CAUSE No. 86739-9

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

INTERNATIONAL UNION OF OPERATING ENGINEERS,
LOCAL 286,

Petitioner,

v.

THE PORT OF SEATTLE,

Respondent.

AMICUS CURIAE BRIEF BY WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION AMERICAN CIVIL LIBERTIES UNION

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I. INTRODUCTION AND IDENTITY OF AMICUS

The Washington Employment Lawyers Association (WELA) is an association of lawyers dedicated to advancing employee rights, in recognition that employment with dignity and fairness is fundamental to the quality of life. Vigorous enforcement of the Washington Law Against Discrimination ("WLAD") is central to WELA's mission. WELA has appeared as amicus curiae numerous times before Washington Courts.

The American Civil Liberties Union of Washington ("ACLU") is a nonprofit, nonpartisan organization with over 20,000 members statewide that is dedicated to constitutional principles of liberty and equality. The ACLU has long been committed to the defense and preservation of civil liberties, including the right to be free from unlawful discrimination, whether the discrimination occurs in the workplace or in other contexts.

This case raises the issue of whether a labor arbitrator can impose discipline inconsistent with an employer's affirmative obligation to deter future violations of the Washington Law Against Discrimination ("WLAD").

II. STATEMENT OF THE CASE[1]

An employee of the Port of Seattle hung a noose and used the "N"

[1] The facts are taken from the parties' briefs and the Court of Appeals' decision. Amici have not independently reviewed the record, except for the Collective Bargaining Agreement.

word at the workplace. The Port did an investigation and determined that its zero tolerance anti-harassment policy had been violated. The Port terminated the employee. The Union filed a grievance that resulted in arbitration.

In addition to the Port's rules, the arbitrator considered the harasser's testimony that he had hung the noose "a few times" due to his "twisted sense of humor." He claimed to be unaware of the symbolic meaning of a noose. During an attempted apology, he tried to explain that it wasn't really a "noose" that he had tied. The arbitrator also heard testimony that the harasser had stated that: "Martin Luther King Day was 'take a nigger to lunch day.'"

Approximately six months after the termination, the arbitrator found that the harasser had violated the Port's anti-harassment policy, but that the harasser was "more clueless than racist." The arbitrator ordered a 20 day suspension, and reinstatement with back pay. It appears that only the union contract and not the WLAD was considered during the arbitration.

The Port appealed to Superior Court, and argued that the order was contrary to public policy. The Superior Court agreed. The court ordered the Port to reinstate the employee but lengthened his suspension from 20 days to 6 months. The court also ordered him to "write a sincere letter of apology" and attend diversity and anti-harassment training. Finally, the court imposed a 4-year probationary period. The Union appealed.

The Court of Appeals ruled that despite the deference owed to labor arbitration decisions, the decision of the arbitrator violated the explicit, well-

defined and dominant policy of the WLAD. The Court concluded that a reduction of discipline to 20 days would impermissibly conflict with the Port's efforts to fulfill its affirmative duty to eliminate and prevent racial discrimination. The Court ruled that the arbitrator's analysis failed to take into account the dominant policies of the WLAD, including the obligation to send a strong statement adequate to persuade the harasser and others to refrain from unlawful conduct. "By describing [the harasser's] conduct as 'more clueless than racist,' the arbitrator 'very simply, sent the message that . . . poor judgment, or other factors, somehow render[ed] the conduct permissible or excusable.' This message and decision violate the public policy of the State of Washington." *International Union of Operating Engineers v. Port of Seattle,* 164 Wn.App. 307, 321, 264 P.3d 268 (2011).

The Court of Appeals ruled, as matter of law, that a suspension of only 20 days in this circumstance violates the WLAD because it is an insufficient punishment to deter future violations, and remanded to the arbitrator for a determination of discipline that satisfied the WLAD policy. Significantly, the Court did not mandate termination from employment or foreclose reinstatement. The Court carefully limited the reach of its decision to the facts of this case. *Id.*

III. SUMMARY OF ARGUMENT

The WLAD embodies the highest Washington state public policy. Its overarching purpose is to deter and to eradicate discrimination and in particular

eradicate racial harassment in the workplace. To achieve this goal, the WLAD places on employers an affirmative obligation to take prompt remedial action to punish employees who racially harass co-workers. The statute requires that the disciplinary action taken against an offending employee be sufficient to deter that particular employee from repeating the offensive conduct, and to send a message to all employees that racial harassment will not be tolerated. Whether the discipline is sufficient to satisfy the employer's affirmative obligation is a fact specific inquiry.

