

Mediation: Is it Appropriate for Sexual Harassment Grievances?

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I. INTRODUCTION

Arbitration is the current mainstay of labor dispute resolution.¹ Even so, more and more labor grievances are being resolved by mediation.² This re-emergence³ of grievance mediation has been well received.⁴ Through the use of mediation, the cost, formality, and delay of arbitration can be avoided.⁵ As a result, it has been successful in providing a forum for cases that do not warrant the time and expense of an arbitration hearing.

While mediation does not guarantee a satisfactory solution to all cases, the likelihood of amicable resolution is one of its strengths.⁶ But

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1. Labor arbitration developed in the United States during the last part of the nineteenth century. It made its most significant advances after World War II. FRANK ELKOURI & EDNA A. ELKOURI, *HOW ARBITRATION WORKS* (4th ed. 1985). For the historical development of labor arbitration in the United States, see Dennis R. Nolan & Roger I. Abrams, *American Labor Arbitration: The Early Years*, 35 U. FLA. L. REV. 373 (1983).

2. Leonard Bierman & Stuart A. Youngblood, *Resolving Unjust Discharge Cases: A Mediator Approach*, 40 ARB. J. 48 (1985); John M. Caraway, *Grievance Mediation: Is It Worth Using?*, 18 J.L. & EDUC. 495 (1989); Stephen B. Goldberg, *Grievance Mediation: A Successful Alternative to Labor Arbitration*, 5 NEGOTIATION J. 9 (1989) [hereinafter Goldberg I]; Stephen B. Goldberg, *The Mediation of Grievances Under a Collective Bargaining Contract: An Alternative to Arbitration*, 77 NW. U. L. REV. 270 (1982) [hereinafter Goldberg II]; Stephen B. Goldberg & Jeanne M. Brett, *Disputants' Perspectives on the Differences between Mediation and Arbitration*, 6 NEGOTIATION J. 249 (1990); Matthew T. Roberts et al., *Grievance Mediation: A Management Perspective*, 45 ARB. J. 15 (1990); Sylvia Skratek, *Grievance Mediation: Does it Really Work?*, 6 NEGOTIATION J. 269 (1990).

3. Nolan & Abrams, *supra* note 1, at 373; "Grievance mediation may not be a 'brand new' technique, but it has recently been receiving renewed attention by parties involved in the administration and enforcement of labor agreements." Caraway, *supra* note 2, at 502; Peter Feuille, *Why Does Grievance Mediation Resolve Grievances?*, 8 NEGOTIATION J. 131 (1992).

4. See Goldberg & Brett, *supra* note 2, at 252; Roberts et al., *supra* note 2, at 16.

5. Goldberg II, *supra* note 2, at 281; Goldberg & Brett, *supra* note 2, at 252; Roberts et al., *supra* note 2, at 15.

6. Goldberg II, *supra* note 2, at 284.

mediation is not appropriate for all types of cases. Some are better suited for a mechanism that involves fact-finding and decision making. This is particularly true where, ultimately, we need to draw bright lines delineating acceptable behavior in the workplace. Sexual harassment is one such case type.

Sexual harassment cases are similar in power structure to domestic violence or criminal assault matters. In those cases there is more than a simple dispute over money or property. Instead, there is a dynamic present that involves power, fear, and coercion. These elements underlie the "dispute" being mediated, which may be a "simple" divorce or the resolution of a criminal charge such as "simple" assault. But like an iceberg, only the tip is visible, and the most dangerous part remains unseen. In those situations, there is an imbalance of power between the batterer and the victim that cannot be reconciled in mediation. Many legal commentators have concluded that mediation is inappropriate in these cases unless special circumstances are present.⁷ Because the same dynamic exists between harasser and victim, mediation is also inappropriate in sexual harassment grievance cases.

Sexual harassment grievances involve more than whether the discipline or discharge of the harasser is appropriate. Instead, how these matters are treated, and how harassers are disciplined is a reflection of how women in the workplace are faring. Grievance mediation of these cases, no matter how well intended, risks trivializing the seriousness of sexual harassment and maintaining an inhospitable environment for the female workforce. This article will examine the appropriateness of mediating union sexual harassment grievance cases.⁸

7. Andree G. Gagnon, Recent Development, *Ending Mandatory Divorce Mediation for Battered Women*, 15 HARV. WOMEN'S L.J. 272 (1992); Charles A. Bethel & Linda R. Singer, *Mediation: A New Remedy for Cases of Domestic Violence*, 7 VT. L. REV. 15, 30 (1982); Kelly Rowe, Comment, *The Limits of the Neighborhood Justice Center: Why Domestic Violence Cases Should Not be Mediated*, 34 EMORY L.J. 855, 862 (1985); Joseph B. Stulberg, *A Civil Alternative to Criminal Prosecution*, 39 ALB. L. REV. 359 (1975).

8. I will limit my analysis to grievance mediation in unionized settings; however, this form of dispute resolution has been used in the nonunion workplace as well. See Bierman & Youngblood, *supra* note 2. A mediation model for nonunion companies has been proposed as the solution to its employer-employee disputes. Adam J. Conti, *Mediation of Work-Place Disputes: A Prescription for Organizational Health*, 11 EMPLOYEE REL. L.J. 291 (1985).

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II. GRIEVANCE ARBITRATION

The foundation stone of labor grievance resolution is arbitration.⁹ Arbitration is a "simple proceeding voluntarily chosen by parties who want a dispute determined by an impartial judge of their own mutual selection, whose decision, based on the merits of the case, they agree in advance to accept as final and binding."¹⁰ While the initial rise of labor arbitration was meant to prevent strikes and was used as "the substitute for industrial strife"¹¹ in the collective bargaining arena, it soon grew to be the primary method of resolving disciplinary grievances as well. The vast majority of union disciplinary grievances go through the arbitration process for resolution.¹² Its main advantages include "the expertise of a specialized tribunal and the saving of time, expense, and trouble."¹³

Grievance arbitration is bargained for by the parties and is part of the collective bargaining agreement reached by the union and the employer.¹⁴ As such, "its rules, limits and regulations" are created by

9. Supreme Court Justice Arthur J. Goldberg wrote:

In the United States Arbitration Act, the Labor-Management Relations Act and in numerous state statutes, our legislative bodies have voiced their conviction that voluntary arbitration of disputes is favored and has an important role in society which seeks the peaceful, prompt and just disposition of controversies involving our citizens.

Arthur J. Goldberg, *A Supreme Court Justice Looks at Arbitration*, 20 ARB. J. 13, 13 (1965); see also 29 U.S.C. § 171(b) (1988); *John Wiley & Sons v. Livingston*, 376 U.S. 543, 549 (1964); *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

10. Matthew N. Chappell, *Arbitrate . . . and Avoid Stomach Ulcers*, 2 ARB. MAG., Nos. 11-12, 6-7 (1944).

11. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960).

12. Discharge and discipline provisions are found in more than 95% of all collective bargaining agreements. Goldberg I, *supra* note 2, at 9. "[A]rbitration provisions can today be found in an estimated 96% of all agreements." ARCHIBALD COX ET AL., *LABOR LAW 705* (10th ed. 1986). Final and binding grievance arbitration is provided for in 98% of labor agreements. BUREAU OF NATIONAL AFFAIRS, *COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS: BASIC PATTERNS IN UNION CONTRACTS 5* (Washington, DC: Bureau of National Affairs Inc., 1989).

