

# Labour Arbitration of Co-Worker Sexual Harassment Cases in Canada

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## Abstract

Women have the right to a workplace free from sexual harassment under Canadian provincial and federal human rights legislation. Canadian labour laws incorporate the right to a grievance procedure including binding arbitration where arbitrators must interpret and apply human rights legislation. This paper analyzes co-worker sexual harassment cases in order to assess how well arbitrations protect the right of unionized women to a harassment free workplace. Results indicate that women complainants were often subjected to aggressive gendered cross-examinations and the application of gendered jurisprudence that largely ignored the impact of gendered power relations in the workplace. The conclusion is that women's experiences in arbitrations are likely a deterrent to filing formal complaints, effectively undermining rather than protecting their rights. Copyright © 2012 ASAC. Published by John Wiley & Sons, Ltd.

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Labour arbitrations are dispute resolution mechanisms in grievance procedures available in unionized workplaces and ensure workers' rights are exercised. Relevant employment law, including human rights codes, must be incorporated into the arbitral process. Employers have a statutory duty to provide a safe and healthy workplace free from harassment

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## Résumé

Aux termes de la législation canadienne fédérale et provinciale en matière des droits de la personne, les femmes ont le droit de travailler dans un environnement exempt de harcèlement sexuel. La législation du travail au Canada leur accorde le droit de recourir à une procédure de règlement de griefs dont l'arbitrage exécutoire au cours duquel les arbitres doivent interpréter et appliquer la législation en matière des droits de la personne. Le présent article analyse les cas de harcèlement sexuel perpétrés par les collègues dans le but d'évaluer jusqu'à quel point les arbitres protègent le droit des femmes syndiquées dans un environnement professionnel exempt de harcèlement.

Il ressort des résultats que les plaignantes sont souvent soumises à de sévères interrogatoires sexistes et à l'application d'une jurisprudence influencée par le sexe qui, pour l'essentiel, ne tient pas compte des rapports de force entre hommes-femmes en milieu de travail. L'étude conclut que les expériences vécues par les femmes pendant l'arbitrage sont susceptibles de décourager celles qui ont l'intention de déposer des plaintes officielles. Une telle situation mine leurs droits au lieu de les protéger. Copyright © 2012 ASAC. Published by John Wiley & Sons, Ltd.

**Mots-clés :** harcèlement sexuel, harcèlement sexuel de la part des collègues, droits de la personne, droits des femmes, arbitrage des conflits du travail

(Robichaud v. Canada, 1987). This paper fills a gap in the literature by assessing how well co-worker sexual harassment arbitrations protect the rights of women to a harassment free workplace. The combination of feminist and industrial relations literature provides an innovative analytical framework for the study.

The Canadian Human Rights Commission defines harassment as "any behaviour that demeans, humiliates or embarrasses a person, [...which] a reasonable person should have known would be unwelcome" (2006, p. 3). According to the Supreme Court of Canada, workplace sexual harassment is the "unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse, job related consequences for the victim of

harassment” (Janzen v. Platy Enterprises Ltd., 1989, p. 3). Despite human rights legislation prohibiting sexual harassment as a form of discrimination and a substantial body of case law, evidence shows that it continues to occur in Canada (Aggarwal & Gupta, 2006) and in many other countries (Chappell & Di Martino, 2000). Although complaints from men are increasing, women are the most frequent targets (Aggarwal & Gupta, 2006). And while women are sexually harassed in both female- and male-dominated workplaces, such occurrences are more frequent in traditionally male work environments such as construction, the trades, and the uniformed services (Hodges, 2006; O’Melveny, 2001).

The next sections provide further context for the main body of the paper by way of a brief review of sexual harassment theories, a discussion of arbitrations as an avenue of redress and the role of the parties, and an overview of previous arbitration studies before moving to the analysis of the cases, discussion, and concluding comments.

### Theoretical Explanations of Workplace Sexual Harassment

a) Theories of sexual harassment can be broadly categorized according to their primary level of explanation: the individual (e.g., Lucero et al., 2006), the organization (e.g., Haiven, 2006; Hart & Shrimpton, 2003), or society (e.g., Hodges, 2006; Wilson & Thompson, 1993). targets is important, as is attention to organizational factors such as policies, training, channels for redress, management, and union commitment. While acknowledging the complexity of sexual harassment and its follows, with a focus on feminist-informed societal level explanations. Feminist theorists are primarily interested in women as targets of harassment, and as is the case in this paper, they explain sexual harassment in terms of the protection of male dominance, masculinity, and power:

The harassment [in traditionally male workplaces] appears designed to preserve the male employees’ masculinity, which is threatened by the ability of women to perform the work, and to put women back into their “rightful” place... Sexual coercion more often affects women in traditionally female occupations... the woman in the traditional gender role is treated as a sex object, precisely because she is in her traditional gender role... Both types of harassment involve the exercise of power, but in different ways and for different purposes. (Hodges, 2006, p. 188).

According to this view of a sex-based hierarchy, men will, in general, have power over women regardless of social or organizational status. It follows, then, that co-worker sexual harassment can be usefully understood as the exercise

of informal power in what is most often a formally equal power relationship “arising from the male sexual prerogative, which implies that men have an unfettered right to initiate sexual interactions or assert the primacy of a woman’s gender role over her work role” (Paludi 1990, as cited in Wilson & Thompson, 2001, p. 72).

