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SEXUAL HARASSMENT: WINNING THE WAR, BUT LOSING THE PEACE?

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ABSTRACT

This article focuses on a division of opinion between labor arbitrators and some federal courts as to the proper *remedy* in workplace sexual harassment cases. Three schools of thought are identified. First, the author examines the reasoning of those who maintain that "progressive discipline" is appropriate and, second, the reasoning of those who have held that public policy requires the "immediate discharge" of harassers whose mere presence would otherwise prevent the employer from maintaining a nonhostile working environment. The author cautions against an emotional, divisive, witch-hunt mentality that national traumas such as the televised Thomas–Hill hearings can set loose and argues, third, that "tailored remedies" such as transfer, counseling, and apologies should be used in all but the most egregious cases if the overarching public policy of maintaining "industrial peace" is to be achieved.

In the still-evolving case law of workplace sexual harassment, a noticeable division of opinion exists among labor arbitrators and the courts as to the proper remedy. Three schools of thought appear to be emerging: one espousing "progressive discipline" in all but the most egregious cases; the second maintaining that "immediate discharge" is required if an employer is to provide a nonhostile working environment, and a third attempting to steer a creative course between the first two by directing innovative, "tailored" remedies such as transfers, counseling, and/or apologies. Sometimes such tailored remedies are in addition to, rather than a substitute for, the traditional remedies of progressive discipline, but they stop short of upholding the *discharge* of the occurred harasser. This article examines the underlying reasoning of each of the three approaches and asks which are best designed to serve the public policy of ending sexual harassment in the workplace *and* the longer-established public policy of encouraging "industrial peace" through collective bargaining.

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As with the proverbial tango, sexual harassment cases invariably involve at least two people: the alleged victim and the accused harasser. Both have rights that can be pursued to arbitration or to court, and outcomes naturally vary according to whose rights are the focus of the case, i.e., the victim's or the harasser's. Thus far, whereas the courts more often hear cases brought by plaintiff victims, most sexual harassment cases heard by arbitrators involve accused harassers whose discharge is grieved as being without "just cause" [1].

In labor arbitration it is traditional that, in discipline and discharge cases, the employer bears the burden of proof. Where the employer fails to prove that the grievant is guilty of the charge against him or her (whether that charge is sexual harassment or any other kind of serious misconduct), the traditional remedy is reinstatement *to the same position* with full back pay and benefits. However, where the employer proves that *some* misconduct occurred, but the arbitrator concludes that the ultimate penalty of discharge is arbitrary, discriminatory, excessively harsh in light of mitigating circumstances, or otherwise unjust, arbitrators have traditionally used their broad remedial powers to order reinstatement *to the same position,* but to subtract from back pay an amount equivalent to an appropriate unpaid suspension, to direct that the reinstatement is contingent on some performance by the grievant (e.g., undergoing treatment for alcohol or drug abuse) and/or to direct that the reinstatement is on a "last-chance" basis [2]. The constant, however, is that reinstatement is nearly always to the same position held by the grievant before the discharge. (We return to this subject in the discussion of transfers as a tailored remedy, *infra.*)

As we shall see, some courts subscribing to the "immediate discharge school" have vacated arbitral reinstatement awards in sexual harassment cases, finding such awards violate the "public policy" of opposing and eradicating sexual harassment from the workplace. Two federal courts even went so far as to vacate an arbitral award where the arbitrator reinstated an employee whose employer had *not* proved him guilty of *any* sexual harassment [3]. Before we examine those cases, however, it will be helpful to place them in their historical context.

BACKGROUND

This is not the first time a division of opinion having to do with how best to implement a "public policy" has occurred between labor arbitrators and the courts. A similar division was noticed in the 1980s when several federal courts vacated arbitral awards reinstating employees who had been discharged for various drug-related activities [4]. The underlying facts in the well-known Supreme Court decision in *United Paperworkers v. Misco,* for example, were that the grievant was accused of smoking marijuana with coworkers in the plant parking lot. The arbitrator concluded that the employer had not proved its case (the evidence was circumstantial), and he reinstated the grievant with full back pay. Both the district

and circuit courts vacated the award, finding it violative of the "public policy" against drugs in the workplace. Ultimately, the Supreme Court reversed and upheld the reinstatement award, but the possibility that awards *can* be vacated where a court finds that they violate a "well-defined and dominant public policy" remains, and lower federal courts have continued to use public policy as a vehicle for overturning arbitral awards that meet with their disapproval [5].

It is worth noting that the *Misco* and related drug cases were decided during the "Just Say No" campaign initiated by President Ronald Reagan and his wife Nancy. Drugs were the issue of the 1980s in much the same way that sexual harassment has been called the issue of the 1990s. Both social problems were the subject of nationwide television broadcasts, which made them the front-cover topics of the major news magazines and a favorite discussion topic of talk shows for months afterward. Both involved highly-charged, emotional issues having to do with workers' privacy rights and lifestyles, and both had the tendency to polarize those with opposing views. As to drugs, there continues to be a generational division, insofar as alcohol is more often the substance of choice of older workers, whereas marijuana and cocaine are "in" with younger ones. Similarly, sexual harassment became a national issue with the televised broadcast of the U.S. Senate Judiciary Committee's hearings in the Anita Hill–Clarence Thomas matter, and for months after the nation was abuzz with upset, angry talk between the genders, as well as between people of different age, class, racial, and ethnic backgrounds.

Given the divisiveness of drugs and sexual harassment in the general public debate, it is not surprising that both issues should have the same effect on two specific groups, namely labor arbitrators and judges (whose relationship, as Judge Stephen Reinhardt of the Ninth Circuit Court of Appeals cheerfully put it, "has always resembled that of any 'shotgun marriage' between strong-minded individuals") [6]. Speaking at the annual meeting of the National Academy of Arbitrators in 1987, Judge Reinhardt observed that there had long been two schools of thought on the bench with respect to the role of labor arbitrators; one he characterized as the "contract/control" school whose philosophy was reminiscent of the discredited *Cutler-Hammer* doctrine [7]. These courts see the arbitrator as strictly the parties' chosen contract reader, and they frequently vacate arbitral awards on the *Cutler-Hammer*-like grounds that the contract is clear and unambiguous, i.e., not susceptible to the interpretation given it by the arbitrator. The other approach, which he called the "expertise/defer" school, sees the arbitrator as an expert in the ongoing *relationship* between the parties. These courts are inclined to uphold arbitral awards that interpret not only the contract but also take into account bargaining history and past practice. These courts, for example, would *not* vacate an award where a discharge was reduced to a lesser penalty because the arbitrator found discharge to be excessively harsh in light of a past practice of progressive discipline for similar misconduct, whether or not the misconduct was proscribed by a "public policy."

