The paper assesses how well co-worker sexual harassment arbitration cases protect the rights of unionized women to a healthy and safe workplace. It concludes that, overall, the arbitral process is likely to be a deterrent to making a formal complaint, thus undermining women’s workplace rights rather than protecting them.

Under the Canadian Human Rights Act, 1985, harassment is defined as “…engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome.” (Section 10[1]). Other jurisdictions have a similar definition. The Canadian Supreme Court, in its 1989 Janzen and Platy Enterprises Ltd decision, ruled that sexual harassment is a form of sex discrimination, as 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” (Aggarwal, 1991). Despite a gradual increase in complaints from men (Biskupic, 2001), women are most frequently the targets of sexual harassment because they usually work in sexually segregated and vulnerable occupations such as teaching, social work and health care (Chappell and Di Martino, 2000). But those few women who do work in male dominated jobs, such as construction, the trades or the uniformed services, also suffer notably high levels of sexual harassment, often by male co-workers (Braid, 1994; Herbert, 1994).

This paper focuses on unionized women who have been harassed by male co-workers and aims to explore how well the arbitration process, and the role of unions in it, protects their right to a safe and healthy workplace free from sexual harassment. In order to discuss the appropriateness of any adjudication process of sexual harassment cases it is important to understand the nature of the problem. To this end, the paper continues with a brief consideration of theoretical explanations of workplace sexual harassment, before turning to a review of the literature on sexual harassment arbitrations as further context for the review of co-worker cases that follows.

Theoretical explanations of workplace sexual harassment

The literature can be broadly divided into individualist, organizational and societal explanations. Behavioural studies of harassers and victims are useful (for example, Chappell and Martino, 2000; Knapp, Faley, Ekeberg and Dubois, 1997) but they are limited by their reliance on individual differences. Adding in organizational influences provides for change, such as effective policies, training, formal channels for redress as well as union and management commitment (for example, Hart and Shrimpton, 2003). Societal level explanations tend to focus on women as targets of sexual harassment, as they are often feminist informed, explaining sexual harassment in terms of the protection of male dominance, masculinity and power (Handy, 2006; Hodges, 2006):
...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, page 188)

Wilson and Thompson (2001) envisaged the organizational hierarchy as “a structure of gendered power” (page 65) and the institutionalization of this power of men over women. Sexual harassment then becomes only one manifestation of a broader framework of patriarchy, where the exercise of power 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”(page 71). This idea is useful in understanding a workplace culture where sexual harassment may be invisible, leading to little if any reporting. It also helps to better understand co-worker harassment as a form of informal power, “...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, cited in Wilson and Thompson, page 72). Consequently, according to this view, men have power over women regardless of social or organizational status. Looking through a similar theoretical lens and based on her international research, Zippel (2008) advocated a sexual harassment policy that takes account of “...gender inequality as the underlying cause of sexual harassment...” (page 178), observing that its implementation:

...itself 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. (page 176)

The next section will discuss the labour arbitration route for addressing workplace sexual harassment, with special reference to the role of unions.

**Arbitration of sexual harassment and the role of unions in co-worker cases**

Law court adjudication is closed to Canadian unionized women who claim workplace sexual harassment, according to the 1995 Weber principle, which granted arbitral jurisdiction over all workplace matters “if the dispute arises out of the collective agreement” (Ontario Court of Appeal, 2006, p. 1), thus making the arbitration process crucial for protection of rights. Indeed, arbitrators are expected to incorporate employment case law into their decisions as well as relevant collective agreement language. Fairness and corrective discipline are central principles in arbitral jurisprudence (as noted in Oshawa Foods and UFCW, 1993). Just cause for discipline has to be established by the employer, who must also show that their actions or inactions did not contribute to any misconduct, by way of ignoring ongoing sexual harassment, for example, or inconsistent discipline. With very few exceptions (for example, theft), arbitrators have traditionally viewed discharge as an absolutely last resort after an employee has been granted the opportunity for improvement, and the jurisprudence requires a careful weighing up of all the circumstances of a situation, including those of the grievor, and not just the offence.
An unsettled grievance claiming sexual harassment by a supervisor or manager fits the traditional model of arbitration as a dispute resolution procedure, since the power differential in the organizational structure and in union-management relations apply. Employers also have a statutory duty to provide a safe and healthy workplace, free from harassment (Robichaud v. R., 1987, cited in Aggarawal, 1991, p. 4). However, there is immediately a tension within any union when an employee alleges co-worker sexual harassment because “…it is faced with a role conflict in deciding what position to take when both the man and woman involved in the case are members of the bargaining unit” (Marmo, 1980, page 39). The legal duty of fair representation reinforces this difficulty for unions. Some unions have produced policies to tackle this potential for conflict of interests and legal liability by establishing a separate representation procedure. For example, the local may pursue the grievance on behalf of the person disciplined by the employer, and the headquarters or national office acts on behalf of the harassed co-worker (CUPE National Director of Equal Opportunities, 1992). The Canadian Labour Congress (Riche, 1994) and some Canadian unions, for example, CAW (Nash, 1994), have also developed policies to deal with co-worker harassment.