Wilson and Thompson (2001) envisaged an organizational hierarchy as “a structure of gendered power” (p. 65), which is complex and hidden, since “the very rules used to determine if behaviour is being seen as harassment are ideologically produced and in themselves an exercise of power” (p. 71). Cleveland and Kerst (1993) illustrated in part how these rules work in practice through male networking, including the rallying around of an accused harasser and the denial that sexual harassment has occurred. Bearing in mind these gendered dynamics, Zippel (2008) advocated a sexual harassment policy that takes account of “gender inequality as the underlying cause of sexual harassment” (p. 178), observing that its implementation:

becomes a political process in which gender and workers’ interests are negotiated. . . [and] the implementation of sexual harassment laws is shaped not only by the laws themselves, but also by systems of industrial relations and institutionalized gender politics. (Zippel, 2008, p. 176)

### Arbitration of Sexual Harassment and the Role of the Parties

Fairness and corrective discipline are central principles in Canadian arbitral jurisprudence (i.e., Oshawa Foods and UFCW 1993, p. 40). The employer has to establish just cause for discipline and cannot contribute (through action or inaction) to any misconduct. Discharge as a last resort after an employee has been granted the opportunity for improvement has long been enshrined in arbitral principles Arbitrators’ decisions must move beyond the misdemeanour itself to assess the circumstances of a grievance including the impact of any remedy on the grievor and workplace.

A grievance alleging sexual harassment by a supervisor or manager more easily fits the conventional model of arbitration. In contrast, many unions face a “classic dilemma” (Haiven, 2006, para 19) in co-worker sexual harassment cases where an alleged harasser files a grievance appealing employer discipline (Cohen & Cohen, 1994; Crain, 1995; Haiven, 2006; Hodges, 2006; Marmo, 1980; O’Melveny, 2001; Taylor, 1998). The duty of fair representation reinforces this tension because protecting the interests of both members potentially undermines bargaining unit solidarity in a political organization where union leaders face regular elections (Hodges, 2006). In turn, the “the gendered nature of most unions... may suggest great difficulty in convincing [unions] to make ending sexual harassment a priority” (Hodges, 2006, p. 185). Indeed, a gendered culture and

structure in unions has been identified as a barrier to equality bargaining (Briskin & McDermott, 1993; Hart, 2002).

Nevertheless, some Canadian unions developed sexual harassment policies in the late 1980s and early 1990s but few tackled co-worker harassment. That said, the Canadian Auto Workers' (CAW) introduced a co-worker harassment policy in 1988, which allowed complaints to be lodged with members of Women's Committees or any other union official (Nash, 1994). In addition, the Canadian Union of Public Employees (CUPE) provided advice on collective agreement language and established separate representation at the national office to protect the interests of a harassed co-worker in the event of a union local filing a grievance on behalf of an alleged harasser (National Director of Equal Opportunities, CUPE, personal communication, 1992).

That this policy development was inconsistent in the labour movement is indicated by problems identified in the male-dominated building trades unions. For example, women's experiences on offshore oil construction sites revealed that co-worker sexual harassment was common and difficult to report, with unions and the employer consortium refusing to tackle it (Hart & Shrimpton, 2003). Moreover, sometimes national union policies are difficult to translate into practice, as shown in a case where a woman was sexually harassed and violently assaulted by a co-worker; her union filed a grievance on behalf of the perpetrator to overturn a dismissal by the employer. The Labour Relations Board found that the union had failed to protect the woman's right to a safe workplace, while also noting the employer's lack of policy (Ontario Women's Justice Network, 2000).

### Previous Studies of Co-Worker Sexual Harassment Arbitrations

The literature on sexual harassment arbitrations is limited, and there is even less on co-worker harassment. Union tension in co-worker sexual harassment cases in American arbitrations was noted by Cohen and Cohen (1994), Crain (1995), Hodges (2006), Marmo (1980), and O'Melveny (2001). A data set of co-worker sexual harassment arbitrations was analyzed by Marmo (1980), Cohen and Cohen (1994), and Lucero, Middleton, and Valentine (2004). Marmo (1980) noted consensus among arbitrators that sexual harassment involving physical contact deserved dismissal, whereas penalties varied in other cases. Cohen and Cohen (1994) examined union defense strategies, finding that denial and victim blaming were more frequently argued than blaming society or management, even though such strategies resulted in no difference in outcomes. Lucero et al. (2004) focused on the rights of the perpetrator with the aim of recommending effective management practices to avoid co-worker harassment arbitrations. Dilts and Samavati (2007) analyzed a set of sexual harassment cases and concluded that arbitrators had denied the occurrence of

co-worker sexual harassment when there was no connection between it and performance of the target.

Turning to Canadian research, Aggarwal's (1991) review of sexual harassment cases identified a small minority pursued on behalf of women alleging harassment by their supervisors or managers. The majority of the cases were discipline grievances, but very few dealt with co-workers in the same union. Taylor's review of just cause cases (1998) was aimed at assisting management and unions in their judgment of appropriate penalties, which he concluded were based on the severity of the conduct as well as its context. Haiven (2006) assessed the effectiveness of zero tolerance sexual harassment policies in a unionized environment and found that the union's defence of the alleged harasser in an adversarial context made them difficult to implement. Both Haiven and Taylor pointed to the potential dilemma for unions in co-worker harassment cases.

In summary, there is very little literature on co-worker sexual harassment arbitrations from the perspective of the women who have been harassed, or literature with a focus on their rights. At the same time, Cohen and Cohen (1994), Crain (1995), Haiven (2006), and Hodges (2006) are noteworthy for their consideration of the plight of female complainants featured in their studies. However, the small body of Canadian research on co-worker harassment arbitrations has not focused on the workplace rights of women.

### Method

Twenty-six arbitration cases decided from January 1992 to June 2008 were analyzed. The Canadian Labour Law Library was searched for awards listed in the Labour Arbitration Cases (LAC) in all jurisdictions. Of main interest in this study were cases where men had allegedly harassed a female co-worker in the same union —arbitrations that fell outside these parameters were excluded. The cases studied covered the public sector (14) and the private sector (12), female- and male-dominated workplaces, and were from several jurisdictions: Alberta, British Columbia, Manitoba, Nova Scotia, Ontario, Saskatchewan, and the federal government.