The discipline required by the employer to deter future acts of harassment must be proportionate to the gravity of the offense. While all illegal harassment is egregious, some instances of harassment are so offensive that only the most severe discipline is appropriate to the circumstances.[2] In other instances, warnings and short suspensions will suffice to satisfy the employer's affirmative obligation. Discipline will also vary depending upon

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[2] It is beyond question that the use of the word "nigger" is highly offensive and demeaning, evoking a history of racial violence, brutality, and subordination. This word is "perhaps the most offensive and inflammatory racial slur in English, . . . a word expressive of racial hatred and bigotry." *Swinton v. Potomac Corp.*, 270 F.3d 794, 817 (9th Cir. 2001) (ellipsis in original) (quotation marks omitted). "Perhaps no single act can more quickly alter the conditions of employment and create an abusive working environment than the use of an unambiguously racial epithet such as 'nigger' by a supervisor in the presence of his subordinates." *Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 675 (7th Cir. 1993) (citations and internal quotation marks omitted). "The direct verbal attack on McGinest and the prevalence of graffiti containing a racial slur evocative of lynchings and racial hierarchy are significant exacerbating factors in evaluating the severity of the racial hostility." *McGinest v. GTE Service Corp.*, 360 F.3d 1103 (9th Cir. 03/11/2004). *See also Daso v. The Grafton School, Inc.*, 181 F. Supp. 2d 485, 493 (D. Md. 2002) ("The word 'nigger' is more than [a] 'mere offensive utterance'. . . . No word in the English language is as odious or loaded with as terrible a history"); *NLRB v. Foundry Div. of Alcon Indus., Inc.*, 260 F.3d 631, 635 n.5 (6th Cir. 2001) ("That the word 'nigger' is a slur is not debatable").

the work history of the offending employee and the history of illegal harassment at the workplace more generally. An employee with a prior history of harassment will require more severe discipline than an employee with no prior offenses. In a workplace where harassment has been a recurring problem, the discipline must be progressively more severe in order to deter it.

It is the function of a labor arbitrator to enforce the provisions of the Collective Bargaining Agreement ("CBA"), which are contractual in nature. The arbitrator's decisions are entitled to substantial deference and cannot be overturned except in extremely narrow circumstances. One narrow circumstance applies if the arbitrator's decision violates an "explicit," "well defined," and "dominant" public policy. The WLAD qualifies as such a public policy. Although the public policy exception is a narrow one, the WLAD is exceptional in that unlike the public policy of many other statutory schemes, the WLAD looks beyond the impact of discipline on an individual employee.

Contrary to the Union's argument, to meet this standard the WLAD does not require legislatively mandated discipline for a particular offense. An arbitrator's ordered discipline violates the public policy reflected in the WLAD only if, as a matter of law, it is insufficient to satisfy the employer's affirmative obligation.

A union arbitration is not intended to promote the public policy

reflected in the WLAD. Arbitrators look to the "industrial common law of the shop," and have no general authority to invoke public laws that conflict with the contract between the union and employer. Indeed, in this case the arbitrator failed to consider the WLAD in making his decision. Although the CBA in this case prohibits discrimination on the basis of protected classifications, it does not specifically reference any civil rights statute. *See* CBA, Art. 4, CP pgs 6-20.

While the law of the shop calls for consistent discipline to be administered for subsequent violations even by different employees, the WLAD mandates that discipline for subsequent violators be progressively more severe for the purpose of deterrence. Moreover, the law of the shop considers only the deterrent impact upon the offending employee and the potential for rehabilitation, but not the impact upon potential future violators.