With this recollection of the 1980s "Just Say No" campaign against drugs, and thus with a certain sense of "déjà vu all over again," we now turn to the current division between labor arbitrators and the courts with respect to the "issue of the 1990s"—sexual harassment. Here again, we find two schools of thought, one focusing on the relationship and past practice of the parties, the "progressive discipline school," and the other focusing on the words of the contract allowing for discharge, "the immediate discharge school." The third, or "tailored remedy" school mentioned at the beginning of this article is less well-defined and still emerging. We focus on it last.

THE PROGRESSIVE DISCIPLINE SCHOOL

"Progressive discipline" is a doctrine developed by labor arbitrators over the years grounded in due process concerns and premised on the belief that most employees, if adequately warned and given opportunity to improve, will correct their behavior to save their jobs. It is common workplace practice, therefore, for employees to be first given an oral or written warning putting them on notice that their conduct is not acceptable; second, given a written reprimand and/or a suspension without pay with the warning that further misconduct of a similar nature may result in more severe discipline, including discharge. Finally, employees who repeat their misconduct in spite of prior progressive discipline are subject to "the capital punishment of the workplace," namely discharge for just cause. Whether or not "just" cause actually exists in a given case is then a matter of adjudication by an arbitrator or a court if the discharge is challenged.

However, since discharge *is* the "capital punishment" of labor and employment law, it should come as no surprise that the evidence presented in many cases falls short of justifying "execution" but does justify a lesser penalty, such as an unpaid suspension. As stated earlier, it is not uncommon for arbitrators to reduce a discharge to a lesser penalty where, for example, discharge is found to be excessively harsh in light of past practice, where it is found to be discriminatory, or where mitigating circumstances such as provocation are present. Even a cursory review of published arbitration awards readily produces numerous cases where discharges for misconduct of all kinds, e.g., threatening or assaulting a supervisor, fighting on the job, "horseplay," use of abusive language, and use of racial slurs, *and sexual harassment* have been reduced to a lesser penalty [2, pp. 691-707].

Before discussing remedy further, it is important first to understand how arbitrators determine whether or not there is "just cause." When just cause is the issue before the arbitrator, most apply, explicitly or implicitly, what has come to be called "The Seven Tests of Just Cause" [8]. While variations of these tests had been used by arbitrators for years, it was Arbitrator Carroll R. Daugherty's list of seven questions in a 1966 arbitration award that became a kind of definitive checklist for determining just cause in discipline and discharge cases [9]. The seven tests are:

1. NOTICE: Did the Employer give to the employee forewarning or foreknowledge of the possible or probable consequences of the employee's disciplinary conduct?

2. REASONABLE RULE OR ORDER: Was the Employer's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the Employer's business, and (b) the performance that the Employer might reasonably expect of the employee?

3. INVESTIGATION: Did the Employer, before administering the 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. FAIR INVESTIGATION: Was the Employer's Investigation conducted fairly and objectively?

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

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

7. PENALTY: Was the degree of discipline administered by the Employer 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 Employer? [8, pp. 23-24].

Not surprisingly, since sexual harassment often takes the form of threats, assault, "horseplay," or abusive language, since the seven tests have proven their worth in innumerable discipline and discharge cases over the years, and since labor arbitrators, like judges, are not innovators by nature, arbitrators have frequently applied the tests in determining whether or not there was "just cause" to discipline or discharge employees accused of sexual harassment. In other words, arbitrators have treated sexual harassment the same as any other form of serious misconduct rather than create a "new animal" requiring new and different burdens and standards of proof and/or new remedies [1, pp. 13-18].

Since this is a pattern of arbitral behavior that is predicted to continue, it is worth exploring in greater detail Arbitrator Daugherty's explanation for why he originally developed a list for himself. Interestingly, he wrote in a 1972 award reinstating an employee discharged for "horseplay" (allegedly pouring water down on the shop foreman from a height of forty feet) that, among the reasons why he developed "The Seven Tests" in the first place was "to minimize an arbitrator's consideration of irrelevant facts and his possible human tendency to let himself be *blown by the variable winds of sentiment* on to an uncharted and unchartable sea of 'equity'" [10]. Considering how the "variable winds of sentiment" were whipped into a veritable typhoon by the 1991 televised testimony of

Judge Clarence Thomas and Professor Anita Hill, these cautionary words of Arbitrator Daugherty carry a special meaning for adjudicators of sexual harassment cases today. Daugherty was warning himself and his colleagues to beware of mass hysteria, beware of the witch-hunt mentality, beware of the natural human tendency to be unduly influenced by these pressures because they prevent one from being fair and objective. In short, he advised the application of the seven tests to prevent the adjudicator from deciding the merits according to his or her emotional reaction to inflammatory facts.

An example of applying the seven tests in a sexual harassment case is found in *Stroehmann Bakeries, Inc. and International Brotherhood of Teamsters, Local 776,* where the arbitrator reinstated an employee who had been accused of sexual harassment. The arbitrator concluded that the employer had not performed an investigation intended "to discover whether the employee did in fact violate . . . a rule" (Daugherty's third test), had not conducted what little investigation there was "fairly and objectively" (Daugherty's fourth test), and had not produced "substantial evidence or proof that the employee was guilty as charged." (Daugherty's fifth test) Nevertheless, in spite of the above-cited findings of the arbitrator, the district and circuit courts to whom the employer appealed vacated the reinstatement award on grounds that it violated public policy [3]. Before discussing the reasoning, however, it is helpful to understand the basic facts of the case as set forth by the arbitrator.

Grievant Leonard, a forty-year-old married man with two teenage children, standing over six feet and appearing (to the arbitrator) to weigh more than two hundred pounds, had been employed as a Stroehmann Bakeries delivery truck driver for seventeen years when the daughter of a friend of his was hired as a night clerk at Stauffers, one of the customers to whom Leonard delivered Stroehmann's baked goods. The two had a friendly, bantering relationship when the young woman, herself being five feet four and weighing 224 pounds, told her mother that the Grievant had "grabbed her breast, . . . pushed himself against her, . . . had an erection . . . [and then] said, "Do not tell your father because we are real good friends" [11, p. 873]. The mother called Stauffers to complain, and Stauffers called Stroehmann's, asking that the grievant "not serve any of the four (4) Stauffers stores anymore" [11, p. 873]. Stroehmann's managers assured Stauffers that "corrective action would be taken immediately," and shortly thereafter they interviewed the accuser by telephone taking notes as she told her story. When she began to sob half-way through the conference call, however, Stroehmann managers admitted that they tried to be very "solicitous" of her feelings, "went easy" on her, and did not question any of the apparent inconsistencies in her account [11, p. 874].

