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Supreme Court No. \_\_\_\_\_

Court of Appeals Division III No. 378896-6-III

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**THE SUPREME COURT  
STATE OF WASHINGTON**

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TEAMSTERS LOCAL 839 AND KENNETH JAMES LATSCH,

Appellants

v.

CITY OF PROSSER,

Respondent

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**RESPONDENT CITY OF PROSSER'S RESPONSE TO  
APPELANT'S MOTION FOR EXTENSION OF TIME AND  
RESPONSE TO PETITION FOR REVIEW**

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**I. IDENTITY OF RESPONDENT**

The Respondent is the City of Prosser.

**II. COUNTERSTATEMENT OF THE ISSUES**

1. Whether there were “extraordinary circumstances” that prevented the Appellant, Teamsters Local 839, to file its Petition for Review within the time requirements of RAP 13.4(a) and did Teamsters Local 839 exercise reasonable diligence in filing the petition?

2. Did the Court of Appeals correctly apply this Court’s decisions in Clark County Pub. Util. Dist. No. 1 v. Int’l Bhd. of Elec. Workers, Local 125, 150 Wash.2d 237, 245 (Wash. 2003), International Union of Operating Engineers, Local 286 v. Vivenzio 176 Wn.2d 712, 721 (Wash. 2013) and Kitsap County Sheriff’s Deputy Guild v. Kitsap County, 167 Wn.2d. 428, 436 (Wash. 2009)?

**III. COUNTERSTATEMENT OF THE CASE**

On March 28, 2018, the Respondent, City of Prosser (“Prosser”) terminated police officer Shane Hellyer (“Hellyer”) for numerous acts of serious misconduct including sexually assaulting a female who was handcuffed in the back of his patrol car and sexually harassing three other women while he was on duty in Prosser. (CP 127, 129, 130). Hellyer’s harassment towards the women included: telling the women about his sex life; telling the women about shopping at an erotic store; offering to buy

women sexual lubricant and sending them pictures of the sexual lubricant; showing women pictures of scantily clad women he had downloaded on his department issued laptop computer; and, commenting in a salacious manner about clothing the women were wearing. (CP 118-122)

On April 7, 2018, Teamsters Union Local 839 (“Local 839”) filed a grievance on Hellyer’s behalf arguing there was not just cause for his termination. The parties went to arbitration over Prosser’s decision to terminate Hellyer and Arbitrator Kenneth Latsch (“Arbitrator”) ultimately ruled there was not just cause to terminate Hellyer and ordered Prosser to reinstate him back to his position as police officer with full backpay. (CP 74)

The Arbitrator’s Award failed to address the sexual harassment complaints by the three women, because the Arbitrator did not believe Hellyer’s harassment of the women warranted the discipline of termination:

“In deciding whether [termination] was appropriate, I must focus on the [sexual assault]. If that incident should not lead to the discipline of discharge, I cannot find that the other events discovered during the investigation [including sexual harassment] should rise to that level.” (*Emphasis, added.*) (CP 72)

On June 3, 2019, Prosser filed a Writ of Certiorari in Benton County Superior Court to vacate the Arbitrator’s Award. (CP 1) Prosser argued the Award violated the State of Washington’s explicit, well-defined and dominate public policy to prevent and end sexual harassment by reinstating Hellyer without making a finding on whether or not he

sexually harassed the three women. (CP 189, 190) Prosser also argued the Award violated the explicit well-defined and dominate public policy to prevent and end sexual harassment by finding that Hellyer's above-cited harassment of the three women did not "rise to [the] level" of a terminable offense. (CP 190)

On November 22, 2019, Benton County Superior Court Judge Samuel Swanberg ("Judge Swanberg") order the case remanded back to the Arbitrator and directed him to provide a written clarification whether "Hellyer sexually harassed Theresa Gannon, Brandi Gannon and/or Kelli Schutt..." (CP 288, 289) Judge Swanberg further directed the Arbitrator to explain "...why it was not necessary to end discrimination and prevent future discrimination." (CP 289.)

On February 3, 2020, the Arbitrator responded to the court ordered clarification and found Hellyer's conduct toward the three women did not warrant discipline as it was merely "the type of course conversation that may take place in the workplace." (CP 389)

Judge Swanberg vacated the Award, finding the Arbitrator violated Washington's explicit, well-defined and dominate public policy to end and prevent sexual harassment by ruling Hellyer's conduct towards the women was "the type of course conversation that may take place in the workplace." (CP 389) In his order vacating the Award, Judge Swanberg wrote:

"While not agreeing with them all, the Court accepts the findings and conclusions made by the arbitrator, with the

exception that the founded interactions of Officer Hellyer with Mses T. Gannon, B. Gannon and Schutts did not constitute sexual harassment under the WLAD because it was the “type of coarse conversation that may take place in the workplace”...this conclusion violates the clear public policy of the WLAD to ensure the civil right “...to be free from discrimination’ and must therefore be reversed to preserve the legislative protection afforded the citizens of the State of Washington.” (CP 416)

On December 3, 2020, Teamsters Local 839 appealed Judge Swanberg’s decision, claiming the court erred by remanding the matter back to Arbitrator Latsch for clarification and erred by vacating the Award. (CP 417, 418) On April 19, 2022, the Court of Appeals unanimously affirmed the superior court’s decision, finding the Arbitrator’s Award violated Washington’s public policy against sexual harassment.

On May 19, 2022, at 5:26 pm, Local 839 filed a Petition for Review to the Washington Supreme Court (“Court”). On May 20, 2022, Erin L. Lennon, Supreme Court clerk sent a letter to the attorneys for Local 839 and Prosser informing Local 839 that it did not file its petition for review timely. (Appendix A)

On May 25, 2022, Local 839 filed a Motion for Extension of Time to File Petition (“Motion for Extension”). In its motion, Local 839 stated it failed to file the petition timely because; 1) An employee for the law firm representing Local 839 had quit approximately two months before the Petition for Review was due to be filed with the Court; 2) An employee for the firm went on sick leave two days prior to the date the Petition for Review was due to be filed with the Court; and, 3) The law firm’s log-in

password to E-file the Petition for Review had expired and by the time they reset the password and submitted their petition they missed the deadline for filing the petition.

