2017 IL App (1st) 162617-U

FIRST DIVISION
December 26, 2017

No. 16-2617

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ILLINOIS DEPARTMENT OF CENTRAL MANAGEMENT SERVICES and ILLINOIS DEPARTMENT OF EMPLOYMENT SECURITY, Plaintiffs-Appellees, v. AMERICAN FEDERATION OF STATE, COUNTY and MUNICIPAL EMPLOYEES COUNCIL 31, LOCAL 1006 UNION, Defendant-Appellant.	) Appeal from the Circuit Court) of Cook County, Chancery) Division)))) No. 15 CH 17887)) Honorable Diane J. Larsen,) Judge Presiding.)))

JUSTICE SIMON delivered the judgment of the court.
Justices Harris and Mikva concurred in the judgment.

ORDER

¶ 1 *Held*: The arbitrator had the authority to reinstate the grievant to her employment position. Public policy did not mandate that the arbitrator uphold the employer's decision to terminate the grievant's employment.

¶ 2 America Evans, an employee of the Illinois Department of Employment Security, was fired after a physical altercation with her supervisor while at work. Under the collective bargaining agreement governing her employment, Evans initiated grievance proceedings that led

to arbitration. The arbitrator reinstated Evans to her position, finding that a 60-day suspension was appropriate. The Department sought judicial review and the circuit court vacated the arbitration award that was entered in Evans' favor. Evans appeals the circuit court's decision to vacate the arbitration award. We confirm the arbitration award and reverse the judgment entered by the circuit court.

¶ 3 BACKGROUND

¶ 4 America Evans was employed by plaintiff Illinois Department of Employment Security. She was employed there for 10 years and had risen to the position of local office supervisor. Her performance reviews showed that she met or exceeded expectations, and she had no record of being disciplined. Evans had been assigned leadership roles including that she sometimes would train other supervisors and sometimes be assigned special projects like providing assistance to other offices that were having trouble keeping up with their caseloads.

¶ 5 In her position as local office supervisor, Evans' superior was local office manager Jose Crespo. Evans was out of the office on a Friday. Evans was apparently out of the office that day because she was working on one of the special projects that she was sometimes assigned. When she returned to the office on Monday, she noticed that internet claims that had been made and that she expected to be processed in her absence had not been processed. She went to Crespo's office unhappy and said something like "if you don't give a fuck, then I don't give a fuck." Crespo was apparently on the phone at the time.

¶ 6 When Crespo finished his phone conversation, he went to Evans' office to discuss the incident. Evans began yelling at him, using profanity and calling him a "motherfucker" and a "loser." Evans then swept the papers from her desk onto the floor. Crespo took a flowerpot that Evans had on the corner of her desk and threw it on the ground.

¶ 7 Evans then attacked Crespo physically. She was trying to hit him and she scratched his

neck, face, chest, arm, and hand. Other workers heard Evans yell "get out of my office you motherfucker" during the confrontation. Photographs were taken just after the incident that show red scratches on Crespo's skin, but there was no blood or broken skin. Coworkers said that they observed Crespo with bruises.

¶ 8 Crespo pressed charges and Evans was convicted of misdemeanor battery. Her sentence was six months of court supervision. At trial, Evans denied that she made any physical contact with Crespo. The court took note of Evans' lack of a criminal background and remarked that the incident seemed to be an unfortunate situation where tempers flared up and things turned physical.

¶ 9 Plaintiff Illinois Department of Central Management Services initiated an investigation and disciplinary proceedings against Evans. At the conclusion of those proceedings, the Department determined that Evans' employment should be terminated as the Department has "no tolerance for physical attacks, threats, and intimidation." The Department stated that Evans violated its policy requiring employees to "conduct themselves in a courteous and respectful manner" when dealing with coworkers. The Department also noted that Evans made false and misleading statements during the investigation providing further justification for her termination.

¶ 10 Evans' employment was governed by a collective bargaining agreement between defendant American Federation of State, County, and Municipal Employees Council 31, Local 1006 (AFSCME) and plaintiff Illinois Department of Central Management Services. The CBA provides that disciplinary action may be imposed on employees, but only for "just cause." The agreement also provides for final and binding arbitration for disciplinary matters. AFSCME, on behalf of Evans, filed a grievance against her discharge and the matter proceeded to arbitration.

¶ 11 The stipulated issue that the arbitrator was called on to resolve was: "Did the employer

have just cause to discharge the Grievant? If not, what is the remedy?" The arbitrator held a hearing where Evans, Crespo, and four other witnesses testified. The arbitrator then issued a detailed 20-page written decision ultimately concluding that Evans violated three sections of the Code of Ethics, but that the Department did not have just cause to discharge her. Instead, the arbitrator found that the appropriate remedy was a 60-day suspension, and she ordered the Department to reinstate Evans.