13. ELKOURI & ELKOURI, *supra* note 1, at 7.

14. Goldberg I, *supra* note 2, at 9; COX ET AL. *supra* note 12; BUREAU OF NATIONAL AFFAIRS, *COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS: BASIC PATTERNS IN UNION CONTRACTS* (Washington, DC: Bureau of National Affairs Inc., 1989).

the union and the employer, and may be changed by them.¹⁵ Having chosen arbitration as the best way to resolve their disputes, the parties usually honor their agreement and proceed through the grievance process to final, binding arbitration.¹⁶ While each contract is different, the arbitration process usually includes three progressive stages of notification and negotiation to resolve the grievance. The final step, if no agreement is reached, is binding arbitration.¹⁷

Grievance arbitration arises from challenges to the employer's imposition of discipline or discharge of an employee for some act or omission. It is understood that workers are expected to meet certain standards of conduct on the job, and if they fail to adhere to these standards, the employer will impose some discipline for that failure.¹⁸ Each work environment is different, and each work place has its own "culture" with acceptable parameters of behavior; however, conduct by the work force that constitutes sexual harassment cannot be tolerated¹⁹ and will result in discipline or discharge.²⁰

III. MEDIATION

A. *The Mediation Model*

In its simplest form "[m]ediation is a process through which two or more disputing parties negotiate a voluntary settlement of their difference with the help of a 'third party' (the mediator) who typically has no stake in the outcome."²¹ However, as mediation continues to grow, expand, and develop it is increasingly difficult to provide a single, universal definition of this process.²² Nonetheless, this is considered to

15. Thomas J. McDermott, *Arbitrability: The Courts Versus the Arbitrator*, 23 *ARB. J.* 18, 19 (1968).

16. ELKOURI & ELKOURI, *supra* note 1, at 23.

17. A.B.A. COMM. ON LAB. ARB. & THE LAW OF COLLECTIVE BARGAINING AGREEMENTS, *HOW ARBITRATION WORKS* 52-64 (4th ed. Supp. 1985-89).

18. ARNOLD M. ZACK, *GRIEVANCE ARBITRATION: ISSUES ON THE MERITS IN DISCIPLINE, DISCHARGE, AND CONTRACT INTERPRETATION* 57 (1989).

19. This is usually in the form of an antidiscrimination clause in the collective bargaining agreement. Also, employers, well aware of their potential liability under federal law, implement antiharassment policies and work rules.

20. See *supra* note 19 and accompanying text.

21. NANCY H. ROGERS & RICHARD A. SALEM, *A STUDENT'S GUIDE TO MEDIATION AND THE LAW* 1 (1987).

22. *Id.*

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be the "classic" mediation model.

Practitioners tend to agree that while there is no "best way" to mediate, certain basic techniques promote successful mediation.²³ Experienced mediators are adept at investigation, empathy, persuasion, invention, and distraction.²⁴ Using these skills, the mediator will: "encourage exchanges of information, . . . help the parties to understand each other's views, . . . promote a productive level of emotional expression, . . . help the parties realistically assess alternatives to settlement, . . . encourage flexibility, . . . stimulate the parties to suggest creative settlements, . . . and invent solutions that meet the fundamental interests of all the parties."²⁵

In practice, mediation usually involves several overlapping stages: "introduction of the process by the mediator;" "presentation of viewpoints by each of the parties;" emotional expressions by the parties; "caucusing [the mediator meeting privately with a party] to discuss confidential information;" "exploration of alternative solutions" and forging an agreement that the parties find acceptable.²⁶

In the early stages, mediators work "to establish their integrity, competence and concern for the parties" and their positions.²⁷ Later, through the use of "active" listening and open-ended questions, mediators are able to gather the information necessary to serve as a foundation for the ensuing discussions. As the session continues, it is common for mediators to meet with each side separately in a "caucus" to discover additional information that the party did not want to share in the joint session with the other disputant present. During this private meeting, the mediator may challenge the party's position and attempt to persuade him or her to hear and understand the other side's viewpoint.²⁸ In later caucuses, the mediator may suggest alternative settlement terms or test the parties' positions on proposals already discussed. "Mediators expect the

23. *Id.* at 8; see, e.g., Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85, 91-106 (1981). Many of those principles have their foundation in labor (collective bargaining) mediation. WALTER A. MAGGIOLO, *TECHNIQUES OF MEDIATION* 91-104 (2d ed. 1985); WILLIAM E. SIMKIN & NICHOLAS A. FIDANDIS, *MEDIATION AND THE DYNAMICS OF COLLECTIVE BARGAINING* (2d ed. 1986).

24. Christopher Honeyman, *Five Elements of Mediation*, 4 NEGOTIATION J. 149, 152-154 (1988).

25. STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 103 (2d ed. 1992).

26. NANCY H. ROGERS & CRAIG A. MCEWEN, *MEDIATION: LAW, POLICY, PRACTICE* 8 (1989).

27. *Id.* at 9.

28. *Id.*

parties to speak frankly in caucuses and may do so themselves in ways that would create hostility if done in a joint session."²⁹ Through a series of these joint and separate sessions, the mediator structures the parties' negotiations, encourages cooperative bargaining, and helps them reach a resolution that is satisfactory for all concerned.³⁰

For mediation to be accepted as an alternative to an adjudicatory process, such as grievance arbitration, the mediator must be fair, impartial, and nonjudgmental; the process must be voluntary and free of bias; and the parties must be equals in the dispute. As mediation is adopted as the means to resolve more and more types of disputes, adherence to this criteria is crucial for the process to be considered appropriate and legitimate.

B. *The Rise of Grievance Mediation*

Grievance mediation³¹ has rejoined arbitration on the labor dispute resolution landscape and is being promoted as a preferred alternative to grievance arbitration.³² In contrast to grievance arbitration "[t]he essence of mediation . . . is compromise. . . . [The mediator's] aim is to persuade negotiators, by proposals or arguments, to come to voluntary agreement."³³ As such, each side is expected to compromise in order to develop a solution.³⁴ In its most common form, mediation is

29. *Id.*

30. This is only a cursory overview of mediation. For a detailed description of the mediation process and mediator techniques see CHRISTOPHER W. MOORE, *THE MEDIATION PROCESS* (1986); PAUL M. LISNEK, *A LAWYER'S GUIDE TO EFFECTIVE NEGOTIATION AND MEDIATION* (1992).

31. Grievance mediation has a long history. The New York State Mediation Board offered grievance mediation in 1886, and mediation was used to resolve grievances in the anthracite coal industry in 1903. Caraway, *supra* note 2, at 495.

32. See Goldberg I, *supra* note 2; Goldberg II, *supra* note 2; see also Bierman & Youngblood, *supra* note 2; Caraway, *supra* note 2; Roberts et al., *supra* note 2; Skratek, *supra* note 2. Not only unions have followed this trend. In South Carolina, the State Commissioner of Labor is granted broad powers to deal with industrial disputes that arise between "employer and employees or capital and labor." S.C. CODE ANN. § 41-17-10 (Law. Co-op. 1976). The Commissioner has used these powers to establish the Labor Management Services (LMS) Division of the South Carolina Department of Labor. This agency implemented a grievance mediation program to handle discharge cases in the nonunion setting. However, it does not handle grievances involving allegations of race, age, sex, religious or national origin employment discrimination. Bierman & Youngblood, *supra* note 2, at 55.

33. ELKOURI & ELKOURI, *supra* note 1, at 4.

34. A.B.A. COMM. ON LAB. ARB. & THE LAW OF COLLECTIVE BARGAINING, *supra* note 17, at 56.

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added as an additional step to the union grievance process.³⁵ Mediation is usually conducted after all the typical grievance steps have been completed except for arbitration, which is the final stage of the grievance process. The most widely known example of a union grievance mediation system was designed by Professor Goldberg for the United Mine Workers of America (UMWA) in the bituminous coal industry.³⁶ The UMWA model provided for mediation after all the steps of the grievance procedure, except arbitration, had been completed.³⁷ While discipline cases were subject to mediation, the UMWA plan did not provide for mediation in discharge cases.³⁸

In the UMWA mediation scheme, the mediator facilitated the discussion of the parties. If they were unable to resolve the dispute, the mediator provided them with a nonbinding advisory opinion of the probable outcome if the matter were referred to arbitration.³⁹ In the event the parties went to arbitration, the individual who served as the mediator could not serve as the arbitrator in the matter.⁴⁰ Further, nothing said or done in the mediation by either party or by the mediator could be used in the arbitration hearing.⁴¹ Using this procedure, eighty-nine percent of the grievances were successfully resolved through mediation; additionally, seventy-seven percent of the grievants whose disputes were mediated were satisfied with the process.⁴² This model, with some variations, has been adopted in other settings.