According to the Union, an arbitrator's order of discipline can not be vacated no matter how lenient the discipline, egregious the conduct, frequent the conduct by the harasser, or the degree to which illegal harassment permeates the workplace. This court should reject that position as contrary to the dominant public policy of the WLAD. According to the Union, the standard for deterrence is lower for a labor arbitration, bound only by the law of the shop, than under the WLAD. The Court should reject this position as well. The WLAD policy was not intended to create a two-tier standard for enforcement depending upon whether employees are represented by a union.

The WLAD requires an equal and consistent standard for enforcement for all employees without regard to union representation.

Amici take no position on whether the arbitrator's required disciplinary sanction in this case is sufficient as a matter of law to fulfill the employer's obligation under the WLAD.

IV. ARGUMENT

A. The WLAD Prohibits Racial Harassment. It Requires Prompt Remedial Action to Deter the Harasser and Other Employees From Future Racial Harassment.

The Washington Law Against Discrimination (WLAD) provides that it is an unfair practice for any employer to discriminate against an employee because of his race. RCW 49.60.180. Workplace harassment is one type of unlawful employment discrimination. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 59 P.3d 611 (2002).

A plaintiff establishes a prima facie case of hostile work environment when she shows that: 1) there was language or conduct of a [racial] nature, or that occurred because of the plaintiff's [race]; 2) such language or conduct was unwelcome in the sense that the plaintiff regarded the conduct as undesirable or offensive; and 3) the conduct was so offensive that it altered the conditions of plaintiff's employment. WPI 330.23; *Glasgow v. Georgia-Pacific Corp.*, 103 Wn. 2d 401, 406, 693 P.2d 708 (1985); *Perry v. Costco Wholesale, Inc.*, 123 Wn.App 783, 792, 98 P.3d 1264 (2004). The requirement that the harassment be "sufficiently pervasive so as to alter the

conditions of employment and create an abusive working environment, [is] to be determined with regard to the totality of the circumstances." *Glasgow,* 103 Wn.2d at 406-07, 693 P.2d 708. *See also Harris v Forklift Sys.*, 510 U.S. 17, 21, 114 S. Ct. 367, 371, 126 L.Ed. 2d 295 (1993)(The "totality of circumstances....includ[es]. . . frequency. . . severity. . . whether . . . physically threatening or humiliating...or unreasonably interferes with. . . work performance").[3]

Under Washington law, vicarious liability is established if Plaintiff can establish either that: a) An owner, manager, partner, or corporate officer participated in the conduct or language; or b) management knew, through complaints or other circumstances, of this conduct or language and failed to take reasonably prompt and adequate corrective action reasonably designed to end it; *or* c) management should have known of the harassment, because it was so pervasive or through other circumstances, and failed to take reasonably prompt and adequate corrective action reasonably designed to end it. *Glasgow,* 103 Wn.2d at 407. For the purpose of vicarious liability, "[m]anagers are those who have been given by the employer the authority and

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[3] In this case, the harasser claims that his conduct was not directed at the employee who complained. Even if taken as true, that does not foreclose a racially hostile work environment. "[I]f racial hostility pervades a workplace, a plaintiff may establish a violation of Title VII, even if such hostility was not directly targeted at the plaintiff." *McGinest v. GTE Service Corp.,* 360 F.3d 1103 (9th Cir. 2004)(collecting cases). "If racial animus motivates a harasser to make provocative comments in the presence of an individual in order to anger and harass him, such comments are highly relevant in evaluating the creation of a hostile work environment, regardless of the identity of the person to whom the comments were superficially directed." *Id.*

power to affect the hours, wages, and working conditions of the employer's workers." *Robel v. Roundup Corp.*, 148 Wn.2d 35, 48 n5, 59 P.3d 611 (2002).[4]

Once an employer has actual or constructive knowledge of illegal harassment, then the employer must take remedial action that is reasonably calculated to end the harassment by the harassing employee and potential future harassment by others as well. In *Perry v. Costco Wholesale, Inc.*, 123 Wn.App 783, 98 P.3d 1264 (2004), the Court specifically adopted federal law concerning the employer's affirmative obligation to deter illegal harassment.

