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

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INTERNATIONAL UNION OF  
OPERATING ENGINEERS,  
LOCAL 286,

Appellant,

v.

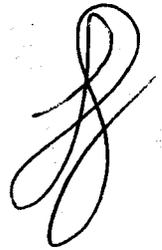
PORT OF SEATTLE,

Respondent.

Case No. 65037-8-I

PORT OF SEATTLE'S  
RESPONSE TO AMICUS  
BRIEF OF WASHINGTON  
STATE LABOR COUNCIL

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## I. INTRODUCTION

Respondent Port of Seattle (the “Port”) respectfully submits this response to the amicus curiae brief filed by the Washington State Labor Council (“WSLC”). The WSLC brief offers no analysis, argument or persuasive case law not previously addressed by the Port or Appellant International Union of Operating Engineers, Local 286 (the “Union”). However, the WSLC brief is noteworthy for the number of crucial points on which WSLC and the Port agree:

- Washington public policy prohibits workplace discrimination and harassment.<sup>1</sup> As stated by WSLC, “Washington law and policy prohibits any type of discrimination in employment....”<sup>2</sup>
- Washington employers have an affirmative duty to provide a workplace free from racial harassment and discrimination.<sup>3</sup> As articulated by WSLC, “employers have a duty to create a safe and nondiscriminatory workplace.”<sup>4</sup>
- In Washington, judicial review of labor arbitration awards is limited.<sup>5</sup>
- In 2009, the Washington Supreme Court explicitly adopted the public policy exception to enforcing arbitration decisions.<sup>6</sup>
- The finality of labor arbitration awards is important.<sup>7</sup>

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<sup>1</sup> Amicus Brief at 11; Respondent’s Brief at 18-20.

<sup>2</sup> Amicus Brief at 11.

<sup>3</sup> Amicus Brief at 11; Respondent’s Brief at 18-20.

<sup>4</sup> Amicus Brief at 11.

<sup>5</sup> Amicus Brief at 7; Respondent’s Brief at 15-16.

<sup>6</sup> Amicus Brief at 5; Respondent’s Brief at 15.

<sup>7</sup> Amicus Brief at 16.

However, the Port strongly disagrees with WSLC's implicit argument that the finality of labor arbitration awards is so important that nothing – not even an arbitration award that prevents an employer from complying with Washington's explicit, well-defined, and dominant public policy against workplace racial harassment – can trump the finality WSLC holds paramount. By elevating finality above all other goals, WSLC advocates an interpretation of the public policy exception to the enforcement of arbitration awards that would render the exception meaningless in any labor arbitration where workplace discrimination or harassment was at issue.

Although the Washington Supreme Court has not yet considered the public policy exception in the context of workplace discrimination or harassment, WSLC's interpretation cannot be the result the Court envisioned in October 2009 when it explicitly adopted the public policy exception.<sup>8</sup> In the crucial area of workplace discrimination and harassment, judicial intervention must be available to employers in the rare circumstance presented here – where an arbitration award prevents an employer from effectively implementing the specific directives of state

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<sup>8</sup> Kitsap County Deputy Sherriff's Guild v. Kitsap County, 167 Wn.2d 428, 436, 219 P.3d 675 (2009).

and federal law that it must maintain a work environment free of race-based harassment. Finality cannot be allowed to trump vital public policy.

Despite the arbitrator's finding that Cann violated the Port's anti-harassment policy by hanging a noose in a prominent location in the workplace, the discipline imposed was so slight as to virtually condone Cann's behavior. The court below correctly determined that the arbitrator's Award was so lenient that it violated Washington's explicit, well-defined and dominant public policy prohibiting discrimination in the workplace by preventing the Port from fulfilling its affirmative duty to provide a workplace free from racial harassment and discrimination. Thus, the Award was properly vacated and this Court should affirm the decision of the court below.