As will be discussed in detail in Section IV of this response, Local 839 clearly failed to exercise reasonable diligence in filing its Petition for Review and its excuses for failing to timely file the petition are not based on extraordinary circumstances.

#### **IV. ARGUMENT**

The Court should deny reviewing Local 839's Petition for Review for two reasons. First, Local 839 did not exercise reasonable diligence when it failed to file its Petition for Review within RAP 13(4)(a)'s strict deadline and proffered no "extraordinary circumstances" why it failed to file the petition timely. Second, the Washington State Court of Appeals Division III's decision correctly applied stare decisis and followed this Court's previous rulings in affirming Benton County Superior Court's ruling that the arbitration award violated Washington's explicit, well-defined and dominate public policy to prevent and end sexual harassment in the workplace.

##### **A. The Court Should Deny Local 839's Motion for Extension.**

Local 839's Motion for Extension should be denied as there were no extraordinary circumstances which prevented it from filing its Petition for Review timely. Furthermore, the motion should be denied as Local 839 failed to exercise reasonable diligence in filing the petition.



1. No extraordinary circumstances exist

As Local 839 points out in its Motion for Extension, RAP 1.2(a) states that the Rules of Appellate Procedure will be “liberally interpreted to promote justice and facilitate the decision of cases on the merits.” However, there are exceptions to the “liberally interpreted” standard. RAP 18.8(b), which is specifically referenced in RAP 1.2(a), governs motions for extension of time to file a petition for review and states:

“The appellate court will only in extraordinary circumstances and to prevent a gross miscarriage of justice extend the time within which a party must file a notice of appeal, a notice of discretionary review, a motion for discretionary review of a decision of the Court of Appeals, a petition for review, or a motion for reconsideration. The appellate court will ordinarily hold that the desirability of finality of decisions outweighs the privilege of a litigant to obtain an extension of time under this section...”  
(Emphasis, added.)

Therefore, this Court will only grant an extension of time to file a petition for review in the rare case where “extraordinary circumstances” exist. Extraordinary circumstances include situations where the filing, despite reasonable diligence, was defective due to excusable error or circumstances beyond the party’s control. Shumway v. Payne, 136 Wn.2d 383, 395, 964 P.2d 349 (1998).

This standard “has rarely been satisfied in reported case law since the effective date of the Rules of Appellate Procedure on July 1, 1976.” Reichelt v. Raymark Indus., 52 Wn. App. 763, 765 (1988). In Reichelt, the Court found that setting the high bar for granting extensions only when

extraordinary circumstances exists “clearly favors the policy of finality of judicial decisions over the competing policy of reaching the merits in every case.” Reichelt, 52 Wn. App. at 765.

This Court has consistently denied motion for extensions where a party does not exercise reasonable diligence, does not claim confusion about the method for seeking review, does not claim excusable error in interpreting the rules, and does not claim the delay was due to circumstances beyond the party’s control. Shumway, 136 Wn.2d at 396.

Local 839 relies heavily on Scannell v State in support of its Motion for an Extension as it is one of the few cases where a motion for an extension of time was granted. However, there are no similarities whatsoever between this case and Scannell. In Scannell, the petitioner was a pro se litigant and was confused over a recent change in court rules. The Scannell Court ruled he had exercised reasonable diligence in following the rules that he thought applied; therefore, granted the extension. Scannell v. State, 128 Wn.2d 829, 834-35 (1996).

Unlike the litigant in Scannell, Local 839 is represented by an attorney and there was no confusion of any court rule. In its Motion for Extension, Local 839 states that it failed to file the Petition for Review timely because an employee had quit the firm approximately 2 months before the due date of the petition, an employee went on sick leave two days before the petition was due; and, its log-in password had expired so they couldn’t E-file the petition and by the time they reset the password

they had missed the filing deadline. Local 839's reasons for missing the deadline to file its petition are merely based on ordinary, everyday internal administrative issues that every law firm deals with and are certainly not extraordinary.

Courts have universally denied similar motions for extensions. In State v. Beckman the Court denied a motion for an extension of time when an internal lack of calendaring procedure resulted in a late filing of a notice of appeal. State v. Beckman 102 Wn. App. 687, 695 (2000). In Reichelt, the court did not find extraordinary circumstances where one of the appellant's attorneys left the firm during the 30-day period after the entry of judgement and the firm's other appellant attorney had a large caseload. Reichelt, 52 Wn. App. at 764-65.

Local 839 has not provided any extraordinary circumstances that were beyond its control that would justify its failure to file the petition for review within the required timelines.

2. Local 839 did not exercise reasonable diligence in filing the petition

As stated previously, an extension of time to file a petition for review will not be granted if a party fails to follow reasonable diligence in meeting the deadline to file the petition. Local 839 clearly did not exercise reasonable diligence in filing its petition after the deadline. Pursuant to RAP 13.4(b), Local 839 had 30 days after the decision to terminate review is filed. Therefore, Local 839 had until 5:00 pm on May 19, 2022 to file a petition for review (Appendix A). At 5:26 pm on May

19, 2022, Local 839 filed a short ten-page petition that was merely a duplication of the unsuccessful arguments it submitted to Benton County Superior Court and in the Division III Court of Appeals. Local 839 had 30 days to file the Petition for Review and made a conscious decision to wait until the eleventh hour to file the petition. Had Local 839 exercised reasonable diligence and not waited to file the petition until 30 minutes before the petition was due, Local 839 would have had plenty of time to reset its log-in password. Furthermore, Washington courts notify attorneys and law firms when their E-file log-in passwords will be expiring soon. Reasonable diligence requires resetting the password before the password expires, not literally minutes before a petition is due.

By waiting until the last minute to file its petition and not resetting its log-in password before letting it expire, Local 839 clearly did not exercise reasonable diligence in filing its Petition for Review.

Since Local 839 has shown no extraordinary circumstances that prevented it from filing its Petition for Review before the deadline to file, and Local 839 did not exercise reasonable diligence in filing the petition before the deadline, its Motion for Extension should be denied.

#### **B. The Court of Appeals Correctly Applied Precedential Decisions**

The Court should not consider Local 839's Petition for Review as Local 839 failed to timely file its petition without good cause. However, assuming arguendo that the Court grants Local 839's Motion for Extension to file its Petition for Review, the Court should not accept

review of this case as the court of appeals correctly followed this Court's decisions when it affirmed the superior court's decision to vacate the arbitration award.

