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SUPREME COURT
OF THE STATE OF WASHINGTON

INTERNATIONAL UNION OF OPERATING ENGINEERS,
LOCAL 286,

Petitioner,

v.

PORT OF SEATTLE,

Respondent.

PETITIONER'S ANSWER TO BRIEF OF AMICUS CURIAE
WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION AND
AMERICAN CIVIL LIBERTIES UNION

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INTRODUCTION

Petitioner has no substantive disagreement with any of the legal assertions contained in the Brief of Amicus Curiae Washington Employment Lawyers Association (WELA) and American Civil Liberties Union (ACLU). We submit this Answer solely to correct and clarify the legal and factual record, as inadvertently misrepresented by WELA and ACLU.

ARGUMENT

I. Amicus Curiae WELA And ACLU Misunderstand The Petitioner's Legal Position Herein And Therefore Are Asking This Court To "Reject A Position" That The Petitioner Has Never Asserted.

WELA and ACLU characterize the Petitioner's position herein as contending that "an arbitrator's order of discipline cannot be vacated no matter how lenient the discipline, egregious the conduct, frequent the conduct by the harasser, or the degree to which illegal harassment permeates the workplace." Brief of Amicus Curiae WELA and ACLU ("WELA/ACLU Brief"), page 6.

The Petitioner cannot stress enough that it does *not* take the position attributed to it by amici. Instead, the Petitioner contends, following *Kitsap County Deputy Sheriff's Guild v. Kitsap County*, 167 Wn.2d 428, 436, 291 P.3d 675 (2009), that a court *may* set aside or reject the judgment of a labor

arbitrator regarding appropriate employee discipline – but *only* if the decision violates an “explicit, well-defined and dominant” public policy.

Amici argue that Washington’s Law Against Discrimination, RCW 49.60 (“WLAD”), “embodies the highest Washington state public policy.” Again, Petitioner does not disagree. However, where (as here) the “public policy” challenge is directed at the “specific relief” provided in an arbitration decision, the decision should not be vacated unless public policy “specifically militates against the relief ordered by the arbitrator.” *Virginia Mason Hosp. v. Washington State Nurses Ass’n*, 511 F.3d 908, 916 (9th Cir. 2007), quoting *Stead Motors of Walnut Creek v. Auto. Machinists Lodge No. 1173*, 886 F.2d 1200, 1212-13 (9th Cir.1989).

Significantly, amici themselves express no opinion on whether the 20-day suspension imposed by Arbitrator Vivenzio in this case is, or is not, “sufficient as a matter of law to fulfill the employer’s obligation under the WLAD.” WELA/ACLU Brief at 7. That silence speaks volumes, because it highlights the point made by Petitioner here, namely, that nothing in Washington law “specifically militates against the relief ordered by the arbitrator” in this particular case, i.e., the 20-day suspension imposed on Mr. Cann. *See Virginia Mason Hosp., supra*, 511 F.3d at 916.

Amici are undoubtedly correct that there are situations where a discipline issued is so excessively lenient that it in effect ratifies or

condones a discriminatory act, an action which might well violate public policy. But that is not the case here. There is no basis upon which the 20-day suspension imposed on Mr. Cann can be fairly classified as being such a ratification or condonation.

Similarly, it cannot plausibly be argued that an employer that seeks to fire an employee, but whose attempted discipline is reduced by a neutral third-party arbitrator to a 20-day suspension, has somehow failed on its own initiative to live up to its legal obligation under the WLAD to take “reasonably prompt and adequate corrective action reasonably designed to end” inappropriate behavior. *See Glasgow v. Georgia-Pacific Corp.*, 103 Wn.2d 401, 407, 693 P.2d 708 (1985).

