Id.* at 470.

117. See *id.*

118. Compare *Stroehmann Bakeries, Inc. v. Local 776, Int'l Bhd. of Teamsters*, 969 F.2d 1436 (3d Cir. 1992) (denying arbitration award ordering reinstatement of employee accused of sexual harassment because it violated public policy), and *Newsday, Inc. v. Long Island Typographical Union*, 915 F.2d 840 (2d Cir. 1990) (holding that arbitrator's award reinstating employee was violative of an explicit, well-defined and dominant public policy against sexual harassment in the workplace), with *Chrysler Motors Corp. v. International Union*, 959 F.2d 685 (7th Cir. 1992) (holding in part that an arbitrator's reinstatement of an employee who had been discharged for sexually assaulting a female co-worker was within the purview of the collective bargaining agreement and public policy), and *Communications Workers v. Southeastern Elec. Coop.*, 882 F.2d 467 (10th Cir. 1989) (holding that the public policy of protecting women against sexual abuse was not strong enough to overturn an arbitrator's decision to suspend an employee accused of sexual assault for one month without pay rather than discharge him).

119. 915 F.2d 840 (2d Cir. 1990).

120. *Newsday, Inc.*, 915 F.2d at 842. In *Newsday*, the harasser was discharged for brushing up against a female co-worker's back and buttocks and then ten minutes later "slamm[ing] into her back" and saying, "Excuse me!" in a non-accidental tone. *Id.* Prior to termination, the company also discovered two similar incidents of unwanted and offensive touching of female co-workers. *Id.* Additionally, a discharge for a similar incident five years earlier was reduced to a suspension coupled with a stern warning from the arbitrator that any similar behavior would be grounds for discharge. See *id.* at 842-43.

121. See *id.* at 843.

eral regulations, and relevant case law.<sup>122</sup> The Second Circuit affirmed the district court's decision and mentioned the narrow review courts have given arbitration awards.<sup>123</sup> The remainder of the opinion focused on an elaborate recitation of public policy and the firm statutory foundation against sexual harassment.<sup>124</sup> With this foundation, the court overruled the arbitration award which reinstated the harasser in defiance of this strong public policy.<sup>125</sup> The court characterized the arbitrator's award as condoning sexual harassment and preventing the employer "from carrying out its legal duty to eliminate sexual harassment" in the workplace.<sup>126</sup>

The Third Circuit also used the public policy exception to overturn an arbitrator's decision in *Stroehmann Bakeries, Inc. v. Local 776, International Brotherhood of Teamsters*.<sup>127</sup> Although acknowledging the deference traditionally afforded to arbitration decisions, the court found "a well-defined and dominant public policy concerning sexual harassment in the workplace which can be ascertained by reference to law and legal precedent."<sup>128</sup> The court vacated the arbitration award, holding that the arbitration failed to consider the "dominant public policy favoring voluntary employer prevention and application of sanctions against sexual harassment in the workplace."<sup>129</sup>

Although no single answer explains the apparent discrepancy in these cases, the roots of the conflict lay in two long held legal principles: judicial deference to arbitration<sup>130</sup> and the public policy exception.<sup>131</sup> To understand this conflict, one must first understand the origin of each principle individually.

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122. *Newsday, Inc.*, 915 F.2d at 843. Writing for the court, Judge Glasser stated, "[t]he need to demonstrate judicial cognizance of the public policy against sexual harassment should not require citation beyond *Meritor Savings Bank FSB v. Vinson* (447 U.S. 57 (1996))." *Id.*

123. *Id.* at 844.

124. *Id.* at 844-45.

125. *Id.*

126. *Newsday, Inc. v. Long Island Typographical Union*, 915 F.2d 840, 845 (2d Cir. 1990).

127. 969 F.2d 1436 (3d Cir. 1992). In *Stroehmann*, the harasser, a bread delivery man, allegedly engaged in provocative speech and fondled the breasts of a female bakery employee while delivering baked goods to her store. *See id.* at 1438.

128. *Id.* at 1441.

129. *Id.* at 1442.

130. *See Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 (1957) (holding that federal district courts have jurisdiction over controversies involving labor contracts in industries affecting commerce and that federal district courts have the authority to fashion a body of federal law for enforcement of such collective bargaining agreements).

131. *See Newsday, Inc.*, 915 F.2d at 845 (finding an "explicit, well-defined, and dominant public policy" against sexual harassment in the workplace).

## V. JUDICIAL DEFERENCE TO ARBITRATION

Since the early Twentieth Century, courts at all levels have viewed arbitration as a "substitute for industrial strife."<sup>132</sup> The early decision of *Textile Workers Union v. Lincoln Mills*<sup>133</sup> represents the United States Supreme Court's belief that "congressional policy in favor of the enforcement of agreements to arbitrate grievance disputes [is] clear."<sup>134</sup> The *Lincoln Mills* Court found this policy in Section 301 of the Labor Management Act of 1947,<sup>135</sup> which was interpreted to mandate judicial enforcement of all collective bargaining provisions including arbitration.<sup>136</sup>

The *Steelworkers Trilogy*,<sup>137</sup> following the *Lincoln Mills* decision, firmly established a judicial policy of deference to arbitrators who act within the provisions of negotiated collective bargaining agreements.<sup>138</sup> In *United Steelworkers v. America Manufacturing*,<sup>139</sup> the Court held that the judiciary has a very limited role when the parties to collective bargaining agreements submit questions of contract interpretation to an arbitrator.<sup>140</sup> Additionally, the Court strongly discouraged weighing the merits of grievances and held that the only duty of the judiciary was to determine whether the disputed matter was indeed a question of contract interpretation subject to arbitration.<sup>141</sup> The second case in the trilogy, *United Steelworkers v. Warrior & Gulf*

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132. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960) (holding that grievances arising out of the employer's actions were subject to arbitration notwithstanding a clause in the collective bargaining agreement declaring matters that were strictly a function of management would not be subject to arbitration).

