STATE OF CONNECTICUT *v.* AFSCME,
COUNCIL 4, LOCAL 391
(SC 18749)

Rogers, C. J., and Norcott, Palmer, Zarella, Eveleigh, McDonald and Espinosa, Js.*

*Argued November 30, 2012—officially released August 6, 2013*

*J. William Gagne, Jr.*, with whom, on the brief, was *Kimberly A. Cuneo*, for the appellant (defendant).

*Thomas P. Clifford, III*, assistant attorney general, with whom were *Ann H. McCarthy*, certified legal intern, and, on the brief, *George Jepsen*, attorney general, and *Philip M. Schulz*, assistant attorney general, for the appellee (plaintiff).

*Opinion*

ROGERS, C. J. The issue to be decided in this appeal is whether an arbitrator's award violates public policy when an employer's decision to dismiss an employee who has engaged in sexual harassment is reduced to a one year suspension without pay. The Appellate Court affirmed the judgment of the trial court vacating on public policy grounds an arbitration award reinstating the grievant, Scott Gamache, to his employment with the plaintiff, the state of Connecticut. *State* v. *AFSCME, Council 4, Local 391*, 125 Conn. App. 408, 422, 7 A.3d 931 (2010). The defendant, AFSCME, Council 4, Local 391, filed a petition for certification to appeal to this court, which we granted limited to the following issue: "Did the Appellate Court properly conclude that the arbitration award was correctly vacated on the ground that it violated the public policy against workplace sexual harassment?" *State* v. *AFSCME, Council 4, Local 391*, 300 Conn. 912, 13 A.3d 1101 (2011). We answer this question in the affirmative and, accordingly, affirm the judgment of the Appellate Court.

The opinion of the Appellate Court sets forth the following facts and procedural history. "The plaintiff and the defendant entered into a collective bargaining agreement effective December 2, 2004, through June 30, 2008. On December 5, 2005, the grievant, a correctional officer employed by the [D]epartment of [C]orrection (department) and member of the bargaining unit represented by the defendant, was discharged from his employment for allegedly engaging in an open pattern of sexual harassment in knowing violation of the department's administrative directive 2.2.[1] The defendant filed a grievance against the plaintiff, and the parties submitted the controversy to arbitration pursuant to the terms of the collective bargaining agreement. The parties joined in framing the following issue to be submitted to the arbitrator: 'Was the dismissal of the [g]rievant for just cause?[2] If not, what shall be the remedy consistent with the [collective bargaining agreement]?'

"On September 20, 2007, following a five day hearing, the arbitrator issued an arbitration award that reduced the grievant's dismissal to a one year suspension from his position without pay or benefits. Specifically, the award provided: 'The dismissal of the [g]rievant was not for just cause. The dismissal is reduced to a suspension of [the] [g]rievant from December 5, 2005, to December 5, 2006. Said suspension shall be without pay and benefits. [The] [g]rievant is hereby reinstated as of December 6, 2006, to the position he held at the time of his termination. He shall be paid the wages that would have been due an employee in the position to which [the] [g]rievant is being reinstated commencing on December 6, 2006, less any earnings [the] [g]rievant received from December 6, 2006 to the date he actually returns to work. . . . [The] [g]rievant shall return to

his position within thirty (30) days of the date of this [a]ward.'

"In reaching his decision, the arbitrator also set forth the following factual findings: '[The] [g]rievant in this matter was disciplined by way of termination because of his violation of [a]dministrative [d]irective 2.2 . . . . The actions allegedly committed by [the] [g]rievant were verbal comments made about [the] [c]omplainant[3] in this matter and other individuals. Some of the comments referred to oral sex in reference to [the] [c]omplainant in this matter, which was done at his pleasure or as compensation for something [the] [c]omplainant wanted. Some of the actions charged against [the] [g]rievant involve [his] personal touching of [the] [c]omplainant. The comments and the physical touching were allegedly done publicly in front of other employees and inmates of the institution. The acts alleged . . . did not all happen at once, but it was alleged that the entire set of acts complained about . . . happened over a substantial period of time. . . .

" 'This [a]rbitrator does find that [the] [g]rievant knew about the [department's] zero tolerance [policy] in reference to [a]dministrative [d]irective 2.2. Because of that, discipline may be called for even though the alleged acts were only done once. One could find that some of the witnesses stretched the truth to some extent because of their own personal feelings either for or against [the] [g]rievant or [the] [c]omplainant in this matter. *This* [*a*]*rbitrator finds that the accusations made by* [*the*] [*c*]*omplainant are true and were substantiated by the witnesses presented by the* [*plaintiff*]; however, they were not sufficient to require the discipline given [the] [g]rievant. The [defendant] presented evidence of similar incidents as this case that established that the discipline given to [the] [g]rievant was too severe.' . . .

"Thereafter, the plaintiff filed this application to vacate the arbitral award pursuant to General Statutes § 52-418.[4] The plaintiff claimed that the enforcement of the award, inter alia, violated public policy referenced in Connecticut statutory and common law and disregarded 'the managerial responsibility of the [plaintiff], as an employer' to enforce a 'zero tolerance policy against sexual harassment in the workplace.' In response, the defendant filed a motion to confirm the award pursuant to General Statutes § 52-417.[5]

"The court, by memorandum of decision, granted the plaintiff's application to vacate the arbitrator's award and denied the defendant's application to confirm the award. The court first determined that there was a well-defined and dominant public policy against workplace sexual harassment as established by General Statutes § 46a-60 (a)[6] and administrative directive 2.2. The court also noted that the grievant was aware of the department's zero tolerance policy proscribing sexual harass-

ment, 'yet [he] repeatedly violated that policy over a long period of time. He continued his lewd and offensive conduct toward his fellow employee even after that employee asked him to stop.' Finally, the court concluded that '[a]nything less than termination of the employment of [the grievant] would be insufficient to uphold the important public policy against workplace sexual harassment.' " (Emphasis in original; footnotes altered.) *State* v. *AFSCME*, *Council 4*, *Local 391*, supra, 125 Conn. App. 410–13.