The Washington Education Association (WEA), in cooperation with the Washington State School Directors' Association (WSSDA), also experimented with grievance mediation.⁴³ The matters sent to mediation included discipline, discharge, and discrimination cases.⁴⁴ While

35. See Goldberg I, *supra* note 2; Goldberg II, *supra* note 2.

36. Goldberg & Brett, *supra* note 2, at 249; Goldberg I, *supra* note 2, at 11.

37. See Goldberg I, *supra* note 2.

38. Goldberg & Brett, *supra* note 2, at 249-50.

39. Goldberg I, *supra* note 2 at 11; Goldberg & Brett, *supra* note 2, at 250; see also, A.B.A. COMM. ON LAB. ARB. & THE LAW OF COLLECTIVE BARGAINING AGREEMENTS, *supra* note 17, at 56. This mediation model bears a striking resemblance to Early Neutral Evaluation. Early Neutral Evaluation is also known as E.N.E., Early Neutral Case Evaluation or Case Evaluation. For a more detailed description of this process, see Wayne D. Brazil et al., *Early Neutral Evaluation: an Experimental Effort to Expedite Dispute Resolution*, 69 JUDICATURE 279 (1986).

40. Goldberg I, *supra* note 2, at 11.

41. *Id.*

42. Goldberg & Brett, *supra* note 2, at 250-51.

43. Skratek, *supra* note 2, at 270.

44. *Id.* at 273.

employers were initially reluctant to engage in mediation in discipline and dismissal cases, they were made part of the grievance mediation study.⁴⁵

The model employed by the WEA closely followed the UMWA model, with mediation being provided as a last step in the grievance process just prior to arbitration.⁴⁶ Like the UMWA program, if the parties were unable to settle the matter, the mediator provided them with a nonbinding, advisory opinion regarding the probable outcome of the case.⁴⁷ Similarly, if the matter continued on to arbitration, the mediator would not serve as the arbitrator and no information revealed in the mediation could be used at the hearing.⁴⁸

Statistics for the WEA pilot project were similar to the UMWA. Thirty of the thirty-two grievances referred to mediation during the 1988 study were resolved as a result of the mediation conference.⁴⁹ The grievants' satisfaction rate with the process was eighty-eight percent, while the grievees' satisfaction rate was ninety percent. All of the union advocates were satisfied, and eighty-two percent of the management advocates were satisfied with the process.⁵⁰

Grievance mediation programs have also been established in other areas. Southwestern Bell Telephone Company (SWBT) and District 6 of the Communications Workers of America (CWA) implemented a one year dispute resolution pilot project⁵¹ that added mediation as a step to the parties' contractual grievance procedures.⁵² "Designed to meet the need for an expeditious and inexpensive procedure for settling a heavy volume of local grievances, the program [sought] to creatively expand on a heavily taxed dispute resolution system."⁵³ The parties agreed to limit mediation to two specific issues: employee disciplinary suspension for just cause and employee dismissal for just cause.⁵⁴

As in the other grievance mediation programs described, the mediator would challenge each side, plant some doubts, and encourage the

45. *Id.*

46. *Id.*

47. *Id.* at 273.

48. Skratek, *supra* note 2, at 279.

49. *Id.* at 274.

50. *Id.* at 278.

51. Alan D. Silberman, *Breaking the Mold of Grievance Resolution: A Pilot Program in Mediation*, 44 ARB. J. 40 (1989). The project began on September 1, 1987. An earlier project was conducted three years before in a similar experiment with Southern Bell Telephone Company. *Id.* at 41.

52. *Id.*

53. *Id.*

54. *Id.*

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parties to modify "their positions to be more acceptable to their opponent."⁵⁵ The emphasis was in preparing both sides to "compromise" to reach a settlement.⁵⁶ If the parties were unable to resolve the matter, the mediator provided them with "an immediate oral advisory opinion" to provide the parties with the benefit of the mediator's judgment regarding the outcome of the case. This opinion would serve as a foundation for further negotiation.⁵⁷

Finally, grievance mediation has also been used to resolve disputes between the California public school systems and their unions.⁵⁸ The mediation has been conducted by the California State Mediation and Conciliation Service, a state agency primarily responsible for mediating impasses in union contract negotiations.⁵⁹

As is the case in most, if not all, union grievance programs, the mediation is governed by the terms of the collective bargaining agreement. Akin to the other programs discussed, the California mediation program is conducted as a step towards arbitration. In case of impasse, the mediator gives the parties an evaluation of the case and its potential outcome.⁶⁰ In some instances, the mediator will render a written opinion as to the appropriate resolution of the grievance or will preside over a grievance adjustment board hearing. The board is composed of an equal number of union and management designees who take limited evidence⁶¹ and issue a final, binding written decision based on a majority vote.⁶² If there is no majority, there is no decision, and the matter continues to "formal" arbitration where staff mediators are not permitted to act as arbitrators.⁶³

Ninety-two percent of all available grievances are processed

55. Silberman, *supra* note 51, at 42.

56. *Id.* at 43.

57. *Id.* at 44.

58. This discussion of grievance mediation programs is by no means comprehensive. Instead, it is intended to be illustrative of the extent to which union grievance mediation has been used and to highlight the terms and conditions of the mediation model employed. There are other programs most of which share some if not all the terms already described. *See, e.g.,* Mollie H. Bowers et al., *Grievance Mediation: A Route to Resolution For the Cost-Conscious 1980s*, 33 LAB. L.J. 459 (1982); Thomas J. Quinn et al., *Grievance Mediation and Grievance Negotiation Skills: Building Collaborative Relationships*, 41 LAB. L.J. 762 (1990).

59. Caraway, *supra* note 2, at 496.

60. *Id.*

61. The hearing is mostly narrative evidence with no cross-examination of witnesses and little of the formality associated with arbitration hearings. *Id.*

62. *Id.*

63. *Id.* at 496-97.

through this mediation program.⁶⁴ It is deemed worthwhile because it saves time, money, and provides the participants flexibility in fashioning a remedy. Based at least in part on the "success" of these pilot projects, commentators have been quick to tout the informality, efficiency, speed and inexpensiveness of grievance mediation,⁶⁵ each adding a personal twist to the process and its use.⁶⁶ It is this process that is now being proposed as the preferred alternative for resolving sexual harassment grievances.⁶⁷ It is this "solution" of which we need to be wary.

IV. GENDER AND MEDIATION

A. Imbalance of Power

Imbalance of power between the disputants is a problem that mediators must often face. A great imbalance makes it impossible to resolve the dispute fairly because the weaker party cannot negotiate on an equal basis. There are different views on how to deal with a power imbalance. Some mediators advocate "rebalancing" the power during the session⁶⁸ while others recommend terminating the meeting. The pivotal criterion is whether there is "a substantial power disparity" between the disputants. If this exists, mediation is "inappropriate because it threatens

64. Caraway, *supra* note 2, at 498-502.

65. "[T]he introduction of grievance mediation as a step prior to arbitration will yield faster, less expensive, and less time-consuming resolutions to all grievance disputes. . . ." Sylvia Skratek, *Grievance Mediation — Does It Really Work?*, MONT. ARB. ASS'N Q. IX, Winter 1989, at 1, *quoted in* Silberman, *supra* note 51, at 45. Interestingly enough, these are the same reasons that arbitration was preferred and championed over litigation for the resolution of labor disputes.

66. Quinn et al., *supra* note 58, at 762; Bowers et al., *supra* note 58, at 459; John C. Sigler, *Mediation of Grievances: An Alternative to Arbitration?*, 13 EMPLOYEE RELATIONS L.J. 266 (1987). *See generally supra* note 2.