Unfortunately, in cases where there is a male dominated union membership, often with an exclusively male executive, there can be a tendency to focus on representing the interests of a male harasser to the detriment of a female co-worker in the bargaining unit minority. Referring to the American labour movement, and citing several studies, Hodges (2006) remarked that:

…the unionized workplace, despite its greater protection for workers in general, has not been without its [sexual] harassment. Indeed, some of the harassment horror stories emerge from unionized employers. While some unions have effectively addressed harassment, others have been part of the problem rather than the solution. (page 184)

In Canada, the mixed record of unions is similar. While some unions had developed policies and procedures in the 1990s, others were slower to become aware of the issue. For example, research into women’s experiences at an offshore oil construction site from late 1990 to 1997 found that 61% of those in non-traditional occupations had experienced sexual harassment, co-worker harassment was common and difficult to complain about, and the unions in particular had failed to tackle it, compounded by lack of employer pro-activity (Hart and Shrimpton, 2003). Subsequent to the release of the original research report, the building trades unions involved in this project developed a training module on sexual harassment. A women’s advocacy group highlighted another case, where an Ontario union failed to represent a woman who had been sexually harassed and violently assaulted by a co-worker. Instead, it only acted on behalf of the perpetrator in filing a grievance to overturn a dismissal decision by the employer. The Labour Relations Board found that the union had failed to protect her rights to a safe workplace (Ontario Women’s Justice Network, 2000), but the Board also noted that the employer was lax in having no policy or channel for redress.

Difficulties in dealing with sexual harassment derive largely from the politics of union leadership and governance in a traditionally gendered culture and structure, seen in the past as a barrier to equality bargaining in Canada and the U.S. (Briskin and McDermott, 1993; Crain and Matheny, 1999), such that “…the gendered nature of most unions may suggest great difficulty in convincing them to make ending sexual harassment a priority (Hodges, 2006, page 185).
Previous studies of sexual harassment arbitrations

The literature on sexual harassment arbitrations is limited, and especially so regarding co-worker harassment. Potential union role conflict and liability in co-worker harassment cases were noted by Marmo (1980), O’Melveny (2001) and Hodges (2006), but none of this work reviewed a set of arbitration cases. Lucero, Middleton and Valentine (2004) focused on the rights of the perpetrator in their analysis of American discipline cases between 1983 and 1997, with the purpose of recommending effective management practices to avoid such arbitrations. Taylor (1998) conducted a review of Canadian just cause cases between 1985 and 1995 to aid management and unions in their judgment of appropriate penalties. Aggarwal (1991) conducted an arbitral review of Canadian sexual harassment cases. A small minority were pursued on behalf of women, who claimed harassment by their supervisors; the rest were settlement of discipline grievances and very few were same union co-worker cases. The most recent study by Dilds and Samavati (2007) included sexual harassment cases as part of their study of U.S. discrimination cases, where they noted that arbitrators had denied the occurrence of co-worker sexual harassment when there was no connection between it and performance of the target, and no employer liability when a co-worker had no authority to hire or fire. Consistent with Taylor’s Canadian study, arbitrators considered the severity of the conduct and the context when assessing penalties.

To sum up, there is very little, if any, literature on co-worker sexual harassment arbitrations from the perspective of the women who have been harassed and whether their interests or rights are being protected in the conventional arbitral process as a model of dispute resolution. Because the majority of grievances filed are just cause, the tendency has been to focus on the perpetrators and the decision factors leading to penalties awarded. This paper aims to fill a gap in the literature by reviewing co-worker sexual harassment arbitration cases with a focus on women’s rights, examining the process and role of the parties, and especially the union, by looking through a feminist as well as an industrial relations lens.

Methodology

The study was based on twenty-six co-worker sexual harassment arbitration cases decided between 1992 to June 2008, a period of about 15 years. They were selected by searching the Canadian Labour Law Library for arbitration awards listed in the Labour Arbitration Cases (LACs) dealing with co-worker sexual harassment. Searches were conducted in each of the labour relations jurisdictions in Canada. Since the aim of the paper was to examine arbitrations dealing with male employees sexually harassing female co-workers in the same bargaining unit, any case that fell outside this category was excluded. It should also be noted that although most arbitration awards are published in the LACs, not all are so this data set cannot be assumed to be exhaustive. Nevertheless, in the end, the cases selected as described included a fairly balanced set from both the public sector (14) and the private sector (12), ranging across the country, namely, Alberta, British Columbia, Manitoba, Nova Scotia, Ontario, Saskatchewan, and the federal jurisdiction, Canada.

