STATE OF WISCONSIN
COURT OF APPEALS

MIDDLETON EDUCATION ASSOCIATION,

Petitioner-Respondent,

v.

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

Respondents-Appellants.

District 4
Appeal No. 2012AP2395
Circuit Court Case No. 2012CV971
Three – Judge Appeal

APPEAL FROM THE CIRCUIT COURT FOR DANE COUNTY
THE HON. D. WILLIAM FOUST, PRESIDING

BRIEF AND APPENDIX OF THE RESPONDENTS-APPELLANTS, MIDDLETON-CROSS PLAINS AREA SCHOOL DISTRICT AND MIDDLETON-CROSS PLAINS AREA SCHOOL DISTRICT BOARD OF EDUCATION

Dated: January 11, 2013.

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STATEMENT OF ISSUES

Did the arbitrator exceed her authority within the meaning of Wis. Stat. §788.10 by concluding that the Middleton-Cross Plains Area School District arbitrarily violated the just cause provision of the collective bargaining agreement when it took different disciplinary action with employees that were involved in misconduct with District technology?

The circuit court answered "no."

Was the arbitrator's award in violation of public policy within the meaning of Wis. Stat. §788.10 by reinstating an employee that had received, viewed, and shared pornographic pictures and videos for over a ten year period and, in addition, by reducing two employees' suspensions to reprimands for receiving and viewing pornographic material over a one and one-half year period and for circulating discriminatory humor?

The circuit court answered "no."

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The Respondents-Appellants submit that both oral argument and publication are appropriate in that this case presents an issue concerning judicial review of arbitration awards that has been considered in several cases by federal courts and in at least one state court case, but has not been directly addressed in a published opinion by Wisconsin Appellate Courts: whether an arbitrator's award is void on public policy grounds if the arbitrator substantially reduces a school district employer's decision to discharge and suspend employees for extensive viewing and sharing of pornographic material and for circulating discriminatory "humor" at school during school hours. This case also presents an issue of whether an arbitrator's award exceeds his/her authority under Wis. Stat. §788.10 on grounds that it is an arbitrary or perverse misconstruction of the parties' collective bargaining agreement.

Publication of the court's opinion is appropriate, because Wisconsin school districts, their employees, and their representatives, as well as Wisconsin citizens, will benefit from definitive guidance from the Court of Appeals on pornography in our schools and related issues. Oral argument will assist the Court in examining the issues presented and probing the arguments of the parties, most particularly the manner in which the arbitrator's award violates public policy, and will permit the Court to ask questions related to the voluminous record in this case.

STATEMENT OF CASE

This case involves an appeal from a circuit court decision and order which confirmed an arbitration award. The record is voluminous and, as a result, a more detailed review of the facts is necessary to adequately summarize the relevant facts for the Court.

On October 7, 2009, at the conclusion of a team teacher meeting in the Glacier Creek Middle School, Andrew Harris (Harris) announced that his sister had sent him an email and that the team had to see what she sent him. *R.5.Pt.B,Tr.10:7–11:8.* When Harris opened the email, there was a picture of a nude woman with her legs spread apart and her genitalia pointed toward the camera and painted to look like an archery target. The woman was surrounded by arrows stuck in the ground. *R.5.Pt.B,Tr.11:16-12:19;R.5.Pt.A.Ex.20:231;A-App.188.* The subject section of the email said "Fw: Image XXXXXXX." *R.5.Pt.A.Ex.20:230;A-App.187.*

One of the team[1] teachers, Kristin Davis (Davis), testified that she had seen Harris display inappropriate images in the past.[2] *R.5.Pt.B,Tr.18:23–19:8.* However, this was the first time Davis had seen Harris open such an email with the door open and kids in the hall. *R.5.Pt.B,Tr.37:11-20,73:14-24.* Davis notified the principal and ultimately took her complaint to the superintendent, Dr. Donald Johnson (Johnson). *R.5.Pt.B,Tr.19:15–25,29:23–30:13.*

[1] The teaching team included Harris, Davis, Marlene Feinstein (Feinstein) and Melanie Cochems (Cochems). *R.5.Pt.B,Tr.8:14–9:3.*

[2] Davis acknowledged that during the earlier years she probably reacted by laughing or declaring that the material was disgusting and not right. *R.5.Pt.B,Tr.24:5–9.*

Johnson instructed the Director of Employee Services, Tabatha Gundrum (Gundrum) to investigate. *R.5.Pt.B,Tr.31:23–32:12,79:2-14.*

I. THE DISTRICT'S INVESTIGATION

Gundrum's investigation was comprehensive, although her computer search of Harris' email was limited to the year or so prior to the commencement of the investigation because the District's computer system had crashed in 2008. *R.5.Pt.B,Tr.551:25–552:6.* Nonetheless, the volume of pornographic material found on Harris' computer for the previous year was substantial. In that short time period, Harris received 23 separate email containing pornographic images, obscene jokes, and motion pictures (including pornographic motion pictures). There were roughly 70 different pictures, five movies or moving pictures, and corresponding written material. *R.5.Pt.A,Ex.20:9-10,139-276;R.5.Pt.A,Ex.22.*

The sheer volume of material found on Harris' computer led Gundrum to conclude that the District should look at the rest of the system for similar content. *R.5.Pt.B,Tr.317:20–318:23.* No building or group was exempt. The content of all computers in the District used by school board members, administrators, teachers, staff, and any other personnel was searched using the same terms as in the examination of Harris' computer usage. *R.5.Pt.B,Tr.350:25–351:14.*

The District discovered additional inappropriate material on the computers of multiple employees. Gundrum then interviewed each employee who received or sent pictures or jokes with inappropriate content verifying that the District employee received and viewed those email and attachments. *R.5.Pt.B,Tr.352:5-9.*

Gundrum's findings are included in a summary report of her investigation of high school personnel in early February, 2009. *R.5.Pt.A,Ex.29:12-13*;*R.5.Pt.B,Tr.443:21-444:7*.