¶ 12 In arriving at her decision, the arbitrator made certain findings of fact. She found that Evans did use profanity directed at Crespo and did physically attack him, including by scratching him. The arbitrator found that Evans got loud first. The arbitrator also found that Evans gave a false statement to the Department by denying that she attacked Crespo and by stating that Crespo threw the flower pot at her, rather than on the ground. The arbitrator noted that there was no evidence that Crespo engaged Evans physically, but that some of the blame for the occurrence was attributable to him for exercising poor judgment and inflaming the situation. Nevertheless, the arbitrator found that Evans' conduct was "far out of line."

¶ 13 Taking everything into account, the arbitrator concluded that discharging Evans was an excessive and unreasonable punishment. The arbitrator took account of Evans long service to the Department and her clean disciplinary record and strong performance evaluations. The arbitrator saw no reason to believe Evans would repeat this kind of conduct and found that Evans would instead likely return to her strong employment performance and leadership role. The arbitrator also noted that Crespo was partially at fault for how he handled the situation (he was suspended for seven days), and opined that it would be unfortunate for the Department to lose out on Evans' skills and experience based on this one lapse in judgment—an aberration.

¶ 14 Plaintiffs brought this case in the circuit court to vacate the arbitration award. The parties

filed cross-motions for summary judgment. The Department argued that the arbitration award was unenforceable because it violates the State's public policy prohibiting battery, workplace violence, and making false statements. The Department also argued that the arbitrator exceeded her authority under the collective bargaining agreement by interfering with the Department's right to implement and enforce a policy prohibiting workplace violence. The trial court found that both those arguments "were persuasive" and entered judgment for plaintiffs, vacating the arbitration award. AFSCME appeals.

¶ 15 ANALYSIS

¶ 16 Both parties provide authority for the proposition that our review is *de novo*. However, in framing the issues differently, the parties respectively put forth authority that diverges on the issue of whether we are to provide deference to the arbitrator's award. AFSCME cites cases for the general proposition that arbitration awards should be construed, wherever possible, so as to uphold their validity (citing *Rauh v. Rockford Products Corp.*, 143 Ill. 2d 377, 386 (1991)). However, as the issues come into focus from the parties' back-and-forth, the Department has settled on advancing its argument that the arbitrator's award violates public policy. In that context, the Department cites cases for the more specific proposition that deference is not given to an arbitrator's award when the question is whether an arbitration award is void for being against public policy (citing *American Federation of State, County & Municipal Employees, AFL-CIO v. Department of Central Management Services*, 173 Ill. 2d 299, 318, 335-36 (1996)).

¶ 17 To be clear, the Department's only asserted position on appeal is that we should overturn the arbitration award because it violates public policy. In order to apply the public policy exception to set aside an arbitration award, the court must find: (1) that the state has an explicit, well-defined and dominant policy that is expressed in its constitution, laws, and legal precedent;

and (2) that the arbitrator's award violates that public policy. *Id*. at 307-08. The Illinois Supreme Court has, however, also indicated that an arbitration award may be affirmed even if it is contrary to public policy when the arbitrator makes a rational finding that the employee can be trusted to refrain from the offending conduct. *Id*. at 322-23.

¶ 18 The Department maintains that Illinois has a well-defined and dominant public policy against workplace violence. In support, the Department cites the Illinois Constitution which states that one of its purposes is to provide for the health, safety, and welfare of the people. Ill. Const. 1970, preamble. The Department also cites the criminal laws prohibiting violence, particularly battery (720 ILCS 5/12-3(a) (West 2012)) and other more specific laws like the Workplace Violence Prevention Act (820 ILCS 275/1) and the Victims' Economic Security and Safety Act (820 ILCS 180/5) which are both aimed at protecting employees and promoting the safety of Illinoisans while at work. Less persuasive but still supportive, the Department cites the Health Care Workplace Violence Prevention Act (405 ILCS 90/1) and the existence of civil causes of action for negligent retention of an employee and retaliatory discharge (see *City of Harvey v. American Federation of State, County & Municipal Employees (AFSCME), Council 31, Local 2404*, 333 Ill. App. 3d 667, 676 (2002); *Leweling v. Schnadig Corp.*, 276 Ill. App. 3d 890, 893 (1995)) as evidence that the State has a public policy of protecting citizens while at work. The Department maintains that all of these sources of positive law demonstrate that "Illinois has a well-defined and dominant public policy to protect employees from workplace violence."

¶ 19 We agree with the Department that the sources of law in Illinois, not to mention the commonsense realities in the labor and employment sphere, seem to establish the State's public policy against workplace violence and of protecting its citizens at work. However, we do not

need to judicially promulgate that public policy considerations prohibit the reinstatement of someone found to have committed any act of violence in the workplace as a matter of law. To accept the Department's position, we would have to conclude that an arbitrator *must* uphold the discharge of an employee following any incident of violence in the workplace without regard to any mitigating factors or any of the relevant circumstances. Such a holding would be a step too far for this case because our resolution of the appeal does not require us to make an absolute policy decision.