What happened next is what resulted in the arbitrator's express conclusion that there was not just cause for the discharge. In spite of the fact that Stroehmann's own "Disciplinary Program" rules stated that the purpose of suspending an employee before discharging him was to "*allow higher management to investigate*

and collect the facts before a final and official dismissal is declared," Stroehmann never conducted an investigation aimed at "collecting the facts" from the *accused* as well as the accuser. Instead, the grievant's immediate supervisors called him into a meeting, telling him when he asked whether he should bring a union representative that it was merely "up to him," and, when he arrived alone, simply asked for his "reaction" to the complaint. When the grievant "reacted" saying that it wasn't true, that the accuser was "a wacko," that he loved his wife and would not consider jeopardizing his job and marriage, and that he could show them that his CB (Citizen's Band) radio wasn't working so that part of his accuser's story [that he told her he'd been talking about "an orgy" with two girls on it] couldn't be true, Stroehmann's management refused the offer to look at the CB—and no further investigation occurred before the grievant was informed a few days later that his discharge was final.

Hearing both sides of the story many months later, the arbitrator was clearly appalled at what he called "a burlesque of an investigation," wherein the telephonic word of a stranger was taken over that of a seventeen-year employee with no history of sexual misconduct [11, pp. 874-75]. After stating clearly that he found the alleged misconduct (breast grabbing) a dischargeable offense if proved, the arbitrator explained why he found it had *not* been proved in the case before him:

> Second, what *is* involved in this case is the absolute insufficiency of Stroehmann's response to the information its management received. . . . Neither Jacobs nor Garret did anything more to determine what in fact happened on November 12th than accept uncritically W—'s telephone account of bizarre behavior on L—'s part. No one probed the apparent inconsistencies between W—'s statement and Zimmerman's double hearsay account to them (and triple hearsay in Company Exhibit 3-B) of what W—'s mother had told him W— had told her. No one met W— in person to evaluate her appearance and demeanor. (For example, at the hearing before me W— stopped cold and then blushed furiously when a simple question about an orange pointed out a hole in her story. It really does not matter where the orange in fact had been. What did matter was W—'s embarrassment that everyone saw at the hearing but no one in Stroehmann's management had an opportunity to see in their limited investigation.) . . .
>
> More important, Jacobs and Garret never once asked L—himself what had happened at Stauffer's Lititz store on November 12th. Instead, withholding warning and opportunity to prepare, they cornered L— alone and confronted him with scurrilous accusations of scurrilous behavior that Jacobs and Garret had already accepted as Gospel. . . . And between that time and the November 20th discharge decision, Stroehmann's discharge decision, Stroehmann's management did nothing more to investigate the facts than to confirm Zimmerman's impressions of W—s bashfulness and of her status as a "very Christian girl." Not only am I mystified by the relevance of those issues to the charges against L—, but I am equally stumped, assuming their relevance, by Stroehmann's failure to consider with equal weight L—'s Christianity or his status as a married father of two.

> Third, as a result of the absolute insufficiency of Stroehmann's investigation, it could not possibly have made a supportable judgment concerning the charges against L—. This is not to say that I believe W— was lying and L—was truthful. The point is that, even on the complete record before me, I have insufficient evidence to resolve the credibility conflict between W— and L—. And if that were the determinative question before me, Stroehmann's would have had to lose for having failed to bear its burden of proof [11, p. 875].

The import of the above, for our purposes here, is that the arbitrator considered it imperative, if the employer's investigation was to meet the "sufficiency test," 1) that the accuser be interviewed in person, 2) that the accused be given an opportunity to bring someone with him if he was going to be faced with serious allegations, and 3) that the accused be given adequate opportunity not only to "react," but to tell his side of the story as well. Where the employer failed to do these things, it failed to perform a "fair and objective" investigation—and that failure alone rendered the discharge *not* for "just cause" under the now-traditional "seven tests" approach discussed above.

Inasmuch as reinstatement with full back pay and benefits is the traditional remedy where the alleged misconduct is not proved, the arbitrator reinstated the grievant in *Stroehmann* to his previous position, expecting, no doubt, that the award would be treated as final, and that would be the end of the matter. As demonstrated in the following discussion, however, the matter most decidedly did *not* end at arbitration; on the contrary, it continued on for years before two courts, both of whom, as discussed below, subscribed to the "second school," which holds that discharge is necessary if an employer is to prevent the recurrence of a sexually hostile work atmosphere.

THE IMMEDIATE DISCHARGE SCHOOL

After receiving the arbitration award directing them to reinstate grievant Leonard, Stroehmann Bakeries sought summary judgment in federal district court claiming that reinstatement violated public policy against sexual harassment in the workplace. The union filed a similar motion arguing that the award was based on "a fair interpretation by the arbitrator of the 'just cause' provision of the collective bargaining agreement" [3, p. 1188]. The court granted Stroehmann's motion and remanded the case to be heard by another arbitrator directing that the second arbitrator should expressly decide whether or not the grievant was guilty as accused rather than, as the first had done, base the award solely on the insufficiency of Stroehmann's investigation. The court ignored much of the arbitrator's opinion, selecting instead certain evidence presented by the employer going to the alleged bias of the arbitrator, to reach the following conclusion:

> The law is well established that where an arbitrator's award violates public policy, a district court may vacate the award. *United Paperworkers Int'l Union v. Misco, Inc.,* 484 U.S. 29, 108 S. Ct. 364, 98 L.Ed. 2d 286 (1987); *W.R. Grace & Co. v. Local Union 759, International Union of United Rubber, etc.,* 461 U.S. 757, 103 S. Ct. 2177, 76 L.Ed, 2d 298 (1983). As indicated, defendant agrees that public policies exist with regard to sexual harassment in the work place and against sexual assault and abuse in general. We find that the arbitrator's decision to reinstate Leonard violates such policies and *sends a message to Stroehmann employees and to the public that complaints of sexual assault are not treated seriously, sensitively or with real regard for the truth of the allegations.*
>
> The credence and weight which was attributed to irrelevant considerations, by itself, offends public policy. The manner in which the award was reached could easily deter other victims, and *Leonard's reinstatement could suggest to Stroehmann's work force that claims of unwitnessed sexual harassment will not be treated seriously* [3, p. 1189, emphasis added].

In short, the court held that an employee who had been *accused,* but not accorded industrial due process in the employer's investigation and, hence, not proved guilty, nevertheless must remain discharged until expressly found innocent because reinstatement would send "the wrong message" to his accuser and to other employees.