It is recognized that analyzing arbitration awards does not provide all the information needed to fully understand the impact of the arbitral process on women’s rights to a harassment free workplace. Interviews with all parties involved in a few selected cases would complement this study well, but, given the sensitive subject, women and others involved may be reluctant to talk to the researcher. Although broadly similar in their structure, the awards varied somewhat in their sequencing and detail, ranging in length, for example, from two very short awards to the
more usual fifteen to twenty pages to the two longest ones at over fifty pages, so that, as primary sources of data, some were richer than others. Nevertheless, in all but one case, it was clear as to the union and employer arguments, grievor and complainant evidence, the jurisprudence submitted by both parties, and the reasoning behind the arbitrators’ decisions.

The specific questions guiding the close analysis of each case 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, what were the arguments of 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. For each case, a summary sheet was constructed and then integrated to develop themes across the cases based on patterns identified in the data. Both industrial relations and feminist literature informed the following analysis, discussion and conclusion.

Finally, from an ethics perspective, all the full text awards used in the documentary analysis below are in the public domain and readily available electronically on the Internet. Many include the names of the grievor and the complainant, but the beginning of a trend to keep the individuals concerned anonymous was noted. In the body of this paper, when referring to a particular arbitration case, or groups of cases, I have identified the company, union and date of decision for analytical purposes, but have avoided using any individual names throughout the text.

**Review of arbitration cases**

Of the twenty-six cases analyzed, only three cases (12%) were to settle grievances filed by unions on behalf of women. The majority of cases, twenty-three (88%), consisted of grievances taken to arbitration on behalf of men disciplined by the employer for sexual harassment. One of the arbitrations consisted of three grievances so the number of men represented in this set of cases is actually twenty-five. 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 twenty-three discharges, 14 (61%) were reduced to reinstatement, mostly with unpaid suspension, and 9 (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 was a dispute over whether a woman’s resignation should have been accepted by the employer or not. The other two were essentially unsettled grievances for discipline that the unions argued had been caused by sexual harassment, and therefore unjust. In Goodyear Canada and USWA (2002), the only woman working in a division of a tire plant as a quality inspector was subjected to a seriously poisoned work environment for a period of seven months in the form of extremely graphic and humiliating pornographic material and messages being posted on and around her work station, and, in a final incident, in the women’s washroom, which only she used. After the latter incident she went home, and, being unable to go into work, called in sick. Shortly afterwards she returned to work with her resignation, which was accepted by management. When the grievor asked for her job back three weeks later, the employer refused. The union argued that the resignation was ineffective because of the employer’s failure to stop the harassment, despite it
being reported by the employee and the union, and that the employer was therefore liable under both the collective agreement and the provincial Human Rights Code.

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 was a strong theme in the arbitrator’s award. In a letter to the union, she said: “I’m getting to the point that I don’t even like coming here to work anymore. I never know when it’s going to happen again. I’m afraid someone might come in here with a gun next…it’s really taking a toll on my life.” (page 13). 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” (page 28).

The arbitrator believed the harassed employee, stating: “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…” (page 25 and 26). The arbitrator’s language, scathing at times, revealed a deep level of disapproval of the employer’s inadequacy in dealing with this co-worker harassment, including its superficial investigation, a “blame the victim” mentality (management boarded up the female washroom and argued that resignation was the employee’s own choice), together with a lack of communication with her throughout. The arbitrator reinstated the woman with full compensation plus damages for mental stress, although not so much as the union had wanted, who had claimed general damages as well.

The reasoning in this decision reveals a solid understanding of the serious nature and effects of sexual harassment and the responsibility of the employer to prevent it, thus sending a clear signal to all parties to this arbitration as well as employers, unions and female employees in general. Moreover, the award stood out from the other cases in this category because of the arbitrator’s clarification of certain legal principles applicable to sexual harassment cases. First, it is not enough for the grievor to establish that sexual harassment has occurred; there must be some action or inaction identified on the part of the employer or union that demonstrates direct rather than vicarious liability. This is especially important where there is co-worker sexual harassment. In this case, the employer was found to have failed in taking the necessary steps to protect the employee. This point is reinforced in the light of a second principle that differentiates sexual harassment cases from other arbitrations, in that they are not seen to be a typical union-management problem capable of resolution through the usual grievance procedure, but involve a wider responsibility over and above any traditional labour relations practices that may impede a proper investigation or support of the harassed employee. As noted in the decision, management restricted communications with the grievor to matters concerning the grievance only and 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.” (page 31)

In a second discipline case, a woman was issued a written warning for leaving an assembly line in a chocolate factory without permission, despite her attempts to report co-worker sexual harassment during her shift. In terms of progressive discipline, a written warning is a relatively serious step in a cumulative record of discipline that takes an employee closer to dismissal with cause, even (in some cases) if any subsequent misdemeanor is dissimilar to
previously disciplined behaviour. The union argued that the warning was unjust given that the employer had not dealt with the sexual harassment she had experienced over a seven hour shift from two co-workers on a parallel conveyor belt who pointed, made innuendos, laughed at her and stared up the woman’s dress. 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, “shaking and crying at this time” according to her evidence (Hershey Canada Inc. and BCT, 2002, page 5). 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” (page 13) and that the employer did not support the female employee but in recommending that she try wearing pants to work (the company uniform was a dress) had revealed a blame the victim mentality. 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” (page 14). The outcome of this case gave a strong signal to management and workers that sexual harassment was illegal and, theoretically at least, should be a deterrent to all parties.