> An employer's remedy should persuade individual harassers to discontinue unlawful conduct. ... [N]ot ... all harassment warrants dismissal, rather, remedies should be assessed proportionately to the seriousness of the offense. Employers should impose sufficient penalties to assure a workplace free from sexual harassment.... [T]he reasonableness of an employer's remedy will depend on its ability to stop harassment by the person who engaged in the harassment. In evaluating the adequacy of the remedy, the court may also take into account the remedy's ability to persuade potential harassers to refrain from unlawful conduct. ... [M]eting out punishments that do not taken into account the need to maintain a harassment-free working environment may subject the employer to suit....

Id. at 793, *citing Ellison v. Brady*, 924 F.2d 872, 882 (9th Cir. 1991). "'Effectiveness will be measured by the twin purposes of ending the current

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[4] Vicarious liability under Washington law differs significantly from federal law. The United States Supreme Court ruled that the employer is vicariously liable for harassment by supervisors or above. In the absence of an tangible employment action, the Court created a two prong affirmative defense that 1) the "employer exercised reasonable care to prevent and correct promptly" harassing behavior *and* 2) that the employee was "unreasonable" in failing to complain. *Burlington Industries*, 118 S.Ct. at 2270; *Faragher*, 118 S.Ct. at 2292-93. Washington State has declined to adopt the federal model. *Robel, supra.*

harassment and deterring future harassment-by the same offender or others. If 1) no remedy is undertaken, or 2) the remedy attempted is ineffectual, liability will attach.' Repeat conduct may show the unreasonableness of prior responses.'" *Perry,* 123 Wn.App. at 794 (citations omitted). "When the employer undertakes no remedy, or where the remedy does not end the current harassment and deter future harassment, liability attaches for both the past harassment and any future harassment." *Nichols v. Azteca Restaurant Enterprises,* 256 F.3d 864, 875-76 (9th Cir. 2001), *citing Fuller v. City of Oakland*, 47 F.3d 1522, 1528-29 (9th Cir. 1995). Necessarily, the arbitrator can determine what discipline will reasonably deter the employee and others from engaging in similar conduct only if the employer makes a record during the arbitration of the prior discriminatory or harassing misconduct by that employee and others in the same workplace. This is part and parcel of the employer's legal duty to take reasonable measures calculated to prevent future illegal conduct; failure to do so violates the WLAD.

B. An Arbitrator's Decision is Entitled To Great Deference.

Courts are generally very deferential to decisions by labor arbitrators. This deferential approach to judicial review found its first important expression in three 1960 Supreme Court cases that have come to be known as the "Steelworkers Trilogy." *See Steelworkers of America v. American Manufacturing Co.,* 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.,* 363 U.S.

574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960). The Court explained "[i]t is the arbitrator's construction [of the agreement] which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." *Enterprise Wheel & Car Corp.*, 363 U.S. at 599, 80 S.Ct. 1358. "[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." *United Paperworkers Intl. Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987). Generally, a reviewing court can not reject the arbitrator's choice of discipline "merely [because it] disagreed" with it. *Enterprise Wheel,* 363 U.S. at 598, 80 S.Ct. at 1361.

C. An Arbitrator's Award May Be Vacated Where it Violates Public Policy.

Notwithstanding the limited judicial review of an arbitrator's decision, a labor arbitrator's decision can be vacated if the award is contrary to public policy. *Eastern Associated Coal Corp.* v. *United Mine Workers of Am., Dist. 17*, 531 U.S. 57, 62, 121 S.Ct. 462, 148 L.Ed.2d 354 (2000); *Kitsap County Deputy Sheriffs Guild* v. *Kitsap County*, 167 Wn.2d 428, 219

P.3d 675 (2009).[5] "[T]he question of public policy is ultimately one for resolution by the courts." *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 43, 108 S.Ct. 364, 373, 98 L.Ed.2d 286 (1987).[6]