67. Edward J. Costello, *The Mediation Alternative in Sex Harassment Cases*, 47 ARB. J. 16 (1992); Howard Gadlin, *Careful Maneuvers: Mediating Sexual Harassment*, 7 NEGOTIATION J. 139 (1991); Mary P. Rowe, *People Who Feel Harassed Need a Complaint System with Both Formal and Informal Options*, 6 NEGOTIATION J. 161 (1990).

68. Of course, the risk in "balancing" the power is that the mediator then ceases being neutral and impartial, and instead takes on the role of advocate for the weaker party. At best, the mediator can act to help weaker parties effectively utilize whatever power they do possess. CHRISTOPHER MOORE, *THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT* 282 (1986); LISNEK, *supra* note 30, at 10-12.

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to exploit the apparent powerlessness of one disputant."⁶⁹ Because dealing with a power imbalance can be difficult and risky, it is imperative that the mediator be sensitive to its presence. If the mediator perceives the power imbalance to be so serious and unchangeable that an agreement would be unfair, then the mediator should terminate the process.⁷⁰

Power can be based on a variety of factors including personality, strategic positions, tactical positions, or gender.⁷¹ Power based on gender is not merely a difference in physical strength. It can be grounded in the emotional, psychological, or financial hold one person has over another.

Of course not every man-woman relationship has a gender-based power imbalance, nor are all imbalances destructive. However, a power imbalance is probably most starkly present in the realm of domestic mediation and abusive relationships. Much has been written about domestic relations mediation.⁷² A prevailing sentiment among many mediators is that mediation is inappropriate when there has been conjugal violence.⁷³ One of the primary reasons mediation is avoided is because of the imbalance of power between the batterer and the victim.⁷⁴ This

69. Frank E. A. Sander, *Alternative Methods of Dispute Resolution: An Overview*, 37 U. FLA. L. REV. 1, 17 (1985); see also MATTHEW LEVINE, POWER IMBALANCES IN VERMONT LAW SCHOOL DISPUTE RESOLUTION PROJECT, A STUDY OF BARRIERS TO THE USE OF ALTERNATIVE METHODS OF DISPUTE RESOLUTION 137 (1984).

70. LISNEK, *supra* note 30, at 10-13. For a discussion on defining a quality mediation, particularly with respect to this issue see Robert A Baruch, *Efficiency and Protection, or Empowerment and Recognition?: The Mediator's Role and Ethical Standards in Mediation*, 41 U. FLA. L. REV. 253 (1989).

71. LISNEK, *supra* note 30, at 10-12.

72. Jessica Pearson & Nancy Thoennes, *Divorce Mediation: Reflections on a Decade of Research in Mediation Research in MEDIATION RESEARCH: THE PROCESS AND EFFECTIVENESS OF THIRD-PARTY INTERVENTION* (Kenneth Kressel & Dean C. Pruitt, eds., 1989); ROBERT DINGWALL & JOHN EEKELAAR, *DIVORCE MEDIATION AND THE LEGAL PROCESS* (1988); *DIVORCE MEDIATION: THEORY AND PRACTICE* (Jay Folberg & Ann Milne, eds., 1988); Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545 (1991); Ann W. Yellott, *Mediation and Domestic Violence: A Call for Collaboration*, *MEDIATION Q.*, Fall 1990, at 39.

73. Gagnon, *supra* note 7, at 15; Bethel & Singer, *supra* note 7, at 15; Rowe, *supra* note 7, at 855. It is not only the commentators that have addressed the issue of mediating domestic violence cases. In certain circumstances the law prohibits the use of mediation. ME. REV. STAT. ANN. tit. 19, § 768 (West Supp. 1992) (prohibiting mandated mediation in domestic violence cases); MASS. GEN. LAWS ANN. ch. 209A, § 3 (West Supp. 1993) (prohibiting mandated participation in domestic violence cases).

74. Barbara J. Hart, *Genile Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation*, *MEDIATION Q.*, Summer 1990, at 317, 318; David B. Chandler, *Violence, Fear and Communication: The Variable Impact of Domestic Violence on Mediation*, *MEDIATION Q.*, Summer 1990, at 331, 333; Kathleen O. Corcoran & James C.

imbalance makes it impossible for the weaker party⁷⁵ to enter into an agreement freely, knowingly, and without fear or coercion. Mediation under those conditions risks reaching an unfair agreement tainted by intimidation.

When a power relationship exists and is partially based on gender, it may have its roots in the basic societal differences between men and women. It has been theorized that men and women cannot share equivalent power in a patriarchy because "[a] society characterized by gender inequality, one that is differentiated and stratified by gender, and that has an institutionalized ideology justifying male domination in all socially significant contexts . . . is a society that routinely provides [men] with greater resources than [women]."⁷⁶

An imbalance of power does not always exist between the sexes. However, there is usually some destructive gender power imbalance present in sexual harassment cases. In the workplace, particularly where women occupy sex-atypical jobs, gender-based power and its potential for being destructive becomes more acute. The power exercised by a harasser can manifest itself with many of the same characteristics as coercion and intimidation from which abused wives suffer. Like spousal abuse, the harassment can include: relentless criticism, isolation from the group, "intimidation, name-calling, mind games, shouting," threats, and unwanted touching.⁷⁷ In this charged, sometimes overwhelming atmosphere, a woman will sometimes "go along"⁷⁸ with male co-workers in a mistaken belief that by doing so she will show she can "get along" with the group and the harassment will cease. This is eerily similar to the battered spouse who believes if she just "tries harder" her partner will not hit her again.⁷⁹

A United States Civil Rights Commission report articulated some serious problems with mediation in domestic violence cases:

Melamed, *From Coercion to Empowerment: Spousal Abuse and Mediation*, MEDIATION Q., Summer 1990, at 303, 311-12.

75. The weaker party is usually the woman. "Only five percent of all reported spouse abuse victims are men (*National Crime Statistics Report*, 1986)." Corcoran & Melamed, *supra* note 74, at 303.

76. Desmond Ellis, *Marital Conflict Mediation and Postseparation Wife Abuse*, 8 LAW & INEQ. J. 317, 330 (1990).

77. Corcoran & Melamed, *supra* note 74, at 305.

78. Victims commonly cope with harassment by participating in the offensive joking or behavior in an attempt to defuse the situation. *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1519 (M.D. Fla. 1991).

79. "Chronically abused women repeatedly forgive their partners, accept the blame, and believe, if they just try harder, their relationship will work out." Corcoran & Melamed, *supra* note 74, at 305 (emphasis added).

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Mediation . . . place[s] the parties on equal footing and ask[s] them to negotiate an agreement for future behavior. Beyond failing to punish assailants for their crimes, this process implies that victims share responsibility for the illegal conduct and requires them to modify their own behavior in exchange for the assailants' promises not to commit further crimes.⁸⁰

With the parallels in power and behavior, the same could be said for sexual harassment grievance cases. The woman who is a victim of sexual harassment is often unaware of the power imbalance. The power exerted in this model makes a fair and equitable resolution through mediation impossible because the woman is not in an equal bargaining position with her harasser, and they are bargaining over matters that are not negotiable. As a result, mediation should be avoided as the means to resolve a grievance arising from this subjugative conduct.

V. SEXUAL HARASSMENT LAW

Pressure for the victim to accept at least partial responsibility for this illegal conduct can only be eliminated by using the law to protect her rights and to punish the transgressor. Sexual harassment is often personified by "horseplay" and innuendo, and the law regulating such behavior is still developing. Bright lines need to be drawn to delineate acceptable conduct. The law is slowly evolving to provide the arbitrator with the objective standards needed to resolve the factual quagmires often present in these cases. This evolution places, in the hands of the arbitrator, tools to excise sexual harassment from the workplace. With these guidelines, the employer and the arbitrator can send a strong signal to workers that unacceptable behavior will be punished accordingly. This same message cannot be delivered by a mediator. It is better to have a fact-finder, the arbitrator, who will assess the actions in light of all the circumstances rather than a mediator who attempts to reconcile the parties, often by undermining the victim's position.