The final case in this section involved a sexually harassed woman dismissed for excessive absenteeism (Coastal Mountain Bus Co. and CAW Canada, 2008). A bus driver, she was subjected to unwanted advances from a male co-worker, involving cards, gifts, invitations and attempted hugs that escalated early on to stalking behaviour, mostly but not limited to riding her bus until the end of the route when there was nobody else around and, once, hiding on her bus, jumping out when she did her pre-trip inspection. As the arbitrator commented, “the fright she experienced has lingered and caused tears during her testimony…she testified the stress was escalating and she was very, very emotional. She would be crying while driving to work anxious about what Mr. ….. would do or where he would show up” (page 6). The medical evidence showed that she had been diagnosed with anxiety and depression and 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… (page 38)”. Initially, the woman reported the harassment to management but did not want to make a formal complaint, opting for the informal joint union-management approach of the company’s sexual harassment policy. Upon the union’s initiative, the perpetrator was sent a cease and desist letter from the union, and the shop steward also spoke to the employee, but this did not fully resolve the harassment from the female employee’s perspective.

The employer argued that the absenteeism began before the sexual harassment and continued after “the harassment had been conclusively resolved” (page 27), maintaining that she had a general anxiety disorder. Thus, the dismissal was justified due to repeated and disruptive absences unrelated to the sexual harassment, and their judgment that her attendance would not improve in future. The union’s position was that the sexual harassment had caused both short and long term disability and this had been insufficiently taken into account in a mechanistic application of the company’s Attendance Management Plan (AMP). Furthermore, this harassment and failure to stop it after an ineffective cease and desist letter, an unfair transfer and the skewed implementation of the AMP was discriminatory under the Human Rights Code.

This grievance was upheld and the woman reinstated with full benefits. However, the arbitrator’s reasoning was focused on the employer’s mistake in assuming that her absenteeism would continue, whereas the medical evidence indicated otherwise, once the sexual harassment stopped. In fact, the award concluded the employer had not discriminated in dealing with the
harassment, and that the woman suffered from a pre-existing general anxiety disorder, but, even so, management had been too quick to discount the harassment’s impact on some of her absences, especially in the year leading up to their decision to discharge. No damages were awarded and no lost wages, but the employer was to reimburse the employee for the cost of counseling and make available similar services upon reinstatement; also, she had to cooperate with the employer in a return to work plan.

This particular case illustrates well the tendency in the cases studied for women’s interests to be somewhat lost in the details and jurisprudence of a traditional arbitration case, reflecting an adversarial union-management relationship, even when she is the grievor. The text of the award was dominated by a detailed chronology of her absences from work (even legitimate ones) and associated medical evidence in an attempt to calculate what in arbitral terms constitutes “culpable and non culpable absenteeism” (see summary and throughout award). The issue of sexual harassment and its effect on women was marginalized, in effect, by this focus. In this award there was no attempt to consider the nature or types of sexual harassment, either in arbitral or academic terms. Rather, a particularly out of date and inaccurate definition of sexual harassment was referred to in the form of a letter from the workers’ compensation board to the employee denying her benefits on the basis that she had not been physically assaulted and that only this constituted sexual harassment. This evidence was offered by the union but rejected by the arbitrator in the consideration for damages for lost wages, without any discussion of how a fundamental misunderstanding of sexual harassment fed into the workers’ compensation decision.

Unlike the reasoning in the Goodyear decision above, there was no recognition of the inappropriateness of management blaming the victim, which they did when they transferred her to a new division instead of stopping the harassment. When considering the legal principles outlined in the Goodyear award regarding sexual harassment cases, it is apparent that this arbitrator did not have the same view of the employer’s responsibility extending above and beyond the conventional union-management relations, including grievance procedure. 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.

In all these cases, the tendency was for the issue of sexual harassment and the women who have suffered co-worker harassment to be relegated into the background, even if they were the grievor, pushing into the foreground the playing out of conventional union-management conflict underlying arbitrations, which by definition are grievances still in dispute after a number of previous attempts to resolve them have failed. The cases embedded in arbitral principles and jurisprudence on effective resignation and culpable absenteeism were particularly vulnerable to this, with long stretches of text devoted to technical discussion on these issues. Interestingly enough, though, the former case transcended this potentially troubling tendency to also include a rigorous analysis of sexual harassment and its ramifications for that case and arbitral principles in general. This was in contrast to the latter case, which lacked any serious text at all on the nature and types of sexual harassment in favour of reliance on conventional arbitral and industrial relations principles not necessarily appropriate in sexual harassment cases. By extension, this failure led to a marginalization of the harassed female employee and only a partial upholding of the grievance with no lost wages or damages awarded for discrimination.