## II. ARGUMENT

**A. Contrary to WSLC's proclamation that "this case is not about Mr. Cann's misconduct," Cann's workplace misconduct and the Port's obligation to provide a workplace free from racial harassment are the key components of this case.**

**1. Cann tied and displayed a noose in the workplace in violation of the Port's anti-harassment policy.**

Understandably, WSLC attempts to downplay and distance itself from the disturbing workplace misconduct by Cann that is at the center of

this case. Briefly,<sup>9</sup> while on duty at the Port, Cann tied a hangman's noose in a rope and hung the noose on a rail overlooking an open, commonly used and traveled work area at the Port. CP 636; 648. An African-American Port employee, Rafael Rivera, with whom Cann had a recent falling out, was working approximately 30 feet away from where Cann hung the noose. CP 211-212.

The sight of the hangman's noose caused Mr. Rivera to "relive a time in [his] life that was demeaning, degrading, humiliating, and dehumanizing." CP 308-309; CP 448. Mr. Rivera served in the Navy and was stationed in Jacksonville, Florida in the 1960s and "witnessed first hand and lived daily with racism." Id.

The arbitrator noted the significance of a noose with regard to harassment in the workplace:

The noose is an object of a nature such that its display would reasonably be expected to be demeaning or to show hostility to people of a protected class within the purview of the policies of the Employer.... The Arbitrator takes notice that the noose, in our national history, literature, and consciousness, communicates hatred and death, frequently targeting African-Americans, and its display is a destructive element in the workplace.

CP 646. Even after learning that Mr. Rivera was offended by the noose, Cann could not muster a sincere apology. CP 652.

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<sup>9</sup> In order to avoid repetition, only a summary of the underlying facts is included here. A detailed factual recitation can be found in Respondent's Brief at 1-12.

The arbitrator found that the Port conducted a thorough and fair investigation and gathered substantial evidence that Cann violated the Port's anti-harassment policy. CP 649; 652. The Port's anti-harassment policy (HR-22) prohibits "[d]isplaying or circulating pictures, objects or written materials...that are sexually suggestive or that demean or show hostility to a person because of a person's age, race, color, national origin/ancestry...or any other category protected by law." CP 638.

The Port is clear that it has a zero tolerance policy for harassment in the workplace:

A "zero tolerance" policy is a policy of having no tolerance for transgressions under the policy. Any alleged violation of this (anti-harassment) policy will generate an investigation and, if verified, will be considered "gross misconduct" and can subject an employee to immediate termination.

CP 638. Cann testified that he understood he would be fired if he violated HR-22. CP 223.

The arbitrator not only found that Cann violated HR-22 but also that the Port applied its anti-harassment policy even-handedly to all employees. CP 653-54. Despite all of this, after the Port terminated Cann's employment on February 11, 2008 for violating HR-22, the Union grieved on behalf of Cann, and requested arbitration. CP 35. The arbitrator issued his award (the "Award") on February 2, 2009, nearly a

year after Cann's termination. CP 633-658. The Award reduced Cann's discipline to a retroactive 20-day suspension without pay, and ordered the Port to reinstate Cann to his prior position with full back pay and benefits. CP 657.

**2. Explicit, well-defined and dominant public policy in Washington prohibits workplace discrimination and harassment.**

The Port and WSLC agree that Washington public policy prohibits workplace discrimination and harassment. Amicus Brief at 11; Respondent's Brief at 18-20. The Washington Law Against Discrimination ("WLAD") makes clear that discrimination based on race is not tolerated in Washington. RCW 49.60.010. The Washington Supreme Court has held on numerous occasions that WLAD embodies public policy "of the highest priority." See Respondent's Brief at 18-20. Moreover, Washington courts have made clear that the purpose of WLAD is to deter and to eradicate discrimination in Washington. See Respondent's Brief at 19.