The specific questions guiding the qualitative analysis of each full text award were: what was the nature of the harassment, how was the woman's experience embedded in the case (specifically with regard to her evidence and its assessment), what were the arguments of the union and the employer, what was the arbitrator's decision and reasoning, what were the implications of legal or arbitral principles adopted for the complainant and women employees generally, and finally, how did the industrial relations process interact with the interests of the woman in the case and women employees generally. These questions were developed from insights gained from the literature and each of the awards was coded according to the text's relationship with those questions. An analysis sheet was constructed for each case and then integrated

with all the other case analysis sheets in order to develop themes based on patterns identified in the data.

The use of cases published in the LACs is well established in previous research (Aggarwal, 1991; Haiven, 2006; Taylor, 1998). Each award analyzed provided insight into the process, which included the application of arbitral principles and the roles played by the parties. At the same time, I kept in mind how arbitral process and outcomes may inform workplace attitudes and behaviour (cf. Crocker, 2008, on the transformative potential of law). Although broadly similar in their structure, the awards varied slightly in their sequencing and detail, ranging in length from very short to the more usual 15 to 20 pages to quite lengthy at over 50 pages. Nevertheless, the union and employer arguments, grievor and complainant evidence, the jurisprudence submitted by both parties, and the reasoning behind the arbitrators' decisions were all clear. It is worth noting that although it is reasonable to assume that grievors' testimony is based on coaching by their union representatives or counsel, at the same time we cannot assume that everything said by a grievor in a hearing is a union argument.

From an ethical perspective, all the awards noted in the following analysis are in the public domain and available on the Internet, where most cases include the names of the grievor and the complainant in the text. I followed the practice of conventional legal citation of arbitration cases that includes identification of organization, union, and date of decision, but excluded any individual employees' names throughout the paper.

### Review of Arbitration Cases

Of the 26 cases analyzed, only three cases (12%) were to settle grievances filed by unions on behalf of women. The majority of cases (23 or 88%), consisted of grievances taken to arbitration on behalf of men disciplined by the employer for sexual harassment. Because one of the arbitrations consisted of three grievances, the number of men represented in this larger set of cases is 25. Twenty-three grievors had been dismissed and two had been suspended for less than two weeks. Both suspensions were reversed with full compensation. Of the 23 discharges, 14 (61%) were reduced to reinstatement, mostly with unpaid suspension, and nine (39%) were upheld. The next section will focus on the few women's grievances reaching arbitration, followed by a review of those fought on behalf of men.

### Women's Grievances Taken to Arbitration

One award assessed whether a woman's resignation should have been accepted by the employer, with the union arguing that it was the result of sexual harassment that the employer had failed to halt, despite it being reported by the

employee and the union (Goodyear Canada and USWA, 2002). A factory quality inspector was subjected for seven months to extremely graphic pornographic material being posted at and around her work station. After a final incident in the women's washroom, she went home, and, being unable to go into work, called in sick. Shortly afterwards she handed in her resignation and management accepted it. When she asked for her job back three weeks later, the employer refused.

This woman's evidence revealed that she felt singled out, frightened for her physical safety, experienced stress and anxiety, and was on medication for depression as the harassment continued. Her being upset to the point of tears and sometimes hysteria during the hearing was a strong theme in the arbitrator's award. The union's submission was that the company had "failed to take the grievor's concerns seriously and was unwilling to change the male-dominated culture of the plant. In the process, the Company stripped the grievor of her dignity, almost caused her to lose her family, and forced her to resign" (Goodyear, 2002, p. 28). The arbitrator believed the woman's evidence:

I accept the grievor's evidence that what she really wanted to do was to escape the emotional torment caused by the ongoing harassment and to attempt to regain some measure of physical and emotional security... it is, to my mind, utterly incomprehensible that the Company officials would have allowed the grievor to collect her things and walk out the door. (Goodyear Canada and USWA, 2002, p. 25)

The arbitrator criticized the employer for conducting only a superficial investigation and for victim blaming, since management had boarded up the only female washroom after the final incident rather than stopping the harassment. During the proceedings the employer had argued that resignation was her own choice. These shortcomings were exacerbated by a lack of communication with the harassed employee throughout. The award reinstated the woman with full compensation plus damages for mental stress, but not for any general damages as claimed by the union.

Arbitral reasoning in this decision incorporated an informed view of the nature and impact of co-worker sexual harassment and employer responsibility to address it, thus sending a clear signal to the immediate parties and, ultimately, the broader labour relations community. Moreover, the award clarified an important arbitral principle differentiating sexual harassment cases such that they are not to be seen by the employer as a typical union-management problem capable of resolution through the traditional management of a grievance procedure, but require a wider responsibility demanding a proper investigation and support of the harassed employee. Management had restricted communications with the harassed woman to matters concerning the grievance only and therefore failed to "investigate the harassment, identify the perpetrator, effect the necessary discipline, keep the

grievor informed, ensure that the workforce was apprised of the important rights at stake, and put in place the necessary strategies to protect the grievor and prevent such behaviour from recurring” (Goodyear Canada and USWA, 2002, p. 31).

In the other two cases pursuing women’s grievances, the unions argued that discipline was unjust because sexual harassment was the underlying cause of their behaviour. The jurisprudence requires an arbitrator to address three questions in discipline cases (Wm. Scott and Company and CFAW, 1977): (a) Has the employee given just and reasonable cause for some form of discipline by the employer? (b) If so, was the employer’s decision to dismiss (or suspend, etc.) the employee an excessive response in all the circumstances of the case? (c) If the arbitrator does consider discharge excessive, what alternative measure should be substituted as just and equitable? The first question requires the arbitrator to decide whether sexual harassment did occur, on the balance of probabilities (an arbitral rule derived from civil law, and different from the criminal law requirement of establishing an occurrence beyond reasonable doubt), as guided by the relevant jurisprudence. This leads logically to answering the second and third questions in an assessment of any mitigating circumstances listed in the jurisprudence to include length of service, economic hardship, and unfair management action—any one of which could potentially allow the arbitrator to lessen a penalty.

