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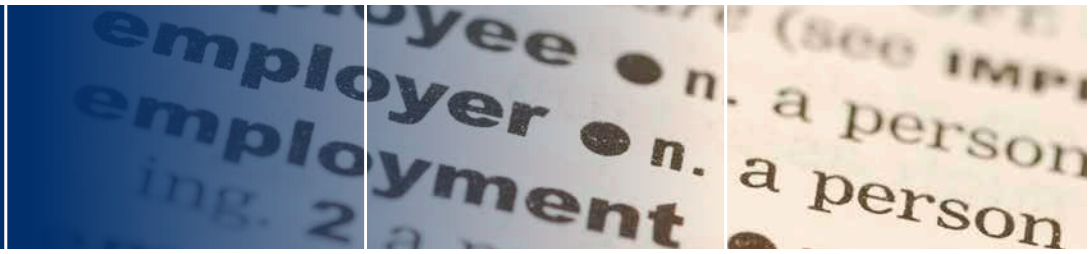

NEWSLETTER
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Connecticut Supreme Court Limits Arbitrator's Discretion When Interpreting Collective Bargaining Agreements

In *State v. AFSCME, Council 4, Local 391,* 2013 Conn. LEXIS 266 (Conn. Aug. 6, 2013), the Connecticut Supreme Court held there is a clear, well-defined and dominant policy against sexual harassment in the State and that an arbitrator's interpretation of the "just cause" provision of a collective bargaining agreement as barring an employee's lifetime termination of employment violated that public policy.

FACTS

The State of Connecticut and AFSCME, Council 4, Local 391, entered into a collective bargaining agreement. A corrections officer employed by the Department of Corrections, who was also a member of the bargaining unit represented by AFSCME, was discharged from his employment for allegedly engaging in an open pattern of sexual harassment in knowing violation of the department's administrative directive. The employee, through AFSCME, filed a grievance against the State, and the parties submitted to arbitration pursuant to the collective bargaining agreement.

The arbitrator issued an award reducing the employee's termination to a one-year suspension without pay or benefits and found the dismissal of the employee was not for "just cause" under the terms of the collective bargaining agreement. *Continued*


Stephen Brown
Partner, Stamford
203.388.2450
stephen.brown@wilsonelser.com


Nicole Fernandes
Associate, Stamford
203.388.2382
nicole.fernandes@wilsonelser.com

For more information about Wilson Elser's Employment & Labor practice visit our website.

The State successfully sought to vacate the arbitrator's award in the Connecticut Superior Court. On appeal, the Appellate Court affirmed the judgment of the trial court in concluding that there is a clearly defined and dominant public policy against sexual harassment in the Connecticut workplace and the arbitrator's decision violated that public policy. On review, the Connecticut Supreme Court was faced with a collective bargaining agreement that provided for remedies short of termination when sexual harassment is established.

RULING

The Court reviewed the arbitrator's decision *de novo* as it involved a challenge to public policy. When the public policy exception is invoked, "[t]he courts employ a two-step analysis … First, the court determines whether an explicit, well-defined and dominant public policy can be identified. If so, the court then decides if the arbitrator's award violated the public policy."

The Connecticut Supreme Court upheld the ruling of the lower courts in concluding that the arbitrator's award was correctly vacated as there is a clear, well-defined and dominant policy against workplace sexual harassment in Connecticut and therefore, the arbitrator's interpretation of the "just cause" provision of the collective bargaining agreement as barring the employee's discharge violated that policy. The Court held that the employee's termination was required as his misconduct was "highly egregious and incorrigible." The Court noted that an employer's failure to take steps to prevent an employee from engaging in harassment and misconduct could expose the employer to liability for civil rights violations, particularly when there is a pattern of such inappropriate behavior.

DISSENT

The dissent pointed to the public policy of the State, which encourages employees to bargain with their employers so that both parties may enter into collective bargaining agreements regarding the parameters of the working conditions and benefits, and when employer-employee disputes under those agreements arise, to favor resolutions reached through the use of arbitration.

NATIONWIDE CASE LAW

The United States Supreme Court has long held that courts generally have only a very limited power to review a labor arbitration award by an arbitrator appointed pursuant to a collective bargaining agreement. *See United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 43 (1987); W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber, Cork, Linoleum and Plastic Workers of America*, 461 U.S. 757, 764 (1983). However, an exception exists where an arbitration award is contrary to public policy. A court may not enforce a collective bargaining agreement that is contrary to public policy and the question of public policy is ultimately one for resolution by the courts. *See Grace*, 461 U.S. at 766; *Misco*, 484 U.S. at 36. Therefore, if an arbitrator construes a collective bargaining agreement in a way that violates public policy, an award based thereon may be vacated by a court. *See Id.*

States surrounding Connecticut have conducted similar inquiries when reviewing an arbitrator's award issued pursuant to a collective bargaining agreement. New York courts have maintained that "[a]n arbitrator's interpretation and application of the terms of a collective bargaining agreement is entitled to deference unless 'the arbitrator's award violates a strong public policy, is irrational, or clearly exceeds a specifically enumerated limitation on the arbitrator's power.'" *Matter of New York State Dept. of Labor (Unemployment Ins. Appeal Board) v. New York State Div. of Human Rights*, 71 A.D.3d 1234, 1236-1237 (3d Dep't 2010) *citing Matter of Henneberry v. ING Capital Advisers, LLC*, 10 N.Y.3d 278 (2008).

