[J-120-2011]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

CASTILLE, C.J., SAYLOR, EAKIN, BAER, TODD, McCAFFERY, ORIE MELVIN, JJ.

THE PHILADELPHIA HOUSING AUTHORITY,	:	No. 15 EAP 2009
	:	Appeal from the Opinion and Order of the
Appellee	:	Commonwealth Court dated September
	:	15, 2008, No. 2405 CD 2004, reversing
	:	the order of the Court of Common Pleas of
v.	:	Philadelphia County entered September
	:	23, 2004 at August Term, 2004, No. 2280,
	:	Civil Trial Division
AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, DISTRICT COUNCIL 33, LOCAL 934,	:	956 A.2d 477 (Pa. Cmwlth. 2008)
	:	ARGUED: October 21, 2009
	:	RESUBMITTED: November 22, 2011
Appellant	:	

OPINION

MR. CHIEF JUSTICE CASTILLE* **DECIDED: August 21, 2012**

We granted review to determine whether a labor arbitration award, issued pursuant to the Public Employe Relations Act ("PERA"),[1] and reinstating an employee discharged for acts constituting sexual harassment, violated well-defined and dominant public policy. Concluding that it did, we affirm the order of the Commonwealth Court, and vacate the award.

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* The matter was reassigned to this author.

1 Act of July 23, 1970, P.L. 563, as amended, 43 P.S. §§ 1101.101-1101.2301.

Appellant, American Federation of State, County and Municipal Employees, District Council 33, Local 934 ("appellant"), and appellee, the Philadelphia Housing Authority ("PHA"), are parties to a collective bargaining agreement ("CBA") governing the wages, hours and working conditions of PHA's employees. The CBA includes a provision that an employee can be terminated only for just cause. Thomas Mitchell, a warehouseman employed by PHA, was accused of sexually harassing a co-worker, Stephanie Broadnax, and was fired following an internal PHA investigation. Thereafter, appellant filed a grievance on Mitchell's behalf. When the grievance procedures of the CBA were exhausted without a resolution satisfactory to appellant and Mitchell, appellant filed a demand for arbitration. Arbitration hearings were conducted on August 27, 2003 and February 17, 2004. The issue before the arbitrator was "whether [PHA] had just cause to terminate [Mitchell's] employment, and, if not, what would be the appropriate remedy." Arbitration Award, dated July 12, 2004, at 27. The arbitrator made extensive factual findings. Id. at 3-27.

Broadnax testified about Mitchell's numerous sexually explicit comments and actions toward her, which began in 2001 and continued into 2002. Id. at 3-10. She described acts of inappropriate touching and sexual comments made by Mitchell, which caused her discomfort, particularly when she and Mitchell were alone. She described one particularly egregious incident where Mitchell grabbed Broadnax from behind while she was filing paperwork, "grinding" himself into her for approximately 15 seconds. Id. at 5, 9. Another incident involved Mitchell hiding under a desk to "take a nap" and then asking Broadnax if he could "eat her pussy" while she worked. Mitchell would hug Broadnax, throw his arms around her neck, and "play with himself" while speaking to her; he made her "upset and nervous." Broadnax testified that she also witnessed Mitchell pinch the breasts of the other female warehouse employee, Linda Bradford.

Broadnax further testified that she was nervous in Mitchell's presence and described him as a bully and a source of persistent annoyance; she testified that his actions were disgusting and upsetting to her. Broadnax conceded that there were occasionally jokes of a sexual nature among the eight employees who worked in the warehouse, but she stated that very little of this behavior was engaged in by anyone other than Mitchell.[2]

When Broadnax learned that Mitchell was going to be reassigned to a desk next to hers, she advised her supervisor, Joseph Brunetti, about Mitchell's conduct, and that she did not want to work so close to Mitchell. Then, Broadnax and Mitchell engaged in a verbal altercation which was apparently prompted by Mitchell's anger that Broadnax had reported his behavior to Brunetti. Brunetti broke up the argument, and took Mitchell outside to discuss and criticize his behavior. Brunetti told Mitchell that he had to stop touching Broadnax and refrain from any more yelling.[3] Shortly thereafter, Broadnax learned that the altercation had been reported to PHA's human relations department, and she met with PHA's Equal Employment Opportunity Officer, Rosanna Grdinich, to whom she described Mitchell's various acts and remarks.

