COURT OF APPEALS
DECISION
DATED AND FILED

August 29, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. ***See*** **WIS. STAT. § 808.10 and RULE 809.62.**

Appeal No. 2012AP2395 **Cir. Ct. No. 2012CV971**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

MIDDLETON EDUCATION ASSOCIATION,

PETITIONER-RESPONDENT,

V.

MIDDLETON-CROSS PLAINS AREA SCHOOL DISTRICT AND MIDDLETON-CROSS PLAINS AREA SCHOOL DISTRICT BOARD OF EDUCATION,

RESPONDENTS-APPELLANTS.

APPEAL from an order of the circuit court for Dane County: C. WILLIAM FOUST, Judge. *Affirmed*.

Before Blanchard, P.J., Sherman and Kloppenburg, JJ.

¶1 PER CURIAM. This case arises from a group grievance filed by the Middleton Education Association (the union) challenging whether there was

just cause for the discipline imposed by the Middleton-Cross Plains Area School District and Middleton-Cross Plains Area School District Board of Education (collectively, the district) upon seven teachers for viewing and sharing on school computers emails containing sexually explicit pictures and inappropriate jokes. The district appeals a circuit court order that confirmed an arbitrator's decision to modify the discipline imposed upon three of the teachers. We affirm for the reasons discussed below.

BACKGROUND

¶2 The district conducted a system-wide audit of its computers after one teacher, Kristen Davis, reported that another teacher, Andrew Harris, had shown her and two fellow teachers an email from Harris's sister that contained a photograph of a nude woman. The district's investigation revealed over thirty teachers and administrators who had accessed inappropriate jokes, sexually explicit materials, or both, on their district-owned computers. Ultimately the district: discharged Harris; pressured an administrator into retirement; removed one retired teacher from the substitute teacher list; imposed suspensions ranging from three to fifteen days on several teachers; and gave reprimands, warnings, or reminder letters to the remaining teachers.

¶3 The union filed a grievance relating to the termination of Harris, the suspensions of five teachers, and the reprimand of one teacher. Two of the suspended teachers settled with the district. The arbitrator determined that there was just cause for discipline of each of the five remaining teachers included in the grievance, but concluded that the level of discipline imposed upon three of the teachers was arbitrarily excessive in relation to the discipline imposed upon other teachers (including those who were not included in the grievance) for comparable

conduct. She then reduced Harris's termination to a suspension and reduced the suspensions of Mike Duren and Gregg Cramer to reprimands. After the union applied to confirm the award, the district moved to vacate it. After hearing argument from the parties, the circuit court confirmed the award. We will set forth more specific facts about the conduct underlying the various levels of discipline imposed in this case as relevant in our discussion below.

STANDARD OF REVIEW

¶4 An arbitrator's award is presumptively valid in this state, due to the strong public policy favoring arbitration as a method for settling disputes. ***Milwaukee Bd. of Sch. Dirs. v. Milwaukee Teachers' Educ. Ass'n***, 93 Wis. 2d 415, 422, 287 N.W.2d 131 (1980). Consequently, our de novo appellate review of an arbitration award is very limited. It is designed primarily to ensure that the parties to the agreement received the arbitration process for which they bargained. ***Racine Cnty. v. International Ass'n of Machinists & Aerospace Workers Dist. 10, AFL-CIO***, 2008 WI 70, ¶11, 310 Wis. 2d 508, 751 N.W.2d 312. We will overturn an arbitrator's award only when the arbitrator exceeded his or her powers. ***Id.***; *see also* WIS. STAT. § 788.10(1)(d) (2011-12).[1] To meet this standard, the party challenging the award must show by clear and convincing evidence that the arbitrator "manifestly disregards the law," demonstrated "perverse misconstruction" or "positive misconduct," or that the award itself is illegal or violates a strong public policy. ***Id.***

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

DISCUSSION

¶5 The district contends that the award reinstating Harris and reducing the discipline imposed upon Duren and Cramer to written reprimands violates strong public policies designed to protect children from exposure to pornography in schools and to protect employees from discrimination or sexual harassment in the workplace. In addition, the district argues that the arbitrator's determination that the disparate disciplinary measures taken against different teachers was arbitrary itself represented an arbitrary and perverse misconstruction of the just cause standard. We will examine each contention in turn.

Public Policy

¶6 "The public policy exception to the general rule of judicial deference should be narrowly construed and limited to situations where the public policy '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.'" ***Sands v. Menard, Inc.***, 2010 WI 96, ¶50, 328 Wis. 2d 647, 787 N.W.2d 384 (citation omitted); *see also* ***W.R. Grace & Co. v. Local Union 759***, 461 U.S. 757, 766 (1983). Here, the district contends that the arbitrator's award violates well-defined and dominant public policies as expressed in: WIS. STAT. § 115.31 (requiring school administrators to report to the state superintendent of public instruction the discharge or resignation of licensed school employees that were based upon "immoral conduct"); 20 U.S.C. § 6777 (section of Children's Internet Protection Act requiring schools to implement technology protection measures to limit the access to harmful materials on any computers purchased with federal funds); and 42 U.S.C. § 2000e et seq. (various provisions of Title VII of

the Civil Rights Act of 1964), together with federal regulations requiring harassment-free work environments.