The defendant appealed from the judgment of the trial court to the Appellate Court. The Appellate Court concluded that there is a clearly defined and dominant public policy against sexual harassment in the workplace in Connecticut and that the arbitrator's decision violated that public policy. Id., 422. Accordingly, it affirmed the judgment of the trial court. This certified appeal followed. The defendant claims that there is no well-defined, dominant public policy against sexual harassment in the workplace and, even if there is, the arbitrator's decision did not violate that policy. We conclude that there is a clear, well-defined and dominant policy against sexual harassment in this state. We further conclude that the arbitrator's interpretation of the just cause provision of the collective bargaining agreement as barring the grievant's dismissal violated that policy.

We begin our analysis with the standard of review. "We have consistently stated that arbitration is the favored means of settling differences and arbitration awards are generally upheld unless an award clearly falls within the proscriptions of § 52-418 . . . . A challenge of the arbitrator's authority is limited to a comparison of the award to the submission." (Citations omitted; internal quotation marks omitted.) *State* v. *AFSCME*, *Council 4*, *Local 387*, *AFL-CIO*, 252 Conn. 467, 473, 747 A.2d 480 (2000). "Because we favor arbitration as a means of settling private disputes, we undertake judicial review of arbitration awards in a manner designed to minimize interference with an efficient and economical system of alternative dispute resolution." (Internal quotation marks omitted.) Id., 474.

"In spite of the general rule that challenges to an arbitrator's authority are limited to a comparison of the award to the submission, an additional challenge exists under § 52-418 (a) (4) when the award rendered is claimed to be in contravention of public policy. . . . This challenge is premised on the fact that the parties cannot expect an arbitration award approving conduct which is illegal or contrary to public policy to receive judicial endorsement any more than parties can expect a court to enforce such a contract between them. . . . When a challenge to the arbitrator's authority is made on public policy grounds, however, *the court is not concerned with the correctness of the arbitrator's deci-*

*sion but with the lawfulness of enforcing the award.* . . . Accordingly, the public policy exception to arbitral authority should be narrowly construed and [a] court's refusal to enforce an arbitrator's interpretation of [collective bargaining agreements] is limited to situations where the contract as interpreted would violate some explicit public policy that is well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests. . . . The party challenging the award bears the burden of proving that illegality or conflict with public policy is clearly demonstrated. . . . Therefore, given the narrow scope of the public policy limitation on arbitral authority, the plaintiff can prevail in the present case only if it demonstrates that the board's award clearly violates an established public policy mandate." (Citations omitted; emphasis added; internal quotation marks omitted.) Id., 474–75.

In *Schoonmaker* v. *Cummings & Lockwood of Connecticut, P.C.*, 252 Conn. 416, 429, 747 A.2d 1017 (2000), this court held that, "where a party challenges a consensual arbitral award on the ground that it violates public policy, and where that challenge has a legitimate, colorable basis, de novo review of the award is appropriate in order to determine whether the award does in fact violate public policy." We also stated in *Schoonmaker*, however, that, "[b]y no means should our decision be viewed as a retreat of even one step from our position favoring arbitration as a preferred method of dispute resolution. . . . [O]ur faith in and reliance on the arbitration process remains undiminished, and we adhere to the long-standing principle that findings of fact are ordinarily left undisturbed upon judicial review. Thus, in the present case, *we defer to the arbitrator's interpretation of the agreements regarding the scope of the* [*contract*] *provision* . . . . We conclude only that as a reviewing court, we must determine, pursuant to our plenary authority and giving appropriate deference to the arbitrator's factual conclusions, whether the [contract] provision in question violates those policies." (Emphasis added.) Id., 431–32. Thus, this court held that it would not substitute its judgment for the judgment of the arbitrator with respect to the meaning of the contract. Id., 432 n.8; see id., 432 ("we defer to the arbitrator's interpretation of the [agreement]").

It is clear, therefore, that this court's ruling in *Schoonmaker* is in no way inconsistent with the principle that, "[w]hen a challenge to the arbitrator's authority is made on public policy grounds . . . the court is not concerned with the correctness of the arbitrator's decision but with the lawfulness of enforcing the award." (Internal quotation marks omitted.) *State* v. *AFSCME, Council 4, Local 387, AFL-CIO*, supra, 252 Conn. 474–75. Thus, when the issue before the arbitrator involves the interpretation of a collective bargaining agreement, the court presumes the correctness of the arbitrator's inter-

pretation, even when the award implicates some public policy. *Schoonmaker* v. *Cummings & Lockwood of Connecticut, P.C.*, supra, 252 Conn. 429. Accordingly, the sole question that the court must decide, in the exercise of its plenary power to identify and apply the public policy of this state; id., 430 ("the identification and application of the public policy of this state presents considerations regarding which courts have greater expertise and knowledge than arbitrators"); is whether, under the arbitrator's presumptively correct interpretation of the contract, the *contract provision* violates a well-defined and dominant public policy. *State* v. *AFSCME, Council 4, Local 387, AFL-CIO*, supra, 475 ("[a] court's refusal to enforce an arbitrator's interpretation of [collective bargaining agreements] is limited to situations where the *contract as interpreted* would violate some explicit public policy that is well defined and dominant" [emphasis added; internal quotation marks omitted]); *Schoonmaker* v. *Cummings & Lockwood of Connecticut, P.C.*, supra, 432 ("we must determine, pursuant to our plenary authority . . . whether the [*contract*] *provision* in question violates those policies" [emphasis added]); see also *Eastern Associated Coal Corp.* v. *United Mine Workers of America, District 17*, 531 U.S. 57, 62, 121 S. Ct. 462, 148 L. Ed. 2d 354 (2000) (when employer seeks vacation of arbitration award on public policy grounds, "we must treat the arbitrator's award as if it represented an agreement between [the employer] and the union as to the proper meaning of the contract's words 'just cause' "). Accordingly, we address that question.

