NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

DIVISION ONE
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BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

EDWIN J. PARKER,	No. 1 CA-CV 10-0844
Plaintiff/Appellee,	DEPARTMENT B
v.	**MEMORANDUM DECISION**
COLLEGEAMERICA ARIZONA, INC.,	(Not for Publication - Rule 28, Arizona Rules of Civil Appellate Procedure)
Defendant/Appellant.	

Appeal from the Superior Court in Maricopa County

Cause No. CV 2010-092729

The Honorable Karen A. Potts, Judge

AFFIRMED

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D O W N I E, Judge

¶1 CollegeAmerica Arizona, Inc. ("College") appeals from the superior court's confirmation of an arbitration award in favor of Edwin J. Parker. Finding no error, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Parker began working for College in the summer of 2002. He was fired on July 9, 2004, after making allegations of sexual harassment in the workplace. The College employee who terminated Parker, who was the alleged harasser, wrote on a personnel form that Parker was fired for "falsely accus[ing] a coworker of sexual harassment."

¶3 Parker filed a charge with the Equal Employment Opportunity Commission ("EEOC"). After an investigation, the EEOC found reasonable cause to believe College had retaliated against Parker "because of his protected activity, by discharging him from employment." Parker thereafter filed suit against College, alleging retaliation in violation of Title VII of the Civil Rights Act of 1964 ("Title VII").

¶4 Because Parker had an arbitration clause in his contract with College, his claim was arbitrated. The parties agreed the Federal Arbitration Act ("FAA") and Federal Rules of Evidence would govern the arbitration proceedings.

¶5 During the arbitration hearing, College sought to introduce copies of two Internet postings authored by Parker. College argued the postings demonstrated that Parker "makes

things up." After an off-the-record discussion with the parties, the arbitrator ruled the postings inadmissible under Federal Rules of Evidence 403 and 404. The first excluded posting, dated March 1997, contained a list of general references to so-called "evils" that Parker appeared to attribute to the government. The second, dated March 2002, "alert[ed]" people to potential threats created by the passage of illegal immigrants across the United States border.

¶6 After a four-day hearing that included 9 witnesses and approximately 100 exhibits, the arbitrator issued a 95-page decision that contained detailed findings of fact and conclusions of law. The arbitrator concluded College had violated Title VII by terminating Parker in retaliation for his sexual harassment complaints. He awarded Parker $263,274.74.[1]

¶7 Pursuant to Arizona Revised Statutes ("A.R.S.") section 12-1511, Parker applied to the superior court for confirmation of the arbitration award. The court confirmed the award over College's objection. College timely appealed. We have jurisdiction pursuant to A.R.S. §§ 12-2101(B) and -2101.01(A)(6).

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[1] The award includes the principal sum of $95,518.33, attorneys' fees of $147,437.24, taxable costs of $9083.70, and non-taxable costs and expenses of $11,235.46.

DISCUSSION

¶8 We generally review the confirmation of an arbitration award for an abuse of discretion. *FIA Card Servs. v. Levy*, 219 Ariz. 523, 524, ¶ 5, 200 P.3d 1020, 1021 (App. 2008). However, we review *de novo* the superior court's application of statutes.[2] *Id.*

¶9 "[A] court 'must' confirm an arbitration award 'unless' it is vacated, modified, or corrected 'as prescribed' in [the FAA]."[3] *Hall St. Assocs. v. Mattel, Inc.*, 552 U.S. 576, 582 (2008) (quoting 9 U.S.C. § 9). Under the FAA, vacatur of an arbitration award is available:

> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators . . . ;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing . . . or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

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[2] Even under a *de novo* standard, our review is limited by the FAA, which enumerates the exclusive grounds on which a "court may vacate, modify, or correct an arbitral award." *Kyocera Corp. v. Prudential-Bache Trade Servs.*, 341 F.3d 987, 994 (9th Cir. 2003). Under neither state nor federal law are the arbitrator's findings of fact reviewed *de novo*. And as we discuss *infra,* judicial review of an arbitrator's legal rulings is limited.