The District recommended varying degrees of discipline for the employees involved. The Middleton Education Association (MEA) filed a grievance, challenging the discipline imposed on bargaining unit members.

II. EVENTS LEADING TO DISCIPLINE: THE GRIEVANTS' CONDUCT

A. Harris Accessed And Shared Large Quantities Of Pornographic Material During Work Time And Professional Meetings For Several Years.

Other contents of Harris' computer was consistent with the picture that triggered the investigation, i.e. the photograph of a young woman with an archery target painted around her genitals. The woman is lying down with her buttocks and genitals pointing directly into the camera, with archery arrows sticking out of the ground, around her body, and in front of her head. *R.5.Pt.A,Ex.20:231;A-App.188.*

Other material on Harris' computer included photographs of naked women in prone positions with their genitals exposed to the camera. *See generally R.5.Pt.A,Ex.20.* There was also a pornographic movie on Harris' computer entitled "Lucky Midget," that actually is a film of a person of short stature having sexual intercourse and performing various sexual acts with a variety of women 11 separate times in the movie. *R.5.Pt.A,Ex.20:213-214;R.5.Pt.A,Ex.22;A-App.199-*

203. Any number of the email attachments are specifically identified in the email subject line as "XXX." *R.5.Pt.A,Ex.20:167,194,212,215,217,226,230,270;A-App.187,204.* The subject lines accurately describe the attachments and Harris acknowledged that he viewed each.[3] *R.5.Pt.A,Ex.20:8.*

Many of these email, including the "target" photograph, were sent to Harris by his sister. *R.5.Pt.B,Tr.1991:10-47,1994:18-21.* Harris' responses to his sister's pornographic email were consistently encouraging and soliciting.[4] For example, Harris' reply email included "tell Jason I love him!!!!!!" (responding to an email, identified as "XXX" in the subject line, forwarding 10 images of a woman exposing her breasts and genitals in various poses) *R.5.Pt.A,Ex.20:187;* "gotta love ya!! Just bought a new zero turn mower – should have bought a damn boat!" (responding to an email, also identified as "XXX," featuring twelve slides of topless women posing and fondling one another on a boat) *R.5.Pt.A,Ex.20:209*; "wow! happy easter monday to me!! (acknowledging receipt of the "Lucky Midget" pornographic movie) *R.5.Pt.A,Ex.20:214;A-App.198*; "Wow those are bizarre nips!!!!! …." (responding to an email marked "ADULT CONTENT XXX" and containing five separate images of women's breasts) *R.5.Pt.A,Ex.20:217;A-App.204;* and "Ewwwwwwww!!!! too funny" (in response to the email attachment

[3] Harris could not access one internet link. *R.5.Pt.A,Ex.20:8.*

[4] The arbitrator attempts to distinguish Harris' welcoming enthusiasm from the actions of someone who "actively seeks porn." *R.5.Pt.D.,Dec. at 48;A-App.173.* Harris' level of encouragement makes this a distinction without a difference.

that depicted a woman's painted genitals as an archery target, and whose subject line read "Image XXXXXXX.") *R.5.Pt.A,Ex.20:230-232;A-App.187-89.*

Harris' conduct occurred at a middle school that serves eleven, twelve and thirteen year old children. Nevertheless, Harris received and viewed this material at school, responded to it at school, and shared it with professional colleagues in professional meetings at school, often during the school day.

In several instances, Harris responded during the school day. *See*, e.g., *R.5.Pt.A,Ex.20:155-166,189-193,194-211,213-214,215-216,217-223,224-225,226-229,230-232, and 235-242.* Some of those responses actually were sent while Harris was in class with his twelve and thirteen year old students. Compare *R.5.Pt.A,Ex.20:26-27 with 20:209,211,226,232,242;A-App.189.* Harris also forwarded one of the email to two separate individuals outside of the school district during the school day, leaving indelible evidence that pornography was being sent from a Middleton-Cross Plains Area School District computer during the school day (no matter how many times it was forwarded). *R.5.Pt.A,Ex.20:194-211.*

The material found on Harris' computer represents only a fraction of the pornographic material Harris received on his school's computer and shared with others over the years. Harris testified that he received hundreds of email from his sister on his school computer. *R.5.Pt.B,Tr.1991:10–17.* Harris knew that his sister sent email with sexual content, particularly those email with "XXX" in the subject line. *R.5.Pt.B,Tr.1994:18–21; Tr.2041:25–2042:12.* Harris acknowledged

receiving email from his sister that were sexually charged or contained sexual content between 1.3 and 1.4 times per month over the course of 9 or 10 years. *R.5.Pt.B,Tr.2056:6–16;Tr.2056:17-21*. Harris agreed that all of the "XXX" rated material was inappropriate for a school environment. *R.5.Pt.B,Tr.2130:14–25.*