A. Forms of Sexual Harassment

Sexual harassment in employment is a type of sex discrimination

80. Lisa G. Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. 57, 72 (1984) (quoting UNITED STATES COMMISSION ON CIVIL RIGHTS, UNDER THE RULE OF THUMB: BATTERED WOMEN AND THE ADMINISTRATION OF JUSTICE 2 (1982)).

that is prohibited under Title VII of the Civil Rights Act of 1964.⁸¹ For Title VII purposes, sexual harassment is defined as "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature."⁸² This conduct constitutes harassment when one of three other criteria is met: (1) submission to such conduct is made, either explicitly or implicitly a term or condition of the worker's employment, (2) submission to or rejection of such conduct by a worker is used as a basis for employment decisions affecting the worker, or (3) such conduct has the purpose or effect of unreasonably interfering with a worker's job performance or creating an intimidating, hostile, or offensive work environment.⁸³

There are two forms of sexual harassment: the tangible job benefit ("quid pro quo") harassment and the hostile work environment.⁸⁴ The quid pro quo harassment occurs when a supervisor conditions some aspect of employment over which he⁸⁵ has control on the worker's submission to sexual demands.⁸⁵ This is the clearest form of harassment. This "tangible job benefit" sexual harassment is between a superior and a subordinate. It less commonly results in a labor grievance action.⁸⁷

The less clear form of harassment, and more common grievance action,⁸⁸ occurs when offensive conduct, usually by co-workers, creates a

81. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e - 2000e-17 (1988). Title VII applies to all employers of 15 or more employees. See also *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986) ("hostile work environment" sexual harassment is a form of sex discrimination that is actionable under Title VII).

82. Equal Employment Opportunity Commission's Guidelines on Discrimination Because of Sex, C.F.R. § 1604.11(a) (1991). The threshold requirement is that the conduct is "unwelcome."

83. *Id.*

84. Martha F. Davis & Alison Wetherfield, *A Primer on Sexual Harassment Law*, 26 CLEARINGHOUSE REV. 306, 307 (1992); see also *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

85. The law is gender neutral. Certainly a woman could sexually harass a male employee; however, in the vast majority of sexual harassment cases the victim is a woman. "Dr. Freada Klein, who is probably the best-known surveyor of this topic in the United States, agrees with me in estimating that 5% of men and 15% of women in the workplace feel seriously harassed each year on the basis of sexual harassment alone." Rowe, *supra* note 67, at 162; Gadlin, *supra* note 67, at 139 (noting that 95% of the complainants in sexual harassment cases are women).

86. Davis & Wetherfield, *supra* note 84, at 307.

87. Only 18.6% of the sexual harassment arbitration cases involved harassment by a supervisor. The vast majority (66.3%) were cases where the victim was harassed by a co-worker. Helen LaVan, *Decisional Model for Predicting Outcomes of Arbitrated Sexual Harassment Disputes*, 44 LAB. L.J. 230, 236 (1993).

88. *Id.*

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hostile work environment that changes the victim's terms and conditions of employment.⁸⁹ In assessing "environmental" harassment, the offending conduct is viewed in its totality to determine whether the conduct "creates an intimidating, hostile, or offensive work environment."⁹⁰ The more outrageous the behavior, the less pervasive it needs to be. Likewise, the more pervasive the harassment, the less severe the individual acts need to be to support a claim of harassment. As a result, numerous "minor" incidents viewed together may constitute harassment.⁹¹ Harmful intent is not required. Well-intentioned remarks may support a harassment claim if sufficiently severe or pervasive.⁹² The worker who engages in this offensive conduct is subject to discipline. The critical issue is then: From whose perspective is the conduct judged for offensiveness?

B. The Reasonable Woman Standard

The evidence of a hostile work environment is evaluated under an objective standard. In ratifying the theory of the hostile work environment, the United States Supreme Court in *Meritor Savings Bank v. Vinson*⁹³ defined harassment from the perspective of the objective, gender-neutral, reasonable person.⁹⁴ That standard has slowly evolved. Instead of examining the behavior from a gender-neutral perspective, the offending conduct is now assessed from the view of a "reasonable person in the same circumstances."⁹⁵

Two recent federal court decisions, *Ellison v. Brady*⁹⁶ and *Robinson v. Jacksonville Shipyards, Inc.*,⁹⁷ reflect a growing trend among the courts to define environmental harassment using the reasonable woman standard.⁹⁸ Each held that it is the victim's perspective that must be used

89. Steven H. Winterbauer, *Sexual Harassment—The Reasonable Woman Standard*, 7 LAB. LAW. 811, 811 (1991).

90. George M. Sullivan & William A. Nowlin, *Critical New Aspects of Sex Harassment Law*, 37 LAB. L.J. 617, 617 (1986).

91. *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991).

92. Winterbauer, *supra* note 89, at 812.

93. *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

94. *Id.* at 69.

95. Davis & Wetherfield, *supra* note 84, at 307.

96. 924 F.2d 872 (9th Cir. 1991).

97. 760 F. Supp. 1486 (M.D. Fla. 1991).

98. Winterbauer, *supra* note 89, at 811.

to decide what conduct creates a hostile work environment."⁹⁹ This means that when the victim of the harassment is female, the perspective used is that of the reasonable woman.

In rejecting the "reasonable person" standard in favor of the victim's perspective, the court in *Ellison* accepted the assumption that men and women have different views of what constitutes harassment. This difference is based at least in part on a woman's greater susceptibility to sexual assault than a man. As a result, the court reasoned that even faced with "mild" harassment, a woman "may understandably worry whether a harasser's conduct is merely a prelude to violent sexual assault."¹⁰⁰

In adopting the reasonable woman standard, the court attempted to eliminate the perpetuation of existing discriminatory practices that men, but not women, find acceptable.¹⁰¹ The court went on to state that the "pervasive and severe" requirement refers to the conduct of the harasser. The victim need not show that conduct had a "severe" effect on her psychological well-being.¹⁰²

Workplace culture is not a defense to environmental harassment. In *Robinson*, a female welder was subjected to a constant barrage of verbal and visual harassment from her male co-workers. When she was unsuccessful in getting her supervisors to remedy the problem she filed suit. The employer argued that the shipyard was a male-dominated, roughhewn, and vulgar workplace and that by choosing to work there, Robinson had knowingly subjected herself to such behavior. The court rejected the employer's argument, holding that Title VII was not intended as a shield to protect preexisting abusive work environments but rather was intended as a sword to battle such conditions.¹⁰³ The court upheld the trend that expects behavioral changes in the workplace. The workplace culture must change to accommodate the sensibilities of women as they enter sex-atypical and traditionally male-dominated fields.

99. *Ellison*, 924 F.2d at 878; *Robinson*, 760 F. Supp. at 1522. These are not the first federal courts to adopt the reasonable woman standard. The standard was adopted in 1987 by the Sixth Circuit in *Yates v. Avco Corp.*, 819 F.2d 630, 637 (6th Cir. 1987), and in 1989 by the Third Circuit in *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 (3d Cir. 1989).

100. *Ellison*, 924 F.2d at 879.

101. *Id.*

102. *Id.* at 878.

103. *Robinson*, 760 F. Supp. at 1526.

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The entire thrust of the reasonable woman standard is to alter, not reinforce, prevailing stereotypes and generally tolerated, if not accepted, discriminatory practices. If the conduct is sufficiently severe or pervasive in the eyes of the reasonable woman, it is sexual harassment, irrespective of how commonplace the practice may be in society at large.¹⁰⁴

The message to employers is clear: They must respond to harassment with strong disapproval and with discipline or discharge of the offending worker.