The courts employ a "two-step analysis . . . [in] deciding cases such as this. First, the court determines whether an explicit, well-defined and dominant public policy can be identified. If so, the court then decides if the arbitrator's award violated the public policy." (Internal quotation marks omitted.) *State* v. *AFSCME, Council 4, Local 387, AFL-CIO*, supra, 252 Conn. 476. Accordingly, the first step of our analysis is to determine whether there is a well-defined and dominant public policy against sexual harassment in the workplace in this state. Our answer is an unequivocal yes. This court previously has recognized that "the clear and unambiguous language of § 46a-60 (a) (8) (C)[7] explicitly indicates that the maintenance of a hostile work environment constitutes sexual harassment and is prohibited by the laws of this state." (Footnote added.) *State* v. *Connecticut State Employees Assn., SEIU Local 2001*, 287 Conn. 258, 276–77, 947 A.2d 928 (2008). Accordingly, we have concluded that "the [policy] against . . . sexual harassment [is] explicitly discernable from [the statute], and, therefore, [is] clearly defined and dominant for the purposes of vacating an arbitral award." Id., 277. Indeed, the defendant does not seriously contend otherwise.[8]

We turn, therefore, to the second step of our inquiry: whether the arbitrator's determination that, under his

interpretation of the collective bargaining agreement, there was no just cause to terminate the grievant but, instead, the proper sanction was to suspend the grievant for one year without pay, violates this public policy. The plaintiff contends that, because administrative directive 2.2. "strictly" forbids sexual harassment in the workplace, enforcement of the arbitrator's award reinstating the grievant would be unlawful. The question before us, however, is not whether *the collective bargaining agreement*, which incorporates administrative directive 2.2, required dismissal under the circumstances of this case. As we have indicated, we must assume for purposes of our review that the arbitrator correctly determined that there was no just cause to terminate the grievant under the terms of the collective bargaining agreement and that, instead, a one year suspension without pay was the appropriate sanction under the agreement. Rather, the question that we must answer is whether, under the specific facts and circumstances of this case, a contract provision requiring the reinstatement of the grievant violates a well-defined and dominant public policy. In other words, we must determine whether public policy required the grievant's dismissal. See *Brantley* v. *New Haven*, 100 Conn. App. 853, 863, 920 A.2d 331 (2007) ("we cannot conclude that [the employee's] conduct, when viewed in the context of the plaintiff's entire career and in light of the [New Haven Department of Fire Service's] inconsistent enforcement of its security policy and the lack of clarity in regard to whom that policy applied, is so egregious that it requires nothing less than termination of the plaintiff's employment so as not to violate public policy"); see also *Philadelphia Housing Authority* v. *AFSCME*, *District Council 33*, *Local 934*, Pa. , 52 A.3d 1117, 1132 (2012) (McCaffery, J., concurring) (When a reviewing court is applying the public policy exception, "considerations of an employer's subjective policies, even a zero-tolerance policy, [or] what a reviewing court feels an employer 'should' be able to do . . . do not in any manner constitute public policy and are thus not relevant to our inquiry. A reviewing court's only inquiry is whether the arbitration award . . . violates a clearly established public policy.").[9]

In making this determination, we are mindful that the fact that an employee's misconduct implicates public policy does not require the arbitrator to defer to the employer's chosen form of discipline for such misconduct. As the United States Supreme Court has held, "an arbitrator is authorized to disagree with the sanction imposed for employee misconduct." *United Paperworkers International Union*, *AFL-CIO* v. *Misco*, *Inc.*, 484 U.S. 29, 41, 108 S. Ct. 364, 98 L. Ed. 2d 286 (1987). While "the arbitrator's decision must draw its essence from the agreement, he is 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." (Emphasis in original.) Id. The arbitrator has the authority to choose the appropriate form of discipline even when the employee misconduct implicates public policy. See *Eastern Associated Coal Corp.* v. *United Mine Workers of America, District 17*, supra, 531 U.S. 67 (when "reasonable people [could] differ as to whether reinstatement or discharge [was] the more appropriate" form of discipline for employee who was terminated for violating public policy against drug use by workers in safety sensitive positions, arbitrator had authority to reinstate employee); *United Paperworkers International Union, AFL-CIO* v. *Misco, Inc.*, supra, 45 ("[n]or does the fact that it is inquiring into a possible violation of public policy excuse a court for doing the *arbitrator's task*" of determining appropriate form of discipline [emphasis added]); see also *C. R. Klewin Northeast, LLC* v. *Bridgeport*, 282 Conn. 54, 96 n.31, 919 A.2d 1002 (2007) (quoting with approval court's statement in *United Paperworkers International Union, AFL-CIO* v. *Misco, Inc.*, supra, 45); *State* v. *AFSCME, Council 4, Local 387, AFL-CIO*, supra, 252 Conn. 474–75 ("[w]hen a challenge to the arbitrator's authority is made on public policy grounds . . . the court is not concerned with the correctness of the arbitrator's decision" [internal quotation marks omitted]); *Philadelphia Housing Authority* v. *AFSCME, District Council 33, Local 934*, supra, 52 A.3d 1132 (McCaffery, J., concurring) (rejecting view "that intermixed with the . . . clear public policy of preventing sexual harassment is some co-existing public policy that requires [an] arbitrator to defer to an employer's . . . chosen form of discipline").[10]

We also recognize that the fact that there is a strong public policy against certain misconduct does not require an employer to terminate every employee who engages in that misconduct.[11] Rather, we must determine whether the employee's misconduct was "so egregious that it requires nothing less than termination of the [employee's] employment so as not to violate public policy." *Brantley* v. *New Haven*, supra, 100 Conn. App. 863.