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[2] Jonas Shour, a warehouse supervisor, testified that Mitchell's actions were joking, inoffensive and "normal," because "everyone" at the warehouse "does it." Arbitration Award at 10-11. Similarly, Bradford, the other female warehouse employee, testified that there was a great deal of sexual banter and "horseplay" in the warehouse, including some sexual touching, but that these activities did not cross boundaries of impropriety. Id. at 11-13.

[3] Ten days later, Mitchell and Broadnax had another loud argument. This time, Brunetti reported the incident to his own supervisor, James Forbes. Forbes himself gave Mitchell a verbal warning to stay away from Broadnax, but Mitchell was not given any written warnings, or a suspension, prior to his termination. Id. at 13-15, 17. Mitchell had previously received a "satisfactory evaluation." Id. at 15.

Grdinich interviewed Broadnax and Mitchell at the warehouse, finding Broadnax credible and Mitchell not credible. Grdinich testified that PHA had a zero tolerance policy on sexual harassment, and because of this policy, she recommended that PHA take immediate administrative action against Mitchell, although she did not recommend a specific discipline. Susan Stefencavage, PHA's human resources assistant general manager, explained that the decision to terminate Mitchell was based on: 1) his pattern of sexual harassment; 2) his unwanted touching of Broadnax; 3) his touching himself; 4) "the policy which provides for termination"[4]; and 5) the fact that there was no way to accommodate Mitchell without placing others in jeopardy or "at risk" for sexual harassment. Id. at 19. Mitchell denied the allegations made against him.

The arbitrator concluded that Mitchell was not credible, and that Broadnax's testimony regarding Mitchell's inappropriate conduct was credible. The arbitrator specifically found that Mitchell had been adequately informed about PHA's prohibition against sexual harassment, and that his behavior toward Broadnax was "lewd, lascivious and extraordinarily perverse." Id. at 33. Although he found that Mitchell's misconduct was "unacceptable," the arbitrator also found that after the "verbal warning" given to Mitchell by Brunetti, Mitchell engaged in no further inappropriate sexual harassment of Broadnax. The arbitrator then concluded that PHA did not have just cause to terminate Mitchell's employment. PHA was directed to reinstate Mitchell and make him whole. Id. at 36-37.

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[4] At all relevant times, PHA had posted a notice regarding its policy on sexual harassment in the workplace, which advised that if PHA concludes that sexual harassment occurred, a "variety of disciplinary measures may be used" including termination of employment. Arbitration Award at 32-33.

PHA filed a petition to vacate the arbitrator's award, which the trial court denied. On PHA's further appeal, the Commonwealth Court reversed, holding that PHA's legal obligation to protect its employees constituted a "core function" of the agency that PHA could not bargain away and, therefore, the arbitrator's award requiring Mitchell's reinstatement was not rationally derived from the CBA and could not be enforced. Philadelphia Housing Authority v. American Fed. of State, County & Mun. Employees, 900 A.2d 1043 (Pa. Cmwlth. 2006), vacated, 941 A.2d 1257 (Pa. 2008). Appellant petitioned for allowance of appeal, and by order dated January 2, 2008, this Court granted the petition, vacated the Commonwealth Court's order, and remanded with instructions to reconsider PHA's petition to vacate in light of Westmoreland Intermed. Unit No. 7 v. Westmoreland Intermed. Unit No. 7 Classroom Assistants Educ. Support Personnel Ass'n, 939 A.2d 855 (Pa. 2007) ("Westmoreland"). Our remand order essentially directed the Commonwealth Court to consider PHA's petition under Westmoreland's newly adopted "public policy exception" to the "essence test," rather than the disapproved "core functions exception" the court had applied in the earlier appeal.[5]