C. The Use of External Law in Grievance Arbitration

Much has been written on the subject of whether an arbitrator may apply external law in a grievance arbitration.¹⁰⁵ One view is that the arbitrator is confined to the interpretation and application of the contract language and is forbidden to add to or modify the terms of the agreement. In other words, the arbitrator is bound by the "internal law" of the collective bargaining agreement and must apply it exclusively.¹⁰⁶ The contrary view is that it is sometimes necessary and appropriate for the arbitrator to consider principles of "external law" when interpreting and enforcing a contract's provisions.¹⁰⁷ As a result of this debate, some arbitrators take the position that every contract embodies the law and as such, the arbitrator must interpret and apply all the law when interpreting the collective bargaining agreement.¹⁰⁸ The other side argues that the arbitrator's power derives solely from the contract, and if the contract and the law are in conflict, then the arbitrator is bound to follow the terms of the agreement.¹⁰⁹ This is the majority view. While an arbitrator may look to many sources for guidance, the arbitrator may not base his or her award solely upon the arbitrator's view of the requirements of the

104. Winterbauer, *supra* note 89, at 818.

105. Jay E. Grenig, *When Can a Grievance Arbitrator Apply Outside Law?*, 18 J.L. & EDUC. 515 (1989); George R. Fleischli, *When Can a Grievance Arbitrator Apply Outside Law?*, 18 J.L. & EDUC. 505 (1989); Theodore St. Antoine, *Deferral to Arbitration and Use of External Law in Arbitration*, 10 INDUS. REL. J. 19 (1988). This is just a sample. The National Academy of Arbitrators' Annual Meeting often results in spirited debate and papers that address this issue.

106. Grenig, *supra* note 105, at 515.

107. Fleischli, *supra* note 105, at 505.

108. Grenig, *supra* note 105, at 517.

109. *Id.* at 520.

law.¹¹⁰ An award will not be enforced if it exceeds the scope of the submission or if it is based on the arbitrator's "view of the requirements of enacted legislation."¹¹¹ That is not to say that external law is not used by arbitrators in reaching their decisions.

Some collective bargaining agreements incorporate external law into the contract. As such, when the parties expressly incorporate language into their contract that is identical to a statute or regulation, the arbitrator must interpret that statute or regulation in reaching his or her decision.¹¹² Consequently, when a contract provides its employees with protection from sexual harassment using language similar to existing external law, the arbitrator is permitted or even required to rely, at least in part, on decisional law in interpreting the offending worker's conduct.

More problematic is the use of external law where the contract contains only a vague "antidiscrimination" clause. Arbitrators' decisions must draw their essence from the contract; however, the contract cannot be read in a legal vacuum. The arbitrator may consider external law in interpreting ambiguous or vague contract language.¹¹³

Arbitrators are selected for their judgment and for their ability to interpret collective bargaining agreements to reflect the intent of the parties. In judging the conduct of a worker, the arbitrator must be keenly aware of the parties' intent to eradicate sexual harassment as evidenced by their inclusion of an "antidiscrimination" clause into the contract.¹¹⁴ Arbitrators should exercise their judgment in applying the current standards. "[A]rbitrators today 'are not afraid to look to applicable statutory and decisional law [and] will apply it if it is relevant.' In short, modern arbitrators seem prepared to take on this added responsibility."¹¹⁵

Clearly under the *Steelworkers*¹¹⁶ trilogy, the arbitrator is

110. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

111. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 53 (1974) (quoting *United Steelworkers*, 363 U.S. at 597).

112. Grenig, *supra* note 105, at 518-19.

113. *Id.* at 526.

114. "Collective bargaining agreements increasingly contain antidiscrimination [sic] clauses that include Title VII prohibitions (Hauck and Pearch, 1992)." LaVan, *supra* note 87, at 231.

115. A.B.A. COMM. ON LAB. ARB. & THE LAW OF COLLECTIVE BARGAINING AGREEMENTS, *supra* note 17, at 88 (quoting Willig, *Arbitration of Discrimination Grievances: Arbitral and Judicial Competence Compared*, PROCEEDINGS OF 39TH ANNUAL MEETING OF NAA, at 108).

116. *United Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

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required to follow the terms of the contract and not the civil rights law. "If there is a conflict between the contract and Title VII, the arbitrator . . . must follow the agreement;" however, "where the contract is silent or the contract has antidiscrimination language requiring the law to be followed, the arbitrator can, and perhaps must, turn to Title VII."¹¹⁷ In interpreting general antidiscrimination clauses, arbitrators have the use of *Ellison*, *Robinson*, and *Vinson* in their arsenal.

In applying these standards, the arbitrator is in a better position to enforce the parties' intent to eliminate sexual harassment in the workplace by sending a strong signal that such conduct will not be tolerated and will be punished appropriately. This cannot be done if the case is subjected to grievance mediation in which the goal is "compromise."

VI. SEXUAL HARASSMENT GRIEVANCES

A. Sexual Harassment Grievances

Collective bargaining contracts protect workers from sexual harassment through antidiscrimination clauses.¹¹⁸ In compliance with these clauses, employers implement policies and work rules prohibiting sexual harassment. Enforcement of these rules and policies lead to grievances.

In the union context, most sexual harassment grievances arise as the result of the discipline or discharge of the harasser, rather than as a grievance filed by the victim of the harassment.¹¹⁹ Generally, the collective bargaining agreement provides that no employee shall be disciplined or discharged without a showing of "just cause."¹²⁰ The just

117. Thomas G. Hauck & Vern E. Pearch, *Sexual Harassment and Arbitration*, 43 LAB. L.J. 31, 34 (1992).

118. "Collective bargaining agreements increasingly contain antidiscrimination [sic] clauses that include Title VII prohibitions (Hauck and Pearch, 1992)." LaVan, *supra* note 87, at 231; Pearce & Flasch, *Sexual Harassment Policies in the Organization*, PROCEEDINGS OF THE SOUTHWEST DIVISION REGIONAL MEETING OF THE ACADEMY OF MANAGEMENT 193-97 (March 12, 1987).

119. Hauck & Pearch, *supra* note 117, at 31; Arjun P. Aggarwal, *Arbitral Review of Sexual Harassment in the Canadian Workplace*, 46 ARB. J. 4 (1991); LaVan, *supra* note 87, at 230; Jonathan S. Monat & Angel Gomez, *Decisional Standards Used by Arbitrators in Sexual Harassment Cases*, 37 LAB. L.J. 713 (1986).

120. To establish whether the employer has "just cause" to discipline the grievant the following criteria must be met: 1) the alleged misconduct must be proven to the satisfaction of the arbitrator, 2) the misconduct must warrant disciplinary action, 3) there must be no extenuating circumstances that might mitigate the guilt of the grievant, 4) there must be no

cause rule leads to a final binding grievance arbitration award if the worker disagrees with the discipline imposed for his actions.

An analysis of these awards reveals the nature of union workplace sexual harassment grievances. The harasser is usually a co-worker of the victim.¹²¹ The conduct most often disciplined involves sexual comments, innuendo, or jokes.¹²² Staring, looks, and suggestive leers have the next highest incident rates.¹²³ Unwanted sexual touching and sexual propositions are the least reported forms of harassment.¹²⁴ In the majority of the cases the discipline imposed is suspension or discharge of the harasser.¹²⁵ It is into this environment that proponents want to inject grievance mediation.

B. Gender and Sexual Harassment Grievances

A significant problem confronting eradication of sexual harassment from the workplace is feminine guilt. Many female victims of harassment wonder whether "they might be at fault in part themselves."¹²⁶ As a result, they feel compelled to monitor their own

proof that the employer had discriminatory reasons for administering the discipline, 5) the misconduct affected the employer-employee relationship and 6) the discipline was appropriate for the offense. Jean T. McKelvey, *Discipline and Discharge*, in *ARBITRATION IN PRACTICE* 91 (Arnold M. Zack ed., 1984); MARVIN F. HILL, JR. & ANTHONY V. SINICROPI, *REMEDIES IN ARBITRATION* 552 (2d ed. 1991); *Enterprise Wire Co.*, 46 LAB. ARB. (BNA) 359 (1966) (Daugherty, Arb.). Discharge, as the ultimate discipline, is considered "industrial capital punishment." As such some arbitrators use "beyond a reasonable doubt" as the proof necessary to uphold the termination. This burden has been challenged by other arbitrators as unreasonable. See ELKOURI & ELKOURI, *supra* note 1, at 661-63 and the cases cited therein. *But see* McKelvey, *supra* at 99.