Not surprisingly, the matter was appealed. The appeal, however, was unsuccessful. A panel of three judges on the Court of Appeals of the Third Circuit upheld the lower court's decision by a vote of two to one. The majority opinion reasoned:

> Under the circumstances present here, an award which fully reinstates an employee accused of sexual harassment without a determination that the harassment did not occur violates public policy. Therefore, Arbitrator Sands construed the Agreement between the parties in a manner that conflicts with the well-defined and dominant public policy concerning sexual harassment in the workplace and its prevention. *His award would allow a person who may have committed sexual harassment to continue in the workplace without a determination of whether sexual harassment occurred. Certainly, it does not discourage sexual harassment. Instead, it undermines the employer's ability to fulfill its obligation to prevent and sanction sexual harassment in the workplace.* For these reasons, we conclude that reinstatement of this employee without a determination of the merits of the allegation violates public policy [12].

The author submits that the *Stroehmann* case is a good example of what happens when differences in adjudicatory focus are compounded by "tunnel vision." Whereas the arbitrator focused on the accused grievant's rights to his job, the courts focused on the accuser's (and even potential accusers') right to a nonhostile work environment. As to "tunnel vision," all of the

adjudicators in *Stroehmann* appear not to have thought at all about *alternative* remedies. None mentioned, for example, the possibility of granting Stauffer's expressed request by simply assigning another driver to make deliveries there. Or, in the unlikely event that the grievant was the only truck driver available, requiring him to make the Stauffer's delivery during daytime hours when the purported victim was not at work. We will return to the subject of alternative, "tailored" remedies subsequently. But first, some further thoughts on the *Stroehmann* courts' reasoning that reinstating the accused harasser would send "the wrong message."

It is worth asking what "message" *is* being sent to which members of the public in the area of remedying sexual harassment. Are *women* (since they are usually the victims) being told that if they accuse a fellow employee or supervisor of sexual harassment, that person is guaranteed to lose his job? If so, the message may result in *preventing* women from raising the issue rather than encouraging them to do so. There is no evidence in *Stroehmann,* for example, that the young woman accuser intended to get her father's friend (and with whom she herself had had a friendly, "bantering" relationship) *fired* when she told her mother that he had grabbed her breast and pushed himself against her. More probably, all she hoped to accomplish was to send *him* "a message" that he should never grab her breast again. Had he never done so, in all likelihood they could have worked together comfortably as they had done before. As she was to learn, however, once she had made her accusation, the case took on a life of its own, and she had no control over its outcome. Even if all of her accusations were completely true, it is entirely possible that she regretted having made them after she saw that they cost her father's friend his job.

Conversely, are *men* (since they are usually the perpetrators) being sent "a message" that, if they are accused of *sexual* misconduct—even by someone whom they consider somewhat "wacko"—that their normal due process rights will be trampled over in a rush to judgment by nervous employers, arbitrators, and courts? There is no evidence that the grievant in *Stroehmann,* for example, would not have been more than willing never to deliver baked goods at Stauffer's for the rest of this working life if that would have saved his job. Nor is there any evidence that he might not have accepted a transfer to a nondelivery job or to a job on the day shift.

In any event, and whatever may or may not have been an adequate and mutually acceptable remedy in the *Stroehmann* case, the author submits that neither of the two "messages" outlined above *should* be sent to American workers if the ultimate goal is the encouragement of "industrial peace" between management and labor, as well as between men and women, in the increasingly diverse American workplace. The better "message" is the one conveyed by sanctions tailored to "fit the crime" and aimed more at ending the harassment than at ending the harasser's job. We turn now to a brief description of some of the remedies developed by arbitrators and judges to accomplish these purposes.

THE TAILORED REMEDY SCHOOL

It should be emphasized that no consensus exists among the courts that sexual harassers must necessarily be *discharged* to maintain a nonhostile workplace environment. In fact, several courts have stated outright that there is no such requirement in Title VII of the 1964 Civil Rights Act or other expressions of the "public policy" against sexual harassment. In *Landgraf v. U.S.I. Film Products,* for example, Barbara Landgraf was subjected to what the district court described as "continuous and repeated inappropriate verbal comments and physical contact" by John Williams, a union shop steward who worked on her shift [13]. Although the employer's investigation turned up four women who corroborated Landgraf's complaint with experiences of their own with Mr. Williams, Williams claimed that they were all lying, and the employer gave him a written reprimand and a nondisciplinary transfer. This relief did not satisfy Ms. Landgraf, and she quit two days after being told that the employer believed it had appropriately remedied the situation. Although the district court found sexual harassment had in fact occurred, it denied Landgraf's claim of constructive discharge. In upholding the lower court, the Fifth Circuit had this to say with respect to the employer's remedial action:

> There was evidence that USI had given Williams its most serious form of reprimand and acted to reduce his contact with Landgraf at the workplace. Landgraf testified that Williams continued to harass her after his reprimand; however, she did not report these incidents to USI before resigning. *Title VII does not require that an employer use the most serious sanction available to punish an offender, particularly where, as here, this was the first documented offense by an individual employee. The district court did not clearly err in concluding that USI took steps reasonably calculated to end the harassment* [13, p. 430, emphasis added].

The key language is "steps reasonably calculated to end the harassment." In *Stroehmann,* for example, the employer could have issued the grievant a reprimand putting him on notice of more serious disciplinary action including discharge should he engage in similar sexual misconduct again and, in all likelihood, that would have ended the harassment, thus satisfying the primary objective of Title VII of the 1964 Civil Rights Act. There was no evidence presented in *Stroehmann* that the accused harasser had grabbed female coworkers' breasts before, that he was harassing anyone other than the one woman who complained, or that he had a record of ignoring warnings about past misconduct of any kind. Nor, for that matter, is there any evidence in the case that other employees would necessarily have interpreted disciplinary action short of discharge as "not taking their complaints seriously or sensitively." In short, there appears to have been no overwhelming reason for immediate discharge, as opposed, for example, to a stiff reprimand or an unpaid suspension to make certain that he took the company's warning seriously. Such penalties can be made known to the accuser and to other

employees as readily as permanent discharge can be made known; "the message" will still be conveyed that sexual harassment will not be tolerated.

