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“GRAY TOUCH”: PROFESSIONAL ISSUES IN THE UNCERTAIN ZONE BETWEEN “GOOD TOUCH” AND “BAD TOUCH”

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INTRODUCTION

Touch is a basic need of human existence. From the minute we are born to our last breath, touch nurtures us. Touch defines us as members of human society. Touch communicates, relates, and emotes. Touch satisfies an existential need.¹

But touch has become a subject of increasing concern and controversy. Problems surround touch. When is touch proper;

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1. James T. Webb, *Existential Depression In Gifted Individuals*, http://www.sengifted.org/articles_counseling/Webb_ExistentialDepressionInGiftedIndividuals.pdf (last visited Apr. 3, 2010).

A particular way of breaking through the sense of isolation is through touch. In the same way that infants need to be held and touched, so do persons who are experiencing existential aloneness. Touch seems to be a fundamental and instinctual aspect of existence as evidenced by mother-infant bonding or ‘failure to thrive’ syndrome.

Id.

when is it misplaced, inappropriate, and/or crossing boundaries? Sexual harassment, abuse of power, and invasion of personal privacy boundaries are reported daily. There has been so much coverage of "bad touch" in the news² that it is easy to forget that good, nurturing, human touch is a necessity for every human being.³ The troublesome news leaves us wondering if any kind of touch beyond nurturing babies has a place in today's modern society. Do allegations against celebrities, sexual abuses by clergy, doctors, and athletes, or accusations against teachers lead to the conclusion that "no touch" is the best rule of thumb?

This article explores "good touch," "bad touch," and the uncertain area of "gray touch" – touch intended to be good, or not intended to be bad, that is nonetheless perceived by the recipient as bad. First, the article examines the concept of "good touch." Second, the article looks at the concept of "bad touch" (touch that can and does cause problems for people in their professional capacities) and examines the role of the law in regulating touch, when and how the law becomes involved in the issue of touch. This section highlights case law and labor arbitration decisions to help understand what judges and arbitrators say about "good touch" and "bad touch." Finally the article introduces a new concept of "gray touch" (touch that may be well intentioned, but is perceived as bad) and explores ways for professionals to approach the often misunderstood and troublesome issue of "touch" in American society's current murky and litigious environment. Because the dependency needs and relative vulnerability of both children and the elderly put both groups at unique risk of being the victims of bad touch, special attention will be paid to these two groups.

2. See, e.g., Cindy Chang, *Archdiocese in Los Angeles Settles Claims of Sex Abuse*, N.Y. TIMES, Dec. 2, 2006, at A10; Charlie LeDuff, *Son of Former Maid Testifies that Jackson Molested Him*, N.Y. TIMES, Apr. 5, 2005, at A15.

3. *Infra* notes 4-18, and accompanying text.

GOOD TOUCH

“Good touch” is supportive, loving, decent, human, reinforcing, and positive. It is the kind of touch that John Stetzel, in his article “Teaching Good Touch,” says “reinforces . . . positive actions and makes [people] feel special and good about themselves and their accomplishments.”⁴ Gail Stewart, author of *Alternative Healing*, says of good touch:

Those who stress touch as a healing method point to the worldwide use of touch to calm and console. A rub, a hug, a pat, a caress—all are used as an unspoken way of reassuring someone who is nervous or upset. This is the basis of touch healing, although its advocates say that touch can do far more.⁵

Touch necessarily occurs in pregnancy, birth, and childhood; it is essential for healthy human development.⁶ Tiffany Field, author of *Touch*, reports that a fetus has nine months of massage in the womb and that any touching between mother and fetus is beneficial in childbirth.⁷ In pregnancy, touch is used on the mother to express comfort, emotion, and to foster relaxation. In a pregnancy study done by Field, massage therapy patients reaped considerably more benefits than those engaged in relaxation therapy alone.⁸ An infant is more likely to

4. John Stetzel, *Teaching Good Touch*, J. PHYSICAL EDUC., RECREATION, & DANCE 13, 13 (Aug. 1994).

5. GAIL STEWART, ALTERNATIVE HEALING 84 (1990).

6. See Jack Heinowitz, *What Our Children Really Need*, PAPA INK MAG., <http://www.papaink.org/ipapa/home/article/display/3.html> (last visited Jan. 19, 2006) (excerpted from JACK HEINOWITZ, FATHERING RIGHT FROM THE START (2001). Reprinted with permission of New World Library, Novato, CA, www.newworldlibrary.com). “In the very beginning, even in utero, touch forms the conduit through which our children experience safety. Touch also lets our infants know that they belong, that they are lovable. Close body contact—hugging, patting, caressing, soothing—calms them as well, and restores their equilibrium.” *Id.*; “Research in human development confirms what we known [sic] intuitive all along—that frequent, nurturing touch is essential for healthy development and the formation of close relationships.” *Id.*

7. TIFFANY FIELD, TOUCH 37 (2001). “Touch alters oxytocin (an estrogen-dependent chemical), which relaxes the individual, promotes touch, encourages bonding, triggers milk letdown during breastfeedings, and sets off the uterine contractions that accompany childbirth (and orgasm).” *Id.*

8. *Id.*

have a healthy respiratory system if he/she goes through natural childbirth and receives the soothing touch of the mother's body on the journey into the world.⁹

Touch is essential during infancy.¹⁰ Tactile stimulation of an infant is necessary for normal development—babies literally need touch to survive and develop properly.¹¹ Touch is a catalyst in proper development of brain synapses in infants.¹²

Only the massage therapy group . . . reported reduced anxiety, improved mood, better sleep, and less back pain by the last day of the study. In addition, the massage therapy group had decreased uterine stress-hormone (norepinephrine) levels. They also had fewer complications during labor, their infants had fewer postnatal complications, and fewer of their infants were born prematurely.

Id. at 40. "Postpartum complications such as muscle spasms, congestion, and postpartum depression can also be prevented by massage therapy." *Id.*

9. FIELD, *supra* note 7, at 38.

The infant's breathing is helped by the massaging action of uterine contractions and the passage through the birth canal. [D]octors often perform stress tests before cesareans to determine whether the baby's respiratory system is mature enough to survive without the massage of the contractions and birth canal passage, which helps release the lipoprotein substance that bathes the baby's lungs like a lubricant and helps them expand and contract.

Id.

10. See Bruce D. Perry, *Childhood Experience and the Expression of Genetic Potential: What Childhood Neglect Tells Us About Nature and Nurture*, 3 BRAIN & MIND 79, 89 (2002).

Another important, yet poorly appreciated, aspect of neglect is the issue of timing. The needs of the child shift during development; therefore, what may be neglectful at one age is not at another. The very same experience that is essential for life at one stage of life may be of little significance or even inappropriate at another age. We would all question the mother who held, rocked and breastfed her pubescent child. Touch, for example, is essential during infancy. The untouched newborn may literally die; in Spitz' landmark studies, the mortality rates in the institutionalized infants was near thirty percent.

Id. (citing Rene A. Spitz, *Hospitalism: An Inquiry into the Genesis of Psychiatric Conditions in Early Childhood*, in PSYCHOANALYTIC STUDY OF THE CHILD VOLUME I, 53, 53-74 (Otto Fenichel et al. eds., 1945); Rene A. Spitz, *Hospitalism: A Follow-Up Report on Investigation Described in Volume I*, in PSYCHOANALYTIC STUDY OF THE CHILD VOLUME II, 113, 113-17 (Phyllis Greenacre et al. eds., 1946)).

11. Perry, *supra* note 10, at 89.

12. Sara Gable & Melissa Hunting, *Nature, Nurture and Early Brain Development*,

Touch can be particularly important for premature infants, as evident in the skin-to-skin contact used in the successful “Kangaroo Care” method where parents allow the infant to lie chest-to-chest in order to foster health.¹³ Touch—one of the five senses—is a primary sense in every human.¹⁴ Doctor John Gonsiorek, a Minneapolis clinical psychologist and Diplomat of

HUM. ENVTL. SCI., publication GH6115, at 1 (reviewed 2001).

Between birth and age 3, the brain creates more synapses than it needs. The synapses that are used a lot become a permanent part of the brain. The synapses that are not used frequently are eliminated . . . How the social and physical environments respond to infants and toddlers plays a big part in the creation of synapses. The child's experiences are the stimulation that sparks activity between axons and dendrites and creates synapses.

Id.; see Lawrence Casler, *The Effects of Extra Tactile Stimulation on a Group of Institutionalized Infants*, in 71 GENETIC PSYCHOL. MONOGRAPHS 139-40 (1965) (supporting the proposition that touch impacts development in infants).

13. SUSAN M. LUDINGTON-HOE & SUSAN GOLANT, KANGAROO CARE 6-7 (1993).

Scores of international scientific studies have shown that Kangaroo Care offers the preterm infant many physical and emotional benefits. These include: [a] stable heart rate; [m]ore regular breathing; [i]mproved dispersion of oxygen throughout the body; [p]revention of cold stress. . . ; [l]onger periods of sleep. . . ; [m]ore rapid weight gain; [r]eduction of purposeless activity . . . ; [d]eased crying; [l]onger periods of alertness; [o]pportunities to breastfeed and enjoy healthful benefits of breast milk; [e]arlier bonding; [and] [i]ncreased likelihood of being discharged from the hospital sooner.

Id.; see FIELD, *supra* note 7, at viii. “The [premature] babies who were massaged gained 47 percent more weight than those not massaged, a clearly significant weight gain.” *Id.*

14. ASHLEY MONTAGU, TOUCHING: THE HUMAN SIGNIFICANCE OF THE SKIN 190 (2d ed. 1978). “The evidence indicates clearly that the skin is the primary sense organ of the human infant, and that during its reflex attachment period it is its tactile experience that is critical for its continued growth and development.” *Id.*; FIELD, *supra* note 7, at 10:

Our bodies have eighteen square feet of skin, which makes skin our largest sense organ. Because skin cannot shut its eyes or cover its ears, it is in a constant state of readiness to receive messages—it is always on. The first sensory input in life comes from the sense of touch while still in the womb, and touch continues to be the primary means of experiencing the world throughout infancy and well into childhood, even into aging.

Id.

the American Psychological Association, who conducts forensic examinations of professionals for the Minnesota Board of Teaching and other professional boards, says, "[t]ouch is not only a human need but also a primate need. If a child does not get human touch there will be problems."¹⁵ Touch is essential in children and adults because it is the sense used to show recognition, understanding, affection, and companionship.¹⁶ Touch is required for healthy emotional, social, and physical development.¹⁷ Helen Colton, author of *The Gift of Touch*, says

15. Joseph L. Daly, *Touch in the Workplace*, LAW & POLITICS 20, 20 (Nov. 1995); see ASHLEY MONTAGU, CULTURE AND HUMAN DEVELOPMENT INSIGHTS INTO GROWING HUMAN 104 (1974). "Work in two orphanages has shown that psychological stresses due to harsh and unsympathetic handling may seriously curtail growth-rates." *Id.*

16. T. BERRY BRAZELTON & STANLEY I. GREENSPAN, THE IRREDUCIBLE NEEDS OF CHILDREN; WHAT EVERY CHILD MUST HAVE TO GROW, LEARN, AND FLOURISH 71, 118 (2000).

Kids who have a good nonverbal communication system in place with their parents tend to react more strongly to verbal commands and body language and often stay closer than children whose nonverbal communication skills are not as well organized or children who are hyperactive Children's ability to communicate unfolds in a sequence of stages starting between about 6 and 18 months of age. At first children communicate only nonverbally, but they can carry on a rich dialogue with smiles, frowns, pointing fingers, squirming, wiggling, gurgling, and crying. By 18 months, children are often very good readers of nonverbal cues

Children who can use and understand nonverbal communication comprehend the fundamentals of human interaction and communication much better than children who can't. They tend to be more cooperative and attentive in school. They are able to pick up on unspoken cues and figure out situations that might baffle other children The important point to remember here is that this ability to read and respond to nonverbal cues, which a child learns very early in life, plays a continuing part in a child's ability to socialize and to learn during the school years.

Id.

17. Brenda Major et al., *Gender Patterns in Social Touch: The Impact of Setting and Age*, 58 J. PERSONALITY & SOC. PSYCHOL. 634, 634 n. 4 (1990). See BRAZELTON & GREENSPAN, *supra* note 16, at 2:

In general, there is a sensitive interaction between genetic proclivities and environmental experience. Experience appears to adapt the infant's biology to his or her environment. In this process, however, not all experiences are the same. Nurturing emotional relationships are the most crucial primary foundation for both intellectual and social growth.

touch is the most important, yet most neglected, of our senses.¹⁸

Just as touch plays a critical role in early human development, it also takes on special significance during the later stages of life. Jane A. Simington argues that as a result of our culture's preoccupation with productivity, youth, and beauty, the elderly are often considered "untouchable," and many elderly experience touch deprivation.¹⁹ This heightened need for physical touch comes at a time when the elderly are also experiencing a great deal of loss in other areas of life,²⁰ such as the loss of loved ones, homes, careers, independence, and physical health. While elderly people who require physical care and assistance are often touched by caregivers, that touch is most often "necessary" or "instrumental"—its purpose is to

See also JULIUS SEGAL & HERBERT YAHRAES, *A CHILD'S JOURNEY FORCES THAT SHAPE THE LIVES OF OUR YOUNG 75* (1978).

In defining *attachment*, these psychologists point out that the child's desire for closeness to other people is one of the most striking characteristics of infancy—a basic fact of infant life. 'He is pleased when this proximity results in physical contact and/or attention, and is unhappy when the proximity is reduced or denied him.' In real life terms, attachment embraces all those things children do as they strive to stay in touch—physically or at least psychologically.

Id.

18. HELEN COLTON, *THE GIFT OF TOUCH: HOW PHYSICAL CONTACT IMPROVES COMMUNICATION, PLEASURE, AND HEALTH 19-20* (1983).

We can survive without sight; blind people do. We can survive without hearing; deaf people do. We can survive without being able to taste; many of us do. We can survive without our sense of smell [T]he earliest of humans, walking on all fours, had their noses close to the ground to sniff the odors that alerted them to danger. Now, as we climb up the evolutionary ladder, our sense of smell is slowly atrophying. But we cannot survive and live with any degree of comfort and mental health when we are not able to *feel*. A complete loss of our sense of touch can send us into a psychotic breakdown.