In *Hershey Canada Inc. and BCT* (2002), a woman received a written warning for leaving an assembly line without permission. In arbitral terms, a written warning is a serious step in a cumulative record of progressive discipline that takes an employee closer to dismissal with cause. The union argued that management’s discipline was unjust because it had not dealt with sexual harassment by two co-workers on a parallel conveyor belt who pointed, made innuendos, laughed at her, and stared up her dress throughout her seven hour shift. She was refused permission to leave her work station on three occasions by the Charge Hand. Eventually she left in frustration to go to the supervisor’s office when there was an escalation into aggressive and threatening gesturing.

After hearing the evidence and arguments, the arbitrator concluded: “I am satisfied that the grievor endured over seven hours of humiliation and degradation at the hands of two employees who subsequently received absolutely no discipline for their misconduct in that regard” (Hershey, 2002, p. 13). Also, the employer had revealed a victim blaming mentality, recommending that she wear pants to work when the company uniform was a dress. The award ordered the record wiped clean and an apology for an “inadequate and inappropriate response to her complaint, for the flawed investigation leading to the discipline imposed and for the inappropriate and deficient investigation and subsequent report on the sexual harassment complaint” (Hershey Canada Inc. and BCT 2002, p. 14).

In *Coastal Mountain Bus Co. and CAW* (2008), a bus driver was dismissed for excessive absenteeism. The union argued this was unjust because she was subjected to unwanted advances from a male co-worker, involving cards, gifts, persistent invitations and attempted hugs that escalated to following her at and around work, and once, hiding on her bus and jumping out when she did her pre-trip inspection. As the arbitrator commented, “the fright she experienced has lingered... she testified the stress was escalating... She would be crying while driving to work anxious about what Mr [name of grievor] would do or where he would show up” (Coastal, 2008, p. 6). This type of harassment, with associated fear on the part of the victim, fits the definition of stalking according to Crocker (2008). Medical evidence confirmed a diagnosis of anxiety and depression with prescribed medication for a range of mental and physical symptoms including “worsening fatigue, excessive emotionalism, feelings of restlessness and being overwhelmed... interrupted sleep, being shaky, having diarrhea, heartburn and chest pains” (Coastal Mountain Bus Co. and CAW, 2008, p. 38). Initially, the woman had opted for the company’s informal joint union-management sexual harassment approach. The union sent a cease and desist letter to the perpetrator and the shop steward spoke to him, but the harassment continued.

The employer argued that the absenteeism began before the sexual harassment and continued after “the harassment had been conclusively resolved” (Coastal Mountain Bus Co. and CAW, 2008, p. 27), maintaining that the grievor had a general anxiety disorder. Dismissal was justified due to repeated and disruptive absences deemed unrelated to the sexual harassment and the company’s judgment that her attendance would not improve. Union arguments were that the sexual harassment had caused short- and long-term disability and was insufficiently taken into account in a mechanistic application of the company’s Attendance Management Plan (AMP). Furthermore, the failure to stop the harassment after an ineffective cease and desist letter, an unfair transfer, and the skewed implementation of the AMP added up to discrimination under the Human Rights Code.

The grievance was upheld and the woman reinstated with full benefits. Arbitral reasoning was that the employer was mistaken in assuming her absenteeism would continue once the sexual harassment stopped, when the medical evidence had indicated otherwise. Also, management was too quick to discount the harassment’s impact on some of her absences, especially in the year leading up to the discharge. The award nevertheless concluded there had been no discrimination by the employer, and that the woman suffered from a pre-existing general anxiety disorder. No lost wages or damages were awarded, but the employer was to pay for past and future counselling; the grievor had to cooperate with the employer in designing a return to work plan.

This case illustrates well the tendency noted in the arbitrations studied for women's interests to be lost in the details, language, and jurisprudence of the award, whether they are the grievor or not. The text was dominated by a detailed chronology of her absences from work (including legitimate ones) and associated medical evidence in an attempt to calculate what in arbitral terms constitutes "culpable and non culpable [innocent] absenteeism" (Coastal Mountain Bus Co. and CAW, 2008, p. 1). The issue of sexual harassment and its effect on women was marginalized, in effect, by this focus. There was no recognition of the inappropriateness of management blaming the victim by transferring her to a new division instead of stopping the harassment, as in the Goodyear (2002) decision. The legal principles applicable to sexual harassment cases outlined in the latter award were not followed by this arbitrator. For example, part of the reasoning behind the conclusion that the employer dealt with the sexual harassment appropriately was built on the lack of challenge or grievance from the union, an accepted position in conventional labour relations.

Overall, the issue of sexual harassment and the women who suffered it were relegated to the background, despite their central role as grievors, pushing into the foreground the conventional union-management conflict underlying arbitrations, which are quasi-judicial with adversarial characteristics. The cases embedded in jurisprudence on effective resignation and culpable absenteeism were particularly vulnerable, with long stretches of text devoted to technical discussion. However, Goodyear (2002) transcended this troubling tendency to include a rigorous analysis of sexual harassment and its ramifications for that case and arbitral principles in general. This was in contrast to Coastal (2008) which lacked any serious text at all on sexual harassment paralleled by a failure to recognize the seriousness of what amounted to criminal harassment, in its reliance on conventional arbitral and labour relations principles. Not surprisingly, this omission led to a marginalization of the harassed woman and only a partial upholding of her grievance with no lost wages or damages awarded for discrimination.