While some courts have refused to sustain arbitral reinstatement awards, others who have heard the case *before* alleged harassers were discharged have pointed to remedies that should at least be given an opportunity to succeed before discharge action is required. Such a recommendation was made by the Ninth Circuit in a widely reviewed case involving behavior by a male Internal Revenue Service (IRS) agent that caused "a reasonable woman" to be frightened. In *Ellison v. Brady,* Kerry Ellison worked in the San Mateo, California, office of the Internal Revenue Service [14]. Although she had had a collegial working relationship with Sterling Gray for two years, in 1986, after she had declined to go out to lunch with him, Mr. Gray handed her a note that read:

> I cried over you last night and I'm totally drained today. I have never been in such constant term oil [sic]. Thank you for talking with me. I could not stand to feel your hatred for another day [14, p. 874].

According to Ms. Ellison, when she read this note, she became "shocked and frightened" [14, p. 874]. She left the room; Gray followed her into the hallway and demanded that she talk to him, but she left the building. When Ellison showed the note to her supervisor, Bonnie Miller (who supervised Gray also), the supervisor said, "This is sexual harassment." Ellison, however, asked that nothing be done about it; she wanted to try to handle the situation herself, and she asked a male coworker to tell Gray that she was not interested in him and he should leave her alone. Gray called in sick the next day, and then Ellison left for a four-week training program in St. Louis. While she was there, she received a card and a typed, single-spaced, three-page letter from Gray in which he wrote, in part:

> I know that you are worth knowing with or without sex . . . Leaving aside the disasters of recent weeks. I have enjoyed you so much over the past few months. Watching you. Experiencing you from O so far away. . . . I will [write] another letter in the near future [14, p. 874].

Ellison, testifying that she thought Gray might be "crazy" or "nuts," immediately telephoned supervisor Miller back in San Mateo, telling Miller that she was "frightened and really upset" and asking that either she or Gray be transferred because she would not be comfortable working with him. (The reader will note that even then Ms. Ellison did not seek the discharge of her harasser.) The same day Miller had a counseling session with Gray, during which she informed him that he was entitled to union representation and that he should leave Ellison alone. Over the next few weeks, while Ellison was still in St. Louis, Miller reminded Gray several more times that he was not to contact Ellison in any way. Gray transferred to the San Francisco IRS office shortly before Ellison returned to San Mateo, but after three weeks, he filed a union grievance requesting a transfer back

to San Mateo. The IRS and the union settled the grievance with an agreement that Gray could return after spending four more months in San Francisco and promising not to bother Ellison. Supervisor Miller informed Ellison of the settlement agreement in a letter explaining that the agency believed it had taken adequate steps to end the harassment by separating Gray and her for six months and assuring Ellison that additional action would be taken if Gray did not keep his promise not to bother her. Ms. Ellison was not satisfied, however, and she filed a formal sexual harassment complaint with the IRS. The Equal Employment Opportunity Commission (EEOC) determined the IRS had taken adequate action to prevent further harassment, and the matter then went to the Ninth Circuit.

Before determining whether or not the IRS had taken adequate remedial action, the Ninth Circuit first determined that it had to evaluate Gray's behavior from the perspective of the "victim" (in this case a woman) rather than from the perspective of the perpetrator. After a thoughtful explanation of why women's "greater physical and social vulnerability to sexual coercion" can make a "reasonable woman" fearful of male behavior that might not similarly frighten a "reasonable man," the court then went on to say it believed most employers could prevent the occurrence or recurrence of sexual harassment by taking steps short of dismissal [14, p. 878]. On this point the court wrote:

> We too believe that remedies should be "reasonably calculated to end the harassment." *Katz,* 709 F2d at 256. An employer's remedy should persuade individual harassers to discontinue unlawful contact. *We do not think that all harassment warrants dismissal.* Barrett 726 F2d at 427; rather remedies should be "assessed proportionately to the seriousness of the offense." *Dornhecker v. Malibu Grand Prix Corp.,* 828 F2d 307, 309 (5th Cir. 1987). Employers should impose sufficient penalties to assure a workplace free from sexual harassment. In essence, then, we think that the reasonableness of any employer's remedy will depend on its ability to stop harassment by the person who engaged in harassment [14, p. 882, emphasis added].

Later, in a footnote, the court addressed the possibility that the "mere presence" of a sexual harasser could create a hostile environment. Clearly having in mind the fears expressed by Ellison that Gray might be obsessive, compulsive, or mentally unbalanced, the court allowed that in such "rare instances" dismissal might be required:

> If harassers are not removed from the workplace when their mere presence creates a hostile environment, employers have not fully remedied the harassment. When employers cannot schedule harassers to work at another location or during different hours, employers may have to dismiss employees whose mere presence creates a hostile environment. We acknowledge that in rare instances dismissal may be necessary when harassers did not realize that their conduct was unlawful. However, we think that in only very, very few cases will harassers be unaware that their conduct is unlawful when that conduct is so serious that a reasonable victim would thereafter consider the harasser's

> mere presence sexual harassment. In those few instances, we think it only proper to conclude that the harasser should have known that his or her conduct was unlawful. In order to avoid the loss of well-intentioned productive employees, employers must educate and sensitize their workforce. . . . [14, p. 883].

Significantly, the Ninth Circuit concluded that, while it was not prepared to say that Mr. Gray should have been *dismissed,* neither was it satisfied that the IRS had done enough to end the harassment because, in fact, *no* disciplinary action had been taken in the matter. Neither the oral counseling by Miller nor the transfer to San Francisco were disciplinary actions, nor did the IRS ever warn Gray of possible discipline including discharge if he harassed Ellison again after returning to the San Mateo office. Hearing the case on a motion for summary judgment, the circuit concluded that it had insufficient evidence to determine whether or not Mr. Gray was one of those "very, very rare cases" of inability to understand the unlawfulness of his conduct (in other words that he was, as Ellison feared, "crazy" or a "nut"), and the court remanded the case for further development of the facts surrounding the terms under which Gray was allowed to return to San Mateo. Apparently contemplating the possibility that Gray could work even at San Mateo without necessarily being a "presence" creating, for Ellison at least, a hostile working environment, the court directed the lower court to ascertain "how often Ellison and Gray would have to interact at San Mateo" [14, p. 883].

Again, as in *Stroehmann,* there is no evidence in *Ellison* that Ms. Ellison herself, in spite of the fact that her fears about Gray's mental balance were found "reasonable," ever asked that Gray be discharged. Instead, it appears that she sought only that he be transferred or, at a minimum, be put on notice that he could be disciplined, including discharged, if he harassed her further after returning to the San Mateo office. It is appears that, had the IRS taken some disciplinary action against Gray, perhaps even only a written warning, the courts, like the EEOC, would have found that the employer had taken appropriate and sufficient steps to end the harassment without costing itself the loss of an otherwise-valued employee. Where the IRS went wrong, therefore, was not in failing to fire Gray, but in failing to discipline him in any way at all.