¶7 As an initial matter, the parties dispute whether Harris's conduct qualified as "immoral conduct" under the version of WIS. STAT. § 115.31 that was in effect at the time—which defined the term as "conduct or behavior that is contrary to commonly accepted moral or ethical standards and that endangers the health, safety, welfare or education of any pupil"—because no children actually saw any of the pornographic images at issue. *See* WIS. STAT. § 115.31(1)(c) (2009-10). They also disagree over whether 20 U.S.C. § 6777 is limited to requiring schools to take measures to block the access of minors to harmful materials online or also requires measures to block the access of adults to such materials.

¶8 We view both of those disputes as only marginally relevant at best. The issue is not whether there is a strong public policy against teachers viewing sexually explicit materials in school or on school-issued computers, even when no children actually see the materials. We can assume the existence of such a public policy for the purposes of this appeal, without getting into a detailed analysis of the cited statutes regarding mandatory reporting of immoral conduct by teachers and the technology protections required as conditions for federal funding of school computers.

¶9 The real issue before us is whether the arbitrator's award—namely, fifteen-day suspensions for two of the teachers, a seven-day suspension for one of them, a three-day suspension for one of them, and written reprimands for three of them—violates the public policy against teachers viewing sexually explicit materials in school or on school-issued computers. We are not persuaded that it

does. To the contrary, we view the arbitrator's decision that discipline was appropriate for each of the teachers included in the grievance before it as an affirmation of the public policies cited by the district. The arbitrator approved the imposition of discipline despite finding that the district's written policies did not directly address either the question of how district employees should respond to inappropriate emails or what use of district-owned laptops away from district property is prohibited. That is, the arbitrator's decision makes clear that the conduct in which the teachers engaged was so obviously inappropriate that discipline was warranted, even in the absence of explicit notice that such conduct would be grounds for discipline.

¶10 The district nonetheless argues that any discipline short of termination for Harris fails to give sufficient weight to the public policy against viewing sexually explicit material in a school. However, that argument is not supported by any published case law in this state and is directly undermined by the district's own decision *not* to terminate the employment of other teachers who also viewed sexually explicit materials in school or on school computers.

¶11 The district further contends that any discipline short of termination for Harris violates the public policy against sexual discrimination in the workplace. In particular, the district urges this court to determine that Harris subjected Davis to harassment—as a matter of law—by showing her an email containing sexually explicit material during a team meeting and by retaliating against her by shunning her after she complained.

¶12 The district's argument on harassment fails to acknowledge the factual findings made by the arbitrator, which included the following: Harris shared the inappropriate email after the team meeting had concluded, at the

request of the other teachers who heard him laughing, and in the context of a long-standing pattern among the team of having personal conversations, including discussion of sexual matters, after meetings; Davis herself never characterized her complaint as one of sexual harassment; tension between Davis and the other team members, including Harris, predated the email incident; and Harris's subsequent emails to another teacher complaining about Davis and threatening to shun her could be seen as merely blowing off steam, since the emails were never sent to Davis and Harris did not actually stop communicating with Davis about work.

¶13 In short, the arbitrator did not, as the district contends, conclude that the unwelcome display of pornographic materials to female colleagues could not constitute sexual harassment as a matter of law. Rather, she determined as a matter of fact that Harris had not displayed the materials during a team meeting; that he had reason to believe that his coworkers would not be offended by the materials; and that his coworkers did not in fact feel sexually harassed. Therefore, we are not persuaded that the arbitrator's decision violated public policy designed to protect the victims of sexual harassment in the workplace.

Just Cause

¶14 The district contends that the arbitrator's disparate treatment analysis perversely misconstrued the just cause standard in the collective bargaining agreement because: (1) the arbitrator failed to consider the district's treatment of non-union district employees; (2) the arbitrator's ultimate imposition of different penalties for those included in the grievance implicitly acknowledges that different offenses warranted different penalties; and (3) Harris's offense was by far the worst among the union members. We do not find any of these contentions persuasive.

¶15 First, we agree with the arbitrator that, since the district administrator and the substitute teacher were not members of the union—and therefore, not subject to the just cause standard in the collective bargaining agreement—they were not similarly situated to the teachers in the grievance. Since those employees could be terminated *without* just cause, the district's decision to terminate its relationship with them does not mean that their conduct rose to the just cause standard. It was therefore reasonable for the arbitrator to consider only whether the district had treated similarly situated teachers similarly when applying the just cause standard.

¶16 Next, the arbitrator agreed with the district that it is appropriate to base the severity of penalties on the nature of the employee's conduct being penalized and on the employee's prior disciplinary history. It does not follow that there was just cause for terminating Harris's employment. The crux of the arbitrator's decision was a balancing of how bad Harris's conduct was in relation to that of any of the other teachers.

¶17 Contrary to the district's assessment that Harris's conduct was by far the worst among the teachers involved, the arbitrator deemed Harris's conduct worse in some respects, but less serious in other respects, than the conduct of other teachers. For instance, the arbitrator deemed it more serious to have *deliberately* accessed pornographic websites on district computers used at home, as some of the other teachers did, than to have passively received inappropriate emails in the school building, as Harris did, and more serious to have sent or forwarded materials than to merely have received them. We will not substitute our judgment for the arbitrator's as to the relative severity of each teacher's conduct. The arbitrator also emphasized that this was Harris's first disciplinary action. This balancing of relevant considerations is precisely what the parties contracted for

when they agreed to have an arbitrator resolve their dispute about the disciplinary actions taken by the district.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.