133. 353 U.S. 448 (1957).

134. *Textile Workers Union*, 353 U.S. at 458-59.

135. 29 U.S.C. § 184.

136. *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448 (1957).

137. See *United Steelworkers v. America Mfg.*, 363 U.S. 564, 569 (1960) (holding that an employee was required to submit to arbitration where a collective bargaining agreement required arbitration of all disputes between the parties concerning meaning, interpretation, and application of the agreement); see also *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 585 (1960) (holding that the question of whether contracting out violated an agreement between the parties is to be determined by arbitrators); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960) (holding that courts should not overrule an arbitrator's decision when the collective bargaining agreement called for arbitration, even though the agreement had expired before the arbitrator made his decision).

138. See *Enterprise Wheel & Car Corp.*, 363 U.S. at 596-98 (stating that interpretation of the collective bargaining agreement is a question for the arbitrator).

139. 363 U.S. 564 (1960).

140. *America Mfg.*, 363 U.S. at 567-68 (stating that the function of the court is greatly limited when the parties have agreed that the arbitrator will settle all contractual questions).

141. *Id.* at 567-69 (explaining that "[w]hen the judiciary undertakes to determine the merits of a grievance under the guise of interpreting the grievance procedure of collective bargaining agreements, it usurps a function which under that regime is entrusted to the arbitration tribunal").

*Navigation Co.*,<sup>142</sup> reaffirmed arbitration as a vital means of maintaining industrial peace.<sup>143</sup> The Court in *Warrior* analogized the collective bargaining agreement as "a new common law - the common law of a particular industry or of a particular plant."<sup>144</sup> The Court held that not only were matters specifically in the contract subject to arbitration, but so too were all other matters unless specifically excluded by actual provisions in the contract or "forceful evidence of a purpose to exclude."<sup>145</sup> Finally, in *United Steelworkers v. Enterprise Wheel & Car Corp.*,<sup>146</sup> the Court concluded that mere ambiguity in the arbitrator's decision is not grounds for overturning the decision.<sup>147</sup> The award should be sustained as legitimate "so long as it draws its essence from the collective bargaining agreement."<sup>148</sup> Since these landmark decisions, courts at all levels have given great deference to arbitration decisions<sup>149</sup> and have refused, except in very isolated situations,<sup>150</sup> to consider the merits of cases decided in arbitration.<sup>151</sup>

## VI. THE PUBLIC POLICY EXCEPTION

### A. *Development of the Public Policy Exception*

Despite the historic deference given to arbitration, courts have recognized a public policy exception to arbitration under limited circumstances.<sup>152</sup> Acknowledging the weight of deference given to arbitration awards,<sup>153</sup> the Supreme Court in *W.R. Grace & Company v. Lo-*

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142. 363 U.S. 574 (1960).

143. *Warrior & Gulf Navigation Co.*, 363 U.S. at 578.

144. *Id.* at 579.

145. *Id.* at 585.

146. 363 U.S. 593 (1960).

147. *See id.* at 598 (asserting that "[a] mere ambiguity in the opinion accompanying an award, which permits the inference that the arbitrator may have exceeded his authority is not a reason for refusing to enforce the award").

148. *Id.* at 597.

149. *See W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber*, 461 U.S. 757, 764 (1983) (holding, *inter alia*, that a federal court may not overrule an arbitrator's decision simply because the court believes its own decision on the matter is wiser).

150. *Id.* at 764.

151. *See id.* at 765 (holding that parties bargain for contracts and federal courts should not "second guess" that bargain).

152. *See Newsday, Inc. v. Long Island Typographical Union*, 915 F.2d 840, 845 (2d Cir. 1990) (holding that "there is an explicit, well-defined, and dominant public policy against sexual harassment in the workplace").

153. *See W.R. Grace & Co.*, 461 U.S. at 764 (citing *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960) as a foundation upon which any consideration of an arbitrator's award must be based).

cal 759, *International Union of United Rubber*<sup>154</sup> established public policy as an exception to arbitration finality where a court cannot enforce a "collective bargaining agreement that is contrary to public policy."<sup>155</sup> The Court sought to limit the reach of the public policy exception<sup>156</sup> while preserving limited judicial review of arbitration awards under collective bargaining agreements.<sup>157</sup> Despite the Court's attempt to limit the public policy exception, subsequent decisions of the circuit courts confused the breadth of the public policy exception and created conflicting case law regarding the application of the *W.R. Grace* decision.<sup>158</sup>

To clarify the discrepancy, the Supreme Court granted certiorari to *United Paperworkers International Union v. Misco, Inc.*<sup>159</sup> The *Misco* Court reiterated its reasoning in *W.R. Grace*<sup>160</sup> that the public policy exception emerged from the common law which forbids a court from "enforcing contracts that violated law or public policy."<sup>161</sup> The Court also re-emphasized its holding in *W.R. Grace* that for a collective bargaining agreement to be unenforceable as contrary to public policy, the policy must be "well defined and dominant" and "ascertain[able] by reference to the laws and legal precedents and not from general con-

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154. 461 U.S. 757 (1983).

155. *W.R. Grace & Co.*, 461 U.S. at 766 (citing *Hurd v. Hodge*, 334 U.S. 24, 34-35 (1948)) (reasoning that "[t]he power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States").

156. *See id.* at 766 (quoting *Mushany v. United States*, 324 U.S. 49, 66 (1945), stating that "[s]uch a public policy, however, must be well defined and dominant, and is to be 'ascertained by reference to the laws and legal precedence and not from general considerations of supposed public interests'").