We conclude in the present case that the public policy against sexual harassment in the workplace required the grievant's dismissal. As set forth in a letter that the commissioner of the department, Theresa Lantz, sent to the Office of the Attorney General after the arbitrator issued the award, the complainant testified in the arbitration proceeding as follows: "[The grievant] stated to [the complainant], 'Hey [h]omo it's about time you came downstairs and stop sucking cock.' [The complainant] also testified that six weeks after that when he was . . . in the pharmacy he felt something touch his buttocks, he jumped and turned around and [the grievant] had a banana held at his crotch area, and made the statement in front of a witness, 'he jumped like a girl.' The [c]omplainant went on to testify . . . that at least

[thirty] times [the grievant] called him a 'ripper.' The [c]omplainant didn't know what that meant, and asked another employee what it meant and was told it meant 'child molester.' He confronted [the grievant] and asked him to stop making those statements, but [the grievant] continued. The [c]omplainant bought a parrot from another co-worker, [the grievant] overheard the conversation and later in the shift asked the [c]omplainant, 'what did you have to do for the bird, give him a blow job.' [The grievant] on other occasions also made comments about the [c]omplainant and a co-worker because they lifted weights together, and asked the [c]omplainant, 'what do you guys do there grab each [other's] crank.' "[12] The arbitrator found that "the accusations made by [the] [c]omplainant [were] true and were substantiated by the witnesses presented by the [plaintiff] . . . ." The arbitrator also found that the grievant knew about the "zero tolerance" policy with respect to sexual harassment, as reflected in administrative directive 2.2,[13] that the grievant's comments and touching were done in front of other employees and inmates, and that the conduct took place "over a substantial period of time." Moreover, given the nature of the grievant's conduct, which included graphic and sexually suggestive comments about the complainant's "sexual activities . . . [and] sexual orientation," comments that had "the effect of embarrassing, ridiculing, or demeaning [the complainant] on the basis of his . . . sexual orientation," "banter that tend[ed] to denigrate or show hostility toward [the complainant] on the basis of . . . [his] sexual orientation," and "[u]nnecessary touching" of the complainant as enumerated in the directive; see footnote 1 of this opinion; it is indisputable that any reasonable person would have known that this conduct violated administrative directive 2.2, especially when the complainant confronted the grievant and demanded that he stop his conduct.

These facts compel the conclusions that the grievant knowingly violated the state's public policy against sexual harassment, as embodied in administrative directive 2.2,[14] and that his misconduct was both highly egregious and incorrigible. We also emphasize the undisputed fact that the conduct occurred in a prison in the presence of other employees and inmates, where the need for order, discipline and a culture of mutual respect among employees is particularly acute.[15] Accordingly, we conclude that the public policy against sexual harassment in the workplace "require[d] nothing less than [the grievant's] termination . . . ."[16] *Brantley* v. *New Haven*, supra, 100 Conn. App. 863. We simply cannot conclude that "reasonable people [could] differ as to whether reinstatement or discharge [was] the more appropriate" form of discipline for this absolutely deplorable and repeated misconduct; *Eastern Associated Coal Corp.* v. *United Mine Workers of America, District 17*, supra, 531 U.S. 67; which the grievant per-

sisted in even after the complainant requested him to stop. Indeed, if termination was not required to vindicate the public policy against sexual harassment in the workplace under these circumstances, it is difficult to conceive of circumstances where it would be.

In reaching this conclusion, we take note of the Appellate Court's statement in *Board of Police Commissioners* v. *Stanley*, 92 Conn. App. 723, 742, 887 A.2d 394 (2005), that the "failure to take remedial steps to prevent [the defendant] from engaging in harassment and misconduct" could expose the employer to liability for civil rights violations, "particularly when there [was] a pattern of such inappropriate behavior."[17] See also *Newsday, Inc.* v. *Long Island Typographical Union, No. 915, CWA, AFL-CIO*, 915 F.2d 840, 845 (2d Cir. 1990) (observing that employee had "ignored repeated warnings," and agreeing with lower court's ruling that award reinstating employee "tends to perpetuate a hostile, intimidating and offensive work environment," thereby exposing employer to liability), cert. denied, 499 U.S. 922, 111 S. Ct. 1314, 113 L. Ed. 2d 247 (1991). Similarly, the fact that the grievant's misconduct in the present case was in knowing violation of administrative directive 2.2, egregious, repeated and incorrigible leads us to conclude that his reinstatement would threaten the perpetuation of a hostile work environment in violation of § 46a-60 (a) (8) (C), thereby exposing the plaintiff to liability.

In support of its claim to the contrary, the defendant contends that this court must defer to the arbitrator's findings that the grievant had demonstrated himself to be a good employee, that no other complaints had been filed against him and that the plaintiff had imposed less severe discipline against other employees who had engaged in similarly egregious misconduct.[18] Although we agree that we must defer to the arbitrator's factual findings on these issues, these facts do not affect our legal conclusion that anything less than termination of the grievant for his knowing, egregious, incorrigible and disruptive misconduct in a prison setting would violate the public policy against sexual harassment in the workplace.

The judgment of the Appellate Court is affirmed.