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[5] In Westmoreland Intermed. Unit No. 7 v. Westmoreland Intermed. Unit No. 7 Classroom Assistants Educ. Support Personnel Ass'n, 939 A.2d 855 (Pa. 2007), the six participating Justices rejected any further application of the core functions exception to the essence test. The "essence test" is the highly deferential standard of judicial review of PERA grievance arbitration awards, which allows a court to vacate an arbitration award only where the award is without foundation in, or fails to logically flow from, the underlying CBA. State System of Higher Educ. (Cheyney University) v. State College & Univ. Prof. Ass'n, 743 A.2d 405, 413 (Pa. 1999). The "core functions" exception to the essence test was based on the premise that a public employer does not relinquish those powers essential to its ability to properly discharge its various functions simply by entering into a CBA. City of Easton v. American Fed. of State, County & Mun. Employees, 756 A.2d 1107, 1111-12 (Pa. 2000), overruled in part, Westmoreland, supra at 865. Instead of the core functions exception, a majority of Justices in Westmoreland adopted the "public policy exception" to the essence test. The public (continued…)

Upon further briefing and reargument, the Commonwealth Court again reversed the trial court and vacated the arbitration award which reinstated Mitchell. Philadelphia Housing Authority v. American Fed. of State, County & Mun. Employees, 956 A.2d 477, 487 (Pa. Cmwlth. 2008) (*en banc*). Applying the public policy exception to the essence test, the court determined that the arbitrator's award reinstating Mitchell violated two related public policies, a policy arising from Title VII of the Civil Rights Act of 1964, and federal Equal Employment Opportunity Commission ("EEOC") regulations, 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. at 483. The court determined that Mitchell'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, PHA 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. at 487.[6]

(…continued)
policy exception is grounded in the general rule that a court will not enforce an unlawful contract or one that otherwise violates public policy. Id. at 863.

[6] Judge Smith-Ribner filed a dissenting opinion in which she criticized the new public policy exception to the essence test, as established "in a vacuum," and focused instead on her view that the arbitration award "was rational and could not be seen as one that failed to flow logically from the collective bargaining agreement." 956 A.2d at 488-89. Judge Pellegrini separately dissented, concluding that "there is no public policy that every harasser must be fired. . . ." Id. at 490. Judge Pellegrini further opined that he would reject the essence test, and would simply apply the standard of review applicable to judgment *n.o.v.*, as prescribed in the Uniform Arbitration Act. Id. This standard, Judge Pellegrini stated, "would allow courts to set aside arbitration awards (continued…)

Appellant filed a petition for allowance of appeal in this Court, and we granted review on the following rephrased issues:

> (1) Whether the Arbitrator's award violates a clearly articulated public policy, as defined by the public policy exception to the essence test, established by this Court in Westmoreland?
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> (2) Whether the Commonwealth Court misapplied the public policy exception by holding that public policy requires severe discipline by an employer in response to sexual harassment, notwithstanding that (a) the employee was disciplined in the form of a verbal warning; (b) the employee abided by the warning and committed no further harassment warranting discipline following the warning; and (c) federal and state regulations, cases, and policies, and the employer's own policy, do not require that an offending employee be punished, and contemplate that a warning may be a sufficient response to sexual harassment?

Philadelphia Housing Authority v. American Fed. of State, County & Mun. Employees, 972 A.2d 482 (Pa. 2009).

As stated, our review of this appeal from a PERA arbitration award is governed by the essence test. If the issue falls within the scope of the parties' CBA, we may vacate the arbitration award only if it "indisputably and genuinely is without foundation in, or fails to logically flow from," the CBA. Cheyney University, 743 A.2d at 413. Under Westmoreland, if the essence test is satisfied, we may consider further whether the award violates a well-defined and dominant public policy. Westmoreland, 939 A.2d at 866 (essence test is subject to narrow exception by which arbitrator's award will be vacated if it violates public policy of Commonwealth). The parties do not dispute that the subject of the arbitration award – the termination of a PHA employee for "just cause" – flowed logically from the parties' CBA. The crux of this matter lies in the proper

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that come to a manifestly unreasonable outcome thereby protecting the public employer, the union, and most importantly, the public." Id. at 498.

application of the public policy exception to the essence test. This is a pure question of law; our standard of review is *de novo,* and our scope of review is plenary. Dechert LLP v. Commonwealth, 998 A.2d 575, 579 (Pa. 2010).