157. *See id.* at 766; *see also* Harry T. Edwards, *Judicial Review of Labor Arbitration Awards: The Clash Between the Public Policy Exception and the Duty to Bargain*, 64 CHI.-KENT L. REV. 3, 9 (1988) (commenting that "[b]y formulating the exception in this manner, the court clearly intended to limit severely the possibility of potentially intrusive judicial review under the guise of public policy").

158. *See* Joan Parker, *Judicial Review of Labor Arbitration Awards: Misco and Its Impact on the Public Policy Exception*, 4 LAB. LAW 683, 699 (1988) (stating that the *Misco* decision did not resolve certain questions regarding the extent of the public policy exception); *see also* Edwards, *supra* note 157, at 12-15 (comparing the circuit courts' interpretation of *W.R. Grace*).

159. 484 U.S. 29 (1987). In *Misco*, the arbitrator overturned the company's termination of an employee accused of marijuana possession and use on company property. Despite a finding that the employee operated a hazardous industrial machine capable of severe injuries to its operator, the arbitrator based his finding on a lack of just cause in light of the circumstances. *Id.* The district court set aside the award as counter to public policy, citing the general safety concerns that arise from the operation of dangerous machinery while under the influence of drugs. *Id.*

160. *W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber*, 461 U.S. 757 (1983).

161. *Misco*, 484 U.S. at 42.

siderations of supposed public interest."<sup>162</sup> Having reviewed *W.R. Grace*, the *Misco* Court held that a court may refuse to enforce specific terms of a collective bargaining agreement if it violates public policy, and that such power was not a broad grant of judicial review.<sup>163</sup> As guidance for future reviewing courts in using the public policy exception, the *Misco* Court stated, "[a]t the very least, an alleged public policy must be framed under the approach set out in *W.R. Grace*, and the violation of such a policy must be clearly shown if an award is not to be enforced."<sup>164</sup>

### B. *Defining the Scope of the Public Policy Exception*

Despite the Supreme Court's efforts to clarify the boundaries of the public policy exception, subsequent decisions by the United States Courts of Appeals continued to create ambiguity as to the doctrine's appropriate application.<sup>165</sup> Using an expansive application of the public policy exception, the Eighth Circuit in *Iowa Electric Light and Power Co. v. Local Union 204 of the International Brotherhood of Electrical Workers*<sup>166</sup> overturned the reinstatement of a nuclear power plant employee who deliberately violated federally mandated safety regulations.<sup>167</sup> The arbitrator found the employee's conduct "deliberate, improper, foolish and thoughtless,"<sup>168</sup> yet concluded that discharge constituted an excessive penalty under the applicable collective bargaining agreement.<sup>169</sup> The district court vacated the award on public policy grounds,<sup>170</sup> and the Eighth Circuit affirmed the lower court based on a "well defined and dominant national policy requiring strict adherence to nuclear safety rules."<sup>171</sup> In the court's view, the in-

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162. *Id.* at 43 (quoting *W.R. Grace*, 461 U.S. at 766). The *W.R. Grace* Court specifically delineated two such public policies: "obedience to judicial orders and voluntary compliance with Title VII of the Civil Rights Act of 1964." *W.R. Grace*, 461 U.S. at 766.

163. See *Misco*, 484 U.S. at 43 (reasoning that "our decision turned on our examination of whether the award created any explicit conflict with other 'laws and legal precedents' rather than assessment of 'general considerations of supposed public interest'" (quoting *W.R. Grace*, 461 U.S. at 766)).

164. *Id.*

165. See *Parker*, *supra* note 158, at 690-91 (noting that the federal circuit courts have issued inconsistent opinions). Compare *E.I. Dupont de Nemours & Co. v. Graselli Employees Indep. Ass'n of E. Chicago, Inc.*, 790 F.2d 611 (7th Cir. 1986), with *Kane Gas Light & Heating Co. v. International Bhd. of Firemen & Oilers*, Local 211, 687 F.2d 673 (3d Cir. 1982).

166. 834 F.2d 1424 (8th Cir. 1987).

167. See *Iowa Elec.*, 834 F.2d at 1426 (holding that public policy dictates strict compliance with safety regulations at nuclear power plants).

168. *Id.* at 1426.

169. *Id.*

170. *Id.* at 1434.

171. *Id.* at 1427.

quiry was not simply whether the arbitrator's award violated public policy, but rather if the underlying conduct was a violation of a statute or other form of positive law.<sup>172</sup> This reasoning was further expanded in *Delta Air Lines, Inc. v. Air Line Pilots Association*.<sup>173</sup> The Eleventh Circuit reasoned that if "an employee, in the course of his employment, commits an act that violates public policy, the award reinstating the employee necessarily also violates public policy."<sup>174</sup>

Other federal courts of appeals take a much narrower view as to the scope of the public policy exception.<sup>175</sup> These courts interpret *Misco*<sup>176</sup> to mean that a court must find that the award of reinstatement itself violates public policy before a court can set aside the arbitrator's award.<sup>177</sup> *Stead Motors v. Automotive Machinists Lodge No. 1173*<sup>178</sup> also illustrates a narrow interpretation of the public policy exception; the Ninth Circuit held that a public policy against the underlying behavior does not necessarily make an award of reinstatement contrary to public policy.<sup>179</sup> While the *Stead Motors* court reasoned that because an expansive reading of *W.R. Grace*<sup>180</sup> and *Misco*<sup>181</sup> could lead to unjust results in cases of minor offenses,<sup>182</sup> this restrictive reading of the pub-

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172. See *Iowa Elec.*, 834 F.2d at 1427-28 n.3 ("[T]his court is not required to find that the award itself is illegal before we overrule the arbitrator on public policy grounds. The Supreme Court in *United Paperworkers v. Misco*, 489 U.S. 29 (1987), declined to reach the issue of whether such a requirement is to be read into the public policy exception.").

173. 861 F.2d 665 (11th Cir. 1989).