In this opinion NORCOTT, PALMER, ZARELLA, McDONALD and ESPINOSA, Js., concurred.

* This appeal originally was argued before a panel of this court consisting of Chief Justice Rogers and Justices Norcott, Palmer, Zarella and Eveleigh. Thereafter, Justices McDonald and Espinosa were added to the panel and they have read the record and briefs, and listened to a recording of the oral argument prior to participating in this decision.

[1] Administrative directive 2.2 (1) provides in relevant part: "It is the policy of the [d]epartment to provide its employees with a workplace free of sexual harassment, retaliation and related misconduct. The [d]epartment shall investigate and provide appropriate discipline, remedial measures and resolution for each complaint and each reported violation of this policy. Any employee who engages in conduct prohibited by this policy will be subject to discipline, *up to and including termination*. . . ." (Emphasis added.)

Administrative directive 2.2 (7) also provides that "[t]he [d]epartment will not tolerate violations of this [d]irective . . . ." Administrative directive 2.2 (4) defines sexual harassment to include "[g]raphic or sexually suggestive comment about an individual's dress, body, sexual attributes, sexual activities, gender identity, or sexual orientation"; "[m]aking a comment or starting or spreading a rumor that has the effect of embarrassing, ridiculing, or demeaning an individual on the basis of his or her sexual attributes, gender identity, or sexual orientation"; "[j]okes, pranks, vandalism or banter that tend to denigrate or show hostility toward an individual or group on the basis of gender, sexual attributes, or sexual orientation"; and "[u]nnecessary touching . . . of another person."

[2] Article 13, § 3, of the collective bargaining agreement between the parties provides: "No employee who has completed the working test period shall be disciplined or discharged except for just cause. In determining just cause, the regulations of the Blue Book governing disciplinary action as defined above are hereby incorporated by reference." The referenced Blue Book is not in the record before us. At oral argument before this court, however, the defendant represented that the phrase "just cause" is not defined in the collective bargaining agreement.

[3] "The complainant, Raymond D. Sayre, was a coworker of the grievant for seven months." *State* v. *AFSCME*, *Council 4*, *Local 391*, supra, 125 Conn. App. 411 n.2.

[4] General Statutes § 52-418 (a) provides in relevant part: "Upon the application of any party to an arbitration, the superior court for the judicial district in which one of the parties resides . . . shall make an order vacating the award if it finds any of the following defects: (1) If the award has been procured by corruption, fraud or undue means; (2) if there has been evident partiality or corruption on the part of any arbitrator; (3) if the arbitrators have been guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown or in refusing to hear evidence pertinent and material to the controversy or of any other action by which the rights of any party have been prejudiced; or (4) if the arbitrators have exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made."

[5] General Statutes § 52-417 provides in relevant part: "At any time within one year after an award has been rendered and the parties to the arbitration notified thereof, any party to the arbitration may make application to the superior court . . . for an order confirming the award. The court or judge shall grant such an order confirming the award unless the award is vacated, modified or corrected as prescribed in sections 52-418 and 52-419."

[6] General Statutes § 46a-60 (a) provides in relevant part: "It shall be a discriminatory practice in violation of this section . . .

"(8) For an employer, by the employer or the employer's agent, for an employment agency, by itself or its agent, or for any labor organization, by itself or its agent, to harass any employee, person seeking employment or member on the basis of sex or gender identity or expression. 'Sexual harassment' shall, for the purposes of this section, be defined as any unwelcome sexual advances or requests for sexual favors or any conduct of a sexual nature when (A) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (B) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (C) such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment . . . ."

We recognize that § 46a-60 (a) was amended since the time of the incidents in this case. See Public Acts 2011, Nos. 11-55, § 24, and 11-129, § 20. Those changes are not relevant to this appeal. For purposes of convenience, we refer herein to the current revision of the statute.

[7] See footnote 6 of this opinion for the relevant text of § 46a-60 (a).

[8] The defendant in the present case argued to the Appellate Court that the public policy against sexual harassment in the workplace applies only to employers, not to employees. *State* v. *AFSCME*, *Council 4*, *Local 391*, supra, 125 Conn. App. 417. The Appellate Court rejected that argument, stating that "[t]he plain language of the statute . . . does not support such an interpretation. Section 46a-60 (a) (8) expressly prohibits workplace sexual harassment 'by [an] employer, *or the employer's agent* . . . .' " (Emphasis added.) Id., 417–18. The defendant does not challenge this conclusion on appeal to this court, but claims in its brief that the Appellate Court improperly relied on administrative directive 2.2 to support its finding of a well-defined

and dominant public policy against sexual harassment. The Appellate Court expressly stated, however, that, "[b]ecause we conclude that § 46a-60 (a) identifies a clear public policy against workplace sexual harassment, we need not decide whether administrative directive 2.2. identifies the same." Id., 418 n.6. Moreover, the defendant conceded at oral argument before this court that there is a well-defined and dominant policy against sexual harassment in this state. Accordingly, we reject the defendant's claim.

[9] See also *Eastern Associated Coal Corp.* v. *United Mine Workers of America*, *District 17*, supra, 531 U.S. 62–63 (when employer terminated employee for drug use, arbitrator reinstated employee and employer sought vacation of award as violating public policy, "the question to be answered is not whether [the employee's] drug use itself violates public policy, but whether the agreement to reinstate him does so"); *Weber Aircraft*, *Inc.* v. *General Warehousemen & Helpers Union Local 767*, 253 F.3d 821, 826 (5th Cir. 2001) ("[t]he question to be answered is not whether [the employee's] sexual harassment of female co-workers itself violates public policy, but whether the [collective bargaining agreement], which [as interpreted by the arbitrator] provides for his reinstatement does so").