[3] The parties' arbitration agreement states that "[t]here shall be no appeal from the award except on those grounds specified by the FAA and case law interpreting the FAA."

> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a).

¶10 College argues the award should not have been confirmed because the arbitrator refused to consider material evidence and exceeded his authority. We disagree.

I. Alleged Refusal to Hear Material Evidence

¶11 To receive relief based on an arbitrator's erroneous evidentiary ruling, a party must establish that its rights were prejudiced. *See Emp'rs Ins. of Wausau v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 933 F.2d 1481, 1490 (9th Cir. 1991). Vacatur under § 10(a)(3) requires proof that the excluded evidence was material to the case and that its exclusion was prejudicial. *Id.* The exclusion of evidence is prejudicial only if it deprives the offering party of a fair hearing. *Newark Stereotypers' Union 18 v. Newark Morning Ledger Co.*, 397 F.2d 594, 599 (3d Cir. 1968). Error that does not deprive a party of a fair hearing is not grounds for vacatur. *Cf. Barnes v. Logan*, 122 F.3d 820, 823 (9th Cir. 1997); *Coutee v. Barington Capital Grp.*, 336 F.3d 1128, 1134 (9th Cir. 2003); *U.S. Life Ins. Co. v. Superior Nat'l Ins. Co.*, 591 F.3d 1167, 1174 (9th Cir. 2010) (citing multiple cases holding that a party must show that, but for the evidentiary ruling, the arbitrator should have made a

different award). Not every error in the admission of evidence rises to this high standard. An arbitration hearing is fundamentally fair if it includes adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator.[4] *Carpenters 46 N. Cal. Counties Conf. Bd. v. Zcon Builders*, 96 F.3d 410, 413 (9th Cir. 1996).

¶12 College argues the exclusion of Parker's Internet postings deprived it of a fair hearing. It contends the precluded evidence would have demonstrated "the inherent unreasonableness of Parker's system of beliefs," shown his "paranoia and delusions of persecution," and established "a hatred of authority and an inability to distinguish fantasy and reality."

¶13 Even assuming *arguendo* that the arbitrator's evidentiary ruling was legally erroneous, College nonetheless received a fair hearing. College does not challenge the notice it received regarding the arbitration proceedings. At the hearing, the arbitrator permitted both parties to present witnesses and exhibits. College had ample opportunity to present its case and to persuade the arbitrator of Parker's allegedly unreasonable beliefs regarding sexual harassment in the workplace. College specifically asked its witnesses to

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[4] College does not allege that the arbitrator was biased, and our own review of the record reveals no bias.

testify about Parker's beliefs. It also apparently used Parker's own testimony to argue that he held irrational beliefs.[5] College has not established that preclusion of two Internet postings unrelated to sexual harassment or College deprived it of a fair arbitration hearing.

¶14 We disagree with College's suggestion that our focus should be on whether the exclusion was improper under the Federal Rules of Evidence. If an arbitrator is "acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." *United Paperworkers Int'l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 38 (1987). An arbitrator's erroneous ruling is actionable only if the arbitrator acts in bad faith or the error was "so gross as to amount to affirmative misconduct." *Id.* at 40 (even if the arbitrator erred in refusing to consider evidence, because his errors were neither committed in bad faith nor so gross as to constitute affirmative misconduct, they did not justify vacatur under § 10(a)). This difference between the exacting standards to which judges are subject and the

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[5] Because the complete arbitration transcript is not in the record, we cannot make a definitive statement on this issue. However, in College's briefs, it cites Parker's arbitration testimony that "illustrate[d] the unreasonableness of his beliefs." College also states that Parker himself testified during the arbitration hearing that "[w]e were all kind [sic] of cautious, paranoid, whatever you want to call the word, about what was going on."

broad-ranging discretion that the law affords arbitrators is one of the risks a party takes when it chooses to include an arbitration provision in a contract.