¶ 20 Instead, this case can be decided based on its own facts. The arbitrator made an express finding that "there is no reason to believe that [Evans] would ever repeat this conduct, and every reason to believe that she would return to her record of strong performance and even leadership for IDES." The Illinois Supreme Court has explained the importance of such an arbitral finding. "As long as the arbitrator makes a rational finding that the employee can be trusted to refrain from the offending conduct, the arbitrator may reinstate the employee to his or her former job, and *we would be obliged* to affirm the award." (Emphasis added) *American Federation of State, County & Municipal Employees*, 173 Ill. 2d at 322.

¶ 21 In order to reach the conclusion that Evans could be trusted to not re-offend, the arbitrator took an in-depth look at Evans' history and performance. The arbitrator considered Evans' 10 years of service to the Department, the absence of any disciplinary history, and Evans' strong performance reviews. The arbitrator also took note of Evans' leadership role and the supervisory authority with which she had been entrusted. The arbitrator found the incident to represent a "single instantaneous error of judgment." The arbitrator also took note of Crespo's role in the ordeal, considering the fact that he was also suspended for his unprofessional actions. Even the judge in Evans' criminal battery case viewed the incident as an unfortunate one-off, deserving

light punishment. The judge presiding over that case remarked: "I have no reason to believe that this is your normal character, nor do I have reason to believe that it is likely to occur again."

¶ 22 The case that best supports the Department's argument is *County of De Witt v. American Federation of State, County, Municipal Employees, Council 31*, 298 Ill. App. 3d 634 (1998). In that case, a nurse was fired for striking an elderly resident in her care. *Id*. at 636. The arbitrator reinstated the nurse to her position. *Id*. On appeal, the court explained that there is an established public policy in Illinois to protect the elderly from abuse or harm. *Id*. at 637. The court further explained that the arbitrator's decision, if allowed to stand, would create a "one free hit rule" where employees could strike a resident, without fear of discharge, as long as it was an isolated incident. *Id*. at 638. The court held that "the public policy of this state does not tolerate *any* incidents of abuse upon the elderly, no matter how infrequent or mild." (Emphasis in original). *Id*.

¶ 23 We disagree that *County of De Witt* applies equally here so that we have to create an absolute, bright-line rule that an arbitrator *must* uphold an employee's discharge upon finding that *any* physical contact occurs between coworkers in the workplace. We decline to create a rule that if there is "workplace violence" (a term susceptible to different interpretations) an employee's discharge must be upheld in arbitration no matter how provoked, no matter how minor the violence, and no matter how unlikely it is that the employee will reoffend. Such a rule would frustrate the collective bargaining agreement and intrude on the authority the parties voluntarily gave to the arbitrator to adjudicate matters of employment discipline. The Department agreed to let disciplinary decisions be made in final and binding arbitration on an individualized basis. Courts are duty bound to enforce validly issued labor-arbitration awards premised upon the parties' collective bargaining agreement. *State, Department of Central*

Management Services v. American Federation of State, County & Municipal Employees, Council 31, 2016 IL 118422, ¶ 28.

¶ 24 Most people would probably accept the premise that if you physically attack your boss, you should be fired. And if the arbitrator would have found that remedy appropriate in this case, we likely would have affirmed that too. Sitting in judicial review, however, the court cannot reweigh the arbitrator's interpretation of the facts and evidence, nor can the court reverse an arbitration award merely because it may have decided the issues differently than the arbitrator. *Weiss v. Fischl*, 2016 IL App (1st) 152446, ¶ 21. The judicial review of an arbitral award is extremely limited (*State v. AFSCME, Council 31, AFL-CIO*, 321 Ill. App. 3d 1038, 1040 (2001)), reflecting the legislature's intent to provide finality for labor disputes submitted to arbitration (*City of Harvey*, 333 Ill. App. 3d at 674).

¶ 25 The question is not whether we agree with the arbitrator's optimistic assessment of Evans' future workplace conduct, but only whether that assessment was rational. *City of Highland Park v. Teamster Local Union No. 714*, 357 Ill. App. 3d 453, 467 (2005). Evans' past record of unblemished service can rationally be seen as predictive of future good behavior and productive employment. The incident has no bearing on Evans' ability to perform her job, nor is there any indication that the safety of her coworkers is in peril going forward. The arbitrator must have concluded that Evans was amenable to discipline and rehabilitation as she imposed a 60-day suspension and found that Evans should then return to her position. There was no evidence introduced at the hearing on which we could base any finding that an incident like this might happen again. To the contrary, the arbitrator found that all indications were that something like this was unlikely to occur again as it was an isolated incident of bad judgment.

¶ 26 Because the arbitrator found that Evans could be trusted to refrain from the offending

conduct in the future, the arbitrator was within her contractually-delegated authority to order that Evans be restored to her position, even if that award would have otherwise been against public policy.

¶ 27 CONCLUSION

¶ 28 Arbitration award confirmed.

¶ 29 Circuit court reversed.