The paper will continue with a review of the cases where unions have taken to arbitration grievances claiming that men who have been disciplined for harassing women in the same bargaining unit do not deserve such harsh penalties.
Men’s grievances taken to arbitration

Three main and interconnected themes that emerged from analysis of these twenty-three cases were as follows: an apparent misunderstanding of the nature of sexual harassment (with a sub-theme of blame the victim), undermining women’s credibility as witnesses, and highlighting or exaggerating mitigating factors for their harassers. Mostly these themes were located in union arguments clearly identified in the awards, but they were often revealed in grievors’ evidence quoted verbatim or summarized by the arbitrators. Interestingly, though, the arbitral reasoning not infrequently revealed one or more of these themes. The significance of the main themes can be better understood in relation to the three questions the jurisprudence requires an arbitrator to address in discipline cases, as cited verbatim in Royal Towers Inc. and HRCEBU (1992):

1. Has the employee given just and reasonable cause for some form of discipline by the employer?
2. If so, was the employer’s decision to dismiss (or suspend, etc.) the employee an excessive response in all of the circumstances of the case?
3. If the arbitrator does consider discharge excessive, what alternative measure should be substituted as just and equitable? (p. 7)

The first question requires the arbitrator to establish whether sexual harassment did occur, on the balance of probabilities, and guided by the relevant jurisprudence. The latter also provides a list of potentially mitigating factors to be considered in answering the second and third questions, such as length of service, economic hardship, due process and progressive discipline implementation. Any one of these factors could work in favour of the grievor, allowing the arbitrator to lessen a penalty. Unfortunately, space prohibits a full discussion of all intertwining research themes mentioned above or indeed all three arbitral questions. This paper will focus on the first arbitral question, most closely associated with the major themes of the nature of sexual harassment and credibility, and a subsequent paper provides a more detailed account of how arbitral weighing up of potential mitigating factors affects women’s rights.

In terms of understanding the nature of sexual harassment, there seemed to be a disconnect in many cases between theoretical explanations of it and key definitions used by the parties in establishing its occurrence or not. Most arbitrators built in the accepted Aggarwal typology, cited as early as the Royal Towers Inc and HRCEBU in 1992, and as recently as in XL Foods and UFCW in 2006, where on p 8, the arbitrator quoted Aggarwal 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.

The award continued with further quoting Aggarwal on his 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.

The problem with this typology is that it allowed union arguments and arbitral reasoning to conclude that co-worker sexual harassment did not, on the whole, fall into a serious category of harassment because in most cases the perpetrator did not have authority over the women and their behaviour could not therefore be classified as coercive, the more serious offence (for example, Saskatchewan and SGEU, 2001; Manitoba Lotteries and MGEU, 2002). Paradoxically, in the very few cases where the perpetrator was in the union but had supervisory authority over the woman harassed (for example, Kitchener (City) and KPFFA, 2008; Canadian Airlines and IAM, 2000), arbitrators did not interpret the sexual harassment as coercive either and the misconduct was not considered serious enough to outweigh any mitigating factors present. The wording of this arbitral working definition is odd, if not disturbing, 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 the logic of including “sexually offensive physical contact” in a less serious category in view of other apparently contradictory arbitral and judicial jurisprudence that depicts physical touching as most serious conduct (Taylor, 1998), or 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 gender hierarchy explanations in the literature, but still reached the conclusion that co-worker sexual harassment fell into the “annoyance” category and therefore, almost by default, not serious. In one case where the union had argued that a grievor’s behaviour was rude and not sexual harassment, the arbitrator disagreed, saying:

…there is no doubt that the grievor, by his actions….., intended to degrade and humiliate [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 […] (Oshawa Foods Ltd. and UFCW, 1993, p 8)

Even so, the harassment, including sexual physical touching as well as very obscene gestures and comments, was not considered serious enough to outweigh the conventional mitigating factor of no prior warning given by the employer, even though there was a sexual harassment policy in place. The arbitrator substituted a suspension for the original dismissal.

Arbitral judgment of misconduct was further complicated by the application of legal principles surrounding the admissibility of evidence. In a few cases, unions requested the exclusion of certain evidence. Sometimes the arbitrator would accede and sometimes not. Although on the surface a legal technicality, the potential inadmissibility of such contested evidence made a difference to the assessment of whether sexual harassment had occurred and its seriousness because it mostly concerned employer submission of evidence to demonstrate a pattern of sexual harassment, such as investigation notes, records of employee discipline or counselling about previous incidents of sexual harassment (Trillium Health Centre and CUPE, 2001; Kitchener (City) and KPFFA, 2008), and in one case, victim impact statements (Health Employers’ Association of BC and BCNU, 2006).