Id.; see FIELD, *supra* note 7, at 19. "Touch is our most social sense. Unlike seeing, hearing, smelling, and tasting, which can generally be done alone, touching typically implies an interaction with another person." *Id.*

19. Jane A. Simington, *The Elderly Require a "Special Touch": Touching Expresses Caring and the Quality of Care Improves*, 42 *NURSING HOMES* 30, 30 (Apr. 1993).

20. JANIE B. BUTTS & KAREN L. RICH, *NURSING ETHICS: ACROSS THE CURRICULUM AND INTO PRACTICE 182* (2005).

accomplish a task—rather than to provide social or emotional support.²¹

However, studies have shown that elderly people whose caregivers do engage in social, emotional, or “expressive” touching benefit in various ways. One study found that this type of non-necessary touching increased the elderly participants’ feelings of calm, safety, comfort, and self-confidence.²² Another study found that this type of expressive touching decreased anxiety in patients with dementia.²³ Caring touch has also been found to help the elderly feel less isolated during periods of stress,²⁴ to alleviate pain,²⁵ and to cope with grief and loss.²⁶

Dolores Krieger, the originator of the term “Therapeutic Touch,” discusses the long evolution of the history of the healing power of touch.²⁷ Today, the practice of Therapeutic Touch is used in at least one-hundred medical centers and health agencies in the United States and in more than eighty foreign countries.²⁸

21. M. Gleeson & F. Timmins, *The Use of Touch to Enhance Nursing Care of Older Person in Long-Term Mental Health Care Facilities*, 11 J. PSYCHIATRIC & MENTAL HEALTH NURSING 541, 541-42 (2004).

22. Pirkko Routasalo & Arja Isola, *The Right to Touch and be Touched*, 3 NURSING ETHICS 165, 171 (1996).

23. E.J. Kim & M.T. Buschmann, *The Effect of Expressive Physical Touch on Patients with Dementia*, 36 INT’L J. NURSING STUD. 235, 241 (1999).

24. Philip Ernst & Jeanne Shaw, *Touching is Not Taboo*, 1 GERIATRIC NURSING 193, 195 (1980).

25. See MATTIE COLLINS, COMMUNICATION IN HEALTHCARE: THE HUMAN CONNECTION IN THE LIFE CYCLE 179 (2d ed. 1983).

26. See IRENE MORTENSON BURNSIDE, NURSING AND THE AGED 130 (2d ed. 1981).

27. DOLORES KRIEGER, THERAPEUTIC TOUCH AS TRANSPERSONAL HEALING 4 (2002). “The ways of healing reach back in time to the earliest historical records. Pictographs etched on the walls of the Cave of the Three Brothers in the Pyrenees depict healing by the laying-on of hands.” *Id.*

28. *Id.* at 12; DEBRA FULGHUM BRUCE, MIRACLE TOUCH xx (2003).

Clinically, the most reliable effects of Therapeutic Touch [TT] include: [a] rapid relaxation response that can occur in as little as two to four minutes, with accompanying lowered blood pressure readings, respirations, and pulse rate; [a]n amelioration or extinction of pain, so that there is a reduced intake of analgesics should any pain persist, and TT also seems to enhance the effects of analgesics already administered; [t]he healing process itself is facilitated and accelerated, as indicated in the case of bone fractures; TT also facilitates anxiety reduction; for instance, there is a

Therapeutic touch has been found to improve the functional ability of elders with degenerative arthritis²⁹ and to relieve headache pain.³⁰

There are more than eighty different types of massage and hands-on touch therapies being used today.³¹ According to the U.S. Bureau of Labor Statistics, there were approximately 97,000 massage therapists in the United States in 2004.³² Massage therapists provided an estimated forty-seven million Americans with massages (twenty-two percent of adult Americans) between August 2004 and July 2005, two million more than the previous year.³³ Massage, as a medical option, is now being taught and studied at a significant number of major academic institutions and medical schools.³⁴ Some health-maintenance

relief from nausea, it enhances the rate and rhythm of respirations and, in all, TT has a profound calming effect. In addition, to a significant extent, Therapeutic Touch promotes: [a] positive change in emotional affect, [t]he effectiveness of symptoms management in cancer and in AIDS; [a] peaceful final transition of those who are terminally ill.

Id.

29. Susan D. Peck, *The Efficacy of Therapeutic Touch for Improving Functional Ability in Elders with Degenerative Arthritis*, 11 NURSING SCI. Q. 123, 130 (1998).

30. Elizabeth Keller & Virginia M. Bzdek, *Effects of Therapeutic Touch on Headache Pain*, 35 NURSING RES. 101, 104 (1986).

31. U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2010-11 Ed.*, Massage Therapists, <http://www.bls.gov/oco/ocos295.htm> (last visited Jan. 29, 2010). "Massage therapists can specialize in more than 80 different types of massage, called modalities. Swedish massage, deep-tissue massage, reflexology, acupressure, sports massage, and neuromuscular massage are just a few of the many approaches to massage therapy." *Id.*

32. *Id.*

33. Am. Massage Therapy Ass'n, *2005 Massage Therapy Consumer Survey Fact Sheet*, available at <http://www.amtamassage.org/pdf/05consurvey.pdf>.

34. The Richard and Hinda Rosenthal Center for Complementary & Alternative Medicine, Columbia University College of Physicians & Surgeons, *Complementary and Alternative Medicine Courses Taught at U.S. Medical Schools*, http://www.rosenthal.hs.columbia.edu/MD_Courses.html (last visited Nov. 7, 2007). The center currently lists programs at medical schools in thirty-four states, the District of Columbia, and Puerto Rico.

There is a steadily growing interest in providing education to physicians about complementary and alternative medicines (CAM) not only during their tenure in medical school, but also as part of their continuing education in the practice of medicine and surgery. This listing aims to provide educators, medical students, physicians and surgeons with

organizations and insurance companies recognize massage therapy as a legitimate health practice.³⁵

Healing touch therapies offer tremendous benefit to people of all ages with all sorts of ailments, including: alcohol and drug dependency; PMS and menopausal symptoms; chronic pain and arthritis; migraine headaches; anxiety and depression; asthma; diabetes and other chronic diseases; repetitive stress injuries; sleep disorders; certain types of cancer; HIV and AIDS.³⁶

Good touch is honored in the professions of education, ministry, and medicine.³⁷ Images of the "Good Doctor" patting the patient on the shoulder; the enthusiastic, encouraging coach hugging the student-athlete after a win in the track event; and the kind pastor holding the hand of the bereaved widow move us in profoundly human ways. Touch is essential in medicine to monitor health and diagnose illness. Medical analysis and treatment requires physical touch of the patient by the doctor and nurse.³⁸ Good pediatric medicine can even involve procedures which restrain and invade a child's body.³⁹ The encouraging wrestling coach hugging and encouraging the young wrestler who has just lost a match is the kind of touch that every parent wants for his/her child. The problem, of course, is how to understand good touch from bad touch.

information about the increasing number of courses and programs about therapies and modalities of healing not conventionally taught in the 125 American Association of Medical Colleges (AAMC) - accredited MD programs.

Id.

35. BRUCE, *supra* note 28, at 2.

36. *Id.*

37. TOUCH IN PSYCHOTHERAPY: THEORY, RESEARCH, AND PRACTICE 55 (Edward W. L. Smith, et al. eds., Guilford Press 1998). "The laying on of hands was always considered to be helpful in medicine"; *Healing Touch: Hands-on Help for the Heart?*, HARVARD HEART LETTER (Harvard Heart Publications) 3 (Oct. 2005), <http://www.holisticlife.com.au/documents/reikiHealingTouch.pdf>; see Ed Horvat, *Starting Point*, 42 NAT'L CATHOLIC REP., Dec. 9, 2005, at 4; BRUCE, *supra* note 28, and accompanying text.

38. JULES OLDER, TOUCHING IS HEALING 160 (1982).

39. See Gillian Bricher, *Children in the Hospital: Issues of Power and Vulnerability*, 26 PEDIATRIC NURSING 277, 280 (2000).

Further, there is an increasing awareness that touch must be viewed in the context of a child's right to his/her own space and integrity.⁴⁰ There are "boundaries" for each person, even when the touch is good and intended to be good.

In the 1970's, good touch was promoted in education as a way for a teacher to stand in place of the parent—"in loco parentis"—during the school day. "In loco parentis" is used in the law to assign and transfer the rights, duties, and responsibilities of the parent during a limited time to another person or agency.⁴¹ The term is used to describe the role of the teacher and administrator in a K-12 educational institution, a boarding school, and even a college when supervising minors and young adults.⁴² The role of the K-12 teacher in the 1960's and 1970's was understood to provide love, guidance, and education to the child in the class during the times the teacher had the child under his/her charge.⁴³ "In loco parentis" was taught and advocated in schools of education as an important method to bond with the student in order to open avenues of communication between teacher and student so that in-depth learning could take place.⁴⁴

But today society has changed.⁴⁵ Now educators are torn

40. *Id.*

41. BLACK'S LAW DICTIONARY 803 (8th ed. 2004). "[I]n loco parentis (in loh-koh p<<schwa>>-ren-tis), *adv. & adj.* [Latin "in the place of a parent"] Of, relating to, or acting as a temporary guardian or caretaker of a child, taking on all or some of the responsibilities of a parent. The Supreme Court has recognized that during the school day, a teacher or administrator may act *in loco parentis*." See *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 654-655 (1995).

42. GALE ENCYCLOPEDIA OF CHILDHOOD AND ADOLESCENCE 365 (Jerome Kagan ed., Gale Research, 1998).

43. *In re Independent Sch. Dist. No. 255*, 102 Lab. Arb. Rep. (BNA) 993, 999 (1994) (Daly, Arb.). Teachers who were taught this method describe the relationship as: "[B]eing based on treating the student like they were their own children." *Id.*

44. *Id.* "Teaching methods that are based on such a philosophy most often instill feelings of love and caring into the teacher student relationship. Teachers . . . are often rewarded for such a relationship with long lasting bonds with students that inspire them to attain fulfillment in other areas of their lives." *Id.*

45. See FIELD, *supra* note 7, at 4.

Sexual abuse is relatively rare in U.S. schools. As little as one percent of all reported sexual abuse cases involving children occur in schools, whereas ninety percent of abusive incidents involve parents and relatives.

between wanting to show positive reinforcement by the use of good touch and legal dangers resulting from heightened awareness of predatory behavior toward children. Further, today there is a clearer understanding of appropriate boundaries, i.e., personal space.⁴⁶ Now it is clear that even good touch can be problematic and misunderstood.⁴⁷

Touch is important in religious worship. Holding of hands and hugging are used in many churches today. Pentecostalism and Faith-Healing require touch between and among the minister and members of the congregation.⁴⁸ In Christianity, touch is used in baptism and confirmation.

Nursing homes and hospice facilities use touch as a way to communicate with the elderly and dying. In the end stage of life, hospice care provides a place for people who are terminally ill to be cared for on physical, emotional, psychological, and spiritual levels.⁴⁹ The hospice setting is aimed at "humane and

Nonetheless, school directors are spending more money on liability than on teacher salaries, and an increasing number of caregivers are leaving the childcare profession.

Id.

46. Karrie Osborn, *Touch Our Children, Teach Our Children*, MASSAGE & BODYWORK, Feb./Mar. 2003, at 16, available at <http://www.messageandbodywork.com/Articles/febMar2003/Touch.html> (last visited Mar. 8, 2010). "[T]ouch has become virtually taboo in our American schools. Teachers are afraid to touch students, to give a comforting pat on the back, or a hug when the child is distressed, for fear of how it will be interpreted." *Id.*

47. See FIELD, *supra* note 7, at 4.

Despite the infrequency of sexual abuse cases in schools, schools have become a primary target for antitouch laws. More and more states are making it illegal for teachers to touch students, and even in those states that have not outlawed touch in schools, it is increasingly risky for teachers to touch students.

Id.

48. Karin Gjerset, *Hearing the Voices: Women and Pentecostalism 2* (1994) (unpublished B.A. senior integrative exercise, Carleton College) (on file with author). Touch is considered a way for Pentecostals to share the Holy Spirit's manifestation in the body of the worshiper. *Id.* at 6.

49. DAWN NELSON, *FROM THE HEART THROUGH THE HANDS: THE POWER OF TOUCH IN CAREGIVING* 75 (2001).

compassionate care for the dying."⁵⁰ Touching the patient plays an important role in the care of the very sick and dying person.⁵¹ The use of massage with the elderly provides benefits for both the receiver and the giver.⁵²

There are many benefits of touch for people facing the end of life. One of the more dramatic examples of touch is seen during the hours immediately preceding a patient's death, termed the "death watch" by caregivers.⁵³ "During a death watch, touch can be more effective than words [P]atients who cannot communicate otherwise are highly responsive to touch. When caregivers stroke hands, faces, and arms, even anxious patients appear to relax. Affectionate gestures—hugs, kisses, handshakes—are also a part of many 'death watches.'"⁵⁴ It is possible for loved ones or caregivers to communicate through touch when the dying person no longer has the ability to communicate in other ways.⁵⁵

From our first breath to our last, touch is essential, a necessary part of each stage of a person's life. Touch defines relationships, emotions, our very selves. "Good touch" is important throughout the life of every human being. Without being touched, a person cannot live a fully human life.

50. *Id.*

51. See Am. College of Physicians, *How to Help During the Final Weeks of Life*, 9, available at http://www.acponline.org/patients_families/end_of_life_issues/cancer/download/final_weeks.doc (last visited Feb. 25, 2006). "Even if the person is sleeping much of the time or slips into a coma, touching and talking remain important. Touch can include back rubs or holdings hands. . . . All of these decrease a person's sense of being alone and can be very comforting." *Id.*; see also Public Policy and the Future of Work and Retirement: J. Hearing Before the Subcomm. on Retirement Income and Employment and the Subcomm. on Human Serv. of the Select Comm. on Aging, H.R., 95th Cong. 66 (May 3, 1978).