All witnesses agreed that Harris had been sharing pornography for years. Davis testified that Harris had been sharing pornographic pictures with the team members for almost the entire thirteen years she had worked with Harris (nine years with the same team of four). *R.5.Pt.B,Tr.18:23–19:8;23:17–25;Tr.44:2–9.* Davis' team members confirmed Davis' report. Feinstein testified that she had seen a number of the pornographic images in *R.5.Pt.A,Ex.20* "on Andy's computer." *R.5.Pt.B,Tr.1556:5–10.* Feinstein recalled Harris exhibiting pornographic photos during team meetings over the last three or four years. *R.5.Pt.B,Tr.1554:13–1557:15.* Cochems reported to Gundrum that Harris had displayed pornographic images to the team over the past ten years. *R.5.Pt.A,Ex.20:4.*

B. Harris Retaliated Against The Employee That Reported His Conduct.

When Harris learned that Davis expressed concern to administration over the viewing (and sharing) pornographic material in the classroom, Harris set upon a course of retaliation, enlisting others to assist in his "shunning" of the complaining witness. Harris began his campaign of retaliation against Davis on November 3, 2009, veiled as an "apology."

> I guess i owe you an apology for showing an offending email. It certainly wasn't my intent to offend, in fact after 9 years of attending our team meetings I was quite sure it was impossible to offend. However if i did, i apologize. I am not sure what you hoped to gain by going to Keeler instead of bringing it up with me at team. I did not go Keeler two years ago when the MySpace/facebook issue arose, rather the team brought it up during a meeting and it was dealt with without you getting called into Tim's office as I did. Should I be offended that you invited Kay L. to our team meeting and then chose to read a magazine the entire time she was there?
>
> I truly dont understand your motivation in this case, but I will say that I dont see how it helps the working relationship between you and me or the relationship with the entire block.
>
> I am not sure how to handle the remainder of the year. I cannot trust that anything said in team will not end up in Tim's (the Principal's) lap so I guess I will say very little, and hope the year passes quickly.

R.5.Pt.A,Ex.20:13. Harris enlisted the assistance of the other team teachers, Cochems and Feinstein, in drafting this "apology." *R.5.Pt.B,Tr.2074:11-22.*

Harris also enlisted another teacher, Shelley Festge (Festge), to participate in his campaign of retaliation conduct against Davis. On November 5, 2009, Harris sent Festge the following email:

> * * *
>
> so i need to fill you on the latest block drama. About 3 weeks ago my sister sends me some dumbass email featuring a nude woman (she is known for sending me this stuff on occasion!). So during team i open it and Kristin sees it we laugh move on. Mind you this is a team meeting that includes Melanie the foulest woman on the planet. This is the same team meeting we have had over 9 years during which all sorts of sexual things have been discussed emailed blah blah blah.
>
> Kristen goes to Keeler and says she is offended and worried that i am looking at porn during class time!!
>
> * * *
>
> So I emailed her and told her what a hypocritical bitch she was ant that she had burned the last vestiges of any bridge that remained between us. Melanie talked to a 6th grade teacher who wants to be in 7th grade about having a talk with Kristen about switching next year ……So basically our block SUCKS!!!!!! I have never really felt this degree of hatred for another woman before…..

R.5.Pt.A,Ex.20:32-33;A-App.192-93.

Festge responded that Davis' action was "the most unfair, ridiculous, bullshit thing a colleague could do. She doesn't deserve to have a team." Festge concluded that "I think *I* hate her, too!! And it is good that the rest of your team is supporting you." *R.5.Pt.A,Ex.20:32;A-App.192.*

Harris then referred to Davis as "a bitch from hell and i refuse to speak to her for the rest of the year. not one word." *R.5.Pt.A,Ex.20:31;A-App.191.* Festge suggested "I am going to photoshop Kristin's face onto a playboy pinup and email it to her and then when she looks at it, tell Keeler." Harris encouraged this proposal "ha I love it!!!!!!!!!! actually get to be her facebook friend and then put it on facebook." *R.5.Pt.A,Ex.20:30;A-App.190.*

On November 17, 2009, when responding to Festge's inquiry, "[a]re you still shunning Kristin?" Harris acknowledged "total shun in effect!!!". Festge replied "Operation Total Shun is a truly righteous mission. I still can't believe the balls/stupidity of that woman. Maybe, like ignorance is bliss, ignorance breeds bravado." *R.5.Pt.A,Ex.20:35;A-App.194.*

Gundrum concluded that Harris' conduct was also retaliatory and violative of the District's harassment policy.[5]

[5] The arbitrator dismissed this conduct as "blowing off steam." *R.5.Pt.D,Dec. at 6;A-App.131.* The District's harassment policy specifically states that "[t]here shall be no retaliation against anyone who has reported harassment or who has cooperated in a harassment investigation." *R.5.Pt.A,Ex.20:21.* The harassment policy expressly includes the display of obscene images. *R.5.Pt.A,Ex.20:21.*

C. Gregg (Doc) Cramer Accessed And Shared Large Quantities Of Pornographic And Other Inappropriate Material During Work Hours For Several Years.