RAP 13.4(b) outlines the specific circumstances when this Court will accept a petition for review:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
- (3) If a significant question of law under the Constitution of the State of Washington or the United States is involved; or
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Local 839 bases its Petition for Review on RAP 13.4(b)(1), arguing that the court of appeals decision conflict's with this Court's and other court of appeals' prior decisions. Local 839's argument is without merit.

Washington courts have made it crystal clear that Washington courts have an obligation to vacate an arbitrator's decision when an arbitrator has exceeded his or her legal authority. Clark County Pub. Util. Dist. No. 1 v. Int'l Bhd. of Elec. Workers, Local 125, 150 Wash.2d 237, 245 (Wash. 2003). An arbitrator exceeds his or her legal authority when their decision violates an "explicit," "well defined," and "dominant" public policy. International Union of Operating Engineers, Local 286 v. Vivenzio, 176 Wn.2d 712, 721 (Wash. 2013); Kitsap County Sheriff's Deputy Guild v. Kitsap County, 167 Wn.2d. 428, 436 (Wash. 2009).

Washington's law against workplace discrimination and harassment, RCW

49.60, The Washington Law Against Discrimination (“WLAD”), sets forth an explicit, well-defined, and dominant public policy. International Union of Operating Engineers, Local 286, 176 Wn.2d 712, 721 (Wash. 2013); Kitsap County Sheriff’s Guild v. Kitsap County and Kitsap County Sheriff’s, 167 Wn.2d 428, 434 (Wash. 2009). The WLAD contains a "clear mandate to eliminate all forms of discrimination" and the "purpose of the law is ‘to deter and to eradicate discrimination in Washington.’” International Union of Operating Engineers, Local 286 at Id.

In applying the above-cited decisions, the court of appeals gave three reasons for unanimously affirming Benton County Superior Court vacating the Award:

“There are three lines of reasoning in the arbitrator’s awards that we conclude violate the express, well defined, dominant public policies to end and prevent discrimination in places of public accommodation by officials acting under color of state law.

The first is the position taken by the award that since the investigation began as one into Ms. Hart’s allegations, for the Department to follow up when it learned that other women in the community had complaints was unfair to Mr. Hellyer, and not an evenhanded application of work rules. One of the well-defined public policies found by Stroehmann was a “public policy favoring voluntary employer prevention and application of sanctions against sexual harassment in the workplace,” a public policy that it applied in the context of harassment of a customer, not a coworker. 969 F.2d at 1442. As earlier observed, for a municipality to fail to take remedial action upon learning of a police officer’s misconduct can subject it to liability in a civil rights suit based on its deliberate indifference. The Department would have been remiss had it ignored information that Teresa, Brandi, and Ms. Schutt complained of sexual harassment by Officer Hellyer.

The second is the position taken by the award that what would otherwise be a police officer’s sexual harassment of a female citizen can be “neutralized” by the following evidence: if pictures

of women in intimate attire are shown not only to her, but to her husband; if her husband thanks a police officer for checking on his wife's business; if she tries to maintain a cordial relationship with the police officers on her town's small police force; or if she has moved out of town.

The third is that for a police officer to repeatedly talk to female citizens in their workplace about his sex life, his and his wife's sexual aids, his perception that the citizen does not wear enough clothing, and to engage in sexual innuendo, is the kind of "coarse conversation" that she should expect in her workplace. This case does not involve harassment by a coworker, and as previously observed, the Washington Supreme Court has held that a claim by a plaintiff who is served rather than employed by the defendant "is more of a consumer claim than a claim between an employee and employer, and [such a] claim is not limited by the employment discrimination statute." Floeting, 192 Wn.2d at 855." (Appendix B, p. 20-22)

The court of appeals finding that the arbitration award violated Washington's expressed, "well defined, dominant public policies to end and prevent discrimination in places of public accommodation by officials acting under color of state law" is well-reasoned and certainly fall squarely within the stare decisis set forth by this and other court decisions.

As it did in Benton County Superior Court and before the Court of Appeals Division III, Local 839 continues to conflate the role of the arbitrator with the role of the court. Benton County Superior Court and the Division III Court of Appeals followed the decisions set forth by this Court mandating that courts vacate an arbitrator's decision when an arbitrator has exceeded his or her legal authority by violating a dominant public policy such as the policy to prevent and end sexual harassment.

In sum, this issue is not appropriate for review, because Local 839 have not identified any actual conflict between the court of appeals decision and this Court's precedent.

V. **CONCLUSION**

Local 839 motion to extend the time for submitting a petition for review should be denied, because it failed file its petition within the RAP 13(4)(a)'s deadline and its failure to timely file the petition was due to its lack of exercising reasonable diligence, not based any extraordinary circumstances beyond Local 839;s control.

If Local 839's Motion to Extend the timeline to file the petition is granted its Petition for Review should be denied because the court of appeals decision does not conflict with this Court's prior decisions.

Respectfully Submitted,

DATED this 23rd day of June, 2022.



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APPENDIX A

**THE SUPREME COURT**  
STATE OF WASHINGTON

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May 20, 2022

**LETTER SENT BY E-MAIL ONLY**

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Re: Supreme Court No. 100945-3 – City of Prosser v. Teamsters Union Local 839, et al.  
Court of Appeals No. 37889-6-III

Clerk and Counsel:

The Court of Appeals has forwarded the “PETITION FOR REVIEW” in the above referenced matter. The matter has been assigned the Supreme Court cause number indicated above.

The Court of Appeals decision terminating review in this case was filed on April 19, 2022. RAP 13.4(a) requires the filing of a petition for review within 30 days after a decision terminating review is filed. GR 30(c) provides that an electronic document is filed when it is received during the clerk’s business hours, otherwise the document is considered filed at the beginning of the next business day. In this case, the petition for review was due by 5:00 p.m. on May 19, 2022. The petition for review was filed at 5:26 p.m. on May 19, 2022. Under GR 30(c), the filing is considered filed on May 20, 2022, and therefore, it is untimely.