Attacking women’s credibility, deeply embedded in the cross-examination process, was a consistent and powerful theme in the large majority of these cases, even in the most progressive awards. Union arguments in defending grievors led to most women complainants being subjected
to further humiliation as they were accused of behaviours that would undermine their allegations of sexual harassment, even though they had already been through an employer investigation and grievance procedure before the hearings began. One particularly threatening tactic pursued by union counsel was accusing women who had been harassed as lying about their experience. In a 1993 case (McMaster University and SEIU) a young female graduate was sexually harassed in 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. Unfortunately, similar accusations were found in relatively recent cases, such as the Health Employers’ Association of British Columbia and BCNU (2006), where this time the grievor in his evidence alleged a conspiracy between four women who had alleged he had sexually harassed them. The arbitrator rejected his accusation, on the balance of probabilities, while applying the arbitral (legal) rules of evidence. In the most recent case in this study set, Kitchener (City) and KPFFA (2008), the union submitted that a junior female fire fighter had lied in her allegation and evidence claiming sexual harassment by the captain, who was in the same bargaining unit:

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 fire 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… (p 33)

The arbitrator rejected this accusation of lying in the investigation and under oath and, further, 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” (p 6). The last sentence in the above quotation refers to the legal principles surrounding the credibility of witnesses, particularly important in co-worker cases because often the harassment occurs when the man and woman are working alone and addressing the first arbitral question 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 their evidence, or lack thereof, internal to the hearing and between that and any prior evidence available, such as during an investigation or grievance procedure meetings. Suffice it to say that this establishment of credibility can result in a highly stressful experience for harassment victims, as illustrated by the following reference to the female fire fighter in the award:

...she testified she was “reluctant at the beginning in filing the complaint because I didn’t want the guys to be worried” 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]. (p. 6)

The arbitrator in this case acknowledged that this women was subjected to a very aggressive cross-examination by union counsel, which involved minute details of the most serious incident, such as precise timing and sequence of events, distance between her and the grievor, even the effect of the thickness of fire fighters’ uniforms. In the end, though, after a
promising early section of the award recognizing the difficulty of a woman working in a male
dominated profession trying to prove herself, and citation of progressive jurisprudence on
credibility in harassment cases, the arbitrator still pursued a line of reasoning that softened the
accusation of lying but alleged that the whole experience of several incidents, only one of which
he judged to be sexual harassment, and her past experience with the grievor as instructor (she
tested sexual harassment but she had not reported it) combined with his reputation regarding his
interaction with women at work (employer evidence not rejected by the arbitrator) had caused her
to be in such an emotional state that she “visualized” (p. 47) but did not actually feel the alleged
sexual physical touching when he pressed up against her back repeatedly three times – in other
words, a kind of self fulfilling prophecy generated by her own perception. Seen through a
feminist lens this argument seems suspiciously gendered in its stereotypical view of women as
being so emotional and impressionable that it impairs their judgment.

Surprisingly, this kind of stereotypical reasoning used to support the conclusion that
sexual harassment did not occur was also identified in two other recent cases. In Toronto Transit
Commission and ATU (2006), an arbitrator rejected some of a female bus driver’s evidence, thus
lessening the seriousness of the misconduct. Sexual harassment accepted as such by the arbitrator
included vexatious comments, invitations and gifts, hiding on her bus and jumping out at the end
of her route, when she was alone, appearing at her shift meetings when not operationally needed,
and following her home on three occasions after a late night shift. She also claimed he had
physically touched (caressed) her during a work interaction and then followed her again for a
fourth time after he had been terminated by the employer. However, the arbitrator denied 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. The grievor denied all counts of harassment, including following his
female co-worker home but, interestingly, the union relied on arguments based on classic arbitral
issues such as the need for clear and cogent evidence for the occurrence of such serious
allegations, and the employer not following due process with regard to progressive discipline.
That this arbitrator did not recognize the behaviour of the harasser as stalking and that the
incidents he judged to be “non-culpable” were typical of a sexual predator is somewhat
disturbing. 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 (for example, Miracle
Food mart and UFCW, 1994; Trillium Health Centre and CUPE, 2001).

In the Ottawa-Carleton Regional Police Services Board and OCRPA (2005) case, the
union argued that the credibility of the female employee harassed was undermined: “…that is not
to say that [complainant] is necessarily lying about the incident, rather, it appears she has
convinced herself that something has occurred that did not. While her perception may be
honestly held, that does not mean her version is true.” (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 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 an office
environment: 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 this man’s behaviour in the workplace “…served to colour [complainant’s] perception…” of the incident:

Her conclusion on this point is, in our view, a result of her preconceived views of [grievor] based in part on her own perception and in part on what she had picked up from others. (p 8)