The District-wide review of computer system use revealed that additional pornographic and otherwise inappropriate material was accessed, displayed and shared by other employees, primarily at the high school. Gundrum identified five email containing 43 different pornographic or sexually explicit pictures that Gregg ("Doc") Cramer (Cramer) had received from a Thomas Dunn (Dunn). *R.5.Pt.B,Tr.383:19-23.*

Gundrum determined that the volume of pornography was not as great, the subject matter was not as graphic or violent as that accessed and shared by Harris, that it had not been exchanged in professional meetings, and had no evidence that it had been occurring for nearly the same length of time. However, Cramer accessed, stored, viewed, and shared hundreds of pages of jokes, including jokes with adult content images and demeaning, racist, and misogynistic messages. Cramer did so during the school day, storing these materials on the District's computer equipment in a "humor folder." *R.5.Pt.B,Tr.495:13–24,496:3-16*. The printed contents of Cramer's "humor folder" filled a large three ring binder with over a ream of paper, each page (double-sided) containing jokes received or forwarded by Cramer on his District computer, many during the school day. *R.5.Pt.A,Ex.31*.

Gundrum identified numerous examples where the content of the jokes was highly inappropriate, some of which exposed the District to liability for

harassment or discrimination. For example, there are jokes that ridicule based on legally protected classifications, including national origin, religion, and sexual orientation. *R.5.Pt.B,Tr.418:21-419:8.* In fact, Gundrum testified that "a large majority of [the joke material in *R.5.Pt.A,Ex.31*], maybe half or more, contain references that would be violations of [the District] nondiscrimination policy. They reference things like national origin or religion or sexual orientation or just inappropriate language or adult humor in general, some reference nudity, those sorts of things." *R.5.Pt.B,Tr. 465:2-8.* The following are representative of the hundreds of "jokes" Cramer received and distributed using District equipment.

Cramer received an email on December 8, 2009 at 10:27 AM under the subject of "Things you will never hear a man say:" "I think Barry Manilow is one cool m…f…." and "No! I don't want to see your sister's new tits." *R.5.Pt.A,Ex.31:28.*

On November 28, 2009, (a Saturday), Cramer received and saved a photograph of the back of a pick up truck filled with an anatomically correct giant penis. *R.5.Pt.A,Ex.31:137.*

On December 16, 2008, Cramer archived a ten step test entitled "Am I Gay?" that uses statements such as "flaaaaming homo," "Gaylord," and "fudgepacker." *R.5.Pt.A.Ex.31:173-174.*

On April 25, 2009, (a Saturday) Cramer received and saved an email with the subject line "Summer: Check your car's air conditioner," with the picture of a

woman with her breasts exposed with large erect nipples. *R.5.Pt.A,Ex.31:476-478.*

On August 5, 2009 at 4:42 PM, Cramer received an email containing the comment, ostensibly from a gynecologist, that "the best engine in the world is the vagina…" and ending with the complaint that "[i]t is only a pity that the management system is too f….g temperamental." *R.5.Pt.A,Ex.31:529.*

On Thursday, July 30, 2009 at 2:12 PM, Cramer sent an email entitled "Darned clever, these Canadians" in which Canadian currency is depicted with pictures of women with oversized, naked breasts. The caption states that "[t]he Canadians have designed their currency to prevent the radical Muslims from even touching it!" The piece concludes with the comment "Muslim terrorists have to kill themselves if they see a naked woman. Those Canadians always find the solution!" *R.5.Pt.A,Ex.31:548.*

On Wednesday, November 19, 2009, Cramer received and saved an email with the subject line "Parental Advisory" where Santa answered mail from children with comments such as "your dad's banging the babysitter," "who names their kid 'Francis' nowadays? I bet you're gay," "that whiney begging shit may work with your folks, but that crap doesn't work with me." *R.5.Pt.A,Ex.31:898-901.*

These email -- a modest fraction of Cramer's material -- are representative of the type of "humor" Cramer shared at work, on a District computer.[6] Cramer received a 10 day suspension from the District.

D. Michael Duren Accessed And Shared Pornographic And Other Inappropriate Material.

Michael Duren (Duren) also accessed, viewed, and shared email with attachments containing adult content and inappropriate jokes to other staff members during the school day, using District computer equipment. Duren was confronted with eight different email, collectively containing 40 images. *R.5.Pt.A,Ex.29:71-75.* The materials included a series of images of men and women fully clothed in various sexual positions and a picture of Santa Claus urinating from the top of a roof. *R.5.Pt.B,Tr.453:3-14.* Duren admitted to Gundrum that he thought he would likely be terminated if his conduct "went public." *R.5.Pt.B,Tr.470:20-25.* Duren received a 12 day suspension from the District.