52. Joan S. Lohman, *Massage for Elders: An Ever-Growing Opportunity*, 40 *MESSAGE THERAPY J.* 60, 62 (2001), available at <http://www.amtamassage.org/journal/massage4elders2.html> (last visited Feb. 27 2010).

53. ANNE MUNLEY, *THE HOSPICE ALTERNATIVE: A NEW CONTEXT FOR DEATH AND DYING* 65 (1983). "Hospice caregivers use the term *death watch* to describe a period of active dying"

54. *Id.* at 65.

55. NELSON, *supra* note 49, at 74.

BAD TOUCH

"Bad touch" is problematic, and the law attempts to protect the vulnerable and the non-vulnerable from unwanted touching. Why? Inappropriate touch can have lifelong ramifications on a person's mental state and ability to engage in relationships.⁵⁶ Indeed, bad touch can lead to some very bad consequences.⁵⁷

Examples of possible inappropriate touch include unwanted sexual touch, corporal punishment (a contentious issue in today's world), assault, mistreatment of the elderly and medical patients, and physical abuse. All can leave lasting scars.

It is a general rule of the workplace that assault and battery by one employee upon another cannot be tolerated. The Company has a responsibility to maintain the proper working conditions and attitudes including the understanding of all employees that one

56. Child Welfare Information Gateway, *Long-term Consequences of Child Abuse and Neglect*, (Children's Bureau, Washington D.C.) Apr. 2008, http://www.childwelfare.gov/pubs/factsheets/long_term_consequences.pdf.

Much research has been done about the possible consequences of child abuse and neglect. The effects vary depending on the circumstances of the abuse or neglect, personal characteristics of the child, and the child's environment. Consequences may be mild or severe; disappear after a short period or last a lifetime; and affect the child physically, psychologically, behaviorally, or in some combination of all three ways. Ultimately, due to related costs to public entities such as the health care, human services, and educational systems, abuse and neglect impact not just the child and family, but society as a whole.

Id.

57. *Id.*

The impact of child abuse and neglect is often discussed in terms of physical, psychological, behavioral, and societal consequences. In reality, however, it is impossible to separate them completely. Physical consequences, such as damage to a child's growing brain, can have psychological implications, such as cognitive delays or emotional difficulties. Psychological problems often manifest as high-risk behaviors. Depression and anxiety, for example, may make a person more likely to smoke, abuse alcohol or illicit drugs, or overeat. High-risk behaviors, in turn, can lead to long-term physical health problems such as sexually transmitted diseases, cancer, and obesity.

Id.

employee has nothing to fear through physical assault by another.⁵⁸

Victims of physical and sexual abuse can suffer from Post-Traumatic Stress Disorder.⁵⁹ Society must protect the vulnerable and the non-vulnerable from assault. Sexual assault, physical assault, sexual abuse, and sexual harassment are considered very "bad touch." Each has potential for long-term and catastrophic effects on the victim.⁶⁰

SEXUAL HARASSMENT

Touch is commonly, but not always, involved in sexual harassment.

Harassment consists of unwelcome conduct, whether verbal, physical or visual . . . [.] Sexual harassment may include explicit sexual propositions, sexual innuendo, suggestive comments, sexually oriented 'kidding' or 'teasing' 'practical jokes,' jokes about gender specific traits, foul or obscene language or gestures, displays of foul or obscene printed or visual material, and physical contact, such as patting, pinching, or brushing against another's body.⁶¹

The Equal Employment Opportunity Commission defines

58. *In re Peachtree Doors*, 96 Lab. Arb. Rep. (BNA) 828, 833 (1991) (Conley, Arb.).

59. 31A ILL. LAW & PRAC. RAPE AND RELATED OFFENSES § 37 (Aug. 2009).

In a prosecution for an illegal act perpetrated upon a victim, including but not limited to prosecutions for . . . predatory criminal sexual assault of a child, criminal sexual abuse, . . . or ritualized abuse of a child, testimony by an expert . . . [in] post-traumatic stress syndrome shall be admissible as evidence.

Id. "Ritualized abuse of a child can be committed when a person involves the child in a mock, unauthorized or unlawful marriage ceremony with another person or representation of any force or deity, followed by sexual contact with the child, see 720 ILCS 5/12-33(a)(4)." *Id.* at n.74.

60. See Kathleen A. Kendall-Tackett et al., *Impact of Sexual Abuse on Children: A Review and Synthesis of Recent Empirical Studies*, 113 PSYCHOL. BULL. 164, 175 (1993); Bassel A. van der Kolk et al., *Childhood Origins of Self-Destructive Behaviour*, 148 AM. J. PSYCHIATRY 1665, 1665 (1991).

61. *In re Simkins Industries, Inc.*, 106 Lab. Arb. Rep. (BNA) 551, 553-54 (1996) (Fullmer, Arb.).

sexual harassment as “[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature”⁶² This form of unacceptable conduct has also been described as:

[u]ninvited and repeated offensive sexual flirtations, advances and propositions, [c]ontinued or repeated verbal abuse of a sexual nature, [g]raphic verbal commentaries about an individual's body, [s]exually degrading words used to describe an individual, [u]ninvited and deliberate touching, [u]ninvited pressure for dates or sexual favors, [u]ninvited sexual teasing, jokes, or remarks or questions, [d]isplay in the workplace of sexually explicit objects or pictures, [t]hreats, demands, or insinuations that employment status or working conditions are contingent upon the employee's toleration of or acquiescence to sexual advances or, [r]etaliation against employees for complaining about any of the behavior described above.⁶³

Being sexually harassed affects physical well-being, emotional health, and vocational development. Women report physical and emotional reactions to being harassed, which include depression, insomnia, headaches, helplessness, and

62. 29 C.F.R. § 1604.11(a) (2009).

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Id.; U.S. Equal Emp. Opportunity Comm'n, *Sexual Harassment*, http://www.eeoc.gov/laws/types/sexual_harassment.cfm (last visited Feb. 26, 2006).

63. *In re* Arbitration Between Clark County Sch. Dist. & Educ. Support Emps. Ass'n, AAA Case 79 E 39 00075 97, 1998 WL 1069130 (Arb.), at 4 (1998) (Bickner, Arb.). For additional variations of the definitional application of “sexual harassment” in the workplace, see, e.g., JANET E. ASHCROFT, *LAW FOR BUSINESS* 345-46 (15th ed. 2005); *In re* Arbitration Between: Giant Eagle Markets Co., Inc., Employer, and United Food and Com. Workers Int'l Union, AFL-CIO & CLC, Local No. 23, 2005 WL 1400412 (Arb.), (2005) (O'Connor, Arb.); *In re* Oklahoma City, 121 Lab. Arb. Rep. (BNA) 1048, 1051 (2005) (Shieber, Arb.).

decreased motivation.⁶⁴ Sexual harassment causes physical hardship, loss of income, administrative neglect, and isolation.⁶⁵

A common place for sexual harassment is the workplace.⁶⁶ Employers have a strong interest in protecting their employees and maintaining a safe and non-hostile work environment.⁶⁷ Employers have a duty under federal and state laws⁶⁸ to provide their employees with a reasonably safe place to work.⁶⁹ This includes employer responsibility in the hiring and supervising of employees, which can result in costly employer liability in the event of sexual harassment or any other type of abuse.⁷⁰

Sexual harassment in schools was, and continues to be, widespread.⁷¹ A 2001 study, *Hostile Hallways: Bullying, Teasing and Sexual Harassment In School*, found that 81% of students (83% of girls and 79% of boys) in elementary and secondary schools had experienced unwanted sexual comments or touching in school.⁷² In response to this unacceptable state of affairs, and in accordance with federal mandates, schools around the country have instituted policies prohibiting sexual harassment by both students and teachers.⁷³ Definitions of sexual harassment

64. Andrea Williams, *Model Procedures for Sexual Harassment Claims*, 48 ARB. J. 66, 70 (Sept. 1993) (citing MICHELE A. PALUDI & RICHARD B. BARICKMAN, *ACADEMIC AND WORKPLACE SEXUAL HARASSMENT: A RESOURCE MANUAL* 27 (1991)).

65. *Id.*

66. *See, e.g., supra* notes 62-65, and accompanying text.

67. SIMMA LIEBERMAN ET AL., *PUTTING DIVERSITY TO WORK: HOW TO SUCCESSFULLY LEAD A DIVERSE WORKFORCE* x, 38, 104 (2004).

68. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(b) (2009); *infra* Appendix I.

69. *Wahlstrom v. Metro-North Commuter R.R. Co.*, 89 F. Supp.2d 506, 522 (S.D.N.Y. 2000).

70. *Id.* at 525.

71. Jeffrey A. Thaler, *Are Schools Protecting Children from Harassment?*, 35 TRIAL at 32, 34 (Aug. 1999).

72. Am. Ass'n of U. Women Educ. Found., *Hostile Hallways: Bullying, Teasing and Sexual Harassment in School*, 4 (2001). Shockingly, this number is essentially unchanged since the original 1993 study, *Hostile Hallways: The American Association of University Women Survey on Sexual Harassment in American's Schools*, except that the gender gap percentages have narrowed from 85% (girls)/76% (boys) to 83% (girls)/79% (boys). *Id.* at 20.

73. *See* Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 (2010); U.S. Dep't of Educ. Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* –

adopted by school districts include, "inappropriate touching, patting, [or] pinching . . . someone's body . . . [that] has the purpose or effect of creating an intimidating, hostile or offensive environment for another person"⁷⁴ and "unwelcome touching,

Title IX, iii (current guidance as of Jan. 26, 2006), available at <http://www.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

Finally, we reiterate the importance of having well-publicized and effective grievance procedures in place to handle complaints of sex discrimination, including sexual harassment complaints. Nondiscrimination policies and procedures are required by the Title IX regulations. In fact, the Supreme Court in *Gebser* specifically affirmed the Department's authority to enforce this requirement administratively in order to carry out Title IX's nondiscrimination mandate. 524 U.S. at 292. Strong policies and effective grievance procedures are essential to let students and employees know that sexual harassment will not be tolerated and to ensure that they know how to report it.

Id. at iii (citing *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292 (1998)). In 2001, 69% of students surveyed reported their school had a sexual harassment policy in place and 36% said their school distributed materials regarding the specifics of the policies. *Hostile Hallways*, *supra* note 72, at 15. For typical policy, see, e.g., Minn. Indep. Sch. Dist., Minn. Indep. Sch. Dist. 196 Pol'ys, Regs. Proc., 405.7AR, Harassment, Discrimination, Violence, or Hazing by Dist. Personnel (Aug. 2006) and 503.4AR, Harassment, Discrimination, Violence or Hazing by Students (Aug. 2006), <http://www.district196.org/District/SchoolBoard/PRPs.cfm> (last visited Mar. 8, 2010).

DEFINITIONS – SEXUAL HARASSMENT

Sexual harassment includes unwelcome sexual advances, requests for sexual favors, sexually-motivated physical conduct or communication of a sexual nature when:

- Submission to that conduct or communication is made a term or condition, explicitly or implicitly, of employment, public service or education; or
- Submission to or rejection of that conduct or communication by an individual is used as a factor in decisions affecting that individual's employment, public services or education, or
- That conduct or communication has the purpose or effect of substantially interfering with an individual's employment, public services or education, or creating an intimidating, hostile or offensive employment, public services or educational environment.

Id. See also State of Vt. Dep't of Educ., *Educator Licensing: Disciplinary Actions Against Licensed Vt. Educators*, <http://www.state.vt.us/educ/new/html/licensing/disciplinary.html> (last visited Nov. 13, 2005) (providing a listing of licensed teachers in Vermont who have been disciplined for misconduct, including sexual misconduct).

74. Univ. of Minn.-Duluth Student Handbook, *What is Harassment?*,

such as patting, pinching or constant brushing against the body of another.⁷⁵ "Legitimate non-sexual touching . . . is not sexual harassment."⁷⁶ Increasing awareness of and sensitivity toward sexual harassment have caused even excellent educators to reevaluate the use of any touch in the school system because of fear that even good touch might be misconstrued.⁷⁷

Elderly people who live in institutional settings are particularly vulnerable to sexual harassment and abuse, particularly those elders with dementia or communication difficulties and those that need assistance with intimate personal care.⁷⁸ One study that looked at sexual offenses against the elderly found that the perpetrators of indecent assault and sexual harassment were predominantly individuals in a position of trust, usually relatives, acquaintances, or professional caregivers.⁷⁹

CORPORAL PUNISHMENT

In 1977, the United States Supreme Court decided that the use of corporal punishment in schools is not a violation of the constitutional rights of the child.⁸⁰ Corporal punishment, or "punishment inflicted on the body,"⁸¹ has been used in the

<http://www.d.umn.edu/student/proced/harassment.html> (last visited Nov. 13, 2005). See Mesa [Ariz.] Unified Sch. Dist. Governing Bd. and Pol'ys and Admin. Regs (Feb. 23, 2010), available at <http://www.mpsaz.org/policies/MPSPolicy.pdf> (including "physical conduct of a sexual nature.")

75. Aspen [Colo.] Sch. Dist. Poly's: Sexual Harassment, <http://www.aspenk12.net/dist/policy/policy.cfm?policy=336> (last visited Nov. 13, 2005).

76. *Id.*

77. *Stephens v. Roane St. Cmty. Coll.*, No. M2001-03155-COA-R3-CV, 2003 WL 21918758 (Tenn. Ct. App. 2003).

78. Katharine Jeary, *Sexual Abuse of Elderly People: Would We Rather Not Know the Details?*, 6 J. ADULT PROTECTION 21, 21, 23, 24 (Sept. 2004).

79. Katharine Jeary, *Sexual Abuse and Sexual Offending Against Elderly People: A Focus on Perpetrators and Victims*, 16 J. FORENSIC PSYCHIATRY & PSYCHOL. 328, 334 (2005).

80. *Ingraham v. Wright*, 430 U.S. 651, 683 (1977). "The prevalent rule in this country today privileges such force as a teacher or administrator 'reasonably believes to be necessary for (the child's) proper control, training, or education.'" *Id.* at 661 (quoting RESTATEMENT (SECOND) OF TORTS § 147(2) (1965)).