### Men's Grievances Taken to Arbitration

Three main and interconnected themes emerged from analysis of these 23 cases: inadequate understanding of sexual harassment with a subtheme of victim blaming; undermining women's credibility as witnesses through gendered arguments; and highlighting or exaggerating mitigating factors for their harassers. These themes were mostly identified in union arguments and often in grievors' evidence quoted verbatim or summarized in the awards. In some cases, arbitral reasoning also revealed one or more of these themes. Space prohibits a full discussion of all

intertwining research themes mentioned above or indeed all three arbitral questions. Therefore, this paper will focus on the first arbitral question, which is most closely associated with the major themes of misunderstanding sexual harassment and questioning women's credibility. A separate paper provides a comprehensive discussion of how assessment of mitigating factors (addressing the second and third arbitral questions) affects women's rights (Hart, 2011).

Analysis of the just cause awards indicated a disconnect in many cases between theoretical explanations of sexual harassment and key definitions used by the parties in establishing whether it had occurred. Most arbitrators incorporated a particular typology, cited as early as 1992 in Royal Towers Hotel and HRCBU and as recently as 2006 in XL Foods and UFCW award—the latter quoted verbatim on sexual annoyance as differentiated from coercive harassment:

Sexual annoyance, the second type of sexual harassment, is sexually related conduct that is hostile, intimidating, or offensive to the employee, but nonetheless has no direct link to any tangible job benefit or harm. Rather, this annoying conduct creates a bothersome work environment and effectively makes the worker's willingness to endure that environment a term or condition of employment. (XL Foods, 2006, p. 7)

The XL Foods award continued to quote this typology with regard to two subgroups of sexual annoyance:

Sometimes an employee is subjected to persistent requests for sexual favours and persistently refuses. Although that refusal does not cause any loss in job benefits, the very persistence of the demands creates an offensive work environment, which the employee should not be compelled to endure. The second subgroup encompasses all other conduct of a sexual nature that demeans or humiliates the person addressed and in that way also creates an offensive work environment. This includes sexual taunts, lewd or provocative comments and gestures and sexually offensive physical contact. (XL Foods, 2006, p. 7)

The problem with the typology is that it allowed union arguments and arbitral reasoning to conclude that co-worker sexual harassment did not fall into a serious coercive category because in most cases the perpetrator did not have authority over the women (e.g., Manitoba Lotteries and MGEU, 2002; Saskatchewan and SGEU, 2001). Paradoxically, in the very few cases where the grievor was in the same bargaining unit but had supervisory power over the woman harassed (e.g., Canadian Airlines and IAM, 2000; Kitchener (City) and KPFFA, 2008;), arbitrators did not judge the sexual harassment as coercive either, making a lesser penalty more likely.

The wording of this working definition is questionable in its portrayal of misconduct that is "hostile, intimidating or offensive" or when it "demeans or humiliates" as merely an "annoyance" or "bothersome." Also, it is difficult to

understand why “sexually offensive physical contact” is in a less serious category of harassment, which is in apparent contradiction with other arbitral and judicial jurisprudence that depicts physical touching as the most serious conduct (Taylor, 1998) and even as sexual assault (see McMaster University and SEIU, 1993). In a number of cases arbitrators acknowledged previous jurisprudence that defined sexual harassment as an abuse of sexual power closer to the gender hierarchy explanations in the literature, but nevertheless reached the conclusion that co-worker sexual harassment fell into the “annoyance” category and therefore was not serious. For example, in one case where the union had argued that a grievor’s behaviour was rude but not sexual harassment, the arbitrator disagreed, saying:

there is no doubt that the grievor, by his actions... intended to degrade and humiliate [the complainant]. His actions indicate the intention to demonstrate sexual dominance and, in his own words, he wanted to show the others that he had equivalent or greater power than she did. As such, the grievor’s actions amounted to sexual harassment of [the complainant]. (Oshawa, 1993, p. 8)

The harassment included sexual physical touching and very obscene gestures and comments but even so it was not deemed serious enough to outweigh the mitigating factor of no warning being given by the employer, even though there was a sexual harassment policy in place. The arbitrator substituted a suspension for the original dismissal.

Assessment of misconduct in the awards was further complicated by legal principles on admissibility of evidence. In a few cases, unions requested the exclusion of evidence. Sometimes the arbitrator would accede and sometimes not. Although on the surface a legal technicality, the exclusion of evidence affected assessment of the occurrence and seriousness of sexual harassment as it mostly concerned employer submissions to demonstrate a pattern, such as investigation notes, records of discipline, or previous sexual harassment counselling (Trillium Health Centre and CUPE, 2001; Kitchener, 2008) and in one case, victim impact statements Health Employers’ Association of BC and BCNU, 2006).

Attacking women’s credibility, often through gendered arguments, was the second main theme identified, which emerged as powerful and consistent across a large majority of the cases studied, even in the most progressive of awards. It was deeply embedded in the cross-examination process and resonated strongly with an apparent failure to understand the nature of sexual harassment. Union arguments in defending grievors led to most women complainants being humiliated as a result of accusations that undermined their allegations of sexual harassment. One intimidating tactic was accusing women who had been harassed as lying about their experience. In McMaster (1993) a young female graduate claimed she had been sexually harassed during a summer job on campus and the union alleged she had lied about it. Overall, the arbitrator found her evidence more

credible than the grievor’s and, combined with other factors, such as the vulnerability of female students in the workplace, upheld the dismissal. Similar accusations were found in relatively recent cases, such as in Health (2006) where the grievor alleged a conspiracy between four women complainants. The arbitrator rejected his accusation, on the balance of probabilities. In Kitchener (2008), the union submitted that a firefighter had lied in her allegation claiming sexual harassment by the captain in the same union:

The Association stated that it “couldn’t disagree more” with the City’s assertion that the Complainant was a credible witness who had “no reason to lie”. According to the Association, the Complainant wanted the Grievor to be fired and was disappointed when she heard that the... department had demoted and transferred him, thereafter “fabricating” the most serious allegation against him that the Association charged she reasonably anticipated would have the greatest impact on the Deputies [uniformed management]... Given what the Association referred to as “serious inconsistencies” in the Complainant’s subsequent cross-examination... the Association submitted that her credibility was irreparably undermined. (Kitchener, 2008, p. 33)

The arbitrator rejected this accusation of lying and did not accede to an effort on union counsel’s part to admit into evidence documents about a personal domestic dispute intended to show that she had “a propensity to lie to people in authority” (Kitchener, 2008, p. 6).