The Petitioner may seek an extension of time in which to file the petition for review by filing a motion for extension of time to file a petition for review. Any such motion should be served and filed in this Court by May 27, 2022. The motion should be supported by an appropriate affidavit establishing good cause for the delay in filing the petition for review; see RAP 18.8 for information on extension of time for filings and RAP Title 17 for the general rules governing motions. A motion for extension of time to file is normally not granted; see RAP 18.8(b).

In addition, the \$200 filing fee did not accompany the petition. The filing fee should also be paid by May 27, 2022.

To continue with this case, by May 27, 2022, the \$200 filing fee must be paid and a motion for extension of time must be received by this Court. Otherwise, it is likely that this case will be dismissed.

Upon receipt of the filing fee and the motion for extension of time, due dates will be set for filing any answer to the petition for review and the motion for extension of time.

Counsel are referred to the provisions of General Rule 31(e) regarding the requirement to omit certain personal identifiers from all documents filed in this court. This rule provides that parties "shall not include, and if present shall redact" social security numbers, financial account numbers and driver's license numbers. As indicated in the rule, the responsibility for redacting the personal identifiers rests solely with counsel and the parties. The Clerk's Office does not review documents for compliance with the rule. Because briefs and other documents in cases that are not sealed may be made available to the public on the court's internet website, or viewed in our office, it is imperative that such personal identifiers not be included in filed documents.

**Counsel are advised that future correspondence from this Court regarding this matter will most likely only be sent by an e-mail attachment, not by regular mail. For attorneys, this office uses the e-mail address that appears on the Washington State Bar Association lawyer directory. Counsel are responsible for maintaining a current business-related e-mail address in that directory.**

Sincerely,



*Signed by docket clerk for:*  
Erin L. Lennon  
Supreme Court Clerk

DRC:jm

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

CITY OF PROSSER,	)	
	)	
Respondent,	)	No. 37889-6-III
	)	
v.	)	
	)	
TEAMSTERS UNION LOCAL 839;	)	UNPUBLISHED OPINION
KENNETH JAMES LATSCH,	)	
	)	
Appellants.	)	

SIDDOWAY, C.J. — After investigating allegations that Police Officer Shane Hellyer sexually assaulted one female citizen and sexually harassed three others, the city of Prosser (City) terminated his employment. Mr. Hellyer’s union, Teamster’s Union Local 839 (Union), filed a grievance that proceeded to arbitration. In an award that focused on one citizen’s allegations of sexual assault, the arbitrator found that the investigation by the City’s Police Department (Department) was unfair and incomplete, and the Department’s conclusion that Mr. Hellyer committed the alleged sexual assault was not supported by clear evidence. The arbitrator ordered that Mr. Hellyer be reinstated as a police officer with full back pay and benefits.

The City applied to the Benton County Superior Court for a writ of certiorari, asking the court to review and vacate the arbitration award on grounds that by finding

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that Mr. Hellyer may have sexually harassed three other citizens and nonetheless ordering him reinstated with back pay and benefits, the arbitrator violated public policy.

Following a remand to the arbitrator and a clarifying award, the superior court agreed with the City and vacated the award, leading to this appeal by the Union.

The Union conflates the arbitrator's explanation for rejecting the sexual assault allegation as a basis for discipline (a conclusion never challenged by the City) with the arbitrator's originally unexplained rejection of three citizen complaints of sexual harassment as a basis for discipline. We agree with the superior court that the arbitrator's award on remand—concluding that the interactions reported by the women were neutralized and were only “coarse conversation” that could not be cause for discipline—violates public policy. Clerk's Papers (CP) at 389. We affirm.

#### FACTS AND PROCEDURAL BACKGROUND

We draw our description of relevant facts leading up to the parties' arbitration from the arbitrator's arbitration award and award on remand. In some cases, we provide detail from exhibits to which the arbitration awards refer.

On August 11, 2017, during the course of an interview by Benton County sheriff's deputies, Alexandra Hart told them that Prosser Police Officer Shane Hellyer touched her inappropriately eight months earlier, during her detention after she had created a disturbance at a local residence. She explained that the prior December 19, after she was handcuffed and placed in the back of his patrol car, Officer Hellyer transported her to the

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Prosser Junior High School parking lot, where he touched her breasts and her vaginal area without her consent. She claimed that he then drove her to her residence, where, after she stepped out of the patrol vehicle, still handcuffed, he pressed up against her and made her touch his penis through his pants. She told the deputies that on another occasion, Officer Hellyer had showed her lingerie, saying he would buy it for her if she wanted. She told the deputies Officer Hellyer had also suggested that they go to a nearby soccer field, which she assumed was because he wanted to have sex with her.

Ms. Hart's allegations were investigated by the sheriff's office. On August 30, 2017, after learning of the allegation, Prosser Police Chief Dave Giles placed Officer Hellyer on administrative leave. The City also decided it was necessary to conduct its own investigation.

Officer Hellyer had previously received no formal discipline, but he had been verbally reprimanded on one occasion. An exhibit later submitted in the arbitration was the record of an April 2008 investigation of a female citizen's complaint of unwanted advances from Officer Hellyer. Prosser Police Sergeant (Sgt.) Ed Blackburn had investigated the 2008 complaint, and his investigative report stated that while the complainant told him she did not want to file a formal complaint at that time, she did want Officer Hellyer to leave her alone, failing which she would file a formal complaint. Sgt. Blackburn had recommended that Officer Hellyer be given a chance to defend

himself, and if no exculpatory information was forthcoming, he be informally disciplined and warned to have no further interaction with the complainant.

Sgt. Blackburn was assigned to conduct the investigation into Ms. Hart's allegations. Ms. Hart had been taken into custody by Officer Hellyer following a disturbance the prior December 19, and Sgt. Blackburn interviewed two other officers who responded to the incident, Prosser Police Officer Raul Sabalza and Benton County Sheriff's Deputy Mathew Clarke. He also interviewed Ms. Hart, her parents, and other Prosser police officers, only one of whom, Matt Shanafelt, had any information of interest. Officer Shanafelt remembered an incident where Officer Hellyer told him where to observe a woman in a local apartment while she was disrobing. He also recounted a complaint he received about Officer Hellyer from Teresa Gannon, a local business owner.