The Port and WSLC also agree that Washington employers have an affirmative duty to provide a workplace free from racial harassment and discrimination. Amicus Brief at 11; Respondent's Brief at 20. In WSLC's words, "employers have a duty to create a safe and nondiscriminatory workplace." Amicus Brief at 11. Many Washington

cases reinforce that if Washington employers fail to properly deter harassment in the workplace, they are exposed to significant liability. See, e.g., Perry v. Costco Wholesale, Inc., 123 Wn. App. 783, 793, 98 P.3d 1264 (2004) (award of \$500,000 against employer that transferred harasser to different shift and required sensitivity training, rather than terminating him); Respondent's Brief at 25-26. The court below recognized this duty in its Order (“[e]mployers have an affirmative duty to provide a workplace free from racial harassment and discrimination”). CP 727. WSLC does not dispute that Washington's public policies prohibiting workplace discrimination and harassment and imposing an affirmative duty on employers to provide a workplace free from racial harassment are explicit, well-defined, and dominant.

As evidenced by its zero tolerance anti-harassment policy and its pursuit of relief in this case, the Port is serious about complying with these public policies. The Port and other similarly situated employers must be permitted to effectively enforce their anti-discrimination policies even when they have organized workforces with access to labor arbitration. In the exceedingly rare circumstance where a labor arbitrator's decision violates Washington's public policy prohibiting racial harassment in the workplace, employers must be able to rely on the narrow public policy

exception to the finality of arbitration decisions adopted by the Supreme Court in Kitsap County.

**B. The court below properly determined that the Award itself violated public policy.**

WSLC contends “that the trial court’s decision is based on a misunderstanding of the extremely limited standard of review of a labor arbitrator’s award....” Amicus Brief at 4. WSLC explains that when “reviewing any arbitration award on public policy,” the court reviews “whether the award itself violates ‘explicit,’ ‘well defined’ and ‘dominant’ public policy.” Amicus Brief at 5.

As articulated in the Post-Hearing Order (CP 725-727), the court below engaged in precisely the review WSLC indicates is required. The Post-Hearing Order contains the following two findings that confirm the appropriate review was conducted:

- The Award “is hereby vacated because it violates Washington’s explicit, well-defined, and dominant public policy prohibiting discrimination in the workplace.” CP 726.
- “The Award undermined the well-defined, explicit and dominant public policy expressed in WLAD because it was excessively lenient.” CP 727.

The court below did not base its vacation of the Award, as WSLC suggests, on whether Cann’s misconduct violated public policy.

Perhaps realizing that the court below did conduct precisely the review Washington law requires, WSLC argues, without citation to

authority, that a more restrictive review should have been undertaken. WSLC urges that the decision below should be overturned because the court “never identified the ‘explicit,’ ‘well-defined,’ or ‘dominant’ Washington law or policy that addresses the fundamental issue here, namely, the degree of discipline that must be issued when an employee violates an employer’s anti-harassment policy.” Amicus Brief at 11. Washington’s public policy exception does not require such a constricted review of the Award.

WSLC cites Kitsap County to support its argument that WSLC’s very narrow interpretation of the public policy exception should apply. Kitsap County is distinguishable in key ways and does not support reversal of the decision of the court below.<sup>10</sup> Importantly, in Kitsap County there was no clear public policy placing an affirmative duty on the employer to correct or prevent the employee’s actions. 167 Wn.2d at 437; Respondent’s Brief at 24-25. In contrast here, Washington’s public policy prohibiting discrimination in the workplace does place an affirmative duty on employers to prevent acts like those perpetrated by Cann. See Respondent’s Brief at 25-26. Further, unlike here, the grievant’s acts in Kitsap County were determined to be the result of a disability. 167 Wn.2d at 431-432; Respondent’s Brief at 27.

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<sup>10</sup> The Port analyzed Kitsap County in detail in Respondent’s Brief at 23-28.

Kitsap County does not support the result for which WSLC argues – a public policy exception so narrow that it only applies if a Washington statute, regulation or case law details the specific discipline that must be imposed on an employee who violates his employer’s anti-harassment policy. Such a result would be absurd.

