



## Washington Court Finds State Public Policy Violated by CBA Arbitration Award Reinstating Worker who Hung Noose at Work

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A labor arbitrator's award reinstating an employee who was terminated for hanging a noose in his workplace violated Washington's public policy against discrimination where the arbitrator's lesser discipline (only a 20-day suspension) prevented the employer from effectively discharging its state law duty of eradicating racial discrimination from the workplace. Thus, a Washington Court of Appeals panel has vacated the award. *Int'l Union of Operating Eng'rs, Local 286 v. Port of Seattle*, No. 65037-8 (Wash. Ct. App. Oct. 17, 2011). However, because the trial court exceeded its authority in making its own decision about the appropriate employee discipline, the Court remanded the case for further proceedings.

### The Facts

In December 2007, Mark Cann tied a noose in a length of rope and hung it on a rail overlooking a high-traffic work area. Rafael Rivera, an African-American co-worker with whom Cann had a falling out, was working within 30 feet of the noose. He saw and reported it to their employer, the Port of Seattle. After a lengthy investigation, the employer terminated Cann for violating its zero-tolerance anti-harassment policy. Cann's union, Local 286 of the International Union of Operating Engineers, filed a grievance under its collective bargaining agreement (CBA) disputing the termination. The grievance proceeded to arbitration under the CBA.

### Grievance Arbitration Decision

The arbitrator considered the CBA and the Port's policies and work rules against workplace harassment and discrimination, all of which inform employees that illegal harassment and discrimination will not be tolerated in the workplace. The prohibited conduct specifically included displaying objects that "show hostility to a person because of" his or her race, color, or other protected category. The Port's rules stated that verified violations of its anti-harassment policy were considered "gross misconduct" and could lead to immediate termination.

Cann admitted that he received a copy of the Port's rules, underwent harassment prevention training, and understood the Port's zero-tolerance policy. Cann testified he hung the noose as a joke directed at another employee (not Rivera) and claimed that he was unaware of the noose's discriminatory symbolism. Cann also testified that, when he learned that the noose had offended Rivera, he apologized.

The arbitrator found that, by hanging the noose, Cann violated the Port's anti-harassment policy. The arbitrator "doubted the sincerity of Cann's apology" and concluded that Cann's conduct warranted substantial discipline. However, the arbitrator found the Port did not have just cause to terminate Cann. Commenting that Cann's behavior was "more clueless than racist," the arbitrator ordered the Port to reinstate Cann with most of his lost pay and benefits, reducing his discipline from termination to a retroactive 20-day suspension.

### Trial Court Decision

The Port asked the trial court to vacate the arbitration award, arguing it was contrary to public policy. The trial court agreed that the arbitration award violated Washington's public policy against workplace discrimination

because the award was “excessively lenient.” It vacated the arbitration award, but ordered the Port to reinstate Cann with his 20-day suspension lengthened to six months. The trial court also ordered that Cann “write a sincere letter of apology,” attend diversity and anti-harassment training, and serve a four-year probationary period during which he would be subject to termination for any additional policy violations. The union appealed.

## Competing Public Policy Concerns

Washington’s public policy strongly supports alternative dispute resolution and favors the finality of arbitration awards. Judicial review of labor arbitration awards is limited to deciding whether the arbitrator acted illegally by exceeding his or her authority under the CBA – the court does not decide the merits of the underlying dispute. However, a court may vacate an arbitration award that violates an “explicit, well-defined, and dominant public policy” reflected in specific laws and legal precedents (as opposed to general considerations “of supposed public interests”).

The Court of Appeals easily found that Washington has an “applicable explicit, well-defined, and dominant public policy” against workplace harassment and discrimination. The Washington Law against Discrimination (“WLAD”) declares that “discrimination . . . threatens not only the rights and proper privileges of [Washington’s] inhabitants but menaces the institutions and foundation of a free democratic state.” The appeals court quoted Washington Supreme Court opinions referring to the WLAD as embodying a public policy “of the highest priority” with the “overarching purpose” of deterring and eradicating discrimination in Washington. The WLAD “clearly condemns employment discrimination as a matter of public policy.” Employers who fail to take adequate remedial measures in response to harassment or discrimination may be subject to liability.

## Did the Lenient Arbitration Award Violate Washington’s Public Policy?

The Court next addressed whether the arbitration award violated Washington public policy by “improperly limiting the Port’s ability to comply with the WLAD.” Because this was a case of first impression in Washington, the Court examined cases from other jurisdictions, finding support in cases from Minnesota and Connecticut, and rejecting the union’s reliance on two federal cases.

In the Minnesota case, *City of Brooklyn Center v. Law Enforcement Labor Services, Inc.*, a police officer was terminated for repeated acts of sexual harassment. The arbitrator there concluded that the alleged conduct did not warrant outright dismissal and reinstated the officer without back pay, concluding that the period between termination and reinstatement would constitute appropriate discipline. The Minnesota Court of Appeals vacated the arbitration award in light of Minnesota’s well-defined public policy of preventing sexual harassment.

Similarly, in the Connecticut case, *State v. AFSCME, Council 4, Local 387*, an on-duty corrections officer directed an obscene racial epithet to a state legislator in a telephone message. After the employer discharged the officer, the arbitrator reduced the discharge to an unpaid 60-day suspension. The Connecticut Supreme Court vacated the arbitration award, finding the arbitrator’s attempts to rationalize the officer’s conduct “minimize[d] society’s overriding interest” in preventing such conduct from occurring. It concluded that a lesser sanction would have sent an inappropriate message that “poor judgment, or other factors, somehow renders the conduct permissible or excusable.”

The Washington Court of Appeals examined the arbitrator’s decision about Cann’s discipline in light of these decisions and Washington’s public policy. The Court concluded that the arbitrator’s lenient sanction for Cann “minimized society’s overriding interest in preventing this conduct from occurring and interfered with the Port’s ability to discharge its duty under the WLAD to prevent future acts of discrimination.” The Court distinguished the two federal cases cited by the union, in which courts affirmed arbitration awards reinstating employees who had engaged in discriminatory conduct, by pointing out that both of those cases involved the “far harsher” discipline of a six-month suspension plus, in one case, a five-year probation. It vacated Cann’s arbitration award, concluding

that the award failed to provide an adequate sanction for his conduct, did not discourage repeat behavior, and did not allow the Port to fulfill its duty to provide a discrimination-free workplace.

However, the Court also found the trial court exceeded its authority in imposing an alternate sanction. This impermissibly substituted the trial court's judgment for the arbitrator's decision, which was the bargained-for remedy under the CBA. Accordingly, the Court remanded the case to the trial court for further proceedings consistent with its opinion.

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This case teaches that to pass muster under Washington's clear public policy against discrimination, an employer's discipline for discriminatory workplace must be substantial enough to discourage repeat behavior – even when the perpetrator is protected by a CBA. For additional information about this case or preventing discrimination and harassment, please contact the Jackson Lewis attorney with whom you regularly work.

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