E. Other Staff Members Accessed And Shared Pornographic And Other Inappropriate Material.

Other staff members, not part of the bargaining unit, also were involved. Rocky Falcone (Falcone), an associate principal and dean of students at the high school,[7] acknowledged receipt of email that contained content that was inappropriate in a school setting. *R.5.Pt.A,Ex.29:6.* The District determined that

[6] The arbitrator found Cramer's jokes were "mostly harmless." *R.5.Pt.D,Dec. at 54;A-App.179.*
[7] *R.5.Pt.B,Tr.412:3-10.*

Dunn, a retired social studies teacher/long term substitute teacher, sent email to other District teachers while he employed as a substitute teacher. *See, e.g., R.5.Pt.B,Tr.327:21-25,329:24-330:3;R.5.Pt.A,Ex.29:16-68;*[8]*R.5.Pt.B,Tr.332:1-10,333:15-24,334:22-25* (snow sculptures on car having intercourse are in motion when viewed on the computer screen; *R.5.Pt.B,Tr.336:12-22,337:8-15,338:20-24,341:9-19,343:2-10.* Rogeberg, Gustafson, Duren, and Cramer commonly were recipients of Dunn email. *R.5.Pt.B,Tr.344:10-22,346:12-20.*[9]

Dunn was considered a relatively serious offender because most of the pornographic material he sent was directed to the high school from his home email. Dunn was removed from the substitute list permanently. *R.5.Pt.D,Dec. at 21;A-App.146.* Falcone did not stop or report the activity, even though he had administrative responsibilities in the District. *R.5.Pt.A,Ex.29:6; R.5.Pt.B,Tr.1767:7-18.* Falcone elected to resign rather than face termination. *R.5.Pt.B,Tr.609:2-20.*

III. THE ARBITRATION DECISION AND SUBSEQUENT JUDICIAL PROCEEDINGS.

The Middleton Education Association ("Association" or "Union") filed a grievance on behalf of bargaining unit employees that had been disciplined or discharged. The District denied the grievance, and the Association demanded

[8] *R.5.Pt.A,Ex.29:16-68* - email and attached photographs sent by Dunn. *R.5.Pt.B,Tr.350:16-23.*

[9] Pertzborn's and Gustafson's conduct is not summarized in this brief as the discipline imposed by the District was not modified by the arbitrator. Vivoda's and Rogeberg's conduct was not considered by the arbitrator due to the separate settlement with these employees. *R.5.Pt.D,Dec. at 2;A-App.127.*

arbitration. Arbitrator Karen Mawhinney heard testimony over 18 days of hearing and issued an award on February 28, 2012.

The arbitrator found that the District had just cause to discipline each of the grievants under the just cause provision of the collective bargaining agreement between the District and the Middleton Education Association:

> First of all, it must be said that with or without a policy or several policies, everyone knows that you can't have porn on your employer's computer, especially if your employer is a school district. Now how it got there is a matter of some contention here. But essentially, the parties have spent a lot of their efforts debating the finer points of the AUP's and the Arbitrator agrees with the District that even if there were no policy, the conduct at issue would be objectionable and subject to discipline. No one needs a policy to tell them that.

R.5.Pt.D,Dec. at 37-38;A-App.162-63.

The arbitrator found that Gundrum and Johnson used reasonable factors to determine discipline.[10] *R.5.Pt.D,Dec. at 47;A-App.172.* The arbitrator also agreed that teachers are supposed to be role models. *R.5.Pt.D,Dec. at 48;A-App.173.* In fact, the arbitrator found that "[t]he District could have decided to discharge everyone." *R.5.Pt.D,Dec. at 53;A-App.178.*

However, the arbitrator substituted her concept of a "fair" punishment for that of both the District administration and the Middleton Cross Plains Area School District Board of Education (Board of Education) and reduced the discipline accorded three grievants, Harris (discharge reduced to a fifteen day suspension), Cramer (ten day suspension reduced to written reprimand) and Duren (twelve day suspension reduced to written reprimand). The arbitrator did not modify any other

[10] The arbitrator found Harris' conduct was not harassing (or retaliatory) under the District's policies and could not be used for any disciplinary action against Harris. *R.5.Pt.D,Dec. at 43;A-App.168.*

employees' discipline (and did not have jurisdiction over the action taken with personnel from outside the bargaining unit).

> I agree with the Union that when the District discharged Harris, it never looked back. When it found that it had a problem at the high school, it still never looked back. The District could have decided to discharge everyone. Once it decided it was not going to discharge everyone, it could have and should have looked back to see if its decision regarding Harris was in line with the others or whether it was excessive.

R.5.Pt.D,Dec. at 53;A-App.178.

The Association applied to the circuit court to confirm the award and the District responded by moving to vacate the award. The parties stipulated to a briefing schedule before the Honorable John Albert, who also established a date for oral argument. Judge Albert subsequently recused himself, and the matter was transferred to the Honorable William Foust. Judge Foust heard oral argument and issued a decision from the bench following oral arguments, confirming the arbitration award.

The District subsequently appealed to the Court of Appeals.

ARGUMENT

This case exemplifies the reason state statutes governing arbitration preserve supervisory authority to the courts. At the core of her decision, the arbitrator ruled that a school board had just cause to terminate the employment of employees involved in sharing and viewing pornography at school. She did not stop with a determination of the District's contract rights, however. The arbitrator then concluded that the District forfeited that contractual right because it imposed different sanctions on different personnel. In the end, however, the arbitrator

imposed different sanctions on them as well. Thus, she branded the distinctions made by the District as "arbitrary," but then made an award based on the very same "arbitrary" distinctions. This, in itself, makes the award arbitrary and impermissible under Wisconsin law.[11]

The arbitrator also manifestly disregarded the unequivocal public policy determination of Congress that pornography is harmful to children and the policy determinations of our State Legislature that viewing and sharing pornography at school, during school hours, with school equipment is prohibited "immoral conduct" for a licensed educator. The arbitrator reinstated an employee that had undisputedly been receiving, viewing, and sharing pornography at school, during school hours and teacher meetings, for at least ten years. She concluded that since other employees were not terminated (not true in itself), this employee could not be discharged either, but instead imposed a 15 day suspension. *R.5.Pt.D,Dec. at 57;A-App.182.* Thus, she ruled that the employee could not be fired for a "first offense," thereby risking further exposure of students and fellow employees to graphic pornography. *R.5.Pt.D,Dec. at 52;A-App.177.*

An arbitration award that reinstates a teacher who admits to viewing this volume of pornography on school computers during the school day and, equally critically, who undisputedly displayed pornography on multiple occasions in faculty meetings dedicated to planning pupils' education and to meeting specific pupils' educational needs violates public policy.