Teresa<sup>1</sup> operated a horticulture nursery in Prosser. She often worked late, and Officer Hellyer would come by the business to check on her well-being. She told Sgt. Blackburn that Officer Hellyer would tell her about his sex life with his wife, and that he told her about purchasing a sexual lubricant. He later sent her a picture of the lubricant. Teresa also told the sergeant that Mr. Hellyer would show her photographs of women in risqué clothing, and that his conversations with her would often turn to sexual matters.

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<sup>1</sup> We refer to Teresa Gannon by her first name for clarity, because Brandace Gannon (who we refer to as Brandi) was also interviewed.



Teresa said Officer Hellyer made her so uncomfortable that her husband would often come by the nursery to check on her well-being.

Brandi Gannon, Teresa's daughter-in-law,<sup>2</sup> told Sgt. Blackburn that she was present when Officer Hellyer visited her mother-in-law's store.<sup>3</sup> She specifically complained that Officer Hellyer would often say that she and her mother wore very little, and in one instance he made a comment about the store being cold and that the women should wear more to cover themselves.<sup>4</sup> Brandi also told investigators that Officer Hellyer would tell her about his sex life with his wife.

Kelli Schutt, who Sgt. Blackburn learned also had complaints about Officer Hellyer, told the sergeant that Officer Hellyer would come to her place of employment, a local winery, and that he often used sexual innuendo in his conversations with her. Ms. Schutt said that Officer Hellyer made her feel uncomfortable, and that he would sometimes stop by her residence in his patrol vehicle.

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<sup>2</sup> The arbitrator describes Brandi as Teresa's daughter, but Sgt. Blackburn's report and other parts of the record consistently identify her as Teresa's daughter-in-law.

<sup>3</sup> This and other details about the harassment complainants' allegations did not appear in the arbitrator's initial award, but do appear in his award on remand.

<sup>4</sup> The arbitrator does not explain why Brandi would view this as sexual harassment, but the written evidence to which the arbitrator refers states that Brandi told Sgt. Blackburn, "Although it was not said directly, [ I ] understood . . . [this] to mean that her nipples on her breasts were showing through her shirt." CP at 35.

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On December 20, 2017, while Sgt. Blackburn's investigation was ongoing, the Benton County prosecutor provided the county sheriff's office with a written declination to prosecute Officer Hellyer for the alleged assault of Ms. Hart. Its letter stated,

The State does believe that a preponderance of the evidence shows that Officer Hellyer had inappropriate contact with Alexandra Hart (AH), by [sic] given AH's mental state on the night of the alleged incident and how long it took to disclose the allegation, the State does not believe this matter can be proved beyond a reasonable doubt.

CP at 11. Sgt. Blackburn thereafter conducted several more interviews and conducted a second interview of Ms. Hart on January 8, 2018.

Officer Hellyer was called in for a meeting with Chief Giles, Sgt. Blackburn and others the next day, to respond to questions about taking Ms. Hart into custody in December 2016 and about his interactions with Ms. Gannon. He gave conflicting answers to the questions asked, and often responded by not recalling specifics about the events under investigation. He was told that there was no record of his interaction with Ms. Hart in police files. After the meeting, however, Officer Hellyer's union representative found a log that contained details about the disputed events that helped explain Officer Hellyer's actions on December 19. Officer Hellyer provided the additional information to Chief Giles.

The Union would later present evidence that in contacts with Ms. Hart beginning in March 2016, Officer Hellyer became aware that Ms. Hart was becoming involved with the local drug culture. According to Officer Hellyer, his interest in Ms. Hart was

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nonsexual and intended to help her get on the right track. After Ms. Hart caused the disturbance on December 19 and was taken into custody, it was agreed by responding officers that Officer Hellyer would take her to the police station. While he ended up taking her home instead, Officer Hellyer explained that was because as he and Ms. Hart sat outside the station, speaking and awaiting the arrival of Officer Sabalza, he heard radio traffic about a possible stolen vehicle and believed he should respond. He claims that after driving Ms. Hart home, he removed her handcuffs according to standard procedure, which involved placing her against his patrol car and placing his knee against the back of her leg. He testified that his conversation with Ms. Hart in his patrol car on December 19, and conversations with her in his patrol car two days earlier and thereafter were all about whether she would agree to work as part of the Benton County Anti-Drug Task Force as an informant. He testified that he set up a meeting for her with task force members, but she failed to appear and he had no further contact with her.

Sgt. Blackburn's 27-page report on his internal investigation was directed to Chief Giles on January 13, 2018. It itemized possible violations by Officer Hellyer of the Prosser Police Department's personnel policy and procedures manual, described the investigation by the Benton County Sheriff's Office and Sgt. Blackburn's own interviews of well over a dozen individuals, and concluded with his findings.

Sgt. Blackburn found more violations of Department policies and procedures in Officer Hellyer's interaction with Ms. Hart than with any other single individual. But he

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also found violations of the manual in Officer Hellyer's dealings with Teresa and Brandi Gannon and Kelli Schutt, who we sometimes refer to collectively hereafter as the "complaining businesswomen."

On March 29, 2018, Mr. Hellyer was discharged from employment by the Department. The Union filed a grievance concerning the termination, and the matter proceeded through the contractual grievance procedure to a two-day arbitration hearing before a mutually-agreed arbitrator.

Following the arbitration hearing, the parties were permitted to file posthearing briefs, and the arbitrator issued a 17-page written award. His award framed the issues presented as, "Did the City of Prosser have cause to terminate Officer Shane Hellyer from employment with the Prosser Police Department," and "If not, what is the appropriate remedy?" CP at 5. He analyzed the issues by applying seven elements of just cause identified for employee discipline in 1965 in *Enterprise Wire Co.*, 46 Lab. Arb. Rep. (BNA) 359 (1966) (Daugherty Arb.). He observed that the City, as the employer, bore the burden of proof. Analyzing each element separately, he was satisfied that the City proved the first three of the seven elements.<sup>5</sup>

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<sup>5</sup> He "[had] no doubt that Mr. Hellyer was adequately warned about the kind of actions involved in this matter," stated that the City "presented credible evidence that it had a number of personnel rules and policies that should have applied in this case," and "[was] satisfied that an investigation was conducted in this matter." CP at 14-15.