174. *Delta Air Lines, Inc.*, 861 F.2d at 674.

175. See generally *Interstate Brands Corp. v. Local 135, Int'l Bhd. of Teamsters*, 909 F.2d 885, 893 (6th Cir. 1990) (holding that although there is a public policy against driving under the influence of alcohol or drugs, reinstating an employee discharged for being intoxicated off-duty does not necessarily violate public policy).

176. 484 U.S. 29 (1987).

177. See *Interstate Brands Corp.*, 909 F.2d at 893 (holding that a reviewing court must decide "not whether [the employee's] conduct for which he was disciplined violated some public policy or law but rather whether the award requiring the reinstatement of [an employee] . . . violated some explicit public policy").

178. 886 F.2d 1200 (9th Cir. 1989).

179. See *Stead Motors*, 886 F.2d at 1215. After a previous warning, the employee was discharged for failing to properly secure lug nuts on customers' vehicles. The arbitrator ordered the employee's reinstatement following a 120-day suspension. *Id.* at 1202-03. The court asserted: "We reject the approach of the Eleventh Circuit that, simply because an employee has committed some act which violates a law or a public policy in the course of his employment, his reinstatement would also necessarily violate that public policy." *Id.* at 1217.

180. *W.R. Grace & Co. v. Local Union 759, Int'l Union of Rubber*, 461 U.S. 757 (1983).

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

182. *Stead Motors*, 886 F.2d at 1215. The court held that:

[I]f the performance of an illegal act while on the job is all that must be proven to demonstrate the violation of a public policy for purposes of *Grace* and *Misco*, then an arbitrator would be prohibited from reinstating any teamster who receives a speeding ticket while driving the company truck, or even an inventory clerk who commits a single act of petty theft.



lic policy exception has also been criticized.<sup>183</sup>

Despite the valid concern about the rationality of termination for minor offenses, the clear public policy against sexual harassment cannot be considered a minor offense. Even though returning a known harasser to a work site is not a direct violation of positive law, it subjects the victim of past harassment to the potential of on-going abuse and subjects the employer to continuing liability.<sup>184</sup> Under either the expansive or narrow view of the public policy exception, sexual harassment is within the type of "well defined and dominant" public policy envisioned by the United States Supreme Court. Therefore, courts who fail to consider sexual harassment as a valid exercise of the public policy exception are ignoring the doctrine of *W.R. Grace*<sup>186</sup> and *Misco*.<sup>187</sup>

#### VII. EXPLORING THE CONFLICTING DOCTRINES: THE SEARCH FOR ANSWERS

Despite the unresolved question as to the proper scope of the public policy exception, clearly a public policy exception to arbitration exists<sup>188</sup> and applies to sexual harassment cases at the federal appellate level.<sup>189</sup> Under the test established in *W.R. Grace & Co. v. Local 759, International Union of the United Rubber Workers*,<sup>190</sup> the *Newsday*<sup>191</sup>

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*Id.*

183. See John E. Dunsford, *The Judicial Doctrine of Public Policy: Misco Reviewed*, 4 LAB. L.J. 669, 676 (1988). The author notes that although the court is sympathetic to the restrictive view,

[N]ot only do the authorities cited in . . . *W.R. Grace* refer to situations other than direct violations of law, but on the facts of that case itself, it is apparent the Court was thinking of public policy in a broader sense than solely of violations of law or directions to a party to perform an action that would violate the law.

*Id.*

184. See *Newsday, Inc. v. Long Island Typographical Union*, 915 F.2d 840, 843 (2d Cir. 1990) (quoting a judge who believes that reinstating sexual harassers subjects women to continuing abuse and prevents an employer from taking necessary steps required by the EEOC).

185. *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 43 (1987) (quoting *W.R. Grace*, 461 U.S. at 766).

186. *W.R. Grace & Co. v. Local 759, Int'l Union of the United Rubber Workers*, 461 U.S. 757 (1983) (holding that courts cannot enforce contracts that violate public policy).

187. See *Misco*, 484 U.S. at 29 (noting the common law practice of refusing to enforce contracts that run contrary to public policy).

188. See *id.* at 42-43 (stating that the doctrine of refusing to enforce contracts that violate public policy "has served as the foundation for occasional exercises of judicial power to abrogate private agreements").

189. See *Stroehmann Bakeries, Inc. v. Local 776, Int'l Bhd. of Teamsters*, 969 F.2d 1436, 1438 (3d Cir. 1992) (holding that the arbitrator's reinstatement of an employee accused of sexual harassment violates public policy); see also *Newsday, Inc. v. Long Island Typographical Union*, 915 F.2d 840, 845 (2d Cir. 1990) (holding that the arbitrator's award reinstating an employee accused of sexual harassment violated public policy).

190. 461 U.S. at 766 (quoting, in part, *Muschany v. United States*, 324 U.S. 49, 66 (1945)).

and *Stroehmann Bakeries*<sup>192</sup> courts determined that prohibitions against sexual harassment were a public policy "well defined and dominant" based in "laws and legal precedent."<sup>193</sup> Even the court in *Chrysler Motors*,<sup>194</sup> despite upholding the arbitrator's award, acknowledged a well-established public policy against sexual harassment.<sup>195</sup>

Given this indisputable public policy against sexual harassment, the question remains unanswered as to when courts will apply it as an exception to overturn an arbitration award. No obvious answer emerges in reviewing the relevant decisions at the federal appellate level. Clearly, courts at all levels of the federal judiciary, even when finding a public policy exception, continue to honor the tradition of judicial deference to arbitration as established in the *Steelworkers Trilogy*.<sup>196</sup>

The granting of an exception under public policy, however, seems to depend on the reviewing court's interpretation of the breadth of the exception. Illustrative of this point is the Tenth Circuit's analysis in *Communication Workers v. Southeastern Electric Cooperative*.<sup>197</sup> The court, in reviewing the employee discharge, applied the test of *Delta Air Lines, Inc. v. Air Line Pilots Association, International*,<sup>198</sup> which took an expansive view of the public policy exception.<sup>199</sup> However, the *Communication Workers*' court was unwilling to independently con-

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191. See *Newsday, Inc.*, 915 F.2d at 844 (finding a public policy exception against sexual harassment).