[11] *See* Argument Section II of this brief, *infra.*

I. THE ARBITRATOR'S AWARD MUST BE VACATED BECAUSE IT VIOLATES ESTABLISHED PUBLIC POLICY AND MANIFESTLY DISREGARDS THE LAW.

Generally, courts are required to grant considerable deference to arbitration awards. The Wisconsin Supreme Court has stated, "[w]hile this Court may disagree with the interpretation of the contract reached by the arbitrator, we will not substitute our judgment for that of the arbitrator." *Dehnart v. Waukesha Brewing Co.*, 17 Wis. 2d 44, 51, 115 N.W. 2d 490 (1962). Similarly, the Court of Appeals has noted that "an arbitration award within the scope of authority delegated to the arbitrator is 'due great deference.'" *City of Madison v. Madison Prof's Police Officers Ass'n.*, 144 Wis. 2d 576, 585, 425 N.W.2d 8 (1988), cited in *Milwaukee Teacher's Educ. Ass'n v. Milwaukee Bd. of Sch. Directors*, 147 Wis. 2d 791, 795, 433 N.W.2d 669 (Ct. App. 1988).

However, arbitrators are not permitted to exceed the authority granted by the parties and disregard the mandates of law, violate public policy, or by issue awards that lack foundation in reason. An award *must* be vacated "[w]here the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made." Wis. Stat. §788.10(1)(d). *See*, e.g., *Milwaukee v. Milwaukee Police Ass'n*, 97 Wis. 2d 15, 292 N.W.2d 841 (1980) and *Eljer Mfg., Inc. v. Kowin Dev. Corp.*, 14 F.3d 1250, 1256 (7th Cit. 1994) *citing Ethyl Corp. v. United Steelworkers of Am.*, 768 F.2d 180, 184 (7th Cir. 1985).

The Court of Appeals owes no deference to the circuit court's decision, as the question of whether the arbitrator exceeded his or her authority under the standards set forth in Wis. Stat. §788.10(1)(d) is a question of law that is reviewed *de novo*. *Racine County v. Int'l Ass'n of Machinists and Aerospace Workers,* 2008 WI 70, ¶11, 310 Wis. 2d 508, 751 N.W.2d 312. State law is interpreted in accordance with its federal counterpart, 9 U.S.C.A. § 10(a)(4) and, accordingly, federal authority is relevant to interpreting Wisconsin law. *Flexible Mfg. Sys. Pty Ltd. v. Super Prods. Corp.*, 874 F. Supp. 247 (E.D. Wis. 1994). *See*, also, *Sands v. Menard, Inc.*, 2010 WI 96, ¶55, n. 27, 328 Wis. 2d 647, 787 N.W.2d 384.

A. An Arbitration Award Must Be Vacated Under Wisconsin Law If It Violates Well Defined And Dominant Public Policy, Or Is In Manifest Disregard Of The Law.

An arbitrator exceeds his or her powers when the award is in manifest disregard of the law. *See Sands*, 2010 WI 96, ¶ 48. An arbitrator manifestly disregards the law when he or she "understood and correctly stated the law but ignored it." *Lukowski v. Dankert*, 178 Wis. 2d 110, 115, 503 N.W.2d 15 (Ct. App. 1993) (citation omitted). Manifest disregard of the law includes failure to consider relevant statutory and case law. *Racine County*, 2008 WI 70, ¶ 33.

Wisconsin law also requires that an arbitration award be vacated if it violates public policy. The Wisconsin Supreme Court has determined that our "courts will overturn an arbitrator's award if…the award itself is illegal or violates strong public policy." *Joint School Dist. No. 10 v. Jefferson Ed. Ass'n*, 78 Wis.2d 94, 117-18, 253

N.W.2d 536 (1977); *see also e.g. Kadlec v. Kadlec,* 2004 WI App 84, ¶14, 272 Wis.2d 373, 679 N.W.2d 914 and *Sands*, 2010 WI 96, ¶48.

Similarly, the United States Supreme Court has determined that an arbitration award must be vacated on public policy grounds if the public policy is "well defined and dominant." Public policy is ascertained by "reference to the laws and legal precedents and not from general considerations of supposed public interests." *W.R. Grace & Co., v. Local Union 759*, 461 U.S. 757, 766 (1983).

Thus, courts will vacate an arbitration award when this standard is met. *See*, e.g., *Iowa Elec. Light & Power v. Local Union 204 of Int'l Bhd. of Elec. Workers*, 834 F.2d 1424, 1427 (8th Cir. 1987) (award reinstating discharged employee vacated on pubic policy grounds, because employee violated nuclear safety rule by propping door open for his convenience); *Stroehmann Bakeries, Inc., v. Local 776 Int'l Bhd. of Teamsters,* 969 F.2d 1436 (3rd Cir. 1992) (award reinstating discharged employee vacated, because re-employment would impair public policy of preventing sexual harassment); and, *Am. Fed. of State, County & Mun. Emp. Mgmt. Serv.*, 671 N.E.2d 668 (Ill. 1996) (award reinstating employee vacated where welfare specialist falsely reported on children's health under child welfare law).