The legal principles surrounding the credibility of witnesses are arguably of particular significance in co-worker cases because often the harassment occurs when the man and woman are working alone and addressing the first arbitral question often comes down to his word against hers. At risk of oversimplifying complicated legal rules of evidence, an arbitrator has to not only consider the demeanor of a witness but also examine the consistency of all their evidence admitted both before and during the hearing. This can result in a highly stressful experience for sexual harassment victims and can deter women from reporting it:

she testified she was “reluctant at the beginning in filing the complaint...” and now regretted doing so (*and would counsel other female employees against filing a similar complaint*) because the process “*makes it seem that you are the person being investigated*” [my italics]. (Kitchener, 2008, p. 6)

Indeed, the arbitrator acknowledged that this woman was subjected to a very aggressive cross-examination by union counsel on the minute details of the most serious incident, such as precise timing and sequence of events, distance between her and the grievor, and even the effect of the thickness of his uniform. A promising early section of the award recognized the difficulty of a woman working

in a male-dominated profession and cited progressive jurisprudence on credibility in sexual harassment cases, including barriers to reporting. The arbitrator's line of reasoning softened the accusation of lying but nevertheless concluded that the whole experience of several incidents, only one of which was deemed to be sexual harassment, caused her to be in such an emotional state that she "visualized" (Kitchener, 2008, p. 47) but did not actually feel the alleged sexual physical touching when he pressed up against her back repeatedly. The complainant's allegations of previous sexual harassment by the grievor when he was her instructor worked against her because she had not reported the harassment at the time; as well, the arbitrator stated that this earlier interaction with the grievor had contributed to her perception that sexual harassment had occurred during the later training session. Furthermore, the employer's evidence on the grievor's reputation for inappropriate interaction with female employees was seen by the arbitrator as confirmation that, given the grievor's reputation at work, the complainant's allegation of sexual harassment during training was the result of the woman's own perception, rather than a reflection of what happened in reality. This arbitral reasoning and conclusion ignores research evidence cited in the award on why women find it difficult to report sexual harassment. Furthermore, seen through a feminist lens, the reasoning is gendered in its assumption that women are so emotional and impressionable that it impairs their judgment.

Stereotypical reasoning used to support the conclusion that sexual harassment did not occur was identified in two other fairly recent cases. In Toronto Transit Commission and ATU (2006), an arbitrator rejected some of a clerk's evidence, effectively lessening the seriousness of an operator's harassment of her. The arbitrator accepted that the grievor following her home on three occasions after a late night/early morning shift constituted sexual harassment, but decided that previous conversations and a social invitation were not harassment. The complainant also claimed that the grievor had physically touched (caressed) her during a work interaction and then followed her again for a fourth time after his employment had been terminated. However, the arbitrator rejected the employer's argument that these last two incidents constituted sexual harassment, reasoning that the perpetrator following her home three times had caused her to be in such an emotional state that she had imagined both of the subsequent incidents. It is noteworthy that the grievor denied all counts of harassment, including following his female co-worker home. Even so, the union relied on arguments based on gender-neutral arbitral issues such as the need for clear and cogent evidence supporting such serious allegations, finding that the employer had not followed due process with regard to progressive discipline.

That this arbitrator did not recognize the behaviour of the harasser as stalking and that the incidents judged to be "non-culpable" were typical of a sexual predator is

somewhat surprising. Credibility of evidence rules refer to what "a practical and informed person would readily recognize as reasonable in that place and those conditions" (Faryna v. Chorna, cited in Ottawa-Carleton Regional Police Services Board and OCRPA 2005, p. 40). It could be argued that an informed arbitrator with a thorough understanding of sexual harassment should be able to recognize this kind of behaviour, especially given the existence of past arbitral decisions based on the identification of stalking and predatory behaviour in sexual harassers (e.g., Miracle Food Mart and UFCW, 1994; Trillium, 2001).

In the Ottawa-Carleton case (2005), the union attacked the credibility of a woman's evidence by again pointing to her imagination: "that is not to say that [the complainant] is necessarily lying about the incident, rather, it appears she has convinced herself that something has occurred that did not." (Ottawa-Carleton, 2005, p. 27). However, the arbitrator in this case applied the credibility rules to compare the woman's and grievor's evidence and relevant jurisprudence to establish, on a higher standard of probabilities than is usual (as then required in sexual harassment cases), that the harassment did occur as she testified.

Unfortunately, one of the most recent cases studied, Alberta and AUPE (2007), reveals stereotypical reasoning when adjudicating a grievance resulting from an incident in a government office: according to the female employee, a male co-worker put his hands deep into her jeans pocket, purportedly to push some candy wrappers back in as they were falling out. The key point here is that the arbitral reasoning concluded that the woman's prior experiences with this male co-worker (ogling or leering) and knowing other female employees' knowledge and coping mechanisms regarding his behaviour "served to colour [the complainant's] perception... [which was] a result of her preconceived views of [the grievor] based in part on her own perception and in part on what she had picked up from others" (Alberta, 2007, p. 8).