To vacate an arbitration award on public policy grounds, it must be "explicit" "well defined," and "dominant." *Eastern Associated Coal Corp. v. Mine Workers,* 531 U.S. 57, 62 (2000); *accord W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber, Cork, Linoleum & Plastic Workers of Am.*, 461 U.S. 757, 766 (1983).[7] In order to violate public policy within

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[5] There exist four grounds supporting vacatur of an arbitration decision resolving a labor dispute: (1) the award does not draw its "essence" from the CBA and thus the arbitrator effectively dispensed "his own brand of industrial justice," (2) the arbitrator exceeded the boundaries of the issues submitted for decision, (3) the award is contrary to public policy, or (4) the award was procured by fraud. *Southern Calif. Gas Co. v. Utility Workers Union of Am.*, 265 F.3d 787, 792-93 (9th Cir.2001).

[6] In *Misco,* an employee operated a machine that used sharp blades to cut rolls of paper. The employee was found in the backseat of a car in the company parking lot "with marijuana smoke in the air and a lighted marijuana cigarette in the front seat ashtray." *Id.* at 33, 108 S.Ct. at 368. In addition, marijuana gleanings were discovered in the employee's car, and marijuana was found in his home. *Id.* After learning these facts, the company discharged him, but an arbitrator ordered his reinstatement. The district court, however, refused to enforce the award, and the court of appeals affirmed, holding that reinstatement would violate the public policy "against the operation of dangerous machinery by persons under the influence of drugs or alcohol." 768 F.2d 739, 743 (5th Cir. 1985). The Supreme Court reversed, stating that the court of appeals had "made no attempt to review existing laws and legal precedents in order to demonstrate that they establish a 'well-defined and dominant' policy against the operation of dangerous machinery while under the influence of drugs." *Misco,* 484 U.S. at 44, 108 S.Ct. at 374. The Court also stated that even if the court of appeals' formulation of public policy were accepted, "no violation of that policy [had been] clearly shown" in that case because there was insufficient evidence that the employee would have operated his machine under the influence of drugs. *Id.*

[7] In *W.R. Grace*, the employer signed a conciliation agreement under the auspices of the EEOC in order to avoid liability under Title VII. The conciliation agreement was in conflict with its collective bargaining agreement concerning seniority rights. The union filed for arbitration, and the arbitrator ruled in favor of the employees for violation of the CBA and awarded damages. The employer filed suit to vacate the order on the basis that it violated the public policy reflected in Title VII. 461 U.S. at 764. Emphasizing the limited nature of the public policy exception, the Supreme Court stated that a court's refusal to enforce an arbitrator's interpretation of a collective bargaining agreement is limited to

this context, the Court must conclude that the arbitrator's award itself violates public policy and not the conduct of the employee. *Eastern Associated Coal Corp.*, 531 US at 62-63. The public policy at issue must be "ascertained by reference to positive law and not from general considerations of supposed public interests." *Id* at 63. "We agree, in principle, that courts' authority to invoke the public policy exception is not limited solely to instances where the arbitration award itself violates positive law." *Id.*[8]

D. The WLAD Qualifies as a Well Defined, Explicit and Dominant Source of Public Policy.

As recognized by the Court of Appeals, in Washington the WLAD is a public policy of the highest priority. The Union in this case argues that the WLAD can never qualify as a "well defined, dominant and explicit" public policy sufficient to vacate an arbitrator's order no matter how lenient the

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situations where the contract as interpreted would violate "some explicit public policy" that is "well defined and dominant." *Id.* at 766, 103 S.Ct. at 2183-84. The Court refused to vacate the arbitrator's order, and concluded that the "Company was cornered by its own actions, and it cannot argue now that liability under the collective-bargaining agreement violates public policy. . . . The Company voluntarily assumed its obligations under the collective-bargaining agreement and the arbitrators' interpretations of it. No public policy is violated by holding the Company to those obligations, which bar the Company's attempted reallocation of the burden." *Id.* at 770.