The arbitrator's award in this case violates the well-defined and dominant public policies of protecting children from pornography in our public schools, against harassment in the workplace, and against discrimination in our schools.

B. The Arbitrator's Award Violates Well Defined And Dominant Public Policy.

1. Wisconsin law establishes that viewing and sharing pornography in our schools constitutes "immoral conduct" in violation of public policy.

Wisconsin's established public policy of protecting children from pornography in our schools is specifically set forth in Wis. Stat. §115.31. Under this statute, a school district administrator is required to report certified personnel to the State Superintendent of Public Instruction if "[t]he person is dismissed, or his or her contract is not renewed, by the employer based in whole or in part on evidence that the person engaged in immoral conduct." Wis. Stat. §115.31(3)(a)3. School district administrators are obligated to report even in circumstances where a licensee resigns if the administrator has reason to believe that "the resignation relates to the person having engaged in immoral conduct." Wis. Stat. §115.31(3)(a)4. Therefore, Wisconsin's public policy concerning "immoral conduct" transcends situations involving discharge or arbitration, and is so compelling that reporting is required regardless of whether an employee's separation from employment is voluntary or not.

"Immoral conduct" means "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." Wis. Stat. §115.31(1)(c). *See, also, R.5.Pt.A,Ex.45*. This includes viewing and sharing pornographic material at school during school hours. The Wisconsin legislature emphatically reminded the

public that "'immoral conduct' includes the intentional use of an educational agency's equipment to download, view, solicit, seek, display, or distribute pornographic material" well before the arbitrator issued her decision in this case. Wis. Stat. §115.31(1)(c) (amended in 2011 Wis. Act 84, eff. December 9, 2011). Even before this bipartisan, unanimous clarification was made to the statute, the Department of Public Instruction ("DPI") had concluded that viewing pornographic material at a school computer in a classroom constituted "immoral conduct" within the meaning of Wis. Stat. §115.31.[12]

Wisconsin courts also have determined that viewing pornography at school constitutes "immoral conduct" as defined in Wis. Stat. §115.31(1)(c), and that the prohibition against "immoral conduct" constitutes a well defined, established public policy for purposes of reviewing an arbitration award. In *Cedarburg Education Ass'n. v. Cedarburg Board of Education*, Circuit Court Case No. 06-cv-501, Ozaukee Co. Cir. Ct., (Mar. 29, 2007) an arbitrator ruled that the Robert Zellner's single act of viewing pornography on a district computer for slightly over a minute at school on a Sunday was insufficient cause for the District to terminate his employment, and reduced the sanction to a reprimand. *R.12:40-43;A-App.210-213.*

The circuit court vacated the award on public policy grounds, finding that the arbitrator's conclusion "completely ignores the stated policy of the Wisconsin

[12] *See*, e.g., *In the matter of the teaching license(s) of Kent A. Tollakson. R.12:44-49;A-App.214-219.* In *Tollakson*, according to the Department of Public Instruction (DPI), "[t]he investigation was commenced because of allegations that Tollakson used his school computer resources to view pornography at school." The DPI could not have asserted jurisdiction over such conduct and commenced an investigation on these grounds if the conduct alleged did not meet the definition of "immoral conduct" under Wis. Stat. §115.31.

Legislature which defines as 'immoral conduct' in Wisconsin Statutes 115.31… The arbitrator's conclusion that immoral behavior is some sort of infraction that can be lumped with other violations in absence of a stated policy is clearly at odds with Wisconsin law." *R.12:42;A-App.212.* The circuit court went on to state, "… clearly the expression of the public policy of this State as set forth in Wis. Stats 115.31 should be sufficient notice to any person that there will be severe consequences when any rule violation crosses into such type of conduct." *R.12:42;A-App.212.*

Harris' conduct over the course of several years completely eclipses Zellner's weekend lapse of judgment. Harris received, viewed and shared several separate pornographic transmissions, much of it more severe, hardcore XXX pornography, and did so at school during the school day. The email attachments that he viewed and, on occasion, shared at teaching team meetings contained innumerable pornographic images, any number of which explicitly displayed female genitalia and, in one case, depicted a woman's genitals as a target for hunting with bow and arrow. *R.5.Pt.A,Ex.20:139-276.* Further, the attachments include videos and movies, one of which can only be described as hardcore, hateful pornography.[13] *See e.g. R.5.Pt.A,Ex.22.*

Yet, the arbitrator held that the District failed to show that any of the grievants engaged in "immoral conduct" because students' health, safety, welfare,