The arbitrator's award focused on the allegations of Ms. Hart. He found just cause for termination lacking because "Ms. Hart did not have specific recollections about several critical aspects of her interactions," Sgt. Blackburn "often used 'leading questions' to elicit information from Ms. Hart," "Ms. Hart's credibility as a witness was questionable, at best," and after Mr. Hellyer "attempted to present information that would have exonerated him for the most serious allegations concerning his interactions with Ms. Hart, . . . the Employer did not follow up on any of his evidence." CP at 15-16. The arbitrator also expressed concern that Sgt. Blackburn relied on "second-hand sources," gathered "anecdotal accounts rather than first person narratives" and reported "a great deal of innuendo." CP at 16. These concerns also must have related to the investigation of Ms. Hart's allegations, because Sgt. Blackburn's information about the complaining businesswomens' interactions with Mr. Hellyer were from first-person interviews.

The initial award assumes the conduct alleged by the complaining businesswomen occurred, stating "[t]he other matters covered in the investigation could have led to other disciplinary action" and if Ms. Hart's allegations did not support discipline, "I cannot find that other events discovered during the investigation should rise to that level." CP at 16-18.

The arbitrator's only other discussion of the allegations of the complaining businesswomen in his initial award were his statements that "the Union has presented enough evidence to *neutralize* the allegations," there appeared to be *inconsistencies* in

witness accounts, and the Union “introduced credible testimony and evidence that *minimized any violation* that Mr. Hellyer may have committed.” CP at 17 (emphasis added).

In seeking a writ of certiorari and review of the award, the City pointed out that the arbitrator’s award pertained almost exclusively to Ms. Hart’s allegation of custodial sexual assault, including only two sentences addressing other allegations of misconduct including the allegation that while on patrol, Mr. Hellyer sexually harassed women who worked in the Prosser community. The City relied on *Stroehmann Bakeries, Inc. v. Local 776, Int’l Brotherhood of Teamsters*, in which the federal Third Circuit Court of Appeals held that an arbitration award that fully reinstated an employee accused of sexual harassment without determining that the harassment did not occur violated public policy. 969 F.2d 1436, 1442 (3d Cir. 1992).

Rather than vacate the award, the superior court remanded it to the arbitrator with directions to clarify whether he found that Mr. Hellyer sexually harassed Teresa and Brandi Gannon and Ms. Schutt, as proscribed by Washington law. If the arbitrator did find sexual harassment, the superior court directed him to address why there was not just cause for discipline.

In his award on remand, the arbitrator accepted the Department’s findings of the conduct that the complaining businesswomen viewed as sexual harassment. He clarified what he perceived as the “neutralizing” explanations and concluded that “the most that

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can be found in this case would amount to the type of coarse conversation that may take place in a workplace.” CP at 389.

When the matter returned to the superior court on the City’s motion to vacate the award, the superior court granted the motion, concluding that the award violated the clear public policy of the Washington Law Against Discrimination, chapter 49.60 RCW (WLAD), to ensure the civil right “. . .to be free from discrimination.” CP at 422. The Union appeals.

#### ANALYSIS

##### *Standard of review*

Courts will review arbitration decisions in only limited circumstances. *Int’l Union of Operating Eng’rs, Local 286 v. Port of Seattle*, 176 Wn.2d 712, 720, 295 P.3d 736 (2013). “When parties voluntarily submit to binding arbitration, they generally believe that they are trading their right to appeal an arbitration award for a relatively speedy and inexpensive resolution to their dispute.” *Clark County Pub. Util. Dist. No. 1 v. Int’l Brotherhood of Elec. Workers*, 150 Wn.2d 237, 247, 76 P.3d 248 (2003). Reviewing an arbitration decision for mistakes of law or fact would call into question the finality of arbitration decisions and undermine alternative dispute resolution. *Kitsap County Deputy Sheriff’s Guild v. Kitsap County*, 167 Wn.2d 428, 434-35, 219 P.3d 675 (2009) (citing *Clark County*, 150 Wn.2d at 246).

In *Kitsap County*, our Supreme Court adopted the approach of federal courts and many other state courts that treat a labor arbitration decision as if it were part of the parties' collective bargaining agreement, which, like any contract provision, can be vacated if it violates public policy. *Id.* at 435-36.<sup>6</sup> The public policy exception to enforcing arbitral awards is limited to decisions that violate an "'explicit,' 'well defined,' and 'dominant' public policy, not simply 'general considerations of supposed public interests.'" *Id.* at 435 (internal quotation marks omitted) (quoting *E. Associated Coal Corp. v. United Mine Workers, Dist. 17*, 531 U.S. 57, 62-63, 121 S. Ct. 462, 148 L. Ed. 2d 354 (2000)). Whether a public policy is explicit, well defined and dominant "must be 'ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests.'" *E. Associated*, 531 U.S. at 62 (internal quotation marks omitted) (quoting *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, 103 S. Ct. 2177, 76 L. Ed. 2d 298 (1983)).

In *Eastern Associated*, the United States Supreme Court held that the public policy exception applies when the arbitration award violates explicit, well defined and dominant *positive law*, but "in principle" was not limited to such instances, although the exception

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<sup>6</sup> The court observed that "historically, we have turned to federal case law for guidance in labor law cases," *Kitsap County*, 167 Wn.2d at 435; *see accord Port of Seattle*, 176 Wn.2d at 725 ("This court turns to federal case law for guidance in labor law cases.").



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must remain narrow. *Id.* at 63. Two concurring justices would have held that the exception applies *only* when the arbitration award violates positive law. *Id.* at 63; 67-68 (Scalia, J., concurring).

Importantly, as explained by the United States Supreme Court, “the question to be answered is not whether [the employee’s conduct] itself violates public policy, but whether the agreement to reinstate him does so.” *Id.* at 62-63. The question is one of law, which we review *de novo*. *Kitsap County*, 167 Wn.2d at 434. It has two facets: whether the award implicates public policy that is explicit, well defined and dominant, and whether the award violates that policy. *Port of Seattle*, 176 Wn.2d at 721-23; *see also City of Seattle v. Seattle Police Officers’ Guild*, 17 Wn. App. 2d 21, 38-60, 484 P.3d 485 (capitalization omitted), *review denied*, 198 Wn.2d 1004 (2021) (separately addressing the “existence of a relevant public policy” and “whether the [award] violates public policy”).