192. See *Stroehmann Bakeries, Inc.*, 969 F.2d at 1438 (holding that vacating an arbitrator's award which reinstated a worker discharged for engaging in sexual harassment was correct because the award violated the public policy against workplace sexual harassment).

193. *Id.* at 1441; *Newsday*, 915 F.2d at 841.

194. *Chrysler Motors Corp. v. International Union*, 959 F.2d 685 (9th Cir. 1992).

195. See *id.* at 687 (citing case law and EEOC guidelines demonstrating policy). But see *id.* at 688-89 (suggesting that it is not in violation of public policy to reinstate a worker who has engaged in sexual harassment if the arbitrator determines that the worker could not be rehabilitated and is unlikely to commit an act violating public policy in the future).

196. See *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 37-38 (1987) (indicating that labor management statutes are intended to promote non-governmental interference in the resolution of labor problems). To effectuate this purpose, courts may not reconsider the merits of an award, the arbitrator's interpretation of the contract, nor the arbitrator's remedies under the contract. *Id.*

197. 882 F.2d 467 (10th Cir. 1989).

198. 861 F.2d 665, 671 (11th Cir. 1988) (reasoning that the appropriate test under *Misco* was not whether a public policy against the employee's conduct existed but instead whether "an established public policy condemn[s] the performance of employment activities in the manner engaged in by the employee"). The *Delta Air Lines* court held that an airline pilot who was drunk during a flight violated an explicit public policy while in the performance of employment duties. Therefore, the court vacated the arbitrator's reinstatement of the pilot. *Id.* at 675.

199. The court in *Communication Workers*, 882 F.2d 467 (10th Cir. 1989), did not find this relationship between the public policy against sexual harassment and job duties when the discharged employee, an electrical lineman, committed a one-time sexual assault on a customer in her home. *Id.* at 469.

clude that the discharged employee had committed the act of sexual assault as part of an employment decision where the complained-of acts were "integral to the performance of [the discharged employee's] employment duties."<sup>200</sup>

The requirement that the acts of sexual harassment be integral to the employee's duties has been given an extremely narrow application by the Tenth Circuit.<sup>201</sup> Under the court's line of reasoning, sexual harassment could almost never qualify as "integral" because an offense such as sexual harassment should not be viewed as within an employee's duties.<sup>202</sup> A better view would hold that the duty to maintain an environment free of sexual harassment is integral to every employee's duties as part of the modern work place.<sup>203</sup> This view is supported by the very nature of Title VII<sup>204</sup> which seeks to eliminate all barriers to employment.<sup>205</sup>

The decisions considering sexual harassment and the public policy exception seem simply to turn on how expansive the reviewing court determines the public policy exception to be.<sup>206</sup> In *Newsday*,<sup>207</sup> the reviewing court, in great detail, acknowledged the strong public policy against sexual harassment.<sup>208</sup> Without analyzing the total scope of the exception, the *Newsday* court held that the arbitrator failed to consider public policy and by returning the harasser to the workplace, effectively condoned and "perpetuate[d] a hostile, intimidating and offensive work environment."<sup>209</sup> Likewise, in *Stroehmann Bakeries*,<sup>210</sup> the

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200. *Id.* (quoting *Delta Air Lines*, 861 F.2d at 671).

201. *See Communications Workers v. Southeastern Elec. Coop.*, 882 F.2d 467, 468 (10th Cir. 1989) (reasoning that the arbitrator's just cause determination was sufficient in addressing the concern of preventing the sexual assault and abuse of women).

202. *See id.* (finding that the arbitrator was correct to find that the conduct under review was not part of an employment decision, but rather a one time offense for which the actor expressed remorse).

203. *See generally Stroehmann Bakeries, Inc. v. Local 776, Int'l Bhd. of Teamsters*, 969 F.2d 1436 (3d Cir. 1992).

204. 42 U.S.C. § 2000e-2 (1994).

205. *See Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971) (concluding that Congress' intent in enacting Title VII was to eliminate all forms of employment discrimination); *see also Bundy v. Jackson*, 641 F.2d 934, 945-46 (D.C. Cir. 1981) (adopting the rationale of *Rogers* in the sexual harassment context).

206. *Compare W.R. Grace & Co. v. Local Union 759, Int'l Union of Rubber*, 461 U.S. 757 (1983), *with Communication Workers v. Southeastern Elec. Coop.*, 882 F.2d 467 (10th Cir. 1989).

207. *Newsday, Inc. v. Long Island Typographical Union*, 915 F.2d 840 (2d Cir. 1990).

208. *See generally id.* at 844-45 (citing Title VII of the Civil Rights Act of 1964, EEOC guidelines, the EEOC Compliance Manual, and case law to establish the existence of a strong public policy against sexual harassment).

209. *Id.* at 845.

210. *Stroehmann Bakeries, Inc. v. Local 776, Int'l Bhd. of Teamsters*, 969 F.2d 1436 (3d Cir.

court found the arbitrator failed to consider or respect pertinent public policy.<sup>211</sup> For the *Stroehmann Bakeries* court, the pertinent public policy contained not only a prohibition against sexual harassment, but also an affirmative duty of employers to take steps to prevent and remedy sexual harassment.<sup>212</sup> By failing to consider these prohibitions, the arbitrator's decision, therefore, violated public policy and had to be overturned.<sup>213</sup> Although other courts have not used this standard approach, a dominant societal policy against sexual harassment exists.<sup>214</sup> Logic would dictate that courts and arbitrators consider the underlying social policy of the *Misco*<sup>215</sup> holding. Even though this approach undermines the nearly absolute deference given to arbitration finality, the Supreme Court clearly stated in *Misco*<sup>216</sup> and *W.R. Grace*<sup>217</sup> that an exception to judicial deference indeed exists.