[10] We recognize, however, that a collective bargaining agreement may reserve to the employer "the unreviewable discretion . . . to discharge an employee once a violation of [an employment rule] is found"; *United Paperworkers International Union*, *AFL-CIO* v. *Misco*, *Inc.*, supra, 484 U.S. 41; in which case the arbitrator would be required to defer to the employer's choice of discipline after finding that the employee engaged in the claimed misconduct. See *LB & B Associates*, *Inc.* v. *International Brotherhood of Electrical Workers*, *Local No. 113*, 461 F.3d 1195, 1200 (10th Cir. 2006) ("[w]hen an agreement includes a 'just cause' termination provision and does not *explicitly* provide that an enumerated offense is such cause, the 'profound deference' owed to an arbitrator's decision, coupled with the fact that the parties have bargained for the arbitrator, not the courts, to decide their dispute, compels affirmance of an arbitrator's interpretation" [emphasis in original]); *Bureau of Engraving*, *Inc.* v. *Graphic Communication International Union*, *Local 1B*, 284 F.3d 821, 825 (8th Cir. 2002) (when collective bargaining agreement does not explicitly require termination for conduct at issue and parties have requested that arbitrator determine whether employee was terminated for just cause, court will not disturb arbitrator's determination that conduct did not constitute just cause for termination); *First National Supermarkets*, *Inc.* v. *Retail*, *Wholesale & Chain Store Food Employees Union Local 338*, 118 F.3d 892, 896–97 (2d Cir. 1997) (when just cause is not defined in collective bargaining agreement and agreement does not provide that conduct will automatically result in termination, arbitrator is authorized to determine whether termination was for just cause and is not limited to determining whether employee engaged in specific conduct). If an employer specifies in the collective bargaining agreement that it reserves the nonreviewable power to choose the form of discipline for such misconduct, and the submission to the arbitrator specifies that the arbitrator is authorized to determine only whether the alleged misconduct occurred, not whether the punishment was appropriate, an arbitration award imposing a lesser form of discipline would not necessarily violate public policy, but it would be subject to vacatur as exceeding the arbitrator's powers.

In the present case, article 5, § 1, of the collective bargaining agreement provides in relevant part: "Except as otherwise limited by an express provision of this [a]greement, the [plaintiff] reserves and retains, whether exercised or not, all the lawful and customary rights, powers and prerogatives of public management. Such rights include but are not limited to . . . the suspension, demotion, discharge or any other appropriate action against its employees . . . ." The plaintiff makes no claim that this provision deprived the arbitrator of the authority to determine the appropriate form of discipline if he found that the grievant engaged in sexual harassment. In addition, we note that this provision was not in the portion of the collective bargaining agreement governing grievance and arbitration procedures, but was in a section governing "[m]anagement [r]ights." Accordingly, it is reasonable to conclude that the plaintiff reserved this right vis-a-vis the defendant, not vis-a-vis the arbitrators.

[11] See *Way Bakery* v. *Truck Drivers Local No. 164*, 363 F.3d 590, 596 (6th Cir. 2004) (employer "cites no case, nor have we found any, that establishes a public policy of flatly prohibiting the reinstatement of a worker who makes a racially offensive remark"); *Westvaco Corp.* v. *United Paperworkers International Union*, *AFL-CIO*, 171 F.3d 971, 977 (4th Cir. 1999) ("[t]here is no public policy that every harasser must be fired"); see also *Eastern*

*Associated Coal Corp.* v. *United Mine Workers of America, District 17*, supra, 531 U.S. 67 (when governing statute and regulation reflected public policy against use of illegal drugs by employees in safety sensitive positions but did not require termination of employees who used drugs, court will not infer that public policy requires termination).

We note that this court stated in *Groton* v. *United Steelworkers of America*, 254 Conn. 35, 48, 757 A.2d 501 (2000), that "the public policy against theft also would include the policy that an employer should not be required to retain in a position of financial trust an employee who has been established to have stolen." The public policy against theft does not require the termination of *every* employee who steals, however, regardless of the specific facts and circumstances of the case. If an employer rationally could conclude that a specific instance of theft did not warrant termination, an arbitration award reinstating the employee would not violate public policy. See *State* v. *New England Health Care Employees Union, District 1199, AFL-CIO*, 271 Conn. 127, 138, 855 A.2d 964 (2004) (rejecting proposition that, "if a single instance of deliberate conduct results in any injury to a client, no matter how inadvertent or minor, the conduct is grounds for termination, per se," pursuant to public policy against protecting persons in custody of Department of Mental Retardation from abuse); cf. *E.I. DuPont de Nemours & Co.* v. *Grasselli Employees Independent Assn. of East Chicago, Inc.*, 790 F.2d 611, 620 (7th Cir.) (Easterbrook, J., concurring) ("[i]f no rational firm would enter into a contract expressly excusing theft, then a court should conclude that an arbitrator who does this is indulging a personal quirk, has succumbed to the desire to give someone a 'second chance' and has abandoned his role as honest interpreter of the contract"), cert. denied, 479 U.S. 853, 107 S. Ct. 186, 93 L. Ed. 2d 120 (1986).

[12] The defendant claimed in the Appellate Court that the trial court improperly relied on the letter from Lantz because it was not part of the record before the arbitrator. *State* v. *AFSCME, Council 4, Local 391*, supra, 125 Conn. App. 424. After quoting the letter at length; id., 423 n.10; the Appellate Court stated that "our conclusion that the [trial] court properly determined that the arbitral award in this case violated clear public policy was reached on the basis of the findings as set forth by the arbitrator. Accordingly, we conclude that the facts in the arbitral record, irrespective of [Lantz'] letter, adequately supported the court's ultimate legal conclusions." Id.