81. 3 WEST'S ENCYCLOPEDIA OF AMERICAN LAW 252 (1998). "Corporal punishment: Physical punishment, as distinguished from pecuniary punishment or

educational setting for centuries.⁸² Historically, the use of corporal punishment in school was acceptable under the common law *in loco parentis* doctrine.⁸³ Before Arkansas explicitly allowed corporal punishment by statute, a labor arbitrator in Arkansas found that because the Arkansas state statute was silent at the time with regard to corporal punishment, a teacher was permitted to spank a student with a paddle.⁸⁴ More recently, the *in loco parentis* legal justification has changed to a state authorization concept.⁸⁵ Today, corporal punishment in public schools is increasingly not permitted by statute.⁸⁶ It is important to note, though, that there can be a significant distinction between what is allowed in the school

a fine; any kind of punishment inflicted on the body. Corporal punishment arises in two main contexts: as a method of discipline in SCHOOLS and as a form of punishment for committing a crime." *Id.*

82. *Ingraham*, 430 U.S. at 661 (discussing Blackstone's Commentaries); "At common law a single principle has governed the use of corporal punishment since before the American Revolution: Teachers may impose reasonable but not excessive force to discipline a child." 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 441 (1979).

83. BLACKSTONE, *supra* note 82, at 441.

[A father] may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed.

Id.; 16D C.J.S. *Constitutional Law* § 1924 (2005); see, e.g., *LaFrenz v. Gallagher*, 462 P.2d 804, 807 (Ariz. 1969); *Suits v. Glover*, 71 So.2d 49, 50 (Ala. 1954).

84. *In re Little Rock Sch. Dist.*, 101 Lab. Arb. Rep. (BNA) 1065, 1070 (1994) (Allen, Arb.). Arkansas has since amended its statutes creating the "School Discipline Act," which explicitly allows for corporal punishment in schools that have a written policy authorizing it to "maintain discipline and order within the public schools." ARK. CODE ANN. § 6-18-505 (West 2009).

85. *Ingraham*, 430 U.S. at 662.

Although the early cases viewed the authority of the teacher as deriving from the parents, the concept of parental delegation has been replaced by the view more consonant with compulsory education laws that the State itself may impose such corporal punishment as is reasonably necessary "for the proper education of the child and for the maintenance of group discipline."

Id. (citing 1 F. Harper & F. James, *Law of Torts* § 3.20, 292 (1956)).

86. *Infra* Appendix II.

versus the home. For example, Minnesota prohibited corporal punishment in schools by statute in 1989 after testimony describing the practice as detrimental.⁸⁷ However, Minnesota still apparently allows significant corporal punishment by a parent in the home setting.⁸⁸ A 2005 survey showed thirty-eight

87. *Bill Abolishing Paddling Backed*, ST. PAUL PIONEER PRESS, Mar. 30, 1989, at 4C. "To allow a 250-pound adult to pick up a board and hit a young child with it has a great potential to cause physical harm... and emotional harm also," said Robert Fathman, chairman of the National Coalition to Abolish Corporal Punishment in Schools." *Id.* In an editorial, the St. Paul Pioneer Press newspaper argued:

In the first place, spanking and paddling are unnecessary. The Japanese don't use corporal punishment in their schools; yet how out of control can classrooms be that are the educational envy of most of the world? In the second place, spanking and paddling are unwise. What kind of horrific lesson-by-example is taught when the large and powerful use force and pain to muscle the small and weak into compliance? This state is not nearly as guilty of the dumb mistake of drubbing students as are some others. In 1986, the last year for which the U.S. Department of Education has figures, paddling was used as punishment on an estimated 107 Minnesota students. In that year, Texas teachers or administrators hit kids more than a quarter of a million times. That was also the year when two students in this country died of their paddlings. One paddling, no matter how tempered the whacks, is one too many.

Editorial, *School Discipline Bill: Schools Should Spare The Rod, Serve Child*, ST. PAUL PIONEER PRESS, Apr. 6, 1989, at 12A. Minnesota provides an interesting contrast between intolerance of corporal punishment in the schools, while tolerating it in the home. The Minnesota Court of Appeals overturned an order placing children in protective custody after a spanking incident in the home. *In re Welfare of the Children of N.F. & S.F.*, 735 N.W.2d 735, 736 (Minn. Ct. App. 2007). The court held that the parental administration of thirty-six strokes with a small maple paddle as discipline was not excessive under the particular circumstances of that case. *Id.* at 736, 740.

88. *In re Welfare of the Children of N.F. & S.F.*, 749 N.W.2d 802, 810-11 (Minn. 2008).

The guardian ad litem urges us to find that the infliction of physical pain, even without specific injury, should be sufficient, and argues that we can infer that paddling a child 36 times inflicts pain. We are unwilling to establish a bright-line rule that the infliction of any pain constitutes either physical injury or physical abuse, because to do so would effectively prohibit all corporal punishment of children by their parents. Because the definition of "physical abuse" under the reporting statute, Minn. Stat. § 626.556, subd. 2(g), and the definition of "emotional maltreatment" under the CHIPS statute, Minn. Stat. 14 § 260C.007, subd. 15, both explicitly exclude "reasonable discipline," it is clear to us that the legislature did not intend to ban corporal punishment. [FN 4]. Moreover, even if pain alone could be a basis on which to conclude that physical abuse has occurred, the bare-bones stipulation of facts that forms this record is an inadequate

states had enacted statutes specifically addressing the use of physically coercive force for discipline in schools.⁸⁹ Unfortunately, the tide of statutory reform has not been all positive—even states explicitly allow corporal punishment in school by statute.⁹⁰

Standards concerning the use of corporal punishment in school have changed dramatically since the 1990's.⁹¹ One of the schools that has prohibited the practice defines corporal punishment as "the unreasonable and unnecessary use of physical force, [and] . . . the intentional [infliction] of physical pain which is used as a means of discipline."⁹² Some school

basis on which to reach such a conclusion here.

FN 4: In their brief, respondents suggest that appellants underlying purpose in these proceedings is to challenge the right of parents to use corporal punishment. Appellants deny such a purpose. That issue, however, is not before us. Nor should our decision be seen as either condoning or condemning the use of corporal punishment. By excepting "reasonable and moderate physical discipline" from the definition of "physical abuse" in section 626.556, the legislature has made a policy decision to permit corporal punishment. Whether we agree or disagree with that policy decision is of no importance. Our role is limited to interpreting the law as the legislature has enacted it.

Id.

89. *Infra* Appendix II.

90. *Id.* Eleven states explicitly allowing corporal punishment are AR, FL, GA, KY, LA, MO, MS, NM, OK, SC, TN. Eighteen states have explicitly prohibited corporal punishment by statute.

91. Ctr. for Effective Discipline, *Discipline at School (NCACPS): Corporal Punishment and Paddling Statistics by State and Race, 2006-07*, <http://www.stophitting.com/index.php?page=statesbanning> (last visited Mar. 16, 2010). "In the 2006-2007 school year, 223,190 school children in the U.S. were subjected to physical punishment. This is a significant drop of almost 18%, continuing a steady trend from the early 1980's"; Ctr. for Effective Discipline, *Study of Corporal Punishment Policies in Catholic Schools*, Mar. 2006, <http://www.stophitting.com/index.php?page=cpincatholic> (last visited Mar. 16, 2010). "The Center for Effective Discipline has completed a survey of corporal punishment policies of [174] Catholic dioceses in the continental U.S. and Hawaii. Results indicate that corporal punishment is not used or is prohibited by specific bans in all U.S. Diocesan Catholic Schools." *Id.*

92. *In re* Madison Metro. Sch. Dist. Bd of Educ., 117 Lab. Arb. Rep. (BNA) 1266, 1267 (2003) (Rice, Arb.). The use of reasonable force, as contrasted with corporal punishment, is usually still allowed and has been defined in a school setting as, "force [] used by school personnel when necessary to restrain, remove or disarm pupils who present a threat of harm to themselves or others, property damage or theft, or who disrupt school activities." *Id.* at 1267. Using reasonable and necessary force to quell a disturbance or prevent an act that threatens physical injury to any

districts incorporate “no corporal punishment” provisions into the terms of the teacher’s contract.⁹³ Such “no corporal punishment” contract provisions have been found to be appropriate standards for “just cause”⁹⁴ termination of a teacher.⁹⁵

ABUSE IN HOSPITALS AND NURSING HOMES

Society expects medical care to be helpful, i.e., “do no harm,” to patients and to encompass only good touch.⁹⁶

person is lawful and acceptable. See, e.g., HAW. REV. STAT. § 302A-1141 (2009); MICH. COMP. LAWS. § 380.1312 (2006); MINN. STAT. § 121A.582 (2005); N.J. STAT. ANN. § 18A:6-1 (2006); NEV. REV. STAT. ANN. § 392.4633 (2006); VA. CODE ANN. § 63.2-1511 (West 2006).

93. See, e.g., Michael Wanbaugh, *Teacher’s Paddle Gathers Dust; Corporal Punishment May Be Legal in Indiana, But Most Area Schools Phased it Out Years Ago*, S. BEND TRIB., June 7, 2004, at 1. “According to Richard Beeching, executive director of South Bend’s National Education Association, corporal punishment has specifically been prohibited by the teacher’s contract since 1991. ‘Discipline was a big issue back in that particular contract year,’ Beeching said. ‘Prior to that contract, teachers were allowed to administer corporal punishment.’” See *In re Madison Metro.*, 117 Lab. Arb. Rep. (BNA) at 1271 (determining “individual teacher contract provides that a teaching appointment is subject to the Board of Education policy and applicable statutes of the State of Wisconsin and such provisions are express conditions of employment between the teacher and the Employer.”)

94. BLACK’S LAW DICTIONARY 235 (8th ed. 2004). “[G]ood cause. A legally sufficient reason.”

The term is often used in employment-termination cases. – Also termed good cause shown; just cause; lawful cause; sufficient cause. Issues of ‘just cause,’ or ‘good cause,’ or simply ‘cause’ arise when an employee claims breach of the terms of an employment contract providing that discharge will be only for just cause. Thus, just cause is a creature of contract. By operation of law, an employment contract for a definite term may not be terminated without cause before the expiration of the term, unless the contract provides otherwise.

Id. (quoting Mark A. Rothstein et al., *Employment Law* § 9.7, 539 (1994)).

95. *In re Arbitration Between Dayton Chapter of Res. Tchrs. and Dayton Pub. Schs.*, AAA Case No.: 52 390 00294 92, 1992 WL 738685 (Arb.) (1992) (Paolucci, Arb.); *In re Arbitration Between: Ypsilanti Pub. Schs. and Ypsilanti Support Staff Ass’n*, AAA Case No. 54 390 00031 06, 2006 WL 4584105 (Arb.) (2006) (Daniel, Arb.).

96. “The physician must be able to tell the antecedents, know the present, and foretell the future – must mediate these things, and have two special objects in view with regard to disease, namely, to do good or to do no harm.” HIPPOCRATES, OF THE EPIDEMICS, BK I. § II.5 (Francis Adams trans., 400 B.C.E.), available at <http://classics.mit.edu/Hippocrates/epidemics.1.i.html> (last visited Mar. 11, 2010).

However, nursing home patients can be particularly vulnerable because of their age and fragility, and sometimes their inability to relate incidents of maltreatment.⁹⁷ In 1996, nearly 450,000 adults age sixty and over were abused and/or neglected in domestic settings.⁹⁸ And between one and two million Americans age sixty-five or older have been abused or exploited by someone they relied on for care or protection.⁹⁹ One study reveals that "81% of nurses and aides in nursing homes . . . had witnessed at least one form of abuse toward a[n] [elderly] patient, including insulting, yelling, threatening to commit physical violence or isolating a patient beyond what is necessary."¹⁰⁰ Actual physical abuse, which includes pushing, grabbing, pinching, slapping, or hitting a patient, was seen by 36% of the staff at least once in a year.¹⁰¹

Arbitration decisions have concluded that an employee does not have to act intentionally for patient abuse to exist.¹⁰² Physical neglect is a form of abuse that can result in dismissal of the employee who did not administer proper care.¹⁰³ Hospitals and nursing homes therefore maintain written policies prohibiting patient abuse¹⁰⁴ that result in discipline and discharge for employees whose acts constitute patient abuse.¹⁰⁵

97. See *Schenck v. Living Centers-East, Inc.*, 917 F. Supp. 432, 437 (E.D. La. 1996).

98. Nat'l Ctr. on Elder Abuse, *Fact Sheet: Elder Abuse Prevalence and Incidence* (2005), http://www.ncea.aoa.gov/ncearoot/Main_Site/pdf/publication/FinalStatistics050331.pdf.

99. *Id.*

100. Deborah J. Crumb & Kenneth Jennings, *Resolving Cases of Patient Abuse in Health-Care Facilities*, 53 DISP. RESOL. J. 36, 37 (1998).

101. *Id.*

102. *In re Arbitration Between United Pub. Workers, AFSCME, Local 646, AFL-CIO, and Hawaii Health Sys. Corp., Maluhia, CZ/02/06, 2002 WL 32303376* (Arb.), at *13 (2002) (Nauyokas, Arb.). "The Arbitrator concurs with Duquette's testimony during which he commented on Esperancilla's negligent act indicating that 'It could be intentional or unintentional. Abuse is abuse. It's just a very basic thing.'" *Id.*

103. *Id.* "The Arbitrator finds that patient abuse and neglect is an act that cannot be taken lightly. . . . In the instant case, the Grievant's act of negligence was not only a serious offense against the Employer, but an act that affected the health, safety, and welfare of Mr. M." *Id.*

104. 42 C.F.R. § 483.13 (2009).

105. *In re United Public Workers, CZ/02/06, 2002 WL 32303376, at *14* (Arb.).