It behooves us here to review the remedial language of the *Guidelines on Sexual Harassment* issued by the U.S. Equal Employment Opportunity Commission in 1980. The EEOC, the agency established to enforce Title VII of the 1964 Civil Rights Act and whose guidelines are given great weight by both labor arbitrators and the courts, stated:

> (f) Prevention 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 [15].

Nothing in this language requires the *discharge* of sexual harassers; instead it urges that "strong disapproval" must be expressed (implying that slaps-on-the-wrist will not suffice, but serious reprimands may), that "appropriate" sanctions should be developed (implying that the penalty should be tailored to fit the crime), and that "methods to sensitize" should be developed (implying that most employees will correct their workplace behavior accordingly if they understand the reasons for it).

The challenge, of course, is to determine what *is* "appropriate" action in any given case. Here some arbitrators and judges have proved themselves exceptional by developing carefully-laid-out remedies that take into consideration the legitimate perspectives of employer, union, accusers, accused, and the workplace environment as a whole.

Before describing some of these remedies, it is important to understand the sources from which arbitrators draw their remedial authority. Arbitrator Anthony Sinicropi, well-known past president of the National Academy of Arbitrators and coauthor of *Remedies in Arbitration,* the definitive treatment of the subject to date, writes that there are two views on the sources of arbitral remedy authority: the "legal authority" view, which sees the collective bargaining agreement or the *law* as the source of authority, and the "policy" view, which sees the collective bargaining relationship as the source [16]. According to Sinicropi, remedies premised on the legal authority concept, which "appear[s] to be the more conservative approach," as well as those premised on relationship considerations, are both subject to criticism by some courts [16, p. 546]. Nevertheless, Sinicropi observed, arbitrators are subject to other pressures pushing them to find creative, tailored remedies. He identified eight specific changes producing this pressure, the following of which are pertinent here:

> 1) The new expectancies of the parties. In the past, remedies were simple and broad, relatively homogenized and bland, usually a general request to "make the party whole." The parties accepted, in fact expected, these results. Today, however, parties appear to have greater and more specific expectations with respect to remedial actions by arbitrators. These may include requests for re-employment, back pay, reinstatement of benefits, interest, damages, and even apologies. While these demands for expanded remedies appear to be significant changes in the area of arbitration, perhaps they are simply the reflection of a larger trend that seems to cut across many of the institutions of our society, or the increased litigiousness within our society. . . .
>
> 2) The role of courts in the arbitration decision-making process. As mentioned above, courts have shown an increasing tendency to review arbitration awards on their merits. They have also found a greater need for specificity in remedies. . . .
>
> 6) The widening array of social issues facing society. These issues have also added to the increasing difficulties in dealing with remedies. The rise of

> employee assistance programs highlights this development.... Because these programs involve remedial aspects of their own, arbitrators often must consider disciplinary actions in light of the employer's obligations (implicit or explicit) to assist in the rehabilitation of such employees, as well as the employee's rights to the continuation or reinstatement of employment status [16, pp. 548-549].

The reader will quickly see that, because sexual harassment is such an emotional and controversial issue, the pressures to respond to "the new expectancies of the parties," "the increased tendencies of the courts to review awards," not to mention the larger pressure of "the widening array of social issues facing society," can unnerve the most self-assured and experienced arbitrator. As Stephen Crow and Clifford Koen observed:

> Remedies in sexual harassment cases present a special challenge to arbitrators . . . What is the remedy if a grievant who is victim of sexual harassment prevails at arbitration? Should the arbitrator make the grievant whole by fashioning a remedy that includes firing a supervisor–harasser, transferring the victim or the perpetrator, compensating the victim for psychological counseling and pain and suffering. At first blush, some of these remedies seem radical in labor arbitration contexts. Any of them, however, would be possible in contemporary legal contexts outside labor arbitration. Will arbitrators take a conservative or liberal approach to remedial action in sexual harassment cases? We believe the approach will be conservative [1, pp. 11-12].

Crow and Koen went on to note that "arbitrators are not radical trendsetters" and that, "to remain acceptable to the parties over time, [they] must keep an eye on the suitability of their decisions" [1, p. 12]. Authors Sinicropi and Crow and Koen all cautioned that arbitrators are on sound ground only when the parties themselves have proposed innovative remedies. Nevertheless, they predicted that some changes in sexual harassment remedies will begin appearing in arbitral awards, specifically, "more transfers of victims and perpetrators . . . and, like the remedial trends in alcohol and drug cases, . . . more consideration to the use of counseling" [1, p. 12]. Sinicropi predicted "even apologies" [16, p. 548].

The traditional remedies in arbitration are to "make whole" the grievant who is unjustly disciplined and to adjust the progressive disciplinary actions of warnings, reprimands, unpaid suspensions to "fit the crime." Where such standard remedies are found to be inadequate, the following alternatives appear to be the predicted "appropriate sanctions" (to use the EEOC's language in the 1980 *Guidelines*) that arbitrators are most likely to apply in sexual harassment cases, separately or in combinations: 1) transfers, 2) counseling, and 3) apologies. Let us discuss them one at a time.

TRANSFERS AS REMEDY

Here arbitrators and judges should be careful to direct the transfer of the harasser rather than the victim—unless the victim has requested a transfer or has voiced complete willingness to accept it. As the Ninth Circuit stated in *Ellison,* citing the EEOC Compliance Manual (CCH) Section 615(a)(9)(iii), para. 3103, at 3213 (1988):

> We decline to accept the government's argument that its decision to return Gray to San Mateo did not create a hostile environment for Ellison because the government granted Ellison's request for a temporary transfer to San Francisco. Ellison preferred to work in San Mateo over San Francisco. We strongly believe that the victim of sexual harassment should not be punished for the conduct of the harasser. We wholeheartedly agree with the EEOC that a victim of sexual harassment should not have to work in a less desirable location as a result of an employer's remedy for sexual harassment [14, p. 882].