Not only does this line of reasoning once again deny women’s experiences in a rather patronizing manner, but it also, in effect, marginalizes their support networks in dealing with sexual harassment, seen as important managing mechanisms in the literature (Handy, 2006), once more revealing a misunderstanding of the nature and manifestations of workplace sexual harassment. Moreover, Taylor (1998) noted that where more than one woman has been harassed and all of them attest to it, if the arbitrator found that there was just cause for discipline, the appropriate penalty will tend to more serious. Although broadly consistent with Taylor on this point, there was a disturbing strand in this set of cases for the union to argue that there was, in effect, 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 seven years in residential homes and upon investigation the employer dismissed the harasser. At the arbitration hearing, the union called as a witness a psychologist who had counselled the grievor and, in the words of the arbitrator, gave evidence that “…[the women’s allegation] was a common reaction of a group or “mob hysteria” towards a man of the grievor’s age.” (p 5). Based on all of the evidence, however, the arbitrator rejected this argument. Similarly, in another case of multiple harassment in a hospital kitchen (Trillium Health Centre and CUPE, 2001), as part of the rationale for denying the grievance the arbitrator commented:

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. (p 8)

Tendencies to see women complainants as the problem leads into a discussion of what amounts to a very strong blame the victim theme 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 on the harasser were denied as credible by the arbitrator, but those focusing on workplace culture were less readily rejected and resurfaced as a mitigating factor for the harasser. One particular grievor testified that “she actually came on to me” (Scarborough General hospital and CUPE, 1992, p 2), which was soundly rejected by the arbitrator based on evidence of sexual assault, even considering the prevailing atmosphere of sexual joking around. Women were accused of being flirtatious with the grievor, one of whom testified: “You cannot flirt and lead a person on” (CBC and CMG, 1998, p 13) and in general, participating in sexual jokes, banter or horseplay (CBC and CMG, 1998; Saskatchewan and SGEU, 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. It should perhaps be noted at this juncture that this was not a blue collar trades dominated workplace but a professional working environment and union. In any event, after applying the credibility guidelines, the arbitrator’s conclusion was to reject this onslaught on her reputation, upholding the discharge in the end, 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 and CMG, 1998, p 20)

One case stands out with regard to the grievor’s comments during the employer’s investigation, given as evidence by a female Human Resource Manager in the award:

…when asked about his understanding of harassment in the workplace, the grievor “launched into a number of telling remarks that were very disconcerting and I was shocked; all women had to do is say something and you’re in trouble, women dress inappropriately, they bounce, rub, shake their booty, use their sexuality to advance their jobs. At one point he said ‘No offence, Ma’am.’ I took offence. He looked at me. I was very offended. I was glad I was with Supt […] .” (Ottawa-Carleton Regional Police Services Board and OCRPA, p. 15)

In the same meeting, the senior police officer present reported that the grievor said he would like a camera installed because “…he was scared of women, that they might say something that wasn’t true… (p. 14). The union did not repeat these arguments in its submission and did not accuse the woman of lying per se, but said that she had misperceived the situation, strongly supporting the grievor’s denial that he had sexually harassed her. This mindset of blaming women for behaviour that the arbitrator concluded was sexual assault, and the refusal to take responsibility for his actions, weighed heavily against the grievor in the final decision to uphold the dismissal.

However, in another case (Saskatchewan and SGEU, 2001), the arbitrator reversed all discipline (5 day suspension), awarding lost wages and benefits, agreeing 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 the workplace, which the employer had tolerated. This reasoning compounded the finding that the misconduct was at a (less serious) sexual annoyance level, whereas interpretation in other awards would have classified it as sexual assault as it involved sexual physical touching, pulling the female employee on to his lap. This case illustrated not only a misunderstanding of sexual harassment but also a blame the victim mindset in the reasoning and award itself, although in many other cases union counsel had used the argument that women had misunderstood the situation and had mistaken joking or horseplay for sexual harassment (Miracle Food Mart and UFCW, 1994; CBC and CMG, 1998; Manitoba Lotteries and MGEU, 2002; Kitchener (City) and KFFA, 2008).

Another blame the victim union argument was that the women did not tell the harasser that their attention was unwelcome or report it to management. As well as going to the heart of defining sexual harassment (addressing the first arbitral question) this argument resonates strongly with the important arbitral principle of progressive discipline, whereby dismissals have often been reversed because the grievor had been given no prior warning with no indication of potential penalty (arbitral questions two and three). But to extend the logic reflecting discipline in largely male dominated blue collar workplaces over the last fifty years to female victims of sexual harassment is not appropriate because it ignores institutionalized gender inequality at work as noted in the literature (Hodges, 2006; Wilson and Thompson, 2001; Zippel, 2008) and relevant jurisprudence with progressive definitions referring to economic and sexual power in the workplace (for example, Trillium Health Centre and CUPE, 2001). Even so, very few arbitrators acknowledged this point of difference, but, for example, in Trillium Health Centre and CUPE
the arbitrator understood why the woman complainant and other female employees who testified they were sexually harassed had not told the grievor or management: “…and why they did not immediately report the various incidents to the Employer is consistent with classic sexual predation and a victim’s reaction to it” (p 6). Overall, women’s testimony in these cases 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, and this reluctance often extended to reporting to management.