[8] In *Eastern Associated Coal,* the Supreme Court declined to invalidate an arbitrator's decision to reinstate an employee who had twice tested positive for illegal drug use. The employee, who drove heavy trucking equipment on public highways, worked in a safety sensitive position and was accordingly required to submit to random drug tests pursuant to regulations promulgated by the Department of Transportation. *Id.* at 60, 121 S.Ct. 462. The Court declined to vacate an order authorizing reinstatement. The reasoning of the Court, however, was based upon the statutory provision which encouraged rehabilitation as a consideration: "rehabilitation is a critical component of any testing program," and "should be made available to individuals, as appropriate, ... " *Id.* at 64 (citation omitted). "They [the relevant policies] also include a Testing Act policy favoring rehabilitation of employees who use drugs." *Id.* at 65.

discipline, egregious the conduct, frequent the conduct by the harasser, or the degree to which illegal harassment permeates the workplace. Union Brief, 16-19; Union Reply Brief, at 4-6. The Court should reject this argument. While the Union and the employer might agree that an arbitrator's order of termination complies with the "just cause" provision of the CBA and the law of the shop, it still would violate the WLAD if the discipline failed as a matter of law to satisfy the employer's affirmative obligation to take disciplinary action sufficient to deter future violations.[9] The industrial common law of the shop need not consider the deterrent effect on employees other than the grievant, but the WLAD requires that a message be sent to all employees to deter future violations.

In *Kitsap County Deputy Sheriff's Guild v. Kitsap County,* 167 Wn.2d 428, 219 P.3d 675 (2009), the Court considered whether to vacate an arbitrator's order reinstating a Kitsap County Deputy Sheriff who had been discharged for repeated dishonesty and erratic behavior. The arbitrator found that the Deputy was suffering from a mental disability and had been untruthful with investigators, but "that the County had failed to show that 'the

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[9] In *Alexander v. Gardner-Denver Co.,* 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974), the Court recognized that arbitrators look to the "industrial common law of the shop" and "[have] no general authority to invoke public laws that conflict with the bargain between the parties...." 415 U.S. at 53, 94 S.Ct. at 1022. "The specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land." *Alexander,*, 415 U.S. at 57. *See also Barrentine v. Arkansas-Best Freight Systems,* 450 U.S. 727, 743 n21, 101 S.Ct. at 1446 n21. Moreover, an arbitrator is required to interpret the agreement in accordance with the intent of the parties rather than the intent of Congress. *Alexander,* 415 U.S. at 53, 57, 94 S.Ct. at 1022, 1024; *Barrentine,* 450 U.S. at 743-44, 101 S.Ct. at 1446.

degree of discipline administered was reasonably related to the seriousness of the proven offenses.'" *Id.* at 432. Although the arbitrator ordered reinstatement, he declined to order back pay. *Id.* at 433. Both sides appealed.

On appeal the County maintained that the reinstatement violated the public policy reflected in state criminal statutes and the *Brady* rule. In reference to the criminal statutes, the court stated that there was nothing in any of the cited statutes (obstructing and making false statements) that "provide an explicit, well defined, and dominant public policy prohibiting reinstatement of any officer found to violate these statutes." *Id.* at 436. The Court then gave examples of cases from other jurisdictions which considered well defined and dominant public policies, including *City of Brooklyn Center v. Law Enforcement Labor Services, Inc.,* 635 N.W.2d 236, 242-44 (Minn. App. 2001) (vacating an arbitration award that reinstated a police officer who had a long history of stalking and sexual harassment while on duty)(parenthetical text original). *Id.* at 437. [10]

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[10] In *City of Brooklyn Center*, a law enforcement officer had a long and extensive history of alleged sexual assault against a fellow officer, stalking and sexual harassment of the female members of the public. *Id.* at 238. The officer was terminated. While the arbitrator found many of the claims stale, he also found that the City "did establish a pattern of inappropriate behavior going back in some cases to 1989." *Id.* at 240. The arbitrator nevertheless reinstated the officer without back pay. The City appealed. The Minnesota Court of Appeals vacated the order relying upon the public policy reflected *inter alia* in the Minnesota Human Rights Act (which prohibits sexual harassment) and Title VII of the 1964 Civil Rights Act. *Id.* at 242-243. "Recognizing the strong and clear public policy against sexual harassment, the affirmative duty of employers to implement that policy, and the unique opportunity of a police officer with a lengthy history of violations of that policy to continue to commit similar violations, we hold that the arbitrator's decision under the extreme facts of this case violated public policy and must be vacated." *Id.* at 243.