121. In a study of one hundred published labor arbitration awards "[s]eventy-two percent of the awards concerned sexual harassment by co-workers, five percent concerned supervisors, and four percent concerned non-employees." Hauck & Pearch, *supra* note 117, at 38. Only 18.6% of the sexual harassment arbitration cases involved harassment by a supervisor. The vast majority (66.3%) were cases where the victim was harassed by a co-worker. LaVan, *supra* note 87, at 236.

122. LaVan, *supra* note 87, at 230; Hauck & Pearch, *supra* note 117, at 31 (stating that the most common conduct complained of involved lewd language or gestures).

123. The incident rate for such acts was at least 27% in this study. LaVan, *supra* note 87, at 230.

124. Unwanted touching rates were 24%, and propositions were reported at a rate of over 20%. *Id.*

125. Monat & Gomez, *supra* note 119, at 715; Hauck & Pearch, *supra* note 117, at 31.

126. Patricia A. Gwartney-Gibbs & Denise H. Lach, *Workplace Dispute Resolution and Gender Inequality*, 7 *NEGOTIATION J.* 187, 191 (1991); Winterbauer, *supra* note 89, at 817.

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behavior rather than seek to have the harasser change his behavior.¹²⁷ This dynamic mirrors the sense of responsibility that a victim in an abusive domestic relationship feels.¹²⁸

Part of this problem stems from a societal prohibition against anger in women. "Despite changes brought about by the recent feminist movement, expressions of anger and aggression are still considered 'masculine' in men, and 'unfeminine' in women."¹²⁹ As such, these societal prohibitions make it difficult, if not impossible for many women to be "directly, clearly, self-assertively angry"¹³⁰ because "[i]t is considered unfeminine to be angry, even angry with good reason."¹³¹ Confronted with the inability to express anger, some women are vulnerable to victimization. This interferes with their ability to be self-assertive and competitive.¹³² Instead of fighting back, these women stay silent and cultivate an unconscious rage, which they may experience through depression, hurt, or guilt.¹³³ These feelings of guilt and responsibility for the offending conduct explain, in part, why victims file so few sexual harassment grievances. It also is a warning that women who are victims of sexual harassment should not be subjected to the subtle and not-so-subtle pressures of grievance mediation.

Mediation involves more than resolving differences. Mediators and uninformed parties would be naive not to appreciate the interpersonal power dynamics at work in the session. "Men may not comprehend their role in this system of sexual domination [domestic violence] any more than women may be able to articulate the source of their feeling of disempowerment. Yet both of these dynamics are at work in the mediation setting."¹³⁴ Arbitration, with its bright lines, can cut through this disempowerment by recognizing the misconduct for what it is. Only in fact-finding are the parties equal.

Arbitration is not a panacea in all cases. Unfortunately, a victim's self-castigation is reinforced by some commentators and sadly, even by some labor arbitrators. It is unacceptable when employers are admonished to "not overreact when there is no evidence of intent to

127. *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1505 (M.D. Fla. 1991).

128. *Corcoran & Melamed*, *supra* note 74, at 305.

129. Grillo, *supra* note 72, at 1576 (quoting Harriet Lerner, *Internal Prohibitions Against Female Anger*, 40 AM. J. PSYCHOANALYSIS, 137, 138 (1980)).

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* at 1576.

134. Grillo, *supra* note 72, at 1605.

intimidate and harass¹³⁵ or when the victim is made to appear at fault for the harassment because she "overreact[ed] to simple horseplay, [or] when touching is a normal office practice."¹³⁶ This problem is exacerbated when the victim is scrutinized for her behavior, speech or dress to see if "she asked for it."¹³⁷ This harkens back to the earlier days of rape prosecution when the victim was accused of inviting her attack.

When a commentator or arbitrator talks about "excessive" harassment,¹³⁸ it implies that "some" harassment is acceptable if the harasser does not have an otherwise tarnished work record.¹³⁹ This is particularly troubling when the analysis is couched in terms such as "a poor work record may be used to substantiate a claim that sexual harassment is unacceptable."¹⁴⁰ This is a clear signal to workers that so long as they are valuable producers they will be given the benefit of the doubt when their conduct towards their female co-workers is scrutinized.

Fortunately, not all arbitrators condone such conduct, and their awards reflect their intolerance of sexual harassment. An individual arbitration award is not binding precedent from one arbitration to another.¹⁴¹ However, the decisions of arbitrators confronted with similar problems can be illustrative in showing how some arbitrators are dealing with sexual harassment. Decisions also show that some behavior is so egregious that once proven, reasonable minds cannot differ on the penalty.

Arbitrators are known and evaluated by the quality of their awards. Those arbitrators who reflect a tolerance for sexual harassment, unless it is "excessive" or coupled with other work deficiencies, will soon find themselves without work, as employers and unions, eager to rid the workplace of sexual harassment, no longer select them. This same marketplace pressure cannot be exerted against a mediator whose work is

135. Monat & Gomez, *supra* note 119, at 715.

136. Hauck & Pearch, *supra* note 117, at 35 (citing King Soopers, Inc. 86 Lab. Arb. (BNA) 254 (1985), DOD Scott AFB, IL, LAIRS 15931 (1984) and Zia Company, 84 FLRR 2-2205 (1984)).

137. Hauck & Pearch, *supra* note 117, at 38.

138. *Id.* at 35 (citing Chicago Social Security Administration, 84 FLRR 2-2078 (1983)).

139. *Id.* (citing DOD Robins AFB, GA, LAIRS 17589 (1986)).

140. *Id.*

141. Code of Professional Responsibility for Arbitrators of Labor-Management Disputes of the National Academy of Arbitrators, *ARBITRATION IN PRACTICE*, app. at 225 (Arnold M. Zack ed. 1984). The Code provides "an arbitrator must assume full personal responsibility for the decision in each case decided" and "the extent, if any, to which an arbitrator properly may rely on precedent, on guidance of other awards, or on independent research is dependent primarily on the policies of the parties on these matters, as expressed in the contract, or other agreement, or at the hearing." Code at G(1) and G(1)(a).

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cloaked in confidentiality, persuasion, and subtle pressure.

Sexual harassment and the punishment for such conduct should not be subject to compromise or reconciliation. "The glories of cooperation . . . are easily exaggerated. If one party appreciates cooperation more than the other, the parties might compromise unequally. Moreover, the self-disclosure that cooperation requires, when imposed and not sought by the parties, may feel and be invasive."¹⁴² This is very true in sexual harassment cases.

Men and woman simply do not perceive the same event in the same way. Research has shown that women find sexual conduct in the workplace more disturbing than men do. "When a survey asked people how they would respond to being sexually approached in the workplace, approximately two-thirds of the men said they would be flattered, whereas two-thirds of the women said they would be insulted."¹⁴³ This difference in perception is perhaps the origin of sexual harassment behavior. Education can help cure this misperception of the welcome of an unsolicited proposition. Nonetheless, unwanted and unwelcome sexual conduct must be eliminated for the health of the workplace. If an employer values its female workers, gender insults and sexual harassment must be stopped.¹⁴⁴ Grievance mediation will not accomplish that goal.

C. Conflict of Interest and Sexual Harassment Grievances

While not the focus of this article, there is another consideration in deciding if mediation is appropriate: the union's duty of fair representation. The union's duty of fair representation of its members is a serious one, and the consequences are grave if the union fails in its responsibility.¹⁴⁵ The duty is complicated by the dual representative capacity the union serves in the case of a grievance based on sexual harassment. The union can find itself caught in the middle of the dispute.¹⁴⁶ Not only does the union represent the harasser in his grievance of the discipline or discharge he received because of his actions, but more often than not the victim of his actions is also a union member.

142. Grillo, *supra* note 72, at 1608.

143. Winterbauer, *supra* note 89, at 817 (citing *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1505 (M.D. Fla. 1991)).