*The arbitrator’s awards implicate explicit, well defined and dominant public policies*

The WLAD declares “that practices of discrimination against any of its inhabitants because of . . . sex . . . [is] a matter of state concern, that such discrimination threatens not only the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state.” RCW 49.60.010. The WLAD recognizes and declares that “[t]he right to be free from discrimination because of . . . sex . . . is . . . a

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civil right,” which includes the right to the “full enjoyment” of any place of public accommodation. *Floeting v. Grp. Health Coop.*, 192 Wn.2d 848, 853, 863, 434 P.3d 39 (2019) (some alterations in original) (quoting RCW 49.60.030(1)(b)).

“Sexual harassment is a form of sex discrimination, which we analyze like other forms of discrimination in places of public accommodation.” *Id.* at 853. The WLAD “makes it unlawful for ‘any person or the person’s agent or employee to commit an act’ of, among other things, discrimination in a place of public accommodation.” *Id.* at 856 (emphasis added) (quoting RCW 49.60.215). The WLAD’s provisions “shall be construed liberally for the accomplishment of [its] purposes.” RCW 49.60.020. There is no statutorily required pervasiveness or severity requirement for discriminatory conduct in a public accommodation context. *Floeting*, 192 Wn.2d at 858. A single discriminatory act in a place of public accommodation may violate the WLAD. *Id.* (citing cases).

A city employee who abuses his authority to sexually harass a private citizen also violates the equal protection clause of the Fourteenth Amendment to the United States Constitution. *E.g.*, *Johnson v. Martin*, 195 F.3d 1208, 1218 (10th Cir. 1999) (holding that the relevant law was “clearly established” in the post-October 1994 time frame for purposes of defendant’s claim of qualified immunity); *cf. Sampson v. County of Los Angeles*, 974 F.3d 1012, 1023-24 (9th Cir. 2020) (plaintiff “plainly alleged a constitutional violation” by a male social worker assigned to her case who subjected her

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to sexualized comments and unwanted advances). Moreover, a municipality that fails to take remedial action upon learning of repeated incidents of misconduct committed by a police officer can be deemed to have been deliberately indifferent to the misconduct and therefore liable under 42 U.S.C. § 1983. *City of Brooklyn Ctr. v. L. Enft Lab. Servs., Inc.*, 635 N.W.2d 236, 242 (Minn. Ct. App. 2001); *Harris v. City of Pagedale*, 821 F.2d 499, 506 (8th Cir. 1987) (affirming jury verdict against municipality where there was sufficient evidence of its officials' failure to take remedial action despite notice of police officer's offensive acts). The equal protection clause of the Fourteenth Amendment and article I, section 12 of the Washington Constitution are substantially identical and subject to the same analysis. *State v. Osman*, 157 Wn.2d 474, 483 n.11, 139 P.3d 334 (2006) (citing *State v. Shawn P.*, 122 Wn.2d 553, 559-60, 859 P.2d 1220 (1993)).<sup>7</sup>

These laws and constitutional provisions evince explicit, well defined and dominant public policies aimed at ending current discrimination and preventing future discrimination in places of public accommodation and by officials acting under color of state law.

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<sup>7</sup> Article I, section 12 states: "No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations."

*The arbitration awards violate the public policies*

The question that remains is whether the arbitrator's awards violated these policies.

The City has never contended that for the arbitrator to reject Sgt. Blackburn's findings relating to Ms. Hart was outside his authority. What triggered the City's request for judicial review was the arbitrator's failure to address the conduct toward the complaining businesswomen that was a basis for Mr. Hellyer's discipline. As the City emphasized in its briefing to the arbitrator, and as the arbitrator acknowledged in his award, the Prosser Police Department operates through a small work force of sergeants and police officers. Given its small size, it is typical to have only two officers on duty at any time. A woman depending on police protection in Prosser would necessarily have to regularly rely on Mr. Hellyer.

The arbitrator took the position in the initial award that the sexual harassment conduct alleged by women other than Ms. Hart should not have been part of the Department's investigation. His award states, "The investigation . . . expanded to events that took place over five years prior to the December 19, 2016 incident. At this point, it appears that the Employer was adding events to the initial investigation to make sure that something could be attributed to Mr. Hellyer's bad actions." CP at 18. In performing his just cause analysis, the arbitrator treated the Department's investigation of Mr. Hellyer's conduct toward the complaining businesswomen as weighing *against the City*,

characterizing the investigation of their complaints as “not an evenhanded application of work rules.” CP at 18.

The employee whose reinstatement was vacated in *Stroehmann Bakeries*, on which the City relied in moving to vacate the arbitration award, was Samuel Leonard, a delivery driver for the bakery company, who was discharged for “immoral conduct” after a customer accused him of sexual harassment. 969 F.2d at 1437-38. Leonard challenged his discharge, and the arbitrator, having concluded that Stroehmann failed to give Leonard a full opportunity to refute the charges or explain his conduct, ordered him reinstated without deciding whether the charge of sexual harassment was true. *Id.* at 1437. A federal district court vacated the arbitrator’s award for violating public policy and remanded for a de novo hearing before a different arbitrator. *Id.* The Third Circuit Court affirmed.

The Union argues that *Stroehmann* is distinguishable, characterizing the arbitrator in that case as having “*refused to consider* evidence and testimony concerning sexual harassment.” Br. of Appellant at 24 (emphasis added). According to the Third Circuit, however, the arbitrator did hear evidence and testimony that he considered to some extent. The arbitrator referred to the female customer’s weight and the fact that she had no social life, and characterized her as “unattractive and frustrated.” 969 F.2d at 1446. The arbitrator allowed Leonard’s attorney, over objection, to ask Stroehmann’s representative, “Would you think an average man would make a pass at a woman like

that?” *Id.* The arbitrator commented on Leonard’s testimony that he had told the female customer “he wished his wife’s breasts were hard like an orange.” *Id.* at 1440. The arbitrator also stated that if he had to make a decision on the merits, he would find in Leonard’s favor. The arbitrator heard evidence and testimony; he simply “studiously avoided the charges against Leonard” and “refused to find whether the alleged sexual harassment occurred.” *Id.* at 1440, 1443.