This line of reasoning once again denies women's experiences in a rather patronizing manner and it also, in effect, marginalizes their support networks in dealing with sexual harassment, which are seen as important managing mechanisms in the literature (Handy, 2006). Such arbitral reasoning reveals a misunderstanding of the nature and manifestations of workplace sexual harassment. Moreover, Taylor (1998) noted that where more than one woman has been harassed, if the arbitrator found that there was just cause for discipline, the appropriate penalty will tend to be more serious. Despite broad consistency with Taylor's conclusions, there was nevertheless a disturbing strand in these cases for the union to argue that there was a conspiracy against the grievor where more than one woman was involved. For example, in Community Living South Muskoka and OPSEU (2000), five women were subjected to physical touching of a sexual nature over a period of nine years in residential homes and upon investigation, the employer

dismissed the harasser. One union witness was the grievor's psychologist who testified that "[the women's allegation] was a common reaction of a group or 'mob hysteria' towards a man of the grievor's age" (Community, 2000, p. 5). Based on all the evidence, however, the arbitrator rejected this argument. Similarly, in another case where there were multiple incidents of harassment, part of the rationale for denying the grievance was as follows:

The grievor has refused to even acknowledge much less apologize for his misconduct. On the contrary, when he testified, he tried to portray himself as an innocent victim of harassment and unwanted touching. There is no hint of any corroboration of these assertions, and I do not believe them. (Trillium, 2001, p. 8)

Tendencies to see women complainants as the problem leads to a discussion of what amounts to an entrenched theme of victim blaming in the cases studied, manifested in a prominent line of argument on the part of grievors and their unions to justify that the perpetrator could not have reasonably known that his conduct was vexatious or unwelcome. In most cases, arguments based on the woman leading the harasser on were denied as credible by the arbitrator, but those focusing on a sexualized workplace culture were less readily rejected and often resurfaced as a mitigating factor for the harasser. One particular grievor testified that "she [the complainant] actually came on to me" (Scarborough General hospital and CUPE, 1992, p. 2). This was rejected by the arbitrator based on evidence of sexual assault, even after allowing for a prevailing atmosphere of sexual banter and joking around. Women were accused of being flirtatious with the grievors, as in one man's complaint: "You cannot flirt and lead a person on" (CBC and CMG, 1998, p. 13), and participating in sexual jokes, banter, or horseplay (CBC, 1998; Saskatchewan, 2001; Westcoast Energy and CEP, 1999). The union called in male workplace friends of the grievor in one case to testify that the woman had made sexual overtures to them. After applying the credibility guidelines, the arbitrator's conclusion was to reject this onslaught on her reputation, upholding the discharge, saying:

As for the explicit sexual exchanges, I find her denial more consistent with the surrounding facts than the Grievor's account of what, in part, would amount to explicit and crude invitations to engage in sexual intercourse. (CBC, 1998, p. 20)

In another case (Saskatchewan, 2001) where workplace culture was also a defence, the arbitral reasoning was different. The arbitrator agreed with the union's argument that the grievor could not know that his attentions were unwelcome because the woman concerned had given mixed signals to him, and had participated in sexual banter in an environment tolerated by the employer. This

reasoning compounded the finding that the misconduct was at a (less serious) sexual annoyance level, whereas interpretation in other awards would have classified sexual touching and pulling the female employee on to his lap as sexual assault. The arbitrator reversed all discipline (a five-day suspension), awarding lost wages and benefits. This case illustrated a misunderstanding of sexual harassment along with a victim blaming mindset in the reasoning and award. It also raises the question of a double standard whereby it appears that men are free to sexualize the workplace whereas women are expected to set and keep to a moral standard. Furthermore, if women had refused to participate in sexual banter, union counsel in several cases argued that women had misunderstood the situation and had mistaken joking or horseplay for sexual harassment (Miracle, 1994; CBC, 1998; Manitoba, 2002; Kitchener, 2008), creating, in effect, a "no-win" paradox for female employees.

Another victim blaming argument of the defence was that the women did not tell the harasser the attention was unwelcome, nor did they report it to management; if they had done so, continued the argument, the grievor would have known their behaviour was unwelcome and stopped the harassment. This argument can be related to the Canadian Human Rights Commission (2006) definition of harassment, whereby the behaviour in question should have been reasonably known by the perpetrator to be unwelcome. Whether the grievor could have reasonably known his behaviour could be deemed harassment and a woman's role in communicating her discomfort to the harasser or management often became key aspects in determining whether sexual harassment took place as alleged (arbitral question number one). In addition, the non-communication defence resonated strongly with the important arbitral principle of progressive discipline, whereby dismissals have often been reversed because the grievor had been given no prior warning. In such cases, the role of the female complainants was frequently and carefully examined in addressing the second and third arbitral questions in the context of mitigating factors potentially favouring the grievor. Extending conventional discipline rules developed largely in male-dominated blue collar workplaces to co-worker sexual harassment cases is questionable. The rules ignore institutionalized gender inequality at work (Wilson & Thompson, 2001; Zippel, 2008) and can be linked to a male standard evident in the male-dominated fields of industrial relations (Forrest, 2001) and the law profession (Macerollo, 2008). The application of traditional discipline principles also ignores progressive arbitral jurisprudence identifying sexual harassment as the abuse of economic and sexual power in the workplace, such as in Trillium (2001), noted above. For example, the arbitrator in that case pointed out that the response of many women who do not complain to a grievor or management is consistent with "classic sexual predation and a victim's reaction to it" (Trillium, 2001, p. 6). Indeed, women's testimonies in the cases studied revealed

how they were often afraid to confront a harasser because of intimidation, potential or actual hostility, job security, humiliation, embarrassment, or wanting to fit in—this reluctance often extended to reporting harassment to management (cf. Crain, 1995; Fitzgerald et al., 1995).