Patient abuse is not tolerated “not only because the law and humanitarian considerations make such behavior unacceptable, but because proper treatment of patients is the heart of Employers’ business.”¹⁰⁶ Patient abuse in health care can also be devastating to the institution.¹⁰⁷ “Findings of patient abuse can lead to facility-licensure penalties (including removal of a facility’s license) and affect Medicare and Medicaid eligibility.”¹⁰⁸ “Abusive acts can also subject the employer to criminal and civil actions by the patients and their families.”¹⁰⁹ “At least forty-two states seek to prevent abuse of nursing-home residents and elderly people.”¹¹⁰ In addition, current federal guidelines oblige facilities to implement policies and procedures to protect residents from abuse.¹¹¹

GRAY TOUCH—THE UNCERTAINTY ZONE

Many forms of “bad touch” hardly need to be debated—sexual abuse, physical abuse, and harassment are bad. Similar to Justice Stewart’s method of identifying pornography, people usually “know it when [they] see it.”¹¹² Therefore, it is not necessary to spend much time on the blatant forms of such conduct. The problem area today is “gray touch”—types of touch that are meant to be “good” but cross the boundaries of the person touched, or touch that is perceived by society as crossing a societal boundary, even when welcomed by the person touched.¹¹³

106. Crumb & Jennings, *supra* note 100, at 38 (citing Ambassador Convalescent Center, Inc., 84 LA 44 (N. Lipson, 1984)).

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. 42 C.F.R. § 483.13 (2009).

112. Referring to *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Justice Stewart concurring, stating, “I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it . . .”)

113. One example of societal norms in flux is the current debate over “no-hugging” or “no public display of affection” policies being implemented in schools. Specifically, students were disciplined at Prattville Junior High in Prattville,

THE TOUCH CONTINUUM

At the far opposite ends of the spectrum of touch, the distinctions between “good touch” and “bad touch” are clear. Good touch heals and reinforces. Bad touch scars and degrades, and can lead to depression, helplessness, and suicide. Bad touch can have life-altering negative consequences.¹¹⁴

Unfortunately, problems of interpretation arise in the murky middle—the uncertain zone of “gray touch.” What about the intended good touch that crosses the recipient’s own

Alabama, and the Mascoutah Public School District 19 near Bellville, Illinois, for hugging classmates. *Students Reprimanded for Hugging Friends at School*, WKYC TV, http://www.wkyc.com/news/national/news_article.aspx?storyid=77548 (last visited Nov. 8, 2007). Similar disciplinary events have occurred recently in Texas and Illinois. Mike Celizic, *Schools Jumping on the Hug Ban-Wagon: Most Forms of Physical Contact Now Barred From Nation's Halls of Learning*, MSNBC TodayShow.com, <http://www.msnbc.msn.com/id/21097673/> (last visited Nov. 8, 2007). Mascoutah provides the following policy guidance:

PUBLIC DISPLAY OF AFFECTION

Displays of affection should not occur on the school campus at any time. It is in poor taste, reflects poor judgment, and brings discredit to the school and to the persons involved. First offenders will be warned. Second offenders will serve detention and a parent conference will be held. Third offenders will serve in-school suspension.

Mascoutah Middle Sch. Student Handbook, 2009, available at <http://mascoutah.il.schoolwebpages.com> (last visited Mar. 7, 2010). Mountain View High School publishes this policy:

DISPLAYS OF AFFECTION

Inappropriate public displays of affection on campus are prohibited. This behavior makes other students and the staff uncomfortable. Behavior should be limited to holding hands, brief hugging, and/or a quick kiss. Anything that goes beyond those activities will be considered inappropriate and will be dealt with in the following manner:

First Offense: Warning to both parties.

Second Offense: Refusing to comply to staff satisfaction will be considered defiance and will be subject to disciplinary action.

Mountain View High Sch. Student Handbook, 2009-2010, available at http://www.bend.k12.or.us/education/sctemp/5dc87c0edc55a4df9acaa4aa57fe279d/1268114250/Student_Handbook_2009-10.pdf. Clearly these policies are open to interpretation leaving students with little formal guidance on how to approach touching of friends and faculty.

114. See *supra* notes 56-60, and accompanying text.

personal psychological boundaries? What are the benchmarks and considerations that go into determining whether a person who intended good might still face discipline and punishment? Many arbitrators and judges faced with such circumstances consider:

- 1) What is really going on in the situation? The individual facts are critical to the final decision. This often results in “he said/she said” problems and witness credibility.¹¹⁵
- 2) The rules of the company/union/school district/health care facility. This would include any handbooks or policies of the institution.¹¹⁶
- 3) The nature of the institution, i.e., higher standards for health care or schools because patients and students are potentially less able to protect themselves than people in a workplace.¹¹⁷
- 4) Prior warnings or prior offenses.¹¹⁸

115. *In re Kroger Ltd. P’ship I*, Louisville, Ky. and United Food & Com. Workers Int’l Union, Local 227, 122 Lab. Arb. Rep. (BNA) 1298, 1309 (2006) (Nicholas, Arb.). “[T]here is a large body of arbitral opinion, including my own, in which a termination(s) is upheld—notwithstanding the grievant’s denials—based on the arbitrator’s assessment of the plausibility of the complaint and the credibility of the complainant.” *Id.*

116. *In re Arbitration Between Snohomish Sch. Dist. No. 201 the Employer and Pub. Sch. Emps., Snohomish the Union*, 1991 WL 693084 (Arb.) (1991) (Wilkinson, Arb.); *Livingston v. Dep’t of Emp. Sec.*, 873 N.E.2d 444, 448-49 (Ill. App. Ct. 2007) (discussing a nursing home that had a rule that employees should not touch patients unless it was necessary for patients’ care).

117. *In re Arbitration Between Seattle Sch. Dist. the Employer and Operating Engineers Local 609-B the Union*, AAA No. 75-390-00282-93, 1994 WL 851212 (Arb.), at 15 (1994) (Wilkinson, Arb.) (stating “the District accurately notes that it bears a special burden of care with regard to its students, by virtue of the public middle school environment”); *In re Indep. Sch. Dist. No. 255, Pine Island, Minn.*, 102 Lab. Arb. Rep. (BNA) 993, 1002 (Daly, Arb.); *State v. Meyer*, No. 04-1305, 2006 WL 1628039, at *5 (Iowa Ct. App. 2006) (“Our conclusion is influenced by our belief that the legislature intended the statute to provide very broad protection to a vulnerable population of nursing home residents.”)

118. *In re Arbitration Between Seattle Sch. Dist.*, 1994 WL 851212 (Arb.) (1994) (Wilkinson, Arb.); *In re Arbitration Between United Public Workers*, 2002 WL 32303376 (Arb.) (stating “[t]he testimony at the arbitration hearing, as well as the

- 5) The treatment of other employees with similar instances of conduct.¹¹⁹
- 6) Whether the employee had ample notice of impropriety of conduct.¹²⁰

Schools and health care facilities have a responsibility to protect the students and patients they serve. Sexual abuse and violence in schools and care facilities are grave concerns. But, how does one distinguish between the various forms of contact such as: (i) touch of a sexual nature; (ii) touch that crosses a student's or patient's boundaries; (iii) touch that is meant to encourage; and (iv) touch meant to correct? Positive reinforcement through touch is seen by teaching professionals and health care professionals as a valuable tool.¹²¹ However, the way each student or patient perceives touch, even "good touch," can differ.¹²²

In the gray zone, arbitrators and judges most often rely on the company or school policy on sexual or physical harassment both in determining the appropriateness of a person's conduct

evidence, revealed that the Grievant had been previously counseled for his negligence in the workplace"); Detroit Medical Center Employer, and Serv. Employees Int'l Union Local 79 (S.E.I.U.), 2005 WL 2462946 (Arb.) (2005) (McDonald, Arb.) (relying in part on prior "major infraction concerning insubordination.")

119. *In re* Madison Metro. Sch. Dist. Bd. of Educ., 117 Lab. Arb. Rep. (BNA) 1266, 1274 (Rice, Arb.) (discussing an arbitrator's overturning of a penalty of discharge after determining past practice of 5 day suspension of different teacher, but imposing 30 day suspension in this case because this instance was "serious matter and merits more than a 5 day suspension.")

120. *In re* Arbitration of Snohomish, 1991 WL 693084; *In re* Smurfit Stone Container Corp., 122 Lab. Arb. Rep. (BNA) 892, 895 (2006) (Fitzsimmons, Arb.); Meyer, 2006 WL 1628039, at *5 (noting that the defendant certified nursing assistant had seventy-two hours of course work, watched a two hour video on nursing home resident abuse, and the nursing home posted a memo warning employees not to tease residents.)

121. Stetzel, *supra* note 4, at 13. "Good touch reinforces students' positive actions and makes them feel special and good about themselves and their accomplishments." See James Delisle, *Healing Touch*, 6 TEACHER MAG., Nov./Dec., 1994, at 50; and Samuel G. Sava, *Losing Touch*, 74 PRINCIPAL at 64 (Jan. 1995).

122. TONY CHARLTON & KENNETH DAVID, SUPPORTIVE SCHOOLS: CASE STUDIES FOR TEACHERS AND OTHER PROFESSIONALS WORKING IN SCHOOLS 25 (1990).

and in enforcing penalties for deviant behavior. It is in an employee's best interest to review such a policy closely and know what type of behavior the organization does not allow. Further, it is imperative for an employee to understand the specific policy in a substantive way so she/he can properly abide by its intentions.

When considering sexual harassment cases, arbitrators often have to characterize the severity of the incident or conduct and issue disciplinary action accordingly, with different degrees of harassment warranting different penalties.¹²³ "Sexual harassment of a serious nature is the type of socially disapproved conduct which is in the category of employee misconduct justifying immediate discharge."¹²⁴ The disciplinary action taken varies with the specifics of each case and also depends on the attitude of the arbitrator toward the specific conduct.¹²⁵ Whether discharge or a lesser penalty is appropriate has been deemed somewhat inconsistent and is a matter on which arbitration awards reflect little uniformity.¹²⁶ Companies may have policies against sexual harassment, which provide for discipline up to and including termination.¹²⁷ An employer has "every right to move aggressively to deal with [an] offending male employee"¹²⁸ and is at liberty to remove the employee before the conduct becomes worse.¹²⁹

Behavior that may have been in contravention of a college's harassment policies, coupled with informal complaints from students, were grounds for suspension of a professor without pay for six months.¹³⁰ The college professor allegedly made a student uncomfortable in a situation where he physically put his

123. *In re King Soopers, Inc.*, 101 Lab. Arb. Rep. (BNA) 107, 111 (1993) (Snider, Arb.).

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *In re Care Inns, Inc.*, 81 Lab. Arb. Rep. (BNA) 687, 694 (1983) (Taylor, Arb.).

129. *Id.*

130. *Stephens v. Roane St. Cmty. Coll.*, No. M2001-03155-COA-R3-CV, 2003 WL 21918758, at *6 (Tenn. Ct. App. 2003).

hands on her shoulders and threatened her in his office.¹³¹ The student also testified to instances where the professor massaged the shoulders of another student and used uncomfortable classroom examples regarding pregnancy and infidelity.¹³² The professor denied the allegations of the office incident, creating a "he said/she said" situation, and causing the evidence at trial to be "hotly disputed."¹³³ The professor was approached by the college's Affirmative Action Officer, who advised him that it was inappropriate to hug and touch students.¹³⁴ He was also cautioned by two fellow professors that touching students was inappropriate.¹³⁵ The professor found no problem with his own conduct, relaying to the court the sentiment that he was trying to make a relaxed environment for his students and that he was trying to be "grandfatherly."¹³⁶ However, the reviewing court found that the "reasonable reaction of the recipient" of his conduct, as opposed to the professor's subjective intent, was the important consideration under the school's sexual harassment policy.¹³⁷ Arbitrators and judges may also consider whether a person has had ample warning of the impropriety of his/her conduct and whether his/her conduct is pervasive.

In *In re Shell Pipe Line Corp.*, an arbitrator decided that a complainant's failure to verbalize her objection to harassing conduct did not make the physical contact more warranted.¹³⁸ In the same case, the arbitrator also decided that discharge of the perpetrating employee was warranted because the perpetrator had used physical contact in harassing the grievant and had engaged in a pattern of behavior over time with several co-workers, as opposed to a single incident committed by a co-

131. *Id.* at *2.

132. *Id.* at *3.

133. *Id.* at *4.

134. *Id.* at *3.

135. *Id.*

136. *Id.* at *4.

137. *Id.* at *9.

138. *In re Shell Pipeline Corp.*, 97 Lab. Arb. Rep. (BNA) 957, 961 (1991) (Baroni, Arb.).

worker.¹³⁹

In cases involving physical abuse of the elderly, arbitrators and judges often consider the intent of the accused.¹⁴⁰ An employee of a nursing home was fired because his employer believed he had physically abused four elderly residents.¹⁴¹ Although the arbitrator found that the employee had mistreated two of the residents, he found that the “mistreatment was not intentional, but was a result of rough handling stemming from carelessness that could be attributed to [the employee’s] ‘size, bulk, strength and, at times, being rushed to perform chores.’”¹⁴² The court upheld the arbitrator’s reinstatement of the employee after a one month suspension without pay.¹⁴³ Similarly, a nursing home administrator appealed the revocation of her license in part for physically abusing residents.¹⁴⁴ The court noted a discrepancy between the Administrative Law Judge’s (ALJ) finding, without explanation, of no abuse versus the State Commissioner of Health’s finding that the administrator physically abused a resident when “she pushed [the resident] into her office and screamed at her . . . to sit still in a chair”¹⁴⁵ and when the administrator removed another resident from her

139. *Id.* at 963.

140. *See, e.g.,* *Livingston v. Dep’t of Emp. Sec.*, 873 N.E.2d 444, 449 (Ill. App. Ct. 2007) (upholding the firing of a nursing assistant who had been fired for slapping an elderly nursing home resident despite the fact that she claimed to have touched the resident on the face in an attempt to “calm down a highly agitated resident.”); *Ark. Dep’t of Human Serv. v. Haen*, 100 S.W.3d 740, 742-43 (Ark. Ct. App. 2003) (reversing an agency finding that a nursing assistant had abused an elderly nursing home resident, when he pushed her wheelchair quickly through a door causing her to hit her foot, because there was no evidence that the act was intentional); *Maggio v. Local 119*, 702 F. Supp. 989, 991, 996 (E.D. NY 1989) (confirming an arbitrator’s reinstatement of a nursing home employee based on the fact that any mistreatment of residents was unintentional); *State Dep’t of Health v. Tegnazian*, 477 A.2d 363, 370 (N.J. Super Ct. App. Div. 1984) (remanding case regarding a nursing home administrator who pushed an elderly resident for more specific factual findings as to whether the push was a form of abuse or whether it was necessary to protect the resident.)