The WLAD public policy relied upon in this case is virtually identical to the public policy relied upon in *City of Brooklyn*, cited by this court. Moreover, the Court of Appeals in this case did not foreclose reinstatement, but only required a sanction greater than a 20 day suspension.

In *Newsday, Inc. v. Long Island Typographical Union, No. 915,* 915 F.2d 840, 844-45 (2d Cir. 1990) *cert. denied,* ___ U.S. ___, 111 S.Ct. 1314 (1991), the employer discharged an employee for sexually harassing female co-workers. Although the arbitrator found that the employee had committed sexual harassment more than once, the arbitrator concluded that progressive discipline was called for but that discharge was too strong a sanction; the arbitrator reinstated the employee, but without back pay. The district court vacated the award and the Second Circuit affirmed, reasoning that the award violated public policy because it returned a known sexual harasser to the workplace, thereby perpetuating a hostile and offensive work environment and inhibiting the employer from carrying out its legal obligation to eliminate such conduct. *Id.* at 845. *See also Stroehmann Bakeries, Inc. v. Local 776, Int'l Bhd. of Teamsters,* 969 F.2d 1436, 1441-42 (3d Cir.1992) (vacating arbitration reinstatement to employee who was fired for sexually harassing a customer's employee, because, in the absence of a finding that the sexual harassment did not occur, public policy against sexual harassment in the workplace and in favor of employer sanctions for sexual harassment by employees, both embodied in Title VII, prohibit reinstatement of worker);

Consolidated Edison v. Utility Workers' Union, No. 95-1672, 1996 WL 374143 (S.D.N.Y. July 3, 1996) (Koeltl, J.) (vacating on public policy grounds the reinstatement of an employee who had already been issued clear warning that further sexual misconduct could lead to dismissal); *Exxon Shipping Co. v. Exxon Seamen's Union,* 11 F. 3d 1189, 1192 (3d Cir. 1993)("Thus, our decision in *Stroehmann Bakeries* implicitly rejected the argument that an arbitration award may be vacated on public policy grounds only when the award requires conduct that is prohibited by positive law").[11]

In *Philadelphia Housing Authority v. American Federation of State, County and Municipal Employees, District Council 33, Local 934,* 2012 WL 3570665 (Pa.), the Court considered a case where an employee sexually harassed a female co-worker with numerous sexually explicit comments and actions. After becoming aware of the harassment, the employer conducted an investigation and determined that the harassing employee should be terminated. Thereafter, the union filed for arbitration. The issue before the

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[11] Courts within other contexts have not been reluctant to vacate an arbitrator's reinstatement order. *E.g. Iowa Elec. Light & Power Co. v. Local Union 204,* 834 F.2d 1424, 1428-30 (8th Cir. 1987) (vacating on public-policy grounds arbitration award reinstating employee found by arbitrator to have committed violation of nuclear power plant safety rules); *Delta Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l,* 861 F.2d 665, 674-75 (11th Cir. 1988) (vacating on public-policy grounds arbitration award reinstating pilot who flew while intoxicated), *cert. denied,* 493 U.S. 871 (1989); *Russell Mem'l Hosp. Ass'n v. United Steelworkers of Am.*, 720 F.Supp. 583, 587 (E.D. Mich. 1989) (vacating on public-policy grounds arbitration award reinstating nurse when "arbitrator explicitly found that [the nurse's] conduct was negligent and that this negligence was 'extremely serious' and 'could have detrimentally impacted the patient's health'"); *Exxon Shipping Co. v. Exxon Seamen's Union,* 993 F. 2d 357, 363-364 (3d Cir. 1993)("we hold the award reinstating Foster violates the public policy protecting the public and the environment against operation of vessels by drug users").

arbitrator was "whether [employer] had just cause to terminate employment, and, if not, what would be the appropriate remedy." *Id.* at *1. The arbitrator found that the *verbal warning* given to the harasser was sufficient and that there was a lack of "just cause" to terminate. *Id.* at *2.