¶15 The record here reveals no bad faith or affirmative misconduct. The arbitrator held an off-the-record conference with the parties before issuing his evidentiary ruling. He stated the federal rule-based reasons for excluding the Internet postings. Nothing in the record suggests, let alone establishes, that the arbitrator acted in bad faith or so grossly as to constitute affirmative misconduct. Even if College "did not enjoy a perfect hearing . . . it did receive a fair hearing. It had . . . the opportunity to be heard and to present relevant and material evidence, and the [arbitrator was] not infected with bias." *Emp'rs Ins. of Wausau,* 933 F.2d at 1491.

II. Alleged Abuse of Power

¶16 The FAA allows a court to vacate an arbitration award if the "arbitrator[] exceeded [his] power[]." 9 U.S.C. § 10(a)(4). "[A]rbitrators 'exceed their powers' . . . not when they merely interpret or apply the governing law incorrectly, but when the award is 'completely irrational,' or exhibits a 'manifest disregard of law.'" *Kyocera,* 341 F.3d at 997 (internal citations omitted). An award is completely irrational only "where [the arbitration decision] fails to draw its essence

from the agreement." *Hoffman v. Cargill Inc.*, 236 F.3d 458, 461-62 (8th Cir. 2001); *see also Bosack v. Soward*, 586 F.3d 1096, 1106 (9th Cir. 2009) ("[T]he question is whether the award is 'irrational' with respect to the contract, not whether the . . . findings of fact are correct or internally consistent.") (citation omitted). This is an extremely limited basis for vacatur. *Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1288 (9th Cir. 2009). Thus, when an arbitrator's findings and conclusions are not inconsistent with the terms of the arbitration agreement, the award is not "completely irrational." *Bosack*, 586 F.3d at 1107 (when the award is based on the governing law set forth in the agreement, it is not completely irrational).

¶17 Manifest disregard of law requires "more than just an error in the law or failure on the part of the arbitrator[] to understand or apply the law." *Mich. Mut. Ins. Co. v. Unigard Sec. Ins. Co.*, 44 F.3d 826, 832 (9th Cir. 1995) (citation omitted); *see also Kyocera*, 341 F.3d at 1003 ("The risk that arbitrators may construe the governing law imperfectly in the course of . . . [a] good faith [attempt] to interpret the relevant law . . . is a risk that every party to arbitration assumes, and such legal and factual errors lie far outside the category of conduct embraced by § 10(a)(4)."). Indeed, the record must establish that the arbitrator "recognized the

applicable law and then ignored it." *Mich. Mut.,* 44 F.3d at 832 (citations omitted). Applying these legal tenets to the case at bar, we find no basis for reversal.

A. Reasonable Belief of Sexual Harassment

¶18 "[A] plaintiff alleging a retaliation claim under Title VII must begin by establishing a prima facie case . . . ." *Little v. United Techs., Carrier Transicold Div.*, 103 F.3d 956, 959 (11th Cir. 1997). The plaintiff must show "he had a good faith, reasonable belief that the employer was engaged in unlawful employment practices." *Id.* at 960 (noting that the plaintiff must have both a subjective and objective reasonable belief).

¶19 The arbitrator cited several facts in support of his conclusion that Parker had a subjective and objective reasonable belief that College engaged in harassing conduct toward its female employees. Though College may disagree with the arbitrator's conclusions, or even his application of the law, "[t]he risk that arbitrators may construe the governing law imperfectly in the course of . . . [a] good faith [attempt] to interpret the relevant law . . . is a risk that every party to arbitration assumes, and such legal and factual errors lie far outside the category of conduct embraced by § 10(a)(4)." *Kyocera*, 341 F.3d at 1003.

¶20 It is clear from his detailed findings of fact and conclusions of law that the arbitrator did not ignore pertinent law. The arbitrator stated the requirements for a prima facie case and cited evidence supporting his conclusion that Parker carried his burden of proof. College claims the arbitrator ignored the law by finding that Parker had a subjective belief of sexual harassment, even after Parker wrote a so-called "retraction" letter. We disagree. The arbitrator made several findings regarding this apparent inconsistency. He concluded the "retraction" letter was written "when Parker legitimately feared that his job was in jeopardy." Based on the totality of circumstances, the letter did not persuade the arbitrator that Parker actually believed the allegedly harassing conduct was lawful. As the superior court correctly noted, "[t]he arbitrator's Finding that [Parker] had a reasonable belief is a classic example of his role as the finder of fact."