### VIII. RESOLVING THE DILEMMA: A CALL TO ACTION

Having reviewed the decisions considering sexual harassment and the public policy exception, we are left without a definitive test as to how a court may reach a decision. Contributing to this lack of consistency is the unresolved question of the proper scope of the public policy exception to arbitration finality.<sup>218</sup> Until the Supreme Court

1992).

211. See *id.* at 1443 (finding that the arbitrator reinstated an employee accused of sexual harassment without determining that the harassment did not occur and thus insisting that the arbitrator incorporate the public policy forbidding sexual harassment into his reasoning).

212. See *id.* at 1442 (noting that the EEOC policy and regulation against sexual harassment specify that "[a]n employer should take all the steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject . . . and developing methods to sensitize all concerned").

213. See *id.* at 1444 (noting specifically that the arbitrator's interpretation of the agreement neither "considered nor respected" public policy).

214. See *id.* at 1441 (revealing that "courts may vacate arbitration awards which explicitly conflict with well-defined, dominant public policy").

215. *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29 (1987) (finding no violation of the appellate court's definition of public policy and that that court's formation of public policy "did not comply with [the] requirement that such policy must be ascertained by reference to laws and legal precedence . . .").

216. *Misco*, 484 U.S. at 43 (noting that a court may refuse to enforce an agreement when the specific terms in that agreement violate public policy).

217. *W.R. Grace & Co. v. Local 758, Int'l Union of United Rubber*, 461 U.S. 757, 766 (1983) (recognizing that courts may not enforce a collective-bargaining agreement that is contrary to public policy as "the question of public policy is ultimately one for resolution").

218. Judge Harry Edwards has called for a bright-line rule of judicial deference, as proposed in *Misco*: "[A] court may refuse to enforce an award on public policy grounds only when the award itself violates a statute, regulation or other manifestation of positive law, or compels conduct by the employer that would violate such a law." Parker, *supra* note 158, at 30-33 (quoting from *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, (1987)); see also *id.* at 709-10 (urging the Court to definitively state what it implied in footnote 12 of *Misco*).

clarifies the appropriate scope of the exception, decisions will continue to vary in their application of the doctrine.<sup>219</sup> Despite the confusion, both arbitrators and employers can take steps to minimize the uncertainty which may exist on any potential appeal; employers also may act to prevent and limit liability for sexual harassment in the workplace.

### A. Arbitrator Considerations

Even though few arbitration decisions have been appealed into the court system,<sup>220</sup> certain recent decisions, such as the arbitrators' awards in *Chrysler*<sup>221</sup> and *Newsday*,<sup>222</sup> have driven employers to challenge what they considered to be unacceptable awards.<sup>223</sup> In fact, one commentator argued that unwise arbitration decision-making is partly responsible for the increased judicial activism in the historically deferential arena of arbitration.<sup>224</sup> Regardless of the truth of that argument, arbitrators may be able to avoid judicial review of their awards by incorporating a more contextualized notion of the workplace in their decisions.<sup>225</sup>

Arbitrators might also be well advised to consider the warning issued by courts in *Newsday*<sup>226</sup> and *Stroehmann Bakeries*,<sup>227</sup> that failure to consider public policy may be grounds for vacating the arbitration award.<sup>228</sup> Likewise, arbitration awards are more likely to be upheld if the arbitrator considers EEOC guidelines as well as applicable court

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219. See Parker, *supra* note 158, at 710 (asserting: "[i]n the absence of such a pronouncement [clarification of the public policy exception], in all likelihood there will continue to be splits among the circuits in regard to the application of the public policy exception").

220. But see Parker, *supra* note 158, at 710 (noting an increase in challenges to arbitration awards in the courts).

221. *Chrysler Motors Corp. v. International Union*, 959 F.2d 685 (7th Cir. 1992).

222. *Newsday, Inc. v. Long Island Typographical Union*, 915 F.2d 840 (2d Cir. 1990).

223. See Parker, *supra* note 158, at 712 (characterizing these decisions on fairly egregious facts as "an amazing naiveté and seemingly unawareness by some arbitrators of the corrosive effect that certain misconduct is having on the workforce, productivity, and society in general").

224. See Parker, *supra* note 158, at 713 (maintaining that an arbitrator's poor judgment leads to problematic results and that arbitrators should pay greater attention to the principles guiding their interpretation of agreements to prevent criticisms of awards being inconsistent with current social values).

225. See Parker, *supra* note 158, at 712-13 (urging that arbitrators consider the procedural guidelines and substantive basis for their awards on just cause, realize the practical limits on an employer's ability to ensure an employee's fitness for work, and consider an employer's tolerance in the face of deliberate and inexcusable employee misconduct).

226. *Newsday*, 915 F.2d 840.

227. *Stroehmann Bakeries, Inc. v. Local 776, Int'l Bhd. of Teamsters*, 969 F.2d 1436, 1443 (3d Cir. 1992).