141. *Maggio*, 702 F. Supp. at 990.

142. *Id.* at 991.

143. *Id.*

144. *Tegnazian*, 477 A.2d at 364.

145. *Id.* at 367.

office by "pushing her across the room."¹⁴⁶ In deciding to remand the case to the ALJ for more specific factual findings, the court noted that the ALJ may have found that the administrator pushed the resident into a chair not as a form of abuse, but to protect the resident, and that she had used only "the slightest degree of physical contact"¹⁴⁷ with the other resident—no more "than was necessary to remove the resident from the room."¹⁴⁸ These decisions highlight the importance of the surrounding circumstances, as well as the intent of the accused, in determining whether certain instances of touching were abusive or not.

The arbitrator or judge may also consider whether the conduct was "sexual" in nature. This type of behavior seems to add to the severity of the conduct and may cause the behavior to be seen as immediately inappropriate. When the touch is sexually motivated, the result is usually suspension or termination.¹⁴⁹

A spontaneous kiss has been considered grounds for suspension where the employee was warned twice previously about making inappropriate ethnic and sexual comments to other employees.¹⁵⁰ A male guard working at a plant gave

146. *Id.* at 367-68.

147. *Id.* at 370.

148. *Id.*

149. *See, e.g., In re Alta Bates Summit Med. Ctr [Oakland, Calif.] and SEIU United Healthcare Workerswest*, 123 Lab. Arb. Rep. (BNA) 650, 650 (2007) (Staudohar, Arb.) (terminating employee for sexual harassment, including touching and imitating sex); *In re Oahu Transit Serv., Inc. and Hawaii Teamsters & Allied Workers, Local 996*, 122 Lab. Arb. Rep. (BNA) 161, 162 (2005) (Najita, Arb.) (terminating bus driver for sexual harassment of minor child including unwanted hug); *In re Arbitration Between: The Med. Coll. of Ohio and Ohio Council #8 Am. Federation of St., County and Municipal Emps., AFL-CIO and AFSCME Local 2415*, No. 12-1-94, 1995 WL 852272 (Arb.), at 14 (1995) (Duda, Arb.) (terminating of teacher was overturned but teacher suspended for 180 days for sexual misconduct with students); *In re Arbitration Between: AFSCME Local 473, Union, and Chief Judge of the Seventeenth Judicial Circuit, Winnebago County, AAA Case No. 51 390 0289 92B*, 1993 WL 801410 (Arb.), at 1 (1993) (Nathan, Arb.) (suspending court bailiff for five days for sexual harassment and touching of female coworker); *In re Arbitration Between Clark County Sch. Dist. and Educ. Support Emps. Ass'n*, 1998 WL 1069130 (Arb.) (1998) (Bickner, Arb.) (terminating school district maintenance worker for sexually touching coworker).

150. *In re Honeywell, Inc.*, 95 Lab. Arb. Rep. (BNA) 1097, 1097 (1990) (Gallagher,

another female guard a “spontaneous birthday kiss” on the cheek and the arbitrator considered the kiss as “conduct that crossed the line between what is and is not acceptable [despite their bantering and flirtatious relationship].”¹⁵¹ Further down the continuum in another dispute, a nursing home employee was discharged where he roughly grabbed the arm of a nurse’s aide and kissed her on the cheek while she was helping a patient.¹⁵²

An employee bus driver was found to be properly discharged where he was in violation of the company’s performance code for engaging in “sexual acts” or sexual misconduct with a passenger.¹⁵³ The bus driver engaged in sexual acts with the passenger while on duty aboard a parked company bus.¹⁵⁴ The company’s performance code stated that an infraction of the company’s policy of indecent, lewd, or vulgar conduct “occurs when an employee makes improper advances toward another person or engages in sexual acts while on duty or on District property or equipment.”¹⁵⁵ The employee was found to be properly discharged.¹⁵⁶

An Iowa court of appeals upheld the conviction of a nursing assistant for wanton neglect of a dependent adult when she repeatedly touched or twisted the nipples of her eighty-six year old male patient with Alzheimer’s disease.¹⁵⁷ While the court characterized the conduct as “teasing,” rather than as sexual, it did focus on the fact that this unwanted touching “could have upset or further depressed [the patient] . . . and . . . may have been humiliating for him.”¹⁵⁸

A person’s position of authority or an adult/child situation

Arb.).

151. *Id.* at 1100.

152. *In re Care Inns, Inc.*, 81 Lab. Arb. Rep. (BNA) 687, 688 (1983) (Taylor, Arb.).

153. *In re Reg’l Transp. Dist.*, 80 Lab. Arb. Rep. (BNA) 1225, 1226, 1234-35 (1983) (Eaton, Arb.).

154. *Id.* at 1232.

155. *Id.* at 1226.

156. *Id.* at 1234.

157. *State v. Meyer*, No. 04-1305, 2006 WL 1628039, at *1 (Iowa Ct. App. 2006).

158. *Id.* at *2.

will likely cause more concern and more severe punishments under the law. A custodian for a school district was suspended for sexually harassing a female student who was under his supervision for work purposes.¹⁵⁹ The student reported to the school district that the custodian had pulled her into an unlighted classroom and put his arms around her head and back.¹⁶⁰ Later that day, the custodian followed the student into the same classroom and turned the lights off, stating "now we have a little privacy."¹⁶¹ When she told him to leave her alone, he switched the light on and walked away.¹⁶² The custodian gave a different story of the occurrences but was still found to have physically and sexually harassed the student.¹⁶³ The arbitrator commented that the custodian's position of authority over the girl added to the seriousness of the incident.¹⁶⁴ The custodian was suspended for sixty days without pay, had to attend counseling at his own expense, and could be reinstated to his position "only upon a favorable and positive report from such professional confirming that he understands the nature of his problem and that he would be able to function in a school environment without further incident."¹⁶⁵ The custodian was also required to continue with the counselor for as long as the professional deemed necessary, and the counselor was required to submit written reports of the custodian's status to the school district.¹⁶⁶ In addition, if there was a negative finding of the custodian's status and progress, the custodian's employment would be subject to review and possible termination.¹⁶⁷

In a case that demonstrates the difficulty in interpreting acts in the zone of gray touch, a school district employee was

159. *In re Flushing Cmty. Sch.*, 100 Lab. Arb. Rep. (BNA) 444, 445-46, 449 (1992) (Daniel, Arb.).

160. *Id.* at 445.

161. *Id.*

162. *Id.*

163. *Id.* at 446, 448.

164. *Id.* at 448.

165. *Id.* at 449.

166. *Id.*

167. *Id.*

suspended for five days without pay because of what was seen as an inappropriate relationship with students regardless of the lack of sexual motive.¹⁶⁸ The employee, a custodian, bounced a girl on his knee and carried her to the office in the presence of others, gave children candy in the presence of others, and had two fifth-grade girls help him empty wastebaskets.¹⁶⁹ Additionally, a female librarian had previously complained about the custodian placing his hands on her shoulders.¹⁷⁰ In this case, the arbitrator reinstated the custodian with back-pay because the custodian was found not to be acting out of sexual motive, but rather kindness and compassion, and the school management had never properly instructed the custodian as to what the school considered an “inappropriate relationship.”¹⁷¹

CROSSING INDIVIDUAL AND SOCIETAL BOUNDARIES

A serious problem today is the variability of individual versus societal boundaries. Some types of touch might be “good” by a reasonably objective definition, but the recipient is nevertheless offended by such contact. Perhaps, the individual was sexually abused as a child? Perhaps, the individual simply has a wide zone of privacy and only lets certain people into that personal space? Unfortunately, even a well-intentioned teacher, doctor, caregiver, minister, or friend might “invade” this gray zone of touch and find himself in trouble for unwanted touching.

One particular arbitration decision points to the difficulty of dealing with teachers who fail to recognize this ill-defined gray zone. In *In re Independent School District No. 255*, an arbitrator had to address the issue of a teacher who regularly touched his students in a way that the female students complained made

168. *Indep. Sch. Dist. No. 833 – Cottage Grove and Int’l Union of Operating Engineers, Local 70*, 88 Lab. Arb. Rep. (BNA) 713, 713 (1987) (Gallagher, Arb.).

169. *Id.* at 714.

170. *Id.* at 713.

171. *Id.* at 716.

them uncomfortable.¹⁷² The teacher (identified as J) admitted to regularly touching students on the back and shoulders and hugging them.¹⁷³ J denied that he had any sexual motivation in touching his female students and relied on having been taught that touch was an important element of educating students.¹⁷⁴ Unfortunately, J had been warned previously about the impact

172. *In re* Arbitration of Indep. Sch. Dist. No. 255, Pine Island, Minn., 102 Lab. Arb. Rep. (BNA) 993, 994-95 (Daly, Arb.).

173. *Id.* at 997.

174. *Id.* at 1000.

The Minnesota Education Association in its *Post-hearing Brief of Teacher* agrees that "nurturing touch can be misconstrued." The Association further argues that the "teaching profession has changed, but some teachers have not." The Association continues:

Teachers who were trained in the sixty's (60's) were taught that nurturing touch of students was the most effective way to "bond" with students. They were taught that once you bonded with them, that opened up avenues of communication in which real learning could take place. In addition, they were taught that as teachers, they would be acting in loco parentis with the students while they were in school. Most telling on this issue was the response of Willie Rauen to questions posed by the Arbitrator. He described the teacher student relationship as being based on treating the student like they were their own children. His description is not unlike multitudes of teachers today.

Teaching methods that are based on such a philosophy most often instill feelings of love and caring into the teacher student relationship. Teachers like [J] are often rewarded for such a relationship with long lasting bonds with students that inspire them to attain fulfillment in other areas of their lives. Those teachers also risk having those feelings and touch misconstrued by the very students it is meant to encourage. There lies the fundamental paradox between teaching today and teaching twenty years ago. Minnesota first outlawed sexual harassment in 1982. The Hill-Thomas spectacle occurred less than three years ago. Teachers are really largely unaware that even good, nurturing touch can cause some reasonable students to feel uncomfortable. This maxim is especially true when it comes to teenage girls.

Students, however, are heightened in their awareness of the issue of sexual harassment. This heightened awareness is a benefit to our society as it grapples with attaining a better state. Along the way on this path of betterment, casualties occur. One such casualty that might result is the positive benefit children get from touch that is nurturing. After all, the only way that a teacher may fully insulate himself from allegations of sexual harassment of this type is to not touch at all. Ultimately, this trade off might not be in the best interests of our society as a whole. Teachers of today are confronted with this difficult choice every day in [the] classroom.

Id. at 999-1000.

his style of touching was having on his female students.¹⁷⁵ Ultimately, the arbitrator allowed J to retain his teaching job, but ordered a strict “no-touch” written contract.¹⁷⁶

Clearly, once an individual has been warned that his/her style of touching is being perceived as inappropriate, it would be wise for that individual to reevaluate his/her sense of boundaries and avoid any future repetition of the previously offending conduct.

A discrimination case brought by a nurse also points to the fact that individual boundaries can take on special legal significance.¹⁷⁷ A nurse sued a residential retirement home that refused to hire him because he was male.¹⁷⁸ The retirement home was successful in arguing that gender was a bona fide occupational qualification because twenty-two of the home’s thirty residents were female and the nurses at the home engaged in “intimate personal care including dressing, bathing, [and] toilet assistance”¹⁷⁹ The home presented evidence that the elderly female residents would not consent to having their personal needs taken care of by a male nurse and they would leave the home if a male nurse was employed there.¹⁸⁰ The court agreed that the home had a duty to protect its residents’ personal privacy interests and could not force its female residents to accept personal care from a male.¹⁸¹

175. *Id.* at 994

176. *Id.* at 1003.

Although the teacher, J, is credible in his testimony that he never touched any of the students in a sexual manner, it is clear from the testimony of the children and the two psychologists that J must have it clearly spelled out to him that he can no longer touch a student as part of his teaching methodology. Dr. Gonsiorek’s recommendation that a “very clear [no touch] contract” be made between the School District and the teacher is ordered.

Id. at 1002.

177. *See* *Fesel v. Masonic Home of Del., Inc.*, 447 F. Supp. 1346, 1347-49 (1978).

178. *Id.* at 1348-49.

179. *Id.* at 1352-53.

180. *Id.* at 1352.

181. *Id.* at 1353.

Personal legal liability for misperceived touch can prove very costly, both emotionally and financially. There are few published legal court precedents available for clear guidance relating to the danger of unintentionally crossing individual boundaries. However, there is one relatively high profile case that provides a cautionary tale to any professional who unintentionally commits such an offense, even if subsequently cleared of any wrongdoing.

In *Bellevue John Does 1-11 v. Bellevue School District # 405*, the Seattle Times appealed a denied December 2002 request for the release of detailed information relating to all sexual misconduct investigations of teachers.¹⁸² The newspaper wanted all information for the previous ten years, including teachers' names, regardless of whether a teacher had been cleared of an accusation.¹⁸³ Several teachers were forced to file suit to block the release of their names and prevailed in the lower court on the ground that it would be an invasion of their privacy.¹⁸⁴ Although the innocent teachers protested, the paper intended to publish all of their names, arguing that even though some individuals were not found to have committed any sexual misconduct, "the allegations were of legitimate public concern whether true or false."¹⁸⁵ The appeals court affirmed withholding some of the names, but went on to create a fine distinction between "unsubstantiated" accusations versus "false" accusations.¹⁸⁶ The court was willing to allow disclosure

182. *Bellevue John Does 1-11 v. Bellevue Sch. Dist. No. 405*, 120 P.3d 616, 617 (Wash. Ct. App. 2005).

183. *Id.* at 620.

184. *Id.*

185. *Id.* at 626.

186. *Id.* at 628.