In *Philadelphia Housing Authority v. AFSCME, District Council 33, Local 934*, 52 A.3d 1117, 1132 (2012), the Supreme Court of Pennsylvania questioned whether a labor arbitration award reinstating an employee discharged for sexual harassment violated well-defined and dominant public policy. The collective bargaining agreement included a provision that an employee could be terminated only for just cause. The Pennsylvania Supreme Court affirmed the lower court's decision to vacate the award and held that the employee's reinstatement violated public policy. *Id.* "The absurd award here makes a mockery of the dominant public policy against sexual harassment in the workplace, by rendering public employers powerless to take appropriate actions to vindicate a strong *Continued*

public policy. Such an irrational award undermines clear and dominant public policy." *Id. at 1125.* "Although a labor arbitrator's decision is entitled to deference by a reviewing court, it is not entitled to a level of devotion that makes a mockery of the dominant public policy against sexual harassment." *Id. at 1128.*

Massachusetts courts have held that "an award may be vacated if (1) it violates a well-defined and dominant public policy, (2) the employee has engaged in disfavored conduct integral to the performance of employment duties, and (3) the conduct violates public policy to such an extent that it requires dismissal." *Lynn v. Thompson*, 435 Mass. 54, 61, 63 (2001), cert. denied, 534 U.S. 1131 (2002) *quoting Massachusetts Hy. Dept. v. American Fedn. of State, County & Mun. Employees, Council 93*, 420 Mass. 13, 16-17 (1995). Still, courts are encouraged to be "cautious when applying the public policy doctrine to vacate an arbitration award." *Lyons v. School Committee of Dedham*, 440 Mass. 74, 79 (2003).

The Third Circuit Court of Appeals in *Stroehmann Bakeries, Inc. v. Local 776*, 969 F.2d 1436 (3d Cir. 1992), involving claims of sexual harassment, affirmed the district court's order vacating the arbitrator's award while confirming that courts may vacate labor arbitration awards only when they "explicitly conflict with well-defined, dominant public policy." *Id.* at 1441. The circuit court held that there is a "well-defined and dominant public policy concerning sexual harassment in the workplace which can be ascertained by reference to law and legal precedent." *Id.*

The Fifth Circuit Court of Appeals maintains that the question to be answered is not whether the employee's act violates public policy, but whether the arbitrator's interpretation of the collective bargaining agreement violates public policy. *See Weber Aircraft, Inc. v. General Warehousemen & Helpers Union Local 767*, 253 F.3d 821, 826 (5th Cir. 2001) *citing E. Associated Coal Corp. v. Mine Workers*, 531 U.S. 57 (2000).

The District Court for the Northern District of West Virginia was called upon to determine whether an arbitrator's interpretation of the collective bargaining agreement violated an explicit public policy that was "well defined and dominant" when the employer sought to vacate an arbitration award reinstating an employee/union member who manipulated test results and recorded false numbers

on a data sheet. *Mylan Pharms., Inc. v. United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union, Local 8-957*, 548 F. Supp. 2d 252, 257-258 (N.D. W. Va. 2008). The court found that there was no well-defined and dominant public policy that explicitly required any particular sanction for this type of violation, and could not find that the arbitrator violated any such policy when he interpreted the collective bargaining agreement and determined that a sanction less than termination was warranted. *Id.*

PRACTICE POINT

The Connecticut Supreme Court follows an established line of cases that maintain that public policy considerations allow a *de novo* review of an arbitrator's decision, thereby limiting an arbitrator's ability to exercise discretion provided for under collective bargaining agreements. In its decision, the Connecticut Supreme Court veers away from prior holdings of the State that place great deference on an arbitrator's award and the balance between that award and public policy. The holding greatly limits the discretion of an arbitrator when the collective bargaining agreement, as in this case, allows for that very discretion in permitting punishment short of termination. Moreover, the decision grants broad authority to the State *Continued*

to discharge an employee whenever sexual harassment is established, regardless of the nature of the harassment, and is likely to raise questions about what constitutes "highly egregious and incorrigible misconduct." However, as recited above, the United States Supreme Court and several states surrounding Connecticut have allowed for an arbitrator's award to be vacated if that award is found to be in contravention of a well-defined and dominant public policy within that state.

The question for those drafting collective bargaining agreements becomes one of balance between public policy standards within a state and parties who submit to arbitration with the intention of relying on the findings of an arbitrator within collective bargaining agreements. The effect very well may be, as the dissent in *State v. AFSCME, Council 4, Local 391* noted, "the rewriting of hundreds of collective bargaining agreements that have been negotiated in good faith, and that provide for remedies less than termination." 2013 Conn. LEXIS 266, 550 (Conn. Aug. 6, 2013).

When drafting these collective bargaining agreements, attorneys should be mindful and account for public policy considerations within a state as well as prior precedent established as it relates to an arbitrator's latitude to interpret and issue awards. Attorneys are also urged to define terms within said agreements so that phrases such as "just cause" are not left up for interpretation by the reviewing authority, which may include courts of law and not just arbitrators.

Members of Wilson Elser's Employment & Labor practice, located throughout the country, provide one convenient point of contact for our clients. Please contact any of the following partners to access the experience and capabilities of this formidable team.

Contacts:

National Practice Chair
Ricki Roer
ricki.roer@wilsonelser.com
212.915.5375
Northeast

By Region:

Midatlantic
Robert Wallace
robert.wallace@wilsonelser.com

Midwest
David Holmes
david.holmes@wilsonelser.com

West
Marty Deniston
martin.deniston@wilsonelser.com

Southeast
Sherril Colombo
sherril.colombo@wilsonelser.com

Southwest
Linda Wills
linda.wills@wilsonelser.com

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