We recognize that the only "arbitral record" before the Appellate Court, was the arbitration award itself, and the plaintiff provided no record of the proceedings before the arbitrator to the trial court or to the Appellate Court. This court previously has recognized that the courts cannot determine the lawfulness of an award in a vacuum. See *Stutz* v. *Shepard*, 279 Conn. 115, 128, 901 A.2d 33 (2006) ("We do not decide issues of law in a vacuum. In order to review an alleged error of law that has evidentiary implications, we must have before us the evidence that is the factual predicate for the legal issue that the appellant asks us to consider." [Internal quotation marks omitted.]); see also id., 126 (citing cases in which this principle of appellate review has been applied to arbitration awards); id., 126–27 (concluding that, because plaintiff had failed to present transcripts of proceedings before arbitrator, his claim was unreviewable). We conclude, however, that, although it would have been preferable for the plaintiff to submit a transcript of the proceedings before the arbitrator to the trial court, we may rely on the letter to the extent that it sets forth the complainant's testimony. First, the defendant neither objected when the plaintiff submitted the letter to the trial court nor filed a motion for reconsideration after the trial court released its memorandum of decision, which quoted the letter at length. Rather, the defendant filed a motion for articulation after the appeal to the Appellate Court was filed in which it argued that the trial court's reliance on the letter was inappropriate. The trial court denied the motion and the Appellate Court subsequently denied the defendant's request to order the trial court to issue an articulation. Accordingly, the defendant's claim that the trial court should not have considered the letter was not preserved for review. More importantly, although the defendant claimed in the Appellate Court that the letter inaccurately stated that the grievant's conduct was the " 'most egregious violation of the zero tolerance policy that [Lantz had] ever seen' " and that the letter failed to include other "versions of the facts"; *State* v. *AFSCME, Council 4, Local 391*, Conn. Appellate Court Records & Briefs, September Term, 2010, Defendant's Brief p. 8; the defendant has never claimed that the letter inaccurately characterized the complainant's testimony before the arbitrator. In addition, as we have indicated, the arbitrator expressly found that the complainant's accusations were "true . . . ."

We can perceive no reason why the plaintiff was barred from referring to the specifics of that testimony in its arguments to the trial court when it is undisputed that the characterization of the testimony was accurate and the arbitrator concluded that the testimony was credible. If other evidence casted a different light on the complainant's version of the facts, nothing prevented the defendant from referring to that evidence.

Finally, we take this opportunity to emphasize that, because reviewing courts frequently do not have access to transcripts of arbitration proceedings, it is particularly important and incumbent upon arbitrators to make express reference to the specific evidence on which they rely in support of their findings of fact, as opposed to simply making conclusory statements.

The dissent contends that we should not consider the letter because it is an "unauthenticated" document that was not submitted to the arbitrator. We are considering the letter, however, only to the extent that it sets forth testimony that was presented to the arbitrator. We can see no reason why the plaintiff would have been prevented from referring to such testimony in its brief to the trial court in the absence of any claim that its characterization of the testimony was inaccurate. The fact that the plaintiff chose to attach the letter to its brief instead of referring to the testimony directly does not affect our conclusion.

[13] At oral argument before this court, counsel for the defendant indicated that, although he did not know the source of the phrase zero tolerance as used by the arbitrator, he did not dispute that the grievant understood that the department had such a policy. We recognize, however, that the plaintiff's zero tolerance policy does not require that every employee who engages in sexual harassment must be terminated.

[14] We recognize that administrative "directives are not in and of themselves determinative of public policy. Internal practices and procedures may reflect public policy but those practices and procedures do not determine that policy." (Internal quotation marks omitted.) *State* v. *AFSCME, Council 4, Local 387, AFL-CIO*, supra, 252 Conn. 476 n.10. We conclude in the present case that administrative directive 2.2 reflects the public policy enunciated in § 46a-60 (a). See id. Indeed, the directive expressly refers to the statute as authority.

We also recognize that the question before us is not whether the grievant violated public policy when he harassed the complainant, but whether the grievant's reinstatement violated public policy. The fact that the grievant must have known that he was violating the public policy against sexual harassment is relevant to that question, however, because it bears on the issue of his willingness to conform his behavior to the known requirements of public policy and to be rehabilitated.

[15] See *Washington* v. *Meachum*, 238 Conn. 692, 733–34, 680 A.2d 262 (1996) (noting prison administrators' duty to maintain order and discipline within prison and "Herculean obstacles to effective discharge of these duties"); cf. *Commissioner of Correction* v. *Coleman*, 303 Conn. 800, 826–27, 38 A.3d 84 (2012) (overriding need to secure safety, security, discipline and order in prison warrants force-feeding of inmate engaged in hunger strike); *Commissioner of Correction* v. *Coleman*, supra, 828 (low morale among prison employees could lead to increased absenteeism which, in turn, could affect security of prison). We also take note of the plaintiff's representations at oral argument before this court that the department adopted its zero tolerance policy with respect to sexual harassment in an attempt to put an end to the climate of ongoing, pervasive and severe sexual harassment that prevailed at various workplaces under the department's jurisdiction, in compliance with a federal consent decree that was expressly referred to in administrative directive 2.2. See *Alter & Associates, LLC* v. *Lantz*, Superior Court, judicial district of Hartford, Docket No. CV-04-0831632-S (April 6, 2004) (noting that case of *Allen* v. *Armstrong*, United States District Court, Docket No. 3:02-CV-1370 [D. Conn. January 20, 2004], in which plaintiffs complained of sexual harassment within department, was resolved in part when department agreed to provide ameliorative training to its employees), aff'd, 90 Conn. App. 15, 27, 876 A.2d 1204 (2005).