Appellant argues that, in vacating the arbitration award reinstating Mitchell, the Commonwealth Court failed to properly apply a highly deferential standard of review. Appellant argues specifically that the award is not contrary to any well-defined, dominant public policy, and thus the very narrow public policy exception to the essence test does not apply here. Appellant states that the exception derives from the law of contracts prohibiting enforcement of agreements that violate the law or public policy, and application of the exception should be undertaken "cautiously and infrequently." Appellant's Brief at 21. Here, according to appellant, the arbitrator's award did not violate any well-defined, dominant public policy that would preclude the use of a warning to curtail further sexual harassment, instead of termination of the offending employee. Relying on federal cases holding that counseling, admonishment or relocation may be sufficient disciplinary responses to harassment, appellant argues there is no public policy that requires "severe discipline" in response to sexual harassment that has been otherwise effectively resolved; the public employer is not required to fire the harasser. Id. at 29-31. No public policy requires termination in response to sexual harassment; instead, argues appellant, the law simply "imposes an obligation on the employer to take steps reasonably necessary to stop the harassment," and "if it stops, as a matter of law the employer has fulfilled its obligation." Id. at 44.[7]

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[7] The Pennsylvania State Education Association ("PSEA") filed an *amicus curiae* brief in support of appellant's position that the arbitration award reinstating Mitchell did not violate public policy. The PSEA is a nonprofit corporation representing active and retired employees working in public schools in the Commonwealth, and states that it "has developed a reputation for comprehensive and expert legal research in the fields of education and labor law." PSEA Brief at 1. PSEA argues, *inter alia*, that public policy (continued…)

Appellee PHA argues that the Commonwealth Court properly vacated the arbitration award. According to PHA, termination of Mitchell was warranted under the circumstances, and the award reinstating him – together with back pay and no other sanction – was contrary to a dominant and well-defined public policy against sexual harassment in the workplace. PHA argues the public policy is clearly derived from federal law – Title VII of the Civil Rights Act of 1964, and the regulations of the EEOC – as well as federal cases interpreting them. PHA also cites to the PHRA, and this Court's recent decision in Weaver v. Harpster, 975 A.2d 555, 567 (Pa. 2009) (in enacting PHRA, "the legislature articulated a public policy to eliminate all forms of invidious discrimination, including sex discrimination in the workplace"). PHA further argues that these laws also create a public policy which favors voluntary employer prevention of sexual harassment in the workplace, as well as the application of sanctions for harassment. The arbitrator clearly found that Mitchell had engaged in sexual harassment and, according to PHA, its responsive decision to terminate Mitchell advanced these strong public policies. PHA asserts that the arbitration award which removed all sanctions against Mitchell undermined PHA's attempts to comply with its own rules designed to eliminate sexual harassment. Further, according to PHA, the verbal "counseling" given to Mitchell prior to any investigation by PHA of the harassment claims could not possibly have constituted an adequate sanction for Mitchell's conduct. PHA claims that the arbitrator effectively condoned Mitchell's "unacceptable" behavior by ordering his reinstatement with back pay. PHA emphasizes that, despite appellant's argument to the contrary, PHA does not take the position that "severe discipline" or

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does not require termination or even severe discipline of an employee who engages in sexual harassment. Id. at 4.

termination is required in every instance of sexual harassment; however, PHA does argue that it should be allowed to fire a sexual harasser under the right circumstances, such as those shown in this case.[8]

We turn to the issues before us, and conclude that the arbitrator's award forcing PHA to take Mitchell back with full back pay – without any sanction at all – violates a well-defined and dominant public policy against sexual harassment in the workplace, a public policy which is grounded in both federal and state law against sex discrimination in employment, including Title VII, the regulations of the EEOC, and this Commonwealth's own PHRA. See generally Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64-67 (1986) (hostile environment sexual harassment is illegal sex discrimination and actionable under federal law); 43 P.S. § 952(b) ("It is hereby declared to be the public policy of this Commonwealth to foster the employment of all individuals in accordance with their fullest capacities regardless of their… sex, … and to safeguard their right to… hold employment without such discrimination…"); Pa. Const. Art. I, § 28 ("Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual.").[9]

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[8] The Pennsylvania School Board Association ("PSBA"), whose function is "to assist local public school entities and to represent and promote general interest in the field of public education," filed an *amicus curiae* brief in support of PHA. Brief of PSBA at 1. The PSBA asserts, *inter alia*, that "an arbitration award interpreting a labor contract in a manner that frustrates the purposes of Title VII is contrary to the public policy of maintaining a workplace free from sexual harassment." Id. at 3. The PSBA further argues that this Court should apply the public policy exception to the essence test "in a manner consistent with the [PERA], a statute that prohibits a collective bargaining agreement that would undermine the health, safety or welfare of citizens of the Commonwealth." Id.