In this case, the arbitrator likewise heard evidence but initially, he studiously avoided making *clear* findings that the conduct alleged by the complaining businesswomen occurred. Required by the superior court to decide that issue, he announced that he would accept the Department’s findings and would “not substitut[e his] judgment for the Employer’s initial investigation” on the matter of the conduct alleged by the complaining businesswomen. CP at 387. He proceeded to identify the “facts presented” that the City concluded warranted discipline. *Id.* This case is different from *Stroehmann*, but only because our arbitrator found the conduct occurred, but concluded it did not amount to sexual harassment.

The arbitrator provided two reasons for his conclusion that sexual harassment was not shown. First, his initial award states that the City’s evidence of the alleged harassment was “neutralize[d].” CP at 17. He did not initially identify how he viewed it as neutralized, but he sets forth his reasons in the award on remand.

Teresa's allegations were, again, that Officer Hellyer would tell her about his sex life with his wife and about purchasing a sexual lubricant, showing her a picture of the lubricant. He showed her photographs of women wearing risqué clothing and his conversations with her would often turn to sexual matters. She said that Officer Hellyer made her so uncomfortable that her husband would often come by the nursery to check on her. Mr. Hellyer admitted that he told Teresa about sexual lubricants and showed her pictures of women in lingerie.

The arbitrator found this to be neutralized by "different information" provided by Mr. Hellyer: that the lingerie he showed Teresa was concealed carry holsters. CP at 388. But Teresa had told investigators the same thing; she told them that Officer Hellyer showed her pictures of women in intimate apparel as suggestions after she obtained her concealed weapon permit. She still viewed the pictures as "sexy concealed carry clothing that were inappropriate." CP at 122.

The arbitrator also found the allegations to be neutralized because of two reasons having to do with Teresa's husband: Officer Hellyer showed the lingerie to him as well, and Teresa's husband had expressed his thanks that Officer Hellyer would check on Teresa's place of business when on patrol.

Brandi's complaints were, again, that Officer Hellyer would often say that she and her mother-in-law wore very little and, in one instance, made a comment about the store being cold and the women should wear more to cover themselves. Brandi, too, said that

Officer Hellyer would tell her about his sex life with his wife. The arbitrator found this to be neutralized by Mr. Hellyer's belief that he had a "good relationship" with Brandi, who "had never shown any discomfort with him." CP at 388.

Ms. Schutt's complaints were, again, that Officer Hellyer would come by her place of business and often used sexual innuendo in his conversations with her. She said Officer Hellyer made her feel uncomfortable, and would sometimes stop by her residence in his patrol vehicle. The arbitrator found this to be neutralized by the fact that Ms. Schutt no longer lived in Prosser and said her memory of the events was not good. What Ms. Schutt said, as recounted in the Department's internal investigation report, was that "her memory of what exactly was said has been forgotten," but "pretty much anything he said was inappropriate as everything seemed to have a sexual innuendo." CP at 120.

The arbitrator's second reason for concluding that none of Mr. Hellyer's conduct warranted discipline was that "the most that can be found in this case would amount to the type of coarse conversation that can take place in a workplace." CP at 389.

There are three lines of reasoning in the arbitrator's awards that we conclude violate the express, well defined, dominant public policies to end and prevent discrimination in places of public accommodation by officials acting under color of state law.

The first is the position taken by the award that since the investigation began as one into Ms. Hart's allegations, for the Department to follow up when it learned that



other women in the community had complaints was unfair to Mr. Hellyer, and not an evenhanded application of work rules. One of the well-defined public policies found by *Stroehmann* was a “public policy favoring voluntary employer prevention and application of sanctions against sexual harassment in the workplace,” a public policy that it applied in the context of harassment of a customer, not a coworker. 969 F.2d at 1442. As earlier observed, for a municipality to fail to take remedial action upon learning of a police officer’s misconduct can subject it to liability in a civil rights suit based on its deliberate indifference. The Department would have been remiss had it ignored information that Teresa, Brandi, and Ms. Schutt complained of sexual harassment by Officer Hellyer.

The second is the position taken by the award that what would otherwise be a police officer’s sexual harassment of a female citizen can be “neutralized” by the following evidence: if pictures of women in intimate attire are shown not only to her, but to her husband; if her husband thanks a police officer for checking on his wife’s business; if she tries to maintain a cordial relationship with the police officers on her town’s small police force; or if she has moved out of town.

The third is that for a police officer to repeatedly talk to female citizens in their workplace about his sex life, his and his wife’s sexual aids, his perception that the citizen does not wear enough clothing, and to engage in sexual innuendo, is the kind of “coarse conversation” that she should expect in her workplace. This case does not involve harassment by a coworker, and as previously observed, the Washington Supreme Court

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has held that a claim by a plaintiff who is served rather than employed by the defendant “is more of a consumer claim than a claim between an employee and employer, and [such a] claim is not limited by the employment discrimination statute.” *Floeting*, 192 Wn.2d at 855.

The Union argues that because the arbitrator is the final judge of the facts and the law and no review will lie for a mistake in either, the superior court exceeded its limited scope of review and we will exceed ours if we independently determine that Mr. Hellyer’s conduct violated anti-discrimination laws. We are not determining whether Mr. Hellyer’s conduct violated anti-discrimination laws, however. Our issue is whether the legal reasoning the arbitrator applies in concluding that Mr. Hellyer’s conduct could not support discipline violates the express, well defined and dominant policies evinced by the WLAD and the equal protection guarantees of the federal and state constitutions. As the United States Supreme Court held in *Eastern Associated*, that is a legal issue—a construction of positive law—that we *necessarily* review in deciding whether the public policy exception to enforcing arbitral awards applies.

We conclude that as construed by the arbitrator and reflected in his awards, the collective bargaining agreement and the awards violate express, well defined and

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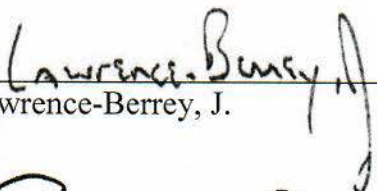
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dominant policies in these respects. The superior court's order vacating the arbitration awards is affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

  
Siddoway, C.J.

WE CONCUR:

  
Lawrence-Berrey, J.

  
Pennell, J.

**LANCE KING, ATTORNEY AT LAW**

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**Transmittal Information**

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