A 20-day suspension – effectively, the equivalent of one month’s lost income and benefits – cannot fairly be characterized, as a matter of law, as a “slap on the wrist,” much less a “slap on the back.” To a blue-collar worker, indeed to almost everyone who works for a living, the loss of a month’s income represents an *extremely* substantial financial penalty. In fact, according to the third annual MetLife Study of the American Dream, issued in 2009, “A startling 50% of Americans surveyed say they could only meet their financial obligations for one month if they were to

lose their job.”¹ In that light, there is no evidence to support the Court of Appeals’ assertion here that such a sanction failed to “send a strong statement” adequate to persuade both the grievant and others to refrain, in the future, from this type of offensive conduct. *See International Union of Operating Engineers v. Port of Seattle*, 164 Wn. App. 307, 320-21, 264 P.3d 268 (2011).

In the absence of any evidence that Mr. Cann was an exception to this rule, one cannot reasonably say, and one certainly cannot conclude as a matter of law, that the discipline imposed on Mr. Cann by Arbitrator Vivenzio was so lenient as to contravene Washington’s public policy embodied in the WALD. One can only infer from the position taken by amici in this case that they do not disagree.

II. The Brief Of Amicus Curiae WELA And ACLU Significantly Misstates The Actual Record In This Case, Which Further Indicates How Problematic It Is To Second-Guess The Findings And Conclusions Of An Arbitrator’s Decision As To The Appropriate Level Of Punishment To Impose For A Specific Act Of Workplace Misconduct.

WELA and ACLU concededly did not independently review the record in this matter, relying instead on secondary sources such as the parties’ briefs and the Court of Appeals’ decision. *See WELA/ACLU Brief*,

¹ http://www.metlife.com/assets/cao/gbms/studies/09010229_09AmDreamStudy_Web.pdf (viewed October 30, 2012).

page 1 n.1. Unfortunately, this omission has led those amici to misrepresent, in significant ways, the actual facts of this case.

Specifically, these amici assert, as if it were a finding of fact that was reached by Arbitrator Vivenzio, that Mr. Cann “used the ‘N’ word at the workplace.” *Id.*, pp. 1-2. No such finding was made by the arbitrator, however, and in fact there is nothing in the record to suggest that any evidence supporting this assertion was even *presented* to the arbitrator.

Similarly, amici assert that the arbitrator “heard testimony” that Cann at one unknown point in time stated that “Martin Luther King Day was ‘take a nigger to lunch day.’” *Id.*, p.2. No such testimony was presented at the arbitration.

The only part of the record that purports to document a Martin Luther King Day comment appears at CP 459, where it is contained in what appear to be the typewritten notes of David Leon, a former Port of Seattle employee. This written statement suggests that the alleged comment, if indeed it was made, was more nuanced, at least, than amici suggest, noting as it does that the victim and Mr. Cann “traded racial insults,” and also was uttered *prior* to a subsequent “harassment training” that appears to have had a salutary effect on the workplace. *Id.* Most importantly, however, there is no evidence that the Port presented any evidence of this alleged statement at the arbitration

hearing or relied upon its alleged existence in its arguments to the arbitrator, the trial court, or the Court of Appeals.

Finally, amici assert that Cann had hung a noose “a few times” due to his “twisted sense of humor.” *Id.* Again, this assertion finds no support in the arbitration decision.

In sum, this is *not* a case where an employee was found to have made a racially offensive joke in the workplace, the Court of Appeals’ reliance on this alleged “fact” was an error, and the amici’s assumption that this occurred is also mistaken. Accordingly, this Court should not base its ruling on such an incident.

Many other things that *are* in the record that was before Arbitrator Vivenzio were also given short shrift by the amici here, such as all of the testimony that led the arbitrator to conclude that termination was not “reasonably related to (a) the seriousness of the employee’s proven offense and (b) the record of the employee in his service with the Employer.” CP 655.

In particular, amici did not note or give any credence to any of the following facts, all of which were found to be significant by Arbitrator Vivenzio:

- (1) That Cann had worked for the Port for twelve years prior to his termination;

- (2) That he was a skilled and reliable worker, with no history of performance problems;
- (3) That his impression of a noose was “not racial, but derived from ‘Cowboys and Indians.’”

CP 655.²

Nor did amici review or consider the arbitral authority (consisting of the discipline decisions issued by other arbitrators in similar circumstances) that led Arbitrator Vivenzio to conclude, as he did, that a 20 day suspension without pay or benefits was appropriate. CP 656-657.