[9] As we discuss infra at note 12 and accompanying text, to the extent the sexual harassment in this case involved assaultive conduct, further support for the dominant public policy could be found in the Pennsylvania Crimes Code.

In Weaver v. Harpster, supra, this Court held that there was no common law cause of action for sexual harassment against an employer who is not subject to the PHRA. Notably, neither the Weaver majority nor the dissent disputed the existence of a public policy against sexual harassment in the workplace. Thus, the majority noted that "in the first section of the PHRA, the legislature articulated a public policy in the broadest of terms, establishing that the Commonwealth's interest in fostering employment without regard to sex applies to 'all individuals,' without limitation." 975 A.2d at 565.[10] The dissenting opinion of Madame Justice Todd, which was joined by this author, would have taken more affirmative remedial action in that arena, but the dissent's expression clearly articulated the sources for the Commonwealth's undisputed public policy: "the Pennsylvania Constitution, supported by statutory law, makes it unmistakably clear that the public policy of our Commonwealth simply does not tolerate invidious gender discrimination -- here in the form of sexual harassment -- with respect to continued employment." Id. at 573 (Todd, J., dissenting). Relying on the Equal Rights Amendment to the Pennsylvania Constitution, and the General Assembly's enactment of the PHRA, the dissent recognized a clear declaration of public policy against sex discrimination, of which sexual harassment is one form. Id. at 574 (Todd, J., dissenting) (discussing Pa. Const. Art. I § 28 and 43 P.S. § 955).

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[10] The Weaver majority focused on the fact that the PHRA applies only to employers with four or more employees, and as a result did not provide a statutory remedy to the employee-victim in that case, who did not work for such an employer. 43 P.S. § 954(b). The Weaver majority determined that the Legislature had designed the PHRA to provide the exclusive procedure for redress of a claim for damages arising out of sexual harassment in the workplace. 975 A.2d at 567. Our holding here – where a public employer sought to redress a victim's harm by firing the harasser, and was then undermined in that effort by a labor arbitrator – is not in tension with the decision in Weaver.

Moreover, as the Commonwealth Court noted here, PHA's formal sexual harassment policy strictly prohibits discrimination or harassment on the basis of sex, and a notice posted in PHA's workplace advises that sexual harassment on the job violates Title VII. Arbitration Award at 32-33. See also Philadelphia Housing Authority v. American Fed. of State, County & Mun. Employees, 956 A.2d at 478-79. The notice warns that a finding of sexual harassment could result in a range of disciplinary measures, including oral or written warnings, demotion, suspension, or even discharge. Arbitration Award at 32; 956 A.2d at 479. The arbitrator expressly found that this notice "provided adequate information to [Mitchell] concerning the prohibition against sexual harassment/misconduct." Arbitration Award at 32-33. Accordingly, the Commonwealth Court had ample support for its recognition that "there is an explicit, well-defined, and dominant public policy against sexual harassment in the workplace," in both federal and Pennsylvania law. 956 A.2d at 483-84.

Nevertheless, the arbitrator ordered PHA to reinstate Mitchell with back pay, reasoning that warehouse supervisor Brunetti's verbal counseling put an end to the sexual harassment and thus adequately addressed Mitchell's "lewd, lascivious and extraordinarily perverse" conduct. 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.

Along these lines, PHA argues that the arbitrator's award here violates public policy because it prevents PHA from taking "appropriate corrective action following its sexual harassment investigation," and because the "pre-investigation warning" given to Mitchell "logically could not have been discipline for misconduct disclosed only after the warning was issued." Appellee's Brief at 24. PHA does not claim that a "mere reprimand" or "warning" for sexual harassment is always insufficient and thus constitutes a *per se* violation of public policy. But, PHA does argue that supervisor Brunetti's conversation with Mitchell cannot have been categorized as appropriate remedial action because it took place before PHA's investigation, and before the extent of Mitchell's sexual harassment had been discovered by appropriate managerial staff at PHA.[11] After completing its investigation, PHA deemed termination to be a proper sanction, and PHA argues that the arbitrator's decision to reinstate Mitchell undermined PHA's attempt to comply with its legal responsibilities to investigate and then provide a remedy.