The two terms do not mean the same thing. As these case files show, it is much easier to label an accusation "unsubstantiated" than to say with confidence that it is false. This is because "unsubstantiated" often means only that an investigator, faced with conflicting accounts, is unable to reach a firm conclusion about what really happened and who is telling the truth. Especially when the conduct reported is a fleeting touch, a comment seemingly off-color or directed at a student's physical appearance, or a habit of writing personal notes, it is possible that the accuser

of the teachers' names in "unsubstantiated" cases, as that may reveal a pattern of conduct.¹⁸⁷ This case is now on appeal to the Washington Supreme Court for review of the unsubstantiated versus false distinction, and the constitutional right to privacy of the teachers who experienced unproven accusations.¹⁸⁸ Needless to say, the teachers involved in this case have paid a high price for conduct that either never actually occurred, or was never intended to be inappropriate.

CONCLUSION

It is difficult to give objective advice that would apply under all circumstances. "Good touch" and "bad touch" are apparently no longer clearly delineated. A "gray touch" zone does certainly now exist. Modern society recognizes that every individual is different and entitled to protection of their individual space. The individual whose profession might require physical contact with society's "vulnerable" populations is best advised to first attempt to glean an awareness of individual personal boundaries before offering what might otherwise objectively be assumed to be "good touch." Even with good touch, the best rule of thumb for the gray zone is, when in doubt, do not touch. Rely instead on kind, loving, and professional words only. Be perceptive of, and respect, the boundaries people build around themselves. In today's world, intended "good touch" can unknowingly cross individual boundaries. Perhaps one day,

misunderstood the words, misinterpreted the intent, or even fabricated the entire event. But it is also possible that the accuser was accurately reporting inappropriate conduct. Where that possibility exists, the public has a legitimate interest in knowing the name of the accused teacher. If a teacher's record includes a number of complaints found to be "unsubstantiated", the pattern is more troubling than each individual complaint. Yet, if the teacher's name in each individual complaint is withheld from public disclosure, the public will not be able to see any troubling pattern that might emerge concerning that teacher.

Id.

187. *Id.*

188. *Bellevue John Does 11-1 v. Bellevue Sch. Dist. No. 405*, 149 P.3d 376, 376 (Wash. 2007).

when society is capable of accurately separating the predators from the nurturers, the gray zone of touch will be minimized. But, for now, all professionals must be wary.

Necessary good touch exists, just as does forbidden bad touch. The key problematic area today lies in the gray zone between good and bad touch. There are no clear answers. Significant additional research, observation, psychological understanding, and legal clarification will be required before we can more clearly delineate the occasions to touch or not to touch within the amorphous gray zone.

APPENDICES I AND II: INTRODUCTION

Because many questions surrounding the issue of touch arise in the context of employment and education, we have included the following two surveys of state laws that address discrimination in employment and corporal punishment in schools.

The first survey focuses on state laws that prohibit discrimination in employment, including but not limited to discrimination based on gender and unfair employment practices. Some of the statutes apply only to private employers, while others apply to both private and public employers.

The second survey focuses on state laws that address the issue of corporal punishment in schools. While some states explicitly allow the use of corporal punishment with students, others strictly prohibit its use.

APPENDIX ONE: DISCRIMINATION IN EMPLOYMENT¹⁸⁹

ALABAMA

ALA. CODE § 25-1-20 (LexisNexis 2007 & Supp. 2009)

Definitions

ALA. CODE § 25-1-21 (LexisNexis 2007 & Supp. 2009)

Discrimination against workers 40 years of age and over— Prohibited

ALA. CODE § 25-1-22 (LexisNexis 2007) Unlawful
employment practices—Generally

ALA. CODE § 25-1-23 (LexisNexis2007) Unlawful
employment practices—Employment agency

ALA. CODE § 25-1-24 (LexisNexis2007) Unlawful
employment practices—Labor organization

ALA. CODE § 25-1-25 (LexisNexis2007) Unlawful

189. Statutes compiled from Westlaw's 50 State Statutory Survey, 50 State Statutory Survey, *Discrimination in Employment*, 0060 Surveys 25 (Westlaw).

employment practices—Apprenticeship

ALA. CODE § 25-1-26 (LexisNexis2007) Unlawful employment practices—Licensure, etc.

ALA. CODE § 25-1-27 (LexisNexis2007) Unlawful employment practices—Advertisement

ALA. CODE § 25-1-28 (LexisNexis2007) Unlawful employment practices—Opposition to employer

ALA. CODE § 25-1-29 (LexisNexis 2007) Remedies

ALASKA

ALASKA STAT. § 18-80-220 (2008) Unlawful employment practices; exception

ARIZONA

ARIZ. REV. STAT. ANN. § 23-340 (1995 & Supp. 2009)

Definitions

ARIZ. REV. STAT. ANN. § 41-1463 (2004 & Supp. 2009)

Discrimination; unlawful practices; definition

ARIZ. REV. STAT. ANN. § 41-1464 (2004 & Supp. 2009) Other unlawful employment practices; opposition to unlawful practices; filing of charges; participation in proceedings; notices and advertisements for employment

ARKANSAS

ARK. CODE ANN. § 11-4-601 (2002) Sex discrimination

ARK. CODE ANN. § 11-4-610 (2002) Additional sex discrimination

ARK. CODE ANN. R ST § 16-123-107 (2006 & Supp. 2009)

Liability

CALIFORNIA

CAL GOV'T CODE § 12940 (West 2005 & Supp. 2010)

Employers, labor organizations, employment agencies and other

persons; unlawful employment practice; exceptions

CAL GOV'T CODE § 12941 (West 2005 & Supp. 2010) Age discrimination; use of salary as method of differentiating between employees

CAL GOV'T CODE § 12945 (West 2005) Pregnancy; childbirth or related medical condition; unlawful practice by employers; benefits and leaves of absence; transfer of position

CAL GOV'T CODE § 12948 (West 2005) Denial of civil rights as unlawful practice

CAL GOV'T CODE § 1197.5 (West 2003 & Supp. 2010) Equal wage rates for all employees; variations; enforcement

COLORADO

COLO. REV. STAT. ANN. § 8-5-102 (West 2009) Wage discrimination prohibited

COLO. REV. STAT. ANN. § 24-34-402 (West 2009)
Discriminatory or unfair employment practices

CONNECTICUT

CONN. GEN. STAT. ANN. § 31-75 (West 2003 & Supp. 2009)
Discrimination in compensation on account of sex

CONN. GEN. STAT. ANN. § 46A-60 (West 2009 & Supp. Aug. 2009) Discriminatory employment practices prohibited

CONN. GEN. STAT. ANN. § 46A-81C (West 2009) Sexual orientation discrimination: Employment

DELAWARE

DEL. CODE ANN. tit. 19, § 711 (2005 & Supp. 2008) Unlawful employment practices; employer practices

DEL. CODE ANN. tit. 19, § 724 (2005) Unlawful employment practices

DEL. CODE ANN. tit. 19, § 1107A (2005) Differential rate of pay based on gender prohibited

DISTRICT OF COLUMBIA

D.C. CODE § 2-1402.11 (2001 & Supp. 2009) Prohibitions

D.C. CODE § 7-1005 (2001) Discrimination in employment prohibited

FLORIDA

FLA. STAT. ANN. § 413.08 (West 2009) Rights of an individual with a disability; use of a service animal; discrimination in public employment or housing accommodations; penalties

FLA. STAT. ANN. § 448.07 (West 2002) Wage rate discrimination based on sex prohibited

FLA. STAT. ANN. § 760.10 (West 2005 & Supp. 2010) Unlawful employment practices

GEORGIA

GA. CODE ANN. § 34-1-2 (2008) Unjust discrimination because of age prohibited

GA. CODE ANN. § 34-5-3 (2008) Prohibition of discrimination

GA. CODE ANN. § 34-6A-4 (2008) Discrimination against individuals with disabilities prohibited

HAWAII

HAW. REV. STAT. ANN. § 378-2 (LexisNexis Supp. 2009) Discriminatory practices made unlawful; offenses defined

HAW. REV. STAT. ANN. § 378-2.3 (LexisNexis Supp. 2009) Equal pay; sex discrimination

HAW. REV. STAT. ANN. § 387-4 (LexisNexis 2004) Wage discrimination prohibited

IDAHO

IDAHO CODE ANN. § 18-7303 (2004) Denial of right to work or accommodations a misdemeanor

IDAHO CODE ANN. § 44-1702 (2003) Discriminatory payment of wages based upon sex prohibited

IDAHO CODE ANN. § 67-5909 (2006 & Supp. 2009) Acts prohibited

ILLINOIS

775 ILL. COMP. STAT. ANN. 5/2-102 (West 2001 & Supp. 2009)
Declaration of Policy

775 ILL. COMP. STAT. ANN. 5/1-103 (West 2001 & Supp. 2009)
General Definitions

820 ILL. COMP. STAT. ANN. 105/4 (West 2008 & Supp. 2009)
Establishment of minimum wage; sex discrimination; allowance for gratuities

820 ILL. COMP. STAT. ANN. 110/1 (West 2008 & Supp. 2009)
Wage discrimination; penalty

INDIANA

IND. CODE ANN. § 22-9-1-2 (WEST 2008) Public policy;
construction of chapter

IND. CODE ANN. § 22-2-2-4 (WEST 2008) Rates; discrimination

IND. CODE ANN. § 22-9-2-2 (WEST 2008) Unfair employment practice; dismissal from employment

IND. CODE ANN. § 22-9-5-19 (WEST 2008) Prohibition against discrimination

IOWA

IOWA CODE ANN. § 216.6 (West 2008) Unfair employment practices

IOWA CODE ANN. § 729.4 (West 2008) Fair employment practices

KANSAS

KAN. STAT. ANN. § 44-1009 (2008) Unlawful employment

practices; unlawful discriminatory practices

KAN. STAT. ANN. § 44-1113 (2008) Unlawful employment practices based on age

KAN. STAT. ANN. § 44-1205 (2008) Same; discrimination in payment of wages within establishment between sexes prohibited; exceptions

KENTUCKY

KY. REV. STAT. ANN. § 344.040 (West 2008) Discrimination by employers

KY. REV. STAT. ANN. § 344.045 (West 2008) Employment practices prohibited

KY. REV. STAT. ANN. § 344.090 (West 2008) Religion or national origin, employment discrimination not unlawful in certain cases

KY. REV. STAT. ANN. § 207.150 (West 2008) Prohibited employment practices; exceptions

KY. REV. STAT. ANN. § 337.423 (West 2008) Discrimination prohibited

LOUISIANA

LA. REV. STAT. ANN. § 23:332 (2008) Intentional discrimination in employment

LA. REV. STAT. ANN. § 23:312 (2008) Prohibition of age discrimination; exceptions

LA. REV. STAT. ANN. § 23:323 (2008) Discrimination

LA. REV. STAT. ANN. § 23:342 (2008) Unlawful practice by employers prohibited; pregnancy, childbirth, or related medical condition; benefits and leaves of absence; transfer of position

LA. REV. STAT. ANN. § 23:368 (2008) Prohibition of genetic discrimination in the workplace; privacy

MAINE

ME. REV. STAT. ANN. tit. 5, § 4571 (2008) Right to freedom

from discrimination in employment

ME. REV. STAT. ANN. tit. 5, § 4572 (2008) Unlawful employment discrimination

ME. REV. STAT. ANN. tit. 5, § 4572-A (2008) Unlawful employment discrimination on the basis of sex

ME. REV. STAT. ANN. tit. 5, § 19302 (2008) Employment discrimination on the basis of genetic information or genetic testing

ME. REV. STAT. ANN. tit. 26, § 628 (2008) Equal pay

MARYLAND

MD. CODE. ANN., ART. 49B § 16 (LexisNexis 2003) Illegal employment practices, *repealed by* Acts 2009, ch. 120, § 1

MD. CODE. ANN., ART. 49B § 17 (LexisNexis 2003) Disability from pregnancy or childbirth, *repealed by* Acts 2009, ch. 120, § 1

MD. CODE. ANN., LAB. & EMPL. § 3-304 (West 2008) Equality in payment for work

MASSACHUSETTS

MASS. GEN. LAWS ANN. ch. 151B, § 3A (West 2008) Employers' policies against sexual harassment; preparation of model policy; education and training programs

MASS. GEN. LAWS ANN. ch. 151B, § 4 (West 2008) Unlawful practices

MASS. GEN. LAWS ANN. ch. 149, § 105A (West 2008) Discrimination forbidden; damages; actions in general; assignment of claim; limitations

MASS. GEN. LAWS ANN. ch. 149, § 24A (West 2008) Dismissal or refusal to employ; penalty

MASS. GEN. LAWS ANN. ch. 93, § 102 (West 2008) Equal rights; violations; civil actions; costs

MICHIGAN

MICH. COMP. LAWS. ANN. § 37.1202 (West 2008) Employers,

prohibited practices

MICH. COMP. LAWS. ANN. § 37.2102 (West 2008) Civil rights; actions based on sexual harassment, familial status discrimination

MICH. COMP. LAWS. ANN. § 37.2202 (West 2008) Employer; prohibited acts

MICH. COMP. LAWS. ANN. § 408.397 (West 2008)
Discrimination on basis of sex, prohibition as to wages

MICH. COMP. LAWS. ANN. § 750.556 (West 2008)
Discrimination between sexes in payment of wages

MINNESOTA

MINN. STAT. ANN. § 181.67 (West 2006)

MINN. STAT. ANN. § 181.81 (West 2006)

MINN. STAT. ANN. § 363A.08 (West 2004)

MISSISSIPPI

MISS. CODE ANN. § 43-6-15 (West 2009)

MISSOURI

MO. ANN. STAT. § 213.055 (West 2010)

MO. ANN. STAT. § 290.410 (West 2009)

MONTANA

MONT. CODE ANN. § 39-3-104 (West 2010)

MONT. CODE ANN. § 49-2-203 (West 2009)

MONT. CODE ANN. § 49-4-101 (West 2009)

NEBRASKA

NEB. REV. STAT. § 48-1004 (West 2004)

NEB. REV. STAT. § 48-1104 (West 2004)

NEB. REV. STAT. § 48-1107.02 (West 2004)