[16] In support of his argument to the contrary, the dissenting justice relies heavily on this court's decision in *State* v. *New England Health Care Employees Union, District 1199, AFL-CIO*, 271 Conn. 127, 855 A.2d 964 (2004). In that case, an employee of the Department of Mental Retardation terminated the grievant, James Howell, after he was found to have abused a client in the custody of that department, identified only as "Ed." Id., 129–30. The arbitrator found that "Howell, [a coworker, Lisa Miller], and Ed . . . were alone in a room. Howell, who had not worked regularly with Ed but was

aware of his various behaviors and how to respond appropriately to them, attempted to assist Ed to the dining room for supper. When Ed began to act violently, [Howell's supervisor, James C. Hughes] came into the room and ordered Howell to 'let Ed alone and let him calm down.' It is unclear whether Howell followed this instruction. Ed's agitation continued, however, and he swung his arms vigorously. Miller and Howell gave conflicting accounts of what happened next. Miller claimed that Howell laughed at Ed, grabbed both of Ed's upper arms, and pushed him forcibly into a reclining chair about four feet away. Howell denied that he had pushed Ed into the chair, but claimed that he had raised his arms to defend himself from Ed's blows, which caused Ed to 'bounce' off of him and into the chair. It was undisputed that Ed fell hard into the chair and received a [one-half] inch laceration when his arm was pinched between the chair and a side table." Id., 130–31. The arbitrator found that "Howell had deliberately shoved Ed into the chair and concluded that he was 'culpable of patient or client abuse under these circumstances.' " Id., 131. The arbitrator made no finding, however, that Howell had abused Ed within the meaning of General Statutes § 17a-247a (1), which defines "[a]buse" as "the wilful infliction by an employee of physical pain or injury . . . ." See *State* v. *New England Health Care Employees Union*, *District 1199*, *AFL-CIO*, supra, 133. Rather, the arbitrator merely had made a "loose reference to deliberate conduct that resulted in inadvertent injury to the client." Id., 140. Thus, there were no facts that would support a finding that Howell had violated the statute that embodied the public policy against abuse of clients in the custody of the Department of Mental Retardation. In contrast, the grievant's conduct in the present case was in knowing violation of the public policy against sexual harassment in the workplace, as embodied in administrative directive 2.2, it was highly egregious and it was incorrigible. Accordingly, we disagree that *New England Health Care Employees Union*, *District 1199*, *AFL-CIO*, is controlling here.

[17] In rejecting the defendant's claim that the trial court improperly determined that reinstatement of the grievant violated public policy, the Appellate Court relied on *Board of Police Commissioners* v. *Stanley*, supra, 92 Conn. App. 723, and *State* v. *AFSCME*, *Council 4*, *Local 387*, *AFL-CIO*, supra, 252 Conn. 467. See *State* v. *AFSCME*, *Council 4*, *Local 391*, supra, 125 Conn. App. 420–21. In neither *State* v. *AFSCME*, *Council 4*, *Local 387*, *AFL-CIO*, supra, 467, nor *Board of Police Commissioners* v. *Stanley*, supra, 723, however, did the reviewing court apply the analysis that we have adopted in this opinion. Specifically, in neither case did the court ask whether nothing less than termination was required to vindicate public policy. Rather, in *State* v. *AFSCME*, *Council 4*, *Local 387*, *AFL-CIO*, supra, 478, this court concluded that "this case poses a narrow, blatant example of the [department's] proper exercise of its power to dismiss." As we have indicated, the question before the court when applying the public policy exception is not whether the employer's choice of discipline was proper under *our* interpretation of the collective bargaining agreement, but whether the *arbitrator*'s interpretation of the agreement as requiring a less severe form of discipline violates public policy. In *Board of Police Commissioners* v. *Stanley*, supra, 742, the Appellate Court stated that "the defendant's use of a police cruiser to intimidate and to watch the victims and [his] offers to use his position to influence a prosecutor are directly at odds with the public policy of this state." Again, however, the question before this court is not whether the employee's conduct violated public policy, but whether the reinstatement of the employee violated public policy. Accordingly, the persuasive value of these cases is somewhat limited. Nevertheless, we think it likely that the conduct of the employee in *AFSCME*, *Council 4*, *Local 387*, *AFL-CIO*, who anonymously left "a profane and racist" message on the voice mail of a state senator regarding the Senate's recent rejection of a proposed contract provision that affected the employee's union; *State* v. *AFSCME*, *Council 4*, *Local 391*, supra, 469; and the conduct of the employee in *Stanley*, who had engaged in "inappropriate language and conduct . . . including the use of sexual language, grabbing [women's] buttocks, harassment [of women] with a police car's flashing lights and observation by the defendant of [a woman] while she was getting out of a shower"; *Board of Police Commissioners* v. *Stanley*, supra, 726; was so egregious that it would require the termination of the employees under the standard that we adopt herein, and we agree with the Appellate Court that the conduct of the grievant in the present case was comparably egregious.

[18] The defendant provided the arbitrator with "innumerable examples of cases in which the employee being disciplined for sexual harassment

received substantially less discipline than that given to [the] [g]rievant . . . .'' On appeal, the defendant has not provided the details of these incidents of sexual harassment or the form of discipline that the plaintiff imposed. We note, however, that, although we must defer to the arbitrator's factual findings with respect to these incidents, it is ultimately for this court, not the employer, to make the legal determination as to whether a particular form of discipline for a particular incident of employee misconduct complies with the public policy of this state. In other words, the fact that an employer has previously violated a public policy by retaining an employee who should have been dismissed does not alter the public policy or justify additional violations of the public policy.