On appeal, the intermediate appellate court determined that the arbitrator's award reinstating [the harasser] violated a policy arising from Title VII of the Civil Rights Act of 1964, as well as the policy embodied in the Pennsylvania Human Relations Act ("PHRA"): "a public policy against sexual harassment, and a separate public policy favoring voluntary employer actions to prevent sexual harassment, including the imposition of sanctions against harassers." *Id.* "The court determined that [the harasser's] reinstatement, without any sanction whatsoever, undermined the public policies against sexual harassment, and thus could not be upheld. 'If forced to honor the arbitration award, [the employer] will not be complying with Title VII and the PHRA, each of which requires that an employer impose appropriate discipline for proven cases of sexual harassment in order to ensure a safe work environment free of sexual harassment.'" *Id.*

The Pennsylvania Supreme Court affirmed. In relevant part, the Court concluded:

> Although we do not hold that termination was required under the circumstances here, we likewise reject the arbitrator's and appellant's counter-assertion that a public employer can be precluded from taking such decisive action against an employee following its investigation. A public employer

> should be empowered to implement a zero tolerance policy when appalling, assaultive, repeated sexual harassment is at issue. The arbitration award to the contrary in this case affirmatively encourages — indeed it rewards — sexual harassment in the public workplace.

Id. at *5. The Court ruled that the arbitrator's award prevented the employer from taking appropriate corrective action. *Id.* at *6. "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 public policy. Such an irrational award undermines clear and dominant public policy." *Id.* "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 *9. The Court distinguished *Eastern Associated Coal Corp., Misco,* and *W.R. Grace. Id.* at *7-8.

The discipline required to comply with the employer's affirmative obligation under the WLAD is fact specific. Not all circumstances require termination or foreclose reinstatement. In this case, termination is not required by the Court of Appeals and is not necessary to comply with the employer's affirmative obligations under the WLAD.[12] The goal of the WLAD is to eradicate racial discrimination from the workplace. Depending upon the facts, reinstatement could violate that public policy goal.

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[12] The Court of Appeals ruling is therefore distinguishable from *Way Bakery v. Truck Drivers Lock,* 363 F.3d 590 (6th Cir. 2004)(refusing to vacate an order reinstating an employee with six months paid suspension for racial harassment.).

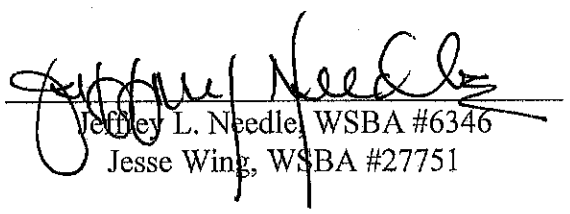
Neither the WLAD nor Title VII are concerned with the potential rehabilitation of the employee, but with the message being sent to the remaining workforce for deterrent purposes. Indeed, the Court of Appeals acknowledged that "the arbitrator's analysis of the appropriate discipline [failed to] take into account the dominant public policies of the WLAD, including a Washington employer's affirmative duty to impose sufficient discipline to 'send a strong statement' adequate to persuade both [the harasser] *and potential violators to refrain from unlawful conduct.*" 164 Wn.App. at 320-21 (emphasis added). In this case, there is no claim that *reinstatement* violates public policy, only that, as a matter of law, a 20 day suspension is insufficient to send a message to the remaining workforce that racial harassment of the most egregious kind will not be tolerated.

V. CONCLUSION

The Court should rule that the WLAD is an explicit, dominant, and well defined public policy sufficient to vacate a labor arbitrator's ordered discipline.

Respectfully submitted this 12th day of October, 2012.

WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION



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THE UNDERSIGNED, under penalty of perjury, under the laws of the State of Washington, does hereby declare as follows that on the 12th day of October, 2012, I submitted electronically via email the foregoing Brief of the Washington Employment Lawyers Association and Motion for Leave to File to the Clerk of the Washington State Supreme Court, and served via legal messenger a copy to the following:

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