Interestingly, another federal judge, Frank Easterbrook of the Seventh Circuit, better known for his "Chicago School of Law and Economics" approach than for his sympathy for individuals, also seems to have arrived at the conclusion that valued employees are reinstateable but not necessarily *to their former positions.* Speaking at the annual meeting of the National Academy of Arbitrators in 1991, Judge Easterbrook cited a case in which an arbitrator reinstated a telephone lineman who sexually harassed a customer in her home. Easterbrook commented that "[a] lineman who sexually harasses a customer may have some ability to engage in gainful employment, but I should think in a different job" [17]. He went on to explain that employers must take many different kinds of risks in a free marketplace, including risks with individual employees whose conduct may be less than desirable, but whose skills are needed, sometimes critically, to keep the business running. And, if the employer designates an arbitrator to make the final judgment, in Easterbrook's opinion, the employer should be required to comply with the arbitrator's decision. Taking the example of the captain of the ill-fated EXXON Valdez, said to have been restored to his position after presumably conquering his drinking problem via treatment in an Employee Assistance Program, Judge Easterbrook stated:

> Why do employers take risks with their customers' (and the environment's) safety? Sometimes they do so because there is a shortage of skilled workers. . . . Sometimes firms retain problematic employees because the promise of redemption helps induce workers with problems to 'fess up' and get help. Few drinkers would admit their problems if that meant discharge; many will do so if the firm is willing to take them back after treatment. To induce more employees to step forward—and thus reduce risks in the aggregate—the firm must be willing to take some risks with individual employees. *If cost-sensitive corporations make such calculations, it cannot be*

> *whimsical for arbitrators to do so when called on to render final decisions* [17, pp. 72-73, emphasis added].

If reinstatement or transfer *to a different position, worksite, or shift* is an appropriate remedy in certain sexual harassment cases, however, that does not mean that arbitrators or judges can or will direct such a remedy on their own volition. On the contrary, adjudicators need to be informed by the parties as to what *are* the possibilities for transfer in any given case. Clearly, in situations where the individual involved has very specific or limitedly transferable skills or where the employer has only one facility, transfer may not be a viable remedy for practical reasons. Where there *are* transfer possibilities, however, the parties should explain them in detail. If the moving party requests nothing more specific that "a transfer," "a transfer" may be all that is awarded, and the parties will be left with a new problem: negotiating a transfer that is acceptable.

COUNSELING AS REMEDY

Counseling resembles the traditional progressive discipline approach in that it serves as a "warning" to the employee that his or her conduct is regarded as unacceptable. "Warning," however, should be just the beginning; "counseling" presumably goes on to explain *why* the conduct is unacceptable and to explore *ways* of correcting the behavior so that it ceases to be a problem. If an employer has an Employee Assistance Program (EAP), as many do, employees can be sent there to be counseled about sexually harassing behavior just as they can be sent there to be counseled about alcohol or drug abuse. Where there is no EAP in place, arbitrators and the courts will have to rely on the parties to find appropriate counselors in the marketplace, but that should hardly prove a major obstacle, at least not in the larger metropolitan areas where mental health professionals abound.

A good example of a carefully crafted remedy requiring the grievant to obtain professional psychiatric counseling is found in *Porvene Roll-A-Door, Inc. and Allied Industrial Workers* [18]. The grievant in *Porvene* was discharged for threatening to "deck" his supervisor if he (the supervisor) did not stop needling him. The arbitrator found that the grievant was "provoked" because of the cruel nature of the supervisor's needling and because he (the grievant) was suffering from excessive stress brought on by his divorce and custody battle. However, the arbitrator did not simply reduce the discharge to an unpaid suspension and reinstate the grievant. Instead, she crafted the following tailored remedy:

> Since it is my duty to fashion a remedy to fit the circumstances of a particular case, and since it is my opinion that the grievant's problems could be stress-related rather than disciplinary, I find that the discharge should be converted to an indefinite suspension not to exceed twelve months from the date of the discharge . . . which will result in a situation similar to a medical

> leave, provided the grievant place himself, at his own expense, under the care and treatment of a medical doctor trained in psychiatry for the treatment of his stress-related problems. If at any time before the expiration of the twelve-month period, grievant's doctor . . . proves to the satisfaction of management or if a dispute arises, a board of medical doctors . . . selected jointly . . . that the grievant has learned to cope with his stress sufficiently so as to function in the Company's environment, grievant shall be reinstated without back pay, but with full seniority and other contractual benefits as if he had been on medical leave of absence. If grievant fails to provide [such evidence], he shall be terminated in a manner consistent with provisions in the Parties' Contract relating to persons on medical or disability leave who fail to provide a written release to regular duties from a qualified and acceptable doctor [18, p. 1020].

In brief, the arbitrator converted a *disciplinary* discharge first to an unpaid medical leave, conditioning reinstatement on the grievant's successful recovery from stress, and, second, converted the disciplinary discharge to a *nondisciplinary* "medical" discharge if he failed to recover. This remedy has much to be said for it. First, it forced the workplace harasser to face what appeared to be his real problem (in this case emotional stress brought on by divorce, but in others it could be any number of underlying mental, emotional, or behavioral disorders that may be treatable if the individual is persuaded to obtain appropriate care). Second, it converted a "black mark" on the individual's employment record, which could frighten off potential employers for the rest of his working life, to a benign termination for inability to return from a medical leave, i.e., it converted a "dishonorable" to an "honorable" discharge, to use the well-known military terms. Third, it separated the individual from the person whom he threatened, thus giving both victim and perpetrator time to put their emotions behind them before they had to interact at work again. (Significantly, however, even this carefully crafted remedy did not provide for reinstatement to a different job or at least to a different supervisor. Had the parties suggested this, the arbitrator might have included it.)

APOLOGY AS REMEDY

As noted above, Anthony Sinicropi characterized "apologies" as an "expanded remedy" which the parties may "even" request. This characterization implies that apologies are somehow outside the range of the normal/traditional remedies, and that arbitrators should be cautious about awarding them unless specifically requested by both parties; otherwise the arbitrator may exceed his or her authority. This author disagrees. As discussed earlier, the traditional relief in arbitration is to "make whole" whoever is harmed. Surely in sexual harassment cases where the "harm" is largely to the victim's dignity, an apology falls well within the make-whole parameter. Moreover, especially if the apology is public, the victim has the emotional satisfaction of restoring the "balance of honor" as it were. The peculiarly humiliating nature of sexual harassment was noted in a 1981 decision authored by then D.C. Circuit Chief Judge, Skelly Wright, in *Bundy v. Jackson*:

> The relevance of these "discriminatory environment" cases to sexual harassment is beyond serious dispute. Racial or ethnic discrimination against a company's minority clients may reflect no intent to discriminate directly against the company's minority employees, but in poisoning the atmosphere of employment it violates Title VII . .. Racial slurs, though intentional and directed at individuals may still be just verbal insults, yet they too may create Title VII liability. How then can sexual harassment, which injects *the most demeaning* sexual stereotypes into the general work environment and which *always represents an intentional assault on the individual's innermost privacy,* not be illegal? [19].