NEB. REV. STAT. § 48-1221 (West 2004)

NEVADA

NEV. REV. STAT. ANN. § 608.017 (LexisNexis 2006)

NEV. REV. STAT. ANN. § 613.330 (LexisNexis 2006 & Supp. 2007)

NEW HAMPSHIRE

N.H. REV. STAT. ANN. § 275:37 (1999 & Supp. 2009)

N.H. REV. STAT. ANN. § 354-A:7 (2009 & Supp. 2009)

NEW JERSEY

N.J. STAT. ANN. § 10:5-1 (West 2002 & Supp. 2009)

N.J. STAT. ANN. § 10:5-4 (West 2002 & Supp. 2009)

N.J. STAT. ANN. § 10:5-4.1 (West 2002 & Supp. 2009)

N.J. STAT. ANN. § 10:5-12 (West 2002 & Supp. 2009)

N.J. STAT. ANN. § 10:5-29.1 (West 2002 & Supp. 2009)

N.J. STAT. ANN. § 34:11-56.1 (West 1999 & Supp. 2009)

NEW MEXICO

N.M. STAT. ANN. § 28-1-7 (West 2000 & Supp. 2009)

NEW YORK

N.Y. CIV. RIGHTS LAW § 47-a (Consol. 2001 & Supp. 2009)

N.Y. EXEC. LAW § 296 (Consol. 1995 & Supp. 2009)

N.Y. EXEC. LAW § 291 (Consol. 1995 & Supp. 2009)

N.Y. LAB. LAW § 194 (Consol. 2003 & Supp. 2010)

NORTH CAROLINA

N.C. GEN. STAT. § 75B-2 (2009)

N.C. GEN. STAT. § 95-151 (2009)

N.C. GEN. STAT. § 143-422.2 (2009)

N.C. GEN. STAT. § 143-422.3 (2009)

N.C. GEN. STAT. § 168A-5 (2009)

NORTH DAKOTA

N.D. CENT. CODE § 14-02.4-04 (2009)

N.D. CENT. CODE § 34-01-17 (2004)

N.D. CENT. CODE § 34-06.1-03 (2004)

OHIO

OHIO REV. CODE ANN. § 4112.02 (LexisNexis 2007 & Supp. 2009)

OHIO REV. CODE ANN. § 4112.14 (LexisNexis 2007 & Supp. 2009)

OHIO REV. CODE ANN. § 4111.17 (LexisNexis 2007)

OHIO REV. CODE ANN. § 4111.99 (LexisNexis 2007 & Supp. 2009)

OKLAHOMA

OKLA. STAT. ANN. tit. 25, § 1302 (West 2008 & Supp. 2010)

OKLA. STAT. ANN. tit. 25, § 1310 (West 2008 & Supp. 2010)

OKLA. STAT. ANN. tit. 40, § 198.1 (West 1999 & Supp. 2010)

OREGON

OR. REV. STAT. § 652.220 (2009)

OR. REV. STAT. § 659A.003 (2009)

OR. REV. STAT. § 659A.009 (2009)

OR. REV. STAT. § 659A.112 (2009)

OR. REV. STAT. § 659A.029 (2009)

OR. REV. STAT. § 659A.030 (2009)

OR. REV. STAT. § 659A.885 (2009)

PENNSYLVANIA

43 PA. STAT. ANN. § 336.3 (West 2009)

43 PA. STAT. ANN. § 955 (West 2009)

RHODE ISLAND

R.I. GEN. LAWS § 28-5-7 (2003 & Supp. 2009)

R.I. GEN. LAWS § 28-6-18 (2003)

R.I. GEN. LAWS § 42-87-2 (2006)

R.I. GEN. LAWS § 42-87-3 (2006)

SOUTH CAROLINA

S.C. CODE ANN. § 1-13-80 (2005 & Supp. 2009)

SOUTH DAKOTA

S.D. CODIFIED LAWS § 20-13-10 (2004)

S.D. CODIFIED LAWS § 60-12-15 (2009)

TENNESSEE

TENN. CODE ANN. § 4-21-401 (2005)

TENN. CODE ANN. § 4-21-407 (2005)

TENN. CODE ANN. § 50-2-202 (2008)

TEXAS

TEX. REV. CIV. STAT. ANN. ART. § 5196 (Vernon 1987)

TEX. HEALTH & SAFETY CODE ANN. § 592.015 (Vernon 2003)

TEX. HUM. RES. CODE ANN. § 121.010 (Vernon 2001)

TEX. LAB. CODE ANN. § 21.051 (Vernon 2006)

TEX. LAB. CODE ANN. § 21.056 (Vernon 2006)

TEX. LAB. CODE ANN. § 21.058 (Vernon 2006)

TEX. LAB. CODE ANN. § 21.101 (Vernon 2006)

TEX. LAB. CODE ANN. § 21.105 (Vernon 2006)

TEX. LAB. CODE ANN. § 21.106 (Vernon 2006)

TEX. LAB. CODE ANN. § 21.108 (Vernon 2006)

TEX. LAB. CODE ANN. § 21.109 (Vernon 2006)

TEX. LAB. CODE ANN. § 21.110 (Vernon 2006)

TEX. LAB. CODE ANN. § 21.125 (Vernon 2006)

TEX. LAB. CODE ANN. § 21.127 (Vernon 2006)

TEX. LAB. CODE ANN. § 21.128 (Vernon 2006)

UTAH

UTAH CONST. art. 16, § 8

UTAH CODE ANN. § 34A-5-106 (2009)

VERMONT

VT. STAT. ANN. tit. 21, § 495 (2009)

VIRGINIA

VA. CODE ANN. § 2.2-3901 (2008)

VA. CODE ANN. § 40.1-28.6 (2002)

VA. CODE ANN. § 51.5-41 (2005)

WASHINGTON

WASH. REV. CODE § 49.12.175 (2008) Wage discrimination due to sex prohibited—Penalty—Civil recovery

WASH. REV. CODE § 49.12.200 (2008) Women may pursue any calling open to men

WASH. REV. CODE § 49.12.360 (2008) Parental leave—Discrimination prohibited

WASH. REV. CODE § 49.44.010 (2008) Blacklisting—Penalty

WASH. REV. CODE § 49.44.090 (2008) Unfair practices in employment because of age of employee or applicant—Exceptions

WASH. REV. CODE § 49.60.030 (2008) Freedom from discrimination—Declaration of civil rights

WASH. REV. CODE § 49.60.180 (2008) Unfair practices of employers

WASH. REV. CODE § 49.60.205 (2008) Age discrimination—
Limitation

WEST VIRGINIA

W. VA. CODE ANN. § 5-11-9 (LexisNexis 2006) Unlawful discriminatory practices

W. VA. CODE ANN. § 21-5B-3 (LexisNexis 2008)
Discrimination between sexes in payment of wages for work of comparable character prohibited

W. VA. CODE ANN. § 21-5C-7 (LexisNexis 2008) Offenses and penalties

WISCONSIN

WIS. STAT. § 111.321 (2007) Prohibited bases of discrimination

WIS. STAT. § 111.33 (2007) Age; exceptions and special cases

WIS. STAT. § 111.34 (2007) Disability; exceptions and special cases

WIS. STAT. § 111.345 (2007) Marital status; exceptions and special cases

WIS. STAT. § 111.36 (2007) Sex, sexual orientation; exceptions and special cases

WYOMING

WYO. STAT. ANN. § 27-4-302 (2009) Prohibition on paying employees less for same work

WYO. STAT. ANN. § 27-9-105 (2009) Discriminatory and unfair employment practices enumerated; limitations

UNITED STATES

29 U.S.C.A. § 206(d) (LexisNexis 2008) Minimum wage

29 U.S.C.A. § 623 (LexisNexis 2008) Prohibition of age discrimination

42 U.S.C.A. § 12112 (LexisNexis 2008) Discrimination

42 U.S.C.A. § 12201 (LexisNexis 2008) Construction

42 U.S.C.A. § 2000e-2 (LexisNexis 2008) Unlawful employment practices

GUAM

GUAM CODE ANN. tit. 22, § 3302 Prohibition of Age or Sex Discrimination (2009)

GUAM CODE ANN. tit. 22, § 3303 Age Discrimination (2009)

GUAM CODE ANN. tit. 22, § 5201 Discriminatory Practices Made Unlawful; Offenses Defined (2009)

GUAM CODE ANN. tit. 22, § 5203 Discriminatory Practices Against Disabled Persons Made Unlawful; Offenses Defined (2009)

GUAM CODE ANN. tit. 22, § 5204 Exceptions (2009)

PUERTO RICO

P.R. LAWS ANN. tit. 1, § 505 (2008) Employment

P.R. LAWS ANN. tit. 29, § 146 (2009) Discrimination because of age, race, color, sex, social or national origin, social condition, political affiliation, political or religious ideology

P.R. LAWS ANN. tit. 29, § 1201 (2009) Public policy

P.R. LAWS ANN. tit. 29, § 1323 (2009) Unfair labor practices—Employer

P.R. LAWS ANN. tit. 29, § 1328 (2009) Unfair labor practices—Bona fide job requirement

VIRGIN ISLANDS

V.I. CODE ANN. tit. 10, § 64 (1997) Unlawful discriminatory practices

V.I. CODE ANN. tit. 24, § 451 (1997) Unlawful practices

APPENDIX II: CORPORAL PUNISHMENT [CP] IN PUBLIC SCHOOLS¹⁹⁰

Alabama, ALA. CODE § 16-1-24.1 (LexisNexis 2001)

Alaska, ALASKA STAT. § 11.81.430 (2008)

Arizona, ARIZ. REV. STAT. ANN. § 15-843 (2009 & Supp. 2009-2010)

Arkansas, ARK. CODE ANN. § 6-18-505 (2007) [explicitly allows CP]

California, CAL. EDUC. CODE § 49000 (West 2006 & Supp. 2010), CAL. CODE § 49001 (West 2006 & Supp. 2010) [disallows CP]

Connecticut, CONN. GEN. STAT. ANN. § 53a-18(2) (West 2007 & Supp. 2009), CONN. GEN. STAT. ANN. § 53a-18(6) (West 2007 & Supp. 2009)

Delaware, DEL. CODE ANN. tit. 14, § 701 (2007)

Florida, FLA. STAT. ANN. § 1003.32 (West 2009) [explicitly allows CP]

Georgia, GA. CODE ANN. § 20-2-730 (2009) [explicitly allows CP]

Hawaii, HAW. REV. STAT. ANN. § 302A-1141 (LexisNexis 2006) [disallows CP]

Illinois, 105 ILL. COMP. STAT. ANN. 5/24-24 (West 2006 & Supp. 2009), *repealed by* P.A. 94-1105, § 85

Indiana, IND. CODE ANN. § 20-8.1-5.1-3 (LexisNexis 2005), *repealed by* P.L. 1-2005, § 240

Iowa, IOWA CODE § 280.21 (West 2009) [disallows CP]

Kentucky, KY. REV. STAT. ANN. § 161.180 (2009) [allows CP by regulation OAG 78-704]

Louisiana, LA. REV. STAT. ANN. § 17:223 (2001), LA. REV. STAT. ANN. § 17:416.1 (2010) [explicitly allows CP]

Maryland, MD. CODE ANN., EDUC. § 7-306 (LexisNexis 2010)

190. Statutes compiled from Westlaw's 50 State Statutory Survey, 50 State Statutory Survey, Corporal Punishment[CP] in Public Schools, 0040 Surveys 7 (Westlaw).

[disallows CP]

Massachusetts, MASS. GEN. LAWS ANN. ch. 71, § 37G (West 2009) [disallows CP]

Michigan, MICH. COMP. LAWS § 380.1312 (2005) [disallows CP]

Minnesota, MINN. STAT. § 121A.58 (2008) [disallows CP]

Mississippi, MISS. CODE ANN. § 37-11-57 (2007) [explicitly allows CP]

Missouri, MO. REV. STAT. § 160.261 (2010) [explicitly allows CP]

Montana, MONT. CODE ANN. § 20-4-302 (2009) [disallows CP]

Nebraska, NEB. REV. STAT. § 79-295 (2004) [disallows CP]

Nevada, NEV. REV. STAT. ANN. § 392.4633 (LexisNexis 2008) [disallows CP]

New Hampshire, N.H. REV. STAT. ANN. § 627:6 (2007 & Supp. 2009)

New Jersey, N.J. STAT. ANN. § 18A:6-1 (West 2009) [disallows CP]

New Mexico, N.M. STAT. § 22-5-4.3 (2006) [explicitly allows CP]

North Carolina, N.C. GEN. STAT. § 115C-288 (2009), N.C. GEN. STAT. § 115C-390 (2009), N.C. GEN. STAT. § 115C-391 (2009)

North Dakota, N.D. CENT. CODE § 12.1-05-05 (1997 & Supp. 2009)

Ohio, OHIO REV. CODE ANN. § 3319.41 (LexisNexis2009) [grandfathered some CP]

Oklahoma, OKLA. STAT. ANN. tit. 70, § 24-100.4 (West 2005) [explicitly allows CP]

Oregon, OR. REV. STAT. § 339.250 (2009) [disallows CP]

Pennsylvania, 22 PA. CODE § 12.5 (2009)

South Carolina, S.C. CODE ANN. § 59-63-260 (2004) [explicitly allows CP]

South Dakota, S.D. CODIFIED LAWS § 13-32-2 (2004)

Tennessee, TENN. CODE ANN. § 49-6-4103 (2009); TENN.

CODE ANN. § 49-6-4104 (2009) [explicitly allows CP]

Utah, UTAH CODE ANN. § 53A-11-802 (2009) [disallows CP]

Vermont, VT. STAT. ANN. tit. 16, § 1161a (2009) [disallows CP]

Virginia, VA. CODE ANN. § 22.1-279.1 (2006) [disallows CP]

Washington, WASH. REV. CODE ANN. § 28A.150.300 (West 2006) [disallows CP]

West Virginia, W. VA. CODE ANN. § 18A-5-1 (LexisNexis 2007)[disallows CP]

Wisconsin, WIS. STAT. § 118.31, 21-4-308 (2007) [disallows CP]