We agree with PHA on this point. The arbitrator specifically found that Mitchell was aware of the prohibition against sexual harassment in the workplace, and that he nevertheless proceeded to commit multiple acts of "lewd, lascivious[,] extraordinarily perverse" and "unacceptable" sexual harassment against his female co-worker victim. Mitchell's conduct was found to be neither an isolated incident nor confined to words. His actions went well beyond mere talking or unwelcome "banter" and involved unwanted physical contact. Mitchell characterized his conduct as mere horseplay, and

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[11] PHA also makes the salient point that Mitchell's apparent cessation of overt sexual misconduct in the few months after the verbal warning -- and during the investigation, while all eyes were upon him -- should not have prevented the imposition of appropriate discipline for the misconduct that had already occurred.

denied the specific allegations. The arbitrator rejected Mitchell's testimony, thus establishing that, in addition to committing the charged acts, Mitchell also attempted to mislead the tribunal about them, and failed to take responsibility for his conduct.

The issue before the arbitrator was whether there was just cause for this termination, and if not, what would be the appropriate remedy short of termination. 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.

Given the repeated assaultive conduct PHA sought to address, this should not be a difficult case. A public employer cannot be denied the power to impose consequences for this sort of inappropriate, and facially criminal, conduct.[12] Indeed, with the general notion in mind that recognized rights must generally have some form of remedy, it is clear that there must be a power in public employers to take meaningful steps to vindicate dominant public policy. To allow an arbitration award which finds that an employee engaged in "extraordinarily perverse" physical sexual harassment of a co-worker, yet then simply dismisses the conduct as unworthy of an employer response beyond initial "counseling," and reinstatement with back pay, would eviscerate the ability of employers to enforce dominant public policy.

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[12] Mitchell's conduct arguably would constitute a basis for criminal prosecution for harassment and indecent assault, at a minimum. See 18 Pa.C.S. §§ 2709(a) (person commits harassment when, with intent to harass, annoy or alarm another, he subjects another to physical contact, repeatedly commits acts which serve no legitimate purpose, or communicates to such other person any lewd, lascivious, threatening or obscene words, language, drawings or caricatures) and 3126(a) (person is guilty of indecent assault if person has indecent contact with the complainant without complainant's consent).

As stated, in Westmoreland, a majority of this Court adopted a public policy exception to the essence test, although Mr. Justice Saylor, whose vote was necessary to recognizing that approach, emphasized that his concurrence was based on "the understanding that the exception is exceptionally narrow, consistent with this Court's prior explanations." 939 A.2d at 868 (Saylor, J., concurring). In this case, a holding that the arbitrator's award did not violate a well-defined, explicit, and dominant public policy would construe the public policy exception so narrowly that it would be, as a practical matter, completely negated. Appellant attempts to separate Mitchell's egregious behavior from the arbitrator's directive that Mitchell be reinstated without sanction for that behavior. Appellant agrees that sexual harassment is against the law, but nevertheless argues that the arbitrator's award undermining PHA's attempt to vindicate the law by firing the harasser must be upheld.

Federal cases cited by appellant to support its position are materially distinguishable from the instant matter, and not only because they do not involve sexual harassment.[13] For example, in Eastern Associated Coal Corp. v. United Mine Workers, 531 U.S. 57 (2000), where a labor arbitrator ordered the employer to reinstate a truck driver who had twice tested positive for marijuana, and the employer challenged the award as violating public policy, the Supreme Court rejected the employer's challenge. The Court recognized that there was a "detailed regulatory regime in a specific field" at