As to the peculiarly hurtful consequences of sexual harassment cases on the *harasser,* Justice William O. Douglas, in a dissenting opinion in *Sampson v. Murray,* commented on the irreparability of stigmatizing injuries:

> On that issue [showing irreparable injury] there is more than meets the eye. Employability is the greatest asset most people have. . . . And the harm is not eliminated by the possibility of reinstatement, for in many cases the ultimate absolution never catches up with the stigma of the accusation. Thus the court in *Schwartz v. Covington* [citation omitted] issued a stay upon a finding of irreparable injury where a serviceman was to be discharged for alleged homosexual activity: . . . a discharge on the basis of a lifetime record or on the basis of captious and discriminatory attitudes of a superior may be a cross to carry the rest of an employee's life. And we cannot denigrate the importance of one's social standing or the status of social stigma as legally recognized harm [20].

Clearly, both Judge Wright and Justice Douglas understood the profoundly degrading nature of *sexual* harassment, that those subjected to it or accused of it invariably feel insulted to their "innermost" core [21]. It has been observed that reputational injuries are wrongs which, once done, cannot be undone, and an employee left with a reputational injury is in "a situation where both the remedy at law and the equitable remedy are inadequate" [21, p. 728]. Nevertheless, something is often better than nothing, even if it *is* inadequate. Surely most individuals who have had their innermost dignity assaulted, either by sexual harassment or by false accusations, will not affirmatively argue that they *do not want* a public apology or retraction of the defamatory statement. The problem will lie not with individuals actively refusing apologies or retractions; it will lie, rather, with their representative *failing to ask* for such relief in their closing arguments or post-hearing briefs. As noted above, adjudicators are not innovators; as a general rule they provide only the forms of relief that are either traditional or are specifically requested by one or both parties. As Marvin Hill and Anthony Sinicropi noted with respect to granting a remedy not requested by a party, "it should be emphasized that even after the parties have empowered the arbitrator with jurisdiction to decide the substantive issue, *they should specifically outline the*

requested relief . . . Failure to do so may result in an award with inappropriate relief, or no relief, being granted" [22].

In sum, what is needed with respect to an apology as part of the remedy in sexual harassment cases is for one or both of the parties to make the affirmative request for it. Better yet, such requests should include whether the apology should be in writing, should be posted on employer bulletin boards and/or carried in internal newsletters, should be made a part of the perpetrator's and victim's personnel records, and the like. Arbitrators and judges would also be well-advised to request that the parties explore the remedy in detail in their posthearing briefs, specifically addressing any unusual requests such as transfer, counseling, and/or apologies. Such a request, coming from the adjudicator, will undoubtedly result in more creative attention being paid to the remedy than is often the case.

CONCLUSION

It cannot be gainsaid that sexual harassment is a serious—and seriously harmful—social problem. Nor can it be gainsaid that there is strong public agreement, now confirmed by numerous statutes, EEOC Guidelines, court decisions, collective bargaining agreements, and arbitration awards, that sexual harassment is unacceptable in the workplace and must be stopped. The question, rather, is how best to see that it *is* stopped while still maintaining "industrial peace" among members of both management and labor and among members of both genders. If sexual harassment can be analogized to a form of warfare ("the battle of the sexes"), then it behooves those who would negotiate peace terms (or at least terms for a ceasefire) to observe the results of various treaties that have been signed over the years. In this area history teaches that, where terms are excessively harsh or punitive, the seeds are sown for further friction and discontent, even the "next war." Likewise, where terms are vague or unduly lenient, the seeds are sown for a repeat of the behavior that led to the war in the first place. Either way, the dispute has not been effectively or finally resolved; the war may have been won, but the peace was lost.

Applying the analogy to sexual harassment disputes, where perpetrators are subjected to the ultimate penalty of permanent discharge for reasons that operate to stigmatize them in the eyes of society and potential future employers, or where perpetrators are merely slapped on the wrist suggesting that "boys will be boys," victims—who just want the harassment to stop—will hesitate to complain, and the harassment will continue. Clearly, the "appropriate sanctions," will generally lie somewhere between the two extremes. In "rare cases," the misconduct will be so egregious or the perpetrator found to be so uncontrolled or incorrigible that there will be no doubt about the appropriateness of discharge. In the vast majority of Sexual harassment disputes, however, the proper remedy will require careful thought on the part of all concerned.

In any event, the author predicts that the current division between the "progressive discipline" school of thought and the "only-discharge-will-do" school will narrow in the coming years as labor arbitrators and the courts look more closely at how best to remedy sexual harassment cases. If so, the third school of all concerned tailored remedies will become increasingly acceptable. Moreover, if arbitrators lead the way in this regard, the courts are likely to follow. As Ninth Circuit Court Judge Reinhardt pointed out with respect to the courts' tendency to overturn arbitral reinstatement awards in drug cases:

> Courts are basically a conservative institution. Judges do not easily change their basic attitudes or practices, and there has long been the understanding within the judiciary that arbitration is an important and useful forum for the resolution of various types of disputes. Moreover, if judicial willingness to intervene causes parties regularly to challenge arbitral awards in the courts, thus substantially increasing our workload, some judges will undoubtedly have second thoughts about the *wisdom* of their action . . . [4, p. 38, emphasis added].

Of course, "wisdom" is hardest come by when emotions are at their most intense, and sexual harassment is, if nothing else, a highly charged, profoundly emotional issue with a capacity to divide individuals into bitterly opposing camps. As the Clarence Thomas–Anita Hill hearings amply demonstrated, particularly where there is an appearance of unfairness to one or both sides, there will remain a sense that "justice" was *not* done. Men will continue to fear being "lynched" and defamed; women will continue to fear being disbelieved or being responsible for costing someone his job. Only if there is a public perception that sexual harassment cases are decided fairly and remedied appropriately will such fears be allayed and will the opposing camps be sufficiently reconciled to work together productively.

The challenge for advocates who present and adjudicators who decide sexual harassment cases will be to rise above the emotional winds, to avoid the shoals of overreaction and underreaction, to hold fast to the compass of the traditional tests of just cause while at the same time charting a creative remedial course whereby the individuals involved do not necessarily have to continue working together but can nevertheless continue to be productively employed. The fundamental purpose for passing all twentieth-century labor legislation in the United States, beginning with the Railway Labor Act on down through the 1991 Civil Rights Act, has been to encourage "industrial peace." It will ill serve the nation as a whole if this overarching public policy is sacrificed in the interest of a public policy that opposes workplace sexual harassment. Nor does such a sacrifice have to be made. As this article has attempted to show, there are ways of reconciling and harmonizing both public policies so that both "the war" *and* "the peace" are won.

* * *

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ENDNOTES

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4. *United Paperworkers International Union v. Misco,* 484 U.S. 29, 108 S. Ct. 364, 98 L.Ed 2d 286 (1987).
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