144. Aggarwal, *supra* note 119, at 60.

145. Failure by the union to take the employee's grievance to arbitration could result in the union being subject to a federal court action for breach of the duty of fair representation. *Bowen v. U.S. Postal Serv.*, 459 U.S. 212 (1983); Robert J. Rabin, *The Impact of the Duty of Fair Representation Upon Labor Arbitration*, 29 SYRACUSE L. REV. 851 (1978).

146. LaVan, *supra* note 87, at 231.

As a result, a conflict of interest arises as the union attempts to serve two members, each with a decidedly different interest in the grievance and its outcome. This places undue pressure on the harassment victim, usually a woman, to minimize her abuse.

The victim is the loser in this conflict. A better procedure may be to have the victim aligned with management in the arbitration as the victim-witness of the harassment whose perpetrator has been disciplined. This eliminates the union's conflict because her abuse will be presented fully and completely by the employer to substantiate its disciplinary actions.

VII. CONCLUSION

Arbitration is not perfect. There will always be arbitrators who find odious conduct to be nothing more than "boys will be boys." However, grievance mediation is not the solution. Mediation poses a greater process danger to the victims of sexual harassment than arbitration. That process danger is partially due to the fact that most victims are women.¹⁴⁷ Much of it is due to the nature of grievance mediation as it is practiced, and the dynamics of the mediation process itself. "[F]orcing unwilling women to take part in a process which involves much personal exposure sends a powerful social message: it is permissible to discount the real experience of women in the service of someone else's idea of what will be good for them . . . or good for the system."¹⁴⁸ Some will argue that education, not discipline, is the way to eliminate sexual harassment. There is an enormous need to teach the work force what is acceptable conduct even at the roughest work sites. The preferred place for this education is outside the disciplinary setting. Nonetheless, discipline and discharge must remain the "iron fist" of punishment in the "velvet glove" of education. A strong, clear message must be sent to transgressors. That message must not be diluted by the vagaries that result from the "compromise" of mediation. Too much is at stake.

147. "[M]ediation as a process is not necessarily good or bad for women's interests; it depends on who the mediator is and what model of mediation is being used." Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Woman's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39, 53 n.78 (1985). However, "critics claim that mediation is detrimental to the interests of women, who, being less empowered, need both the formal legal system and aggressive legal representation to protect existing rights and pursue new legal safeguards." Janet Rifkin, *Mediation From a Feminist Perspective: Promise and Problems*, 2 LAW & INEQ. J. 21, 22 (footnote omitted) (1984).

148. Grillo, *supra* note 72, at 1607.

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Victims of sexual harassment must know that their harassers will be punished and that they will not be prodded to minimize their abuse in the guise of mediation and reconciliation. The victim is not the only benefactor from the public discipline of the harasser. How the employer, and ultimately the arbitrator, treat harassers has a profound impact on female workers. Victims of harassment, as well their female co-workers, are liable to view reinstatement or reduction in discipline "of the harasser as a slap in their face as well as a slap on the wrist of the offender."¹⁴⁹

Reinstatement or reduction of penalty could and probably would be a common result of grievance mediation. It may create fear and resentment among the female work force, and it sends "the wrong signal to other employees, particularly bullying male workers."¹⁵⁰ The psychological cost of this informal dispute resolution mechanism to the female work force would be high indeed.

Arbitration does not benefit the female workers alone. Male employees have the right to know what conduct and behavior is appropriate and acceptable. Mediation would leave doubts in the work force as to what conduct is permitted. However, vigorous enforcement through arbitration of the antiharassment work rules and the antidiscrimination clause in the contract sends the correct message that sexual harassment will not be tolerated.

Some will argue that mediation as a step toward grievance arbitration cannot do any harm. That is not the case. With settlement rates well in excess of the eighty percent range, grievance mediation would have a significant impact on how these cases would be resolved.

In grievance mediation, the victim is unrepresented and may not even be at the table when union and employer negotiate a resolution. In a situation where the victim is made part of the mediation and the disciplined worker is grieving to avoid discharge or suspension, the pressure on her would be enormous to capitulate and go along with a compromise. As a result, "[f]orcing mediation can produce a situation in which the [person] with the fewest scruples wins."¹⁵¹

In the case of grievance mediation, it is the harasser who is confronted with discharge or discipline. He has the most to lose in the arbitration and the most to gain in manipulating the mediation. It would be the victim of the harassment that would be the object of that manipulation, and the one who would suffer the most from it.

149. Aggarwal, *supra* note 119, at 15.

150. *Id.*

151. Grillo, *supra* note 72, at 1584.

It is this manipulative potential of mediation¹⁵² that is one of its greatest weaknesses. It should not be used in a setting fraught with so many dangers for the female victim. Just because it has been reported that many find mediation helpful does not mean everyone would profit from the experience, or that it is appropriate in every case.¹⁵³

Because of its flexible, informal nature mediation has been challenged as never appropriate¹⁵⁴ or as inappropriate under certain circumstances.¹⁵⁵ However, mediation is generally recognized as a useful means of resolving some disputes in a variety of fora.¹⁵⁶ Nonetheless, Professor Fuller, while a supporter of mediation, recognizes its limitation. He wrote:

A pervasive use of mediation could . . . obliterate the essential guideposts and boundary markers men need in orienting their actions toward one another and could end by producing a situation in which no one could know precisely where he stood or how he might get where he wanted to be. As between black and white, gray may sometimes seem an acceptable compromise, but there are circumstances in which it is essential to work hard toward keeping things black and white.¹⁵⁷

Professor Rosenberg put it another way: "[l]et the [f]orum [f]it the [f]uss."¹⁵³

152. Rifkin, *supra* note 147, at 21.

153. Grillo, *supra* note 72, at 1606.

154. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

155. Robert P. Burns, *The Appropriateness of Mediation: A Case Study and Reflection on Fuller and Fiss*, 4 OHIO ST. J. ON DISP. RESOL. 129 (1989); Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986); Lon L. Fuller, *Mediation — Its Forms and Functions*, 44 S. CAL. L. REV. 305, 328 (1971); see also Gagnon, *supra* note 7, at 272; Grillo, *supra* note 72, at 1547; Rifkin, *supra* note 147; Rowe, *supra* note 7, at 855.

156. JAY FOLBERG & ALISON TAYLOR, *MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION* (1984); JAMES E. CROWFOOT & JULIA M. WONDOLLECK, *ENVIRONMENTAL DISPUTES: COMMUNITY INVOLVEMENT IN CONFLICT RESOLUTION* (1991); Jessica Pearson & Nancy Thoennes, *Divorce Mediation Research Results*, in *DIVORCE MEDIATION: THEORY AND PRACTICE* 429, 440 (Jay Folberg & Ann Milne eds., 1988); Craig A. McEwen & Richard J. Maiman, *Small Claims Mediation in Maine: An Empirical Assessment*, 33 ME. L. REV. 237 (1981).

157. Fuller, *supra* note 155, at 328.

158. Introductory Remarks of Maurice Rosenberg as Moderator, Panel II: Let the Tribunal Fit the Case — Establishing Criteria for Channeling Matters into Dispute Resolution Mechanisms, *Current Developments in Judicial Administration: Papers Presented at the Plenary Session of the American Association of Law Schools*, 80 F.R.D. 147, 166 (1977).

SEXUAL HARASSMENT GRIEVANCES

In the headlong rush to add mediation to the labor grievance dispute resolution arsenal,¹⁵⁹ we should not lose sight of the fact that not every forum is appropriate for every fuss. We should be wary of situations where "mediation becomes a wolf in sheep's clothing."¹⁶⁰ The sexual harassment grievance is just such a situation.

159. Not all voices are praising grievance mediation. "But, before the praise gets any greater and the use more widespread, the grievance mediation process deserves much more careful scrutiny than it has received." Feuille, *supra* note 3, at 142.

160. Grillo, *supra* note 72, at 1610.