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[13] One material distinction is when the cases involve private rather than public employers. See, e.g., United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29 (1987) and W.R. Grace & Co. v. Local Union 759, 461 U.S. 757 (1983), discussed infra. Appellant's microscopically narrow reading of the public policy exception may be more defensible in the private sector, where the employers were subject to labor agreements governed by the National Labor Relations Act, and federal cases have articulated an extremely narrow exception to the essence test. In the case of public employers, such as PHA, we may apply a less restrictive reading of the exception, and thus accord less deference to an arbitration award such as the inexplicable award at issue here.

issue in the case, such that "courts should approach with particular caution pleas to divine further public policy in that area." Id. at 63. And in that "specific field," the Department of Transportation had set up a regulatory scheme that actually included and promised rehabilitation and testing for repeat drug users, in line with the conditions imposed upon reinstatement by the arbitration award:

> Neither the Act nor the regulations forbid an employer to reinstate in a safety-sensitive position an employee who fails a random drug test once or twice. The congressional and regulatory directives require only that the above-stated prerequisites to reinstatement be met.

Id. at 65. Given that the arbitrator's decision complied with this expressly stated public policy regarding drug abuser recidivist truck drivers, and where the legislation had complex remedial aims of which opportunities for rehabilitation are a "critical component," the argument that the arbitration award violated public policy failed. Id. at 64-65. The Court emphasized that the award did not "condone" the employee's conduct; instead it "punishe[d]" him by suspending him for three months without pay, requiring him to pay arbitration costs for both sides, and imposing conditions for continued employment. Id. at 65-66. See also Communication Workers v. Southeastern Elec. Coop., 882 F.2d 467, 468 (10th Cir. 1989) (suspension without pay of employee who engaged in sexual harassment only once, and was penitent and apologetic about it, was sufficient discipline). The no discipline award in the instant case is easily distinguishable.

The decision in United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29 (1987), another victimless drug case,[14] is also distinguishable. There, the High Court

[14] We recognize that both Misco and Eastern Associated Coal, which involved drug use by workers in safety-sensitive positions, implicated potential harm to others. But in the case of sexual harassment, the harm to a victim other than the grievant himself has already occurred.

held that an arbitration award reinstating an employee who had been accused of smoking marijuana on company property did not violate public policy. The Court focused on the fact that the employer had failed to prove the charge, id. at 34, and held that a "refusal to enforce an award must rest on more than speculation or assumption." Id. at 44. It was "by no means clear from the record that [the reinstated employee] would pose a serious threat to the asserted public policy" against the operation of dangerous machinery by persons under the influence of drugs, and the arbitration award was upheld. Id. at 45. By contrast, there is no question that the record in this case established that Mitchell sexually harassed his co-worker, by both word and deed, in direct violation of applicable state law, federal law and the employer's own stated policies, and failed to take responsibility for his conduct.

The decision in W.R. Grace & Co. v. Local Union 759, 461 U.S. 757 (1983), another case which did not involve assaultive sexual behavior against a co-worker, is also inapposite. In upholding the arbitrator's award against the employer's claim that it violated public policy, the Court focused on the primacy of seniority rules in the parties' pre-existing collective bargaining agreement over a subsequent contract between the employer and the EEOC, designed to remediate past race and gender discrimination in hiring, and in which the union had not participated. The Court held that the employer was not entitled to "alter the collective bargaining agreement without the Union's consent" and thus the arbitrator's award was proper and enforceable. Id. at 771. Here, PHA did not attempt to supplant the parties' CBA without the union's consent; instead, PHA applied the agreement's terms by discharging for "just cause" an employee who violated established public policy.

The Third Circuit's decision in Stroehmann Bakeries, Inc. v. Local 776, 969 F.2d 1436 (3d Cir. 1992), which involved claims of sexual harassment, is more instructive. In

Stroehmann, the labor arbitrator reinstated -- with back pay -- a worker who had been fired when the company discovered that he had sexually harassed a customer's employee. The Third Circuit 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 indeed 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. (citing Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1); Meritor Sav. Bank, supra; 29 C.F.R. § 1604.11(a) (unwelcome sexual advances and other physical conduct of sexual nature constitute sexual harassment when such conduct has purpose or effect of creating intimidating, hostile, or offensive work environment)). In holding that the arbitration award was unacceptable under the public policy exception, the court stated that "an award which fully reinstates an employee accused of sexual harassment without a determination that the harassment did not occur violates public policy." Id. at 1442. See also Newsday Inc. v. Long Island Typographical Union, 915 F.2d 840 (2d Cir. 1990) (reinstatement of repeat sexual harasser violated explicit, well-defined and dominant public policy).[15]