**C. WSLC’s interpretation of the public policy exception would effectively abolish it when workplace harassment is at issue.**

WSLC argues that “[b]ecause there is no Washington law on the severity of discipline that must be issued when an anti-harassment policy is violated, the trial court had no legal basis for increasing the period of unpaid suspension.” Amicus Brief at 14. Under WSLC’s suggested interpretation, in order for the public policy exception ever to be applicable in a workplace harassment situation, there would have to be a statute, regulation or case law that contained an exhaustive listing of all the ways in which an employee might violate his employer’s anti-harassment policy and the corresponding mandated discipline for each theoretical violation. Literally, a statute, regulation or case(s) would need to specify, for example, that the punishment for a single racially offensive remark heard by one co-worker is a three-day unpaid suspension; the punishment for a second similar incident is a ten-day unpaid suspension; the punishment for displaying a racially offensive cartoon in an open part

of the work area is a thirty-day unpaid suspension and one-year probation; and the list would need to go on and on to cover innumerable potential violations and punishments, not only covering acts focused on race, but also to address potential harassing conduct based on each of the protected class articulated in WLAD.

Although WSLC may wish for such a preposterous interpretation of the public policy exception in order to support its goal of absolute finality of labor arbitration decisions, WSLC cites no authority that supports such a result. The Port acknowledges that the review of arbitration awards in Washington is narrow, but it is not so narrow that the exceptions adopted by the Washington Supreme Court in Kitsap County could never apply absent a law specifying the severity of discipline for each specific WLAD violation.

The Port is unaware of any Washington or federal authority that contains the theoretical exhaustive chart of potential acts of workplace harassment and the corresponding required punishment for engaging in the listed behavior. Thus, under WSLC's interpretation, the public policy exception would **never** be applicable in cases involving workplace harassment or discrimination. Such a result is inconsistent with Washington's strong public policy to deter and eradicate discrimination in Washington.

**D. WSLC does not cite a single case to support its position that the court below could not order a remedy once it vacated the Award.**

WSLC complains that the authority cited by the Port in support of the right of the court below to fashion alternate relief after vacating the Award “has nothing to do with the issues here.” Amicus Brief at 15. Of course, the Port never claimed that Kiessling v. N.W. Greyhound Lines, 38 Wn.2d 289, 297, 229 P.2d 335 (1951), was directly on point. Respondent’s Brief at 28-29. WSLC does not dispute that Kiessling stands for the general principle for which the Port cited it, that a trial court has broad authority to fashion the relief it deems appropriate. Id. The court below properly relied on that broad authority when it ordered relief after vacating the Award.

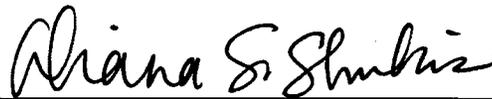
Even more telling, WSLC does not cite a single Washington case in support of its argument that the court below had no authority to determine a remedy once it determined the Award violated public policy and was vacated. WSLC does cite United Steelworkers of America v. Warrior and Gulf Navigation Co., 363 U.S. 574, 582 (1960), in connection with its arguments about Kiessling, but that case provides no support other than general observations about labor arbitrators’ presumed understanding of the “industrial common law” in factual circumstances entirely unlike those at issue here.

### III. CONCLUSION

The Port does not dispute that the public policy exception is narrow, but this Court should not accept WSLC's invitation to make it disappear. The court below properly reviewed the Award in accordance with the narrow public policy exception adopted by the Washington Supreme Court. The decision of the court below should be affirmed.

RESPECTFULLY SUBMITTED this 14th day of January, 2011.

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**Certificate of Service**

I, Greta A. Nelson, certify under penalty of perjury of the laws of the State of Washington that on January 14, 2011, I caused a copy of the document to which this is attached to be delivered to the following individual(s) via legal messenger:

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