228. See *id.* (discussing cases in which courts have both refused and allowed for a vacated judgment based on public policy).

decisions when interpreting sexual harassment law.<sup>229</sup> Ultimately, arbitrators should carefully evaluate the application of sexual harassment law and policy in adjudicating harassment discipline cases, even if utilizing the just cause standard.<sup>230</sup>

### B. Employer Considerations

Aside from the actions of judges and arbitrators, the employer can take steps to limit liability by preventing sexual harassment and acting in the face of a complaint.<sup>231</sup> Much has been written about what employers can and should do when defending against sexual harassment liability; however, in addition to being reactive, employer actions must also be "reasonably calculated to end the harassment."<sup>232</sup> In *Meritor Savings Bank v. Vinson*,<sup>233</sup> reviewing courts were instructed to "look to agency principles for guidance"<sup>234</sup> to determine whether the employer took the appropriate action. This standard was later articu-

229. See HAUCK, *supra* note 6, at 23 (asserting that the use of external sources such as the EEOC guidelines have become a widely accepted practice, absent a conflict with the terms of a bargaining agreement). The United States Supreme Court explicitly sanctioned the practice of arbitrators looking to the law in *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598 (1960). However, one commentator has noted that "the reader will observe that many arbitrators do give consideration to 'the law,' but the extent of adherence thereto may vary considerably from case to case . . . but they do take cognizance—in essence judicial notice—of the legal principle concerning the issue under consideration." ELKOURI & ELKOURI, *supra* note 77, at 368-69. When the applicable law conflicts with contractual provisions, opinions are divided about which action is appropriate. See Bernard D. Meltzer, *Ruminations About Ideology, Law and Labor Arbitration*, in THE ARBITRATOR, THE NLRB, AND THE COURTS: PROCEEDINGS OF THE 20TH ANNUAL MEETING OF NATIONAL ACADEMY OF ARBITRATORS 1, 15, 31 (1967) (arguing that if a conflict exists, the arbitrator should "ignore the law"); cf. Alexander v. Gardner-Denver, 415 U.S. 36, 42 (1974) (stating that an arbitrator "has no general authority to invoke public laws that conflict with the bargain between the parties . . . [and that] where the collective bargaining agreement conflicts with Title VII [42 U.S.C. § 2000-e], the arbitrator must follow the agreement"). But see Robert G. Howlett, *The Arbitrator, the NLRB, and the Courts*, in THE ARBITRATOR, THE NLRB, AND THE COURTS: PROCEEDINGS OF THE 20TH ANNUAL MEETING OF NATIONAL ACADEMY OF ARBITRATORS 67, 83 (1967) (insisting that arbitrators and the contracts they interpret are bound by statute and common law).

230. See Parker, *supra* note 158; see also HAUCK, *supra* note 6, at 42 (proclaiming to "[a]rbitrators: [i]ncorporate the federal definition and standards of sexual harassment in such arbitration cases and become well informed about the dynamics of male-female problems in the work place").

231. See *Nash v. Electrospace Sys., Inc.*, 9 F.3d 401, 402 (5th Cir. 1993) (sustaining the lower court's grant of summary judgment to the defendant-employer not only because the plaintiff failed to prove her claim, but also because of the employer's prompt and sensitive handling of the case asserting, "[w]hen a company, once informed of allegations of sexual harassment, takes prompt remedial action to protect the claimant, the company may avoid Title VII liability").

232. *Katz v. Dole*, 709 F.2d 251, 255 (4th Cir. 1983) (concluding that a former federal air-traffic controller claiming gender discrimination under Title VII satisfied the requirements for proving sexual harassment but not disparate treatment).

233. 477 U.S. 57 (1986).

234. *Meritor*, 477 U.S. at 72 (holding a bank employee's allegations sufficient to state a claim for hostile work environment sexual harassment).

lated as an employer's duty to take prompt remedial action.<sup>235</sup>

Actions which meet this standard for employer responsibility vary from case to case. Some commentators suggest that effective employer action includes sexual harassment policies, grievance procedures, and employee training as the most important means of prevention.<sup>236</sup> Additionally, the EEOC guidelines suggest examples of appropriate employer action,<sup>237</sup> while other commentators specifically recommend more detailed courses of action.<sup>238</sup>

From any perspective, the first step is an effective preventative sexual harassment policy.<sup>239</sup> Employee and management training is also an important preventative measure.<sup>240</sup> Once a complaint is filed, an employer must conduct a prompt and objective investigation.<sup>241</sup> Following the conclusion of the investigation, the employer must take

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235. See *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1486 (3d Cir. 1990) (citing *Steele v. Offshore Shipbuilding, Inc.*, 867 F.2d 1311, 1316 (11th Cir. 1989)).

236. *Andrews & Andrews*, *supra* note 15, at 39.

237. Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(f) (1996). The EEOC guidelines provide:

[P]revention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

29 C.F.R. § 1604.11(f) (1996).

238. See Edward Cerasia, *Harris v. Forklift Systems, Inc.: An Objective Standard, But Whose Perspective?*, 10 LAB. L.J. 253, 266-68 (1994) (detailing investigation, policy implementation, and training protocols for the employer); see also TITUS E. AARON, *SEXUAL HARASSMENT IN THE WORKPLACE: A GUIDE TO THE LAW AND A RESEARCH OVERVIEW FOR EMPLOYERS AND EMPLOYEES* (1993) (providing detailed examples of appropriate investigative and training steps as well as an analysis of relevant cases in defining "prompt remedial action").

239. Hope A. Comisky, "Prompt and Effective Remedial Action?" *What Must an Employer Do to Avoid Liability for "Hostile Work Environment" Sexual Harassment*, 8 LAB. L.J. 181, 199 (1992) (defining an "effective" policy as one in which all employees have knowledge of the policy, and are periodically educated about the policy). Comisky suggests that an effective policy must provide managers instruction about sexual harassment and must train them to deal with sexual harassment complaints. *Id.* Additionally, according to Comisky, "effective" also means that more than one person is designated to receive sexual harassment complaints. *Id.*

240. See AARON, *supra* note 238, at 199 (summarizing comprehensive training programs). The author states that:

training programs should encourage, if not require, employees to use established procedures to report specific types of conduct . . . . A training program should encourage employees to attempt informal resolution of unwanted or unwelcome sexual conduct, dispel the myths surrounding such a response, and train employees how to respond more effectively to sexual harassment on an informal basis.