The significance of these errors by amici is that they show why it is so important to defer to an arbitrator’s judgment as to what kind of discipline is necessary and appropriate to ensure appropriate workplace conduct. Such authority is in any event implicit in the arbitrator’s role. In the absence of any explicit contractual provision to the contrary, it is precisely the arbitrator’s role to bring “his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies.” *United Paperworkers International Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 41, 108 S.Ct. 364 (1987) (quoting *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593,

² It is worth noting, in this regard, that the Port itself, on April 4, 2008, justified its decision to impose only a “verbal warning” on Terry Chapman for *his* part in tying the noose on the basis that the noose “was intended to send a message to Mr. Richard Calhoun” – *not* the African-American employee – “based on his age and that he had ‘one foot in the grave.’” CP 591-593. As the Port said in that letter, this fact was “not in dispute.” CP 591. Thus, the Port itself believed that Cann’s conduct in this matter, while deeply inappropriate, was not racially motivated.

597, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960)). “[W]here it is contemplated that the arbitrator will determine remedies for contract violations that he finds, courts have no authority to disagree with his honest judgment in that respect.” *Id.*, 484 U.S. at 38.

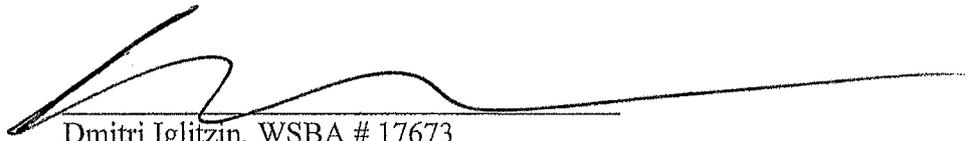
In this case, amici implicitly suggest that had different evidence been presented at hearing, or had that evidence been given different weight, a different, more severe punishment might potentially have been appropriate. Because it was Arbitrator Vivenzio, not amici, who actually heard the evidence presented at the hearing in this matter, however, and it was Arbitrator Vivenzio who then properly made factual findings based on that evidence and determined what discipline was appropriate, Arbitrator Vivenzio’s Award should be vacated only if the remedy he imposed is demonstrably in violation of some “explicit, well-defined and dominant” public policy. Because no such policy clearly proscribes the remedy imposed by Arbitrator Vivenzio in this case, the Award at issue in this case should not have been vacated and the decision of the Court of Appeals should be reversed.

CONCLUSION

As noted above, the Petitioner does not dispute that a court *may* set aside or reject the judgment of a labor arbitrator regarding appropriate employee discipline. Such a ruling should only issue, however, if the

decision violates an “explicit, well-defined and dominant” public policy. Because Washington’s well-established policy opposing discrimination in the workplace does not unambiguously mandate a punishment more severe than a 20 days’ suspension, the Award at issue in this case should not have been vacated, the decision of the Court of Appeals should be reversed, and this case should be remanded to the superior court for further proceedings consistent therewith.

Respectfully submitted this 31st day of October, 2012.



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CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of October, 2012, I caused the foregoing Petitioner's Answer to Brief of Amicus Curiae Washington Employment Lawyers Association and American Civil Liberties Union to be filed with the Washington State Supreme Court via electronic mail to:

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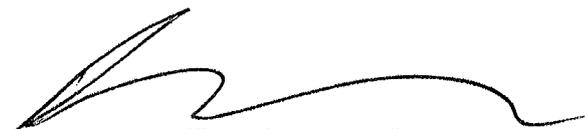
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To Whom It May Concern:

Please find attached the Petitioner's Answer to Brief of Amicus Curiae Washington Employment Lawyers Association and American Civil Liberties Union (13 pages, .pdf) for Case No. 86739-9 (IUOE Local 286 v. Port of Seattle) by attorney Dmitri Iglitzin (WSBA#17673) to be filed with the Supreme Court via electronic mail. If you have any further questions or concerns, please contact me immediately. Thank you.

Sincerely,

Jennifer L. Schnarr

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