**Discussion and conclusion**

Protecting the legal right to a healthy and safe workplace free from sexual harassment fell to the employer in the majority of the arbitration cases studied. Since they have to be concerned about their liability under human rights and occupational health and safety legislation, their interests do not always coincide with the female employee in a sexual harassment case. In very few cases did the union step in to protect the rights of a woman being harassed by filing a grievance and taking it to arbitration; this is consistent with both previous reviews of Canadian sexual harassment cases (Aggarwal, 1991; Taylor, 1998). In only a few just cause cases the union provided legal counsel for the women complainants, but it is questionable as to how effective this was in protecting their rights. In one award, the arbitrator stated that the legal counsel for the victim was invited to participate and sat in the hearings, but did not examine or cross-examine any witnesses, even though he/she had the opportunity to do so. In the other two cases where the award notes that the union arranged for legal counsel for the complainant, reference was made to their input only in relation to the victim accepting the reinstatement of the perpetrator (and in one case this was a change from her position early in the hearings). So, although on the face of it, the harassed women in these cases were provided legal representation during the hearings, in reality the focus in the end was again on the interests of the perpetrator rather than protection of the complainant. In general, women’s rights were marginalized in the extremely adversarial process of a quasi-judicial model of arbitrations as the traditional grievance dispute resolution mechanism.

In many cases unions were seen to be aggressively protecting the rights of the male perpetrator, often moving beyond what was required to meet their technical duty of fair representations to pursue arguments that were clearly gendered, hooking into stereotypical and out-dated images of women, as recognized by a number of the arbitrators. These unions displayed a fundamental misunderstanding of the nature and impact of sexual harassment, ignoring the underlying cause of a workplace gendered hierarchy recognized in the literature and patriarchal explanations of the abuse of sexual and economic power. Another interpretation could be that legal counsel were pressured to win the union case at any cost in the context of strong union-management conflict. In any event, 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 what can only be termed the re-victimization of women in many of these cases. Moreover, in a few cases, arbitral reasoning did not sufficiently take into account institutionalized gender and power inequality at work either, especially important in explaining co-worker sexual harassment, and so gender biased arguments were built into their reasoning and decisions.

This is not to say that male employees found by their employers and arbitrators to have sexually harassed women should always be dismissed. However, unions and their counsel have to be more aware of the potential for re-victimization, the important ethical implications of their arguments and legal tactics, and their impact on the rights of women at work. Some unions did
manage to defend the male harasser based on fairness and due process, without resorting to
gender-biased arguments. Nevertheless, based on this study, the arbitration process is likely to a
be another deterrent against making a formal complaint of sexual harassment, thus undermining,
in effect, women’s workplace rights rather than protecting them.

\[\text{i}\] I would like to thank Amy Warren for bringing to my attention the studies included in the individualist
and organizational categories.

\[\text{ii}\] Although this duty differs in detail across Canadian jurisdictions, overall, a union member would “have
grounds for a complaint if their union failed to deal with them objectively, honestly and without hostility or
serious negligence.” (Pierce and Bentham, 2007, p 182)

\[\text{iii}\] This was a case involving CUPE, which raises the issue of espoused versus implementation of national
union policy, although it is perhaps linked with the union’s structure, as, in comparison with many other
Canadian unions, CUPE locals have a high degree of autonomy.

\[\text{iv}\] It is reasonable to assume that grievors give evidence based on coaching by their union representatives or
counsel but, methodologically, we cannot simply assume that everything said by a grievor in a hearing is a
union argument.

References

Aggarwal, A. (1991) Arbitral review of sexual harassment in the Canadian workplace, 


Sterba (Eds.), Sexual harassment: Issues and answers (pp. 129-131). New York: Oxford
University Press.

awareness to action: Strategies to stop sexual harassment in the workplace (pp. 13-17).
Ottawa: Human Resources Distribution Centre.

McDermott (Eds.), Women challenging unions. Toronto: University of Toronto Press.

Canadian Airlines International Ltd. and International Association of Machinists and Aerospace


Labour Office.

Coastal Mountain Bus Co. and Canadian Auto Workers Canada (CAW), Local 111. (2008). 92
CLAS 189.

Community Living South Muskoka and Ontario Public Service Employees’ Union [OPSEU].

CUPE National Director of Equal Opportunities (1992). Research interview conducted by the author for doctoral thesis on pay equity bargaining, St. John’s, NL.


Hershey Canada Inc. and Bakery, Confectionery, Tobacco and Grain Millers International Union [BCT], Local 446. (2002). 113 LAC (4th) 429.


Royal Towers Hotel Inc. and Hotel, Restaurant and Culinary Employees and Bartenders’ Union [HRCBU], Local 40. (1992). 32 LAC (4th) 264.