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[15] Appellant dismisses Stroehmann and Newsday as unique, and relies instead on various federal cases which suggest that reinstatement might be an appropriate result in situations involving less severe misconduct, *if* the errant employee is actually punished in some way. See, e.g., Weber Aircraft, Inc. v. General Warehousemen & Helpers Union Local 767, 253 F.3d 821 (5th Cir. 2001) (eleven-month unpaid suspension for unspecified sexual harassment where victim was not "truly threatened"); Westvaco Corp. v. United Paperworkers Int'l Union, 171 F.3d 971 (4th Cir. 1999) (nine-month unpaid suspension for verbal sexual harassment). See also Way Bakery v. Truck Drivers Local No. 164, 363 F.3d 590 (6th Cir. 2004) (six-month unpaid suspension and five years of probation for racially offensive remark followed by attempts to apologize). But see Chrysler Motors Corp. v. Int'l Union, Allied Ind. Workers, 959 F.2d 685 (7th Cir. 1992) (upholding award of 30-day suspension and back pay for worker who grabbed co-worker's breasts).

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. The award in this case encourages individuals who are so inclined to feel free to misbehave in egregious ways, without fear of any meaningful consequence. The arbitrator's opinion includes a detailed description of Mitchell's behavior in the workplace and the arbitrator concedes it was "unacceptable." But, the arbitrator ultimately divorced Mitchell's conduct, and his failure to accept responsibility, from any consequence and held that PHA did not have just cause to fire Mitchell. In our view, the rational way to approach the question is to recognize the relationship between the award and the conduct; and to require some reasonable, calibrated, defensible relationship between the conduct violating dominant public policy and the arbitrator's response.

Even if the arbitrator's award reinstating Mitchell were not patently unreasonable on its face, the arbitrator's reasoning betrays a lack of appreciation for the dominant public policy, reasoning which obviously infected his award: the reasoning and the award simply cannot be separated one from the other. The arbitrator's finding that the pre-investigation discussion between Brunetti and Mitchell resolved the matter before a higher level of management became involved is equally problematic. Appellant apparently views this chastisement as an appropriate response that was "reasonably calculated" to stop the harassment, Appellant's Brief at 26, and that nothing more severe was either required or permitted. But, apart from acknowledging that "the only action taken in terms of counseling or discipline" prior to termination was Brunetti's "verbal warning," the arbitrator did not measure its value as discipline. The arbitrator was charged with determining whether termination was proper and, if not, whether some other form of discipline was. Were we to approve the arbitrator's award finding no

just cause for termination, and ordering reinstatement with back pay, we would essentially be holding that PHA has no recourse from the arbitrator's conclusion that Mitchell's cessation of overt acts of sexual harassment, which he denied in testimony found to be unbelievable, sufficed to end the matter.

Still, appellant argues that the law of deference to arbitrators prevents PHA from firing an employee who engaged in "extraordinarily perverse" and "unacceptable" sexual harassment of his co-worker, and then failed to take responsibility for the conduct, and insists that PHA must give him a job and all his back pay. We reject this argument and conclude instead that a public employer must be permitted to do more than engage in adjectival condemnation when faced with this sort of employee misconduct. We therefore hold that the arbitrator's award of reinstatement with back pay violates the public policy of this Commonwealth, and we thus affirm the Commonwealth Court's decision to vacate the award.[16]

Order Affirmed.

Madame Justice Orie Melvin did not participate in the decision of this case.

Messrs. Justice Saylor and Eakin and Madame Justice Todd join the opinion.

Mr. Justice Saylor files a concurring opinion.

Mr. Justice Eakin files a concurring opinion.

Mr. Justice McCaffery files a concurring opinion in which Mr. Justice Baer joins.

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[16] As noted earlier, the Commonwealth Court expressly vacated the arbitration award. 956 A.2d at 487 n.20. The Commonwealth Court's mandate also reversed the trial court's decision denying PHA's petition to vacate the arbitration award. Id. at 487-88.