## Discussion

### Summary

The small number of cases where the union filed a grievance on behalf of women is consistent with earlier reviews of Canadian cases (Aggarwal 1991; Taylor 1998), although it is not possible from this study to explore to what extent this is due to under-reporting, union reluctance to pursue women's grievances, or prior resolution. Where unions acted to protect women's rights, their arguments were sound and led to varying levels of redress, with employers pursuing arguments aimed at undermining women's credibility as witnesses and minimizing the seriousness and impact of sexual harassment. However, in many of the discipline cases, unions appeared to be aggressively protecting the rights of the male perpetrator, moving beyond what was required to meet their legal duty of fair representation to pursue gendered arguments, reflecting stereotypical and out-dated images of women, as recognized by a number of the arbitrators. In a minority of cases, arbitral reasoning did not sufficiently take into account institutionalized inequality and gendered power relations at work either, and so gendered arguments were built into award reasoning and decisions. A typology of sexual harassment in arbitral jurisprudence, cited in several cases, facilitated the minimization of the seriousness and impact of co-worker harassment on women. Also, in many cases, the arbitral emphasis on the traditional principle of "culpability" of the grievor was difficult to reconcile with the Canadian Supreme Court's jurisprudence requiring a focus on the impact of a harasser's behaviour on the target (cf. Aggarwal & Gupta, 2006).

### Contributions to Scholarship

The merging of feminist and industrial relations literature allowed new insights that enrich previous arbitration studies. Union difficulties dealing with the tension often triggered by co-worker sexual harassment have been noted before (Cohen & Cohen, 1994; Crain, 1995; Haiven, 2006; Hodges, 2006; Marmo, 1980; O'Melveny, 2001). This study furthered understanding of the complex ways in which this conflict played out in the arbitral process. Many unions displayed a fundamental misunderstanding of sexual harassment in their aggressive defence of male grievors. Gendered arguments ignored the underlying cause of a gendered organizational hierarchy recognized

in the literature (Hodges, 2006; Wilson & Thompson, 2001; Zippel, 2008), and also ignored available arbitral jurisprudence on sexual harassment as involving the abuse of sexual and economic power (Goodyear, 2002; Trillium, 2001). A feminist lens identified the marginalization of women's experiences in the traditional union-management conflict manifested in arbitral process, principles, and reasoning where male workers' interests were foremost. This study of sexual harassment arbitrations builds on previous research identifying complex gender-class tensions in industrial relations when it comes to women's equality (Acker, 1989; Hart, 2002).

### Applied Implications

Given a general social unionism in Canada and the threat co-worker sexual harassment poses to internal solidarity, it is understandable that more unions are developing policies and procedures to address it specifically (e.g., USW Canada, n. d.). Others are updating their policies on workplace sexual harassment and violence (e.g., CUPE, 2009). Interestingly, one US women's advocacy group noted that many unions worldwide have made significant progress in developing policies to combat sexual harassment (Stop Violence Against Women, 2005). Even so, it was difficult to tell from the awards studied how many unions provided separate legal representation for complainants as required in some union policies (CUPE, 1992, National Director of Equal Opportunities, Personal Communication; USW Canada, n. d.). In a very few cases arbitrators noted its occurrence but only one award noted an active second counsel. Contrary to the usual alignment of the parties, often it was the employers who were protecting women's workplace rights. In many of the cases, there was an apparent contradiction between progressive policies increasingly espoused by the labour movement and union practice.

The findings of this research indicated that legal counsel, increasingly hired by the parties in arbitrations (Hebdon & Brown, 2008), felt professionally obliged to win the union case at any cost in what has become a highly adversarial, legalistic context despite the original model that promised an informal, quicker, and quasi-judicial resolution process. Cormack and Peter (2007) pointed out that the neo-liberal shift from social to individual responsibility and an associated emphasis on the rights of the accused since the Bill of Rights (Canada, 1982) has led to enhanced defence powers, very aggressive cross-examinations to pressure sexual assault complainants to drop charges, and a parallel danger of slipping more easily into victim blaming. It may well be that this shift and its consequences have filtered through to arbitrations.

In several cases, the humiliating and degrading process of being cross-examined in response to strongly gendered arguments in order to assess the credibility of women versus their harassers led to the re-victimization of women. Canadian law provides unionized workers the right to challenge

discipline through a grievance procedure with arbitral resolution if necessary, and in some cases, dismissal is clearly not appropriate. However, unions and their counsel should be more aware of the potential for re-victimization of a female complainant in arbitrations, the ethical implications of their arguments and legal tactics, and their impact on the rights of all women at work. Some unions in this study did manage to defend the grievor based on due process, without resorting to gendered arguments. Also, evidence of gendered arbitral reasoning in some cases points to a need for ensuring that arbitrators' training includes comprehension of the underlying causes and impact of co-worker sexual harassment, and of the potential for traditional arbitral jurisprudence to underestimate its seriousness.

### Limitations and Future Research Directions

Not all arbitrations are published in the Canadian Labour Arbitration Cases (LACs) so the archival data used in this research is not representative of all cases; this limitation, combined with a qualitative analysis, means that no broad generalizations can be drawn from the study. Further insights into the complexities of the arbitral process and its effect on women's rights could be achieved by selecting a small number of cases for in-depth study to include, if possible, research interviews with the main participants, including the female complainants. The findings from this study, however, indicate that the arbitration process is likely to have a chilling effect on women who are considering filing a formal sexual harassment complaint thus undermining, rather than protecting, their workplace rights.

### Endnotes

1. In a 2008 sexual assault case, the Supreme Court of Canada stated that there could be no standard of proof higher than the balance of probabilities in all civil cases (*F.H. v. McDougal*, [2008] 3 S.C.R. 41, 2008 SCC 53). In other words, arbitrators could no longer apply arbitral jurisprudence requiring a stronger balance of probabilities that sexual harassment had occurred due to the seriousness of the allegations, as indicated by some arbitral jurisprudence until that time. In theory, this change should have a beneficial effect on arbitral assessment of women's credibility under cross-examination in a co-worker harassment case. It remains to be seen if this will happen in practice.

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