*Id.*

241. See Comisky, *supra* note 239, at 199 (advocating an independent investigation during which the alleged harasser, victims, and other relevant witnesses are interviewed). This investigation may require consultation with outside counsel. *Id.* Finally, a written report should be completed and the results shared with the complainant and the victim. *Id.*

appropriate actions based on the investigation or report findings.<sup>242</sup> Employers who are timely and thorough in their actions, are more likely to survive judicial scrutiny under the "prompt and remedial action" test.<sup>243</sup>

An additional step which employers may take to limit wrongful discharge liability is to negotiate, within the collective bargaining agreement, standards by which sexual harassers will be disciplined.<sup>244</sup> Commentators suggest removing the just cause discipline provisions from contracts.<sup>245</sup> It has been shown, however, that arbitrators are likely to imply a just cause standard even if none is specifically stated.<sup>246</sup> A better approach would be to negotiate a specific provision dealing with sexual harassment for all Title VII claims. Absent this specific contractual provision, employers should specifically delineate, within applicable work rules and disciplinary codes, how various sexual harassment incidents will be addressed and punished.

## IX. CONCLUSION

Since the passage of the Civil Rights Act in 1964,<sup>247</sup> public awareness and demand for equal opportunity has led to increased claims of

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242. Comisky, *supra* note 239, at 199 (arguing that appropriate actions may range from simple counseling to transfers or even termination). She argues "the only action that is certain to remedy the harassment is to terminate the alleged harasser. If that action is taken too promptly - without an appropriate investigation - it may not be defensible . . . [I]f less severe action is taken, courts evaluate its 'effectiveness' based on whether the harassment ends." *Id.*

243. See Comisky, *supra* note 239, at 184-87 (defining the prompt and remedial test as the vehicle of action to take so that an employer may insulate itself from liability for sexual harassment). Essentially, courts will question whether prompt and effective remedial action was taken upon report of the harassment, rendering the employer's response "adequate." See, e.g., *Equal Employment Opportunity Comm'n v. Gurnee Inn Corp.*, 914 F.2d 815, 816-17 (7th Cir. 1990); *Baker v. Weyerhaeuser*, 903 F.2d 1342, 1345-47 (10th Cir. 1990); *Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991); *Evans v. Ford Motor Co.*, 768 F. Supp. 1318, 1326 (D. Minn. 1991); *Spencer v. General Elec. Co.*, 697 F. Supp. 204 (E.D. Va. 1988); *Shrout v. Black Clawson Co.*, 698 F. Supp. 204 (E.D. Va. 1988).

244. See *Stroehman Bakeries, Inc., v. Local 776, Int'l Bhd. of Teamsters*, 969 F.2d 1436, 1443-46 (3d Cir. 1992) (discussing how courts have treated collective bargaining agreements regarding both public and societal policy stances).

245. See Barbara A. Brown, *Labor Law: Wrongful Discharge*, 1987 ANN. SURV. AM. L. 779, 808 (advising employers to avoid language that suggests there is a guarantee of a threshold determination of just cause for termination).

246. See Wendi J. Delmendo, *Determining Just Cause: An Equitable Solution for the Workplace*, 66 WASH. L. REV. 831, 843 (1991) (criticizing the theory that employers can avoid wrongful termination lawsuits by removing just cause provisions from employment contracts); see, e.g., *Pugh v. See's Candies, Inc.*, 171 Cal. Rptr. 917, 926 (1981); *Toussaint v. Blue Cross & Blue Shield*, 292 N.W.2d 880, 885 (Mich. 1980); *Kestenbaum v. Pennzoil Co.*, 766 P.2d 280, 284 (N.M. 1988). Each of these cases finds an implied contract of good faith and fair dealing as well as implied just cause requirements.

247. 42 U.S.C. § 2000 (1998).



discrimination.<sup>248</sup> Sexual harassment, with its roots in Title VII,<sup>249</sup> has also gained increased public awareness, as well as augmented judicial recognition. With this recognition and awareness has come an increase in the number of workplace sexual harassment claims and an increasing responsibility for employers to take timely action in addressing sexual harassment.

When employer action takes the form of discipline, the traditional just cause standard found in most labor contracts serves as a shield for harasser-employees covered by collective bargaining agreements. Subject to internal resolution, these disciplinary actions become a matter for arbitration. Despite a firmly established tradition of judicial deference to the finality of arbitration, some courts have used the public policy exception to overturn these arbitration awards when the awards threaten to conflict with other well established social and legal prohibitions. Given the current confusion over the scope and breadth of the public policy exception, the United States Courts of Appeals split when faced with arbitration awards returning accused harassers to the workplace.

This article has argued that courts and arbitrators must consider the public policy against sexual harassment if the exception, as defined by the Supreme Court, is to have vitality. Until the Supreme Court speaks to the imbalance between the conflicting doctrines, both arbitrators and employers can take steps to avoid the conflict and limit liability. Arbitrators should consider both the public policy against sexual harassment, as well as the employer's dual liability to the victim and the harasser. This will allow for more thorough arbitration decisions and lessen the chances for judicial review. Employers, on the other hand, should follow the guidance of the EEOC in taking both preventive and remedial actions to eliminate sexual harassment in the workplace.

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248. In 1994, EEOC Chairman Gilbert F. Casellas announced that the EEOC had received a record 91,189 new charges during fiscal year 1994 (October 1, 1993 to September 30, 1994). This figure represented a 3.7% increase over the record 87,942 charges filed in fiscal year 1993. *EEOC Chairman Announces Task Forces to Address Operational Issues: Releases FY 1994 Enforcement Results*, E.E.O.C. News Release, Dec. 1, 1994, available in 1994 WL 672153.

249. Equal Opportunity Act of 1972, 42 U.S.C. § 2000 (1994).