¶21 An arbitration award should be confirmed unless the arbitrator could not have rendered the same award without manifestly disregarding the governing law. *See Barnes*, 122 F.3d at 823. In this case, the arbitrator did not manifestly disregard the law, and the facts he deemed credible supported his application of the law.

B. Inconsistent Testimony

¶22 Finally, College argues the arbitrator exceeded his authority by failing to reject the entirety of Parker's testimony. "Credibility of witnesses is always for the factfinder, and this is especially so when the factfinder is an arbitrator." *Pawlicki v. Farmers Ins. Co.*, 127 Ariz. 170, 173, 618 P.2d 1096, 1099 (App. 1980).

¶23 Both parties cite *Lopez-Umanzor v. Gonzales*, 405 F.3d 1049 (9th Cir. 2005), to support their positions regarding Parker's testimony. In *Lopez-Umanzor*, the court stated it has "long recognized that a person who is deemed unbelievable as to one material fact *may* be disbelieved in all other respects." *Id.* at 1059 (emphasis added) (citation omitted). *Lopez-Umanzor* does not stand for the proposition that a factfinder who disbelieves some of a witness's testimony *must* reject all of it, though the trier of fact has the ability to do so. Indeed, the Ninth Circuit's rather unremarkable holding is consistent with jury instructions routinely given in Arizona civil trials regarding the credibility of witnesses. *See, e.g.*, Rev. Ariz. Jury Instr. ("RAJI") Civil Preliminary 5 ("In deciding the facts of this case, you should consider what testimony to accept, and what to reject, *you may accept everything a witness says, or part of it, or none of it*.") (emphasis added).

¶24 What *is* required is that a neutral factfinder give parties the opportunity to present relevant evidence before making credibility determinations. *See Lopez-Umanzor*, 405 F.3d at 1059 (before determining a witness's credibility, a party must be given a "fair hearing in front of a neutral decisionmaker"). As discussed *supra*, College received a fair hearing. The arbitrator was impartial, admitted and reviewed voluminous exhibits, and heard testimony from multiple witnesses. Although Parker was successfully impeached at times (as were other witnesses), the arbitrator "had the opportunity to observe the witnesses and to assess their credibility" and "[h]e accepted the testimony of [Parker] as reliable." *Kirschner v. West Co.*, 247 F. Supp. 550, 553-54 (E.D. Pa. 1965). We will not substitute our judgment for the arbitrator's as to the credibility of witnesses who appeared before him, nor can we conclude that the testimony of certain witnesses should not have been accepted as true. *See Pawlicki*, 127 Ariz. at 173, 618 P.2d at 1099; *Kirschner*, 247 F. Supp. at 553 (because the "alleged inconsistencies in the oral testimony of [the party] and alleged conflicts between oral testimony and writings in evidence . . . were all [before] the arbitrator," a court will not substitute its judgment absent the express exceptions in § 10(a)).

III. Attorneys' Fees on Appeal

¶25 Both parties request an award of attorneys' fees on appeal pursuant to A.R.S. § 12-1514.[6] Section 12-1514 permits the recovery of fees and costs in arbitration confirmation proceedings, including at the appellate level. *Steer v. Eggleston*, 202 Ariz. 523, 528, ¶¶ 23-25, 47 P.3d 1161, 1166 (App. 2002). We therefore award Parker his fees and costs incurred on appeal upon compliance with ARCAP 21(a). College is not the prevailing party and is not entitled to a fee award.

CONCLUSION

¶26 For the reasons stated, we affirm the judgment of the superior court.

/s/
MARGARET H. DOWNIE,
Presiding Judge

CONCURRING:

/s/
PETER B. SWANN, Judge

/s/
DONN KESSLER, Judge

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[6] Parker also requests fees under 42 U.S.C. 2000e-5(k). Because we award him fees pursuant to A.R.S. § 12-1514, we need not decide whether he is also entitled to fees under federal law.