[13] The film "Lucky Midget" is a graphic, hardcore pornographic video of a man of short stature engaged in multiple sex acts with multiple female partners. *R.5.Pt.A,Ex.22;A-App.199-203.* Harris watched the entire film at his desk in a public school classroom *R.5.Pt.B,Tr.1991:18-20,1992:10-15* and then wrote back to his sister (who sent him the film) "happy easter Monday to me!" *R.5.Pt.A,Ex.20:214;A-App.198.*

or education were not endangered. *R.5.Pt.D,Dec. at 55;A-App.180.* The arbitrator reached the conclusion that "immoral conduct" under state law could not have occurred unless the District could prove that children actually viewed the pornography in question. *R.5.Pt.D,Dec. at 27,30-31,33,55;A-App.152,155-156,158,180***.** Indeed, the arbitrator actually treated the letter that Superintendent Johnson sent home to parents (which simply assured parents that children were not involved in the incidents involving pornography) as an admission by the District that it did not truly believe that students' welfare or educations were endangered by a steady diet of viewing and sharing pornography at school. *R.5.Pt.D,Dec. at 27,30-31,33;A-App.152,155-156,158,* referring to *R.5.Pt.A,Ex.46.*

In essence, the arbitrator determined that no matter how much pornography the faculty or staff possess or share at school, there is no "immoral conduct" if the pornography is not directly displayed to students. This point of view more than disregards the public policy which to shield children from pornography, particularly in the schools, it flouts it. The arbitrator's contention -- that children must be exposed to pornographic material for it to endanger their health, safety, welfare, or education -- ignores what it means to "endanger." Risks don't have to have fully materialized to be real and immediate (for example, guns can endanger even if no one points or shoots them and bomb scares endanger even though they are essentially hoaxes that don't involve any real explosives). The arbitrator's pronouncement confuses endangering (which is what the statute prohibits) with

actual harm and, in the process, prescribes a standard for conduct that is itself dangerous to the health, safety, welfare, or education of our children.[14]

The question of whether showing pornographic pictures to other teachers in team meetings and watching actual pornographic movies at one's desk in a classroom constitutes "immoral conduct" within the meaning of the statute is an issue that the court reviews *de novo.* As a result, this Court need not adopt the arbitrator's conclusion in determining state public policy or the meaning of state statutes. The arbitrator's interpretation of the "immoral conduct" standard -- that circulation of pornography in our schools does not endanger pupils' welfare or education so long as it is not displayed directly to pupils -- is not the public policy of the State of Wisconsin.

The Court of Appeals should vacate the award as contrary to public policy and in manifest disregard of the law.

2. Federal law expressly and specifically declares that it is the public policy of the United States to protect school children from pornography.

The well-defined and dominant public policy of protecting children from pornography in our public schools is also established by the Children's Internet Protection Act ("CIPA"), a federal law that was enacted for the specific and express purpose of keeping pornography out of public schools. CIPA requires school

[14] The arbitrator's failure to apply the endangerment standard set forth in Wis. Stat. §115.31 is inexplicable particularly where the District established that, in a previous case, a teacher had been suspended for saving photographs with nudity on his computer and the misconduct came to light because students were able to access his computer and find the photographs. *R.5.Pt.D,Dec. at 28;A-App.153.*

districts to block or filter both student *and* adult access to obscene or pornographic pictures and to implement internet safety policies. 20 U.S.C. § 6777. CIPA was enacted to protect students from being exposed to pornography while at school. Pornography is specifically defined by the statute as "harmful to minors."

This very public policy basis for vacating an arbitrator's award was considered by the court in *Board of Education, Peru Cent. School Dist. v. Stephney*, 800 N.Y.S.2d 811 (2005). In *Stephney*, a second grade teacher viewed pornography numerous times in his classroom when students were not present and, when his conduct was discovered, his employment was terminated. *Stephney*, 800 N.Y.S.2d at 813. The arbitrator ("hearing officer") reduced Stephney's discipline to a suspension without pay for the remainder of the school year and ordered him reinstated after the suspension was served. *Stephney*, 800 N.Y.S.2d at 813. On appeal by the school board the court found that it was "bound by public policy concerns to vacate the award." *Stephney*, 800 N.Y.S.2d at 815. Specifically, the *Stephney* court found that state and federal legislation, most notably including CIPA, demonstrated a public policy of protecting children from pornography. *Stephney*, 800 N.Y.S.2d at 815.

This arbitration award here simply cannot stand in light of the policy mandates of CIPA. The sheer volume of inappropriate material (particularly viewed and shared by Harris) leads to the conclusion that it was only a matter of time before a student walked into the classroom, found a way to access the material, or somehow was exposed to it through other means. Moreover, the danger presented by pornography in the school extends beyond the risk that children might see the

inappropriate material, to the risk of pubescent children being the object of consideration of those who only moments earlier were viewing graphic and misogynistic pornography. The noxious mixture of pornography during prep periods or team planning time, followed by instructional time with children, cannot be tolerated.

A school cannot uphold the policy purposes of CIPA if it cannot discharge repeat offenders that regularly view pornography on District equipment, in the classroom, during the school day, and certainly those who introduce the most lurid pornography in academic staff meetings or actually watch pornographic videos of live sex acts in their classrooms over several years. As in *Stephney*, this court should vacate that portion of the arbitration award that reduced Harris' discharge to a fifteen day suspension and reduced the suspensions of Cramer and Duren to written reprimands.

3. State and federal law mandate preventing sexual harassment and establish that reporting sexually harassing behavior is protected conduct as a matter of public policy.

The arbitrator's decision also is in clear violation of well-defined public policy[15] that protects victims from discrimination and sexual harassment. The arbitrator's pronouncement that Harris' behavior should not have been reported to management and, instead, should have been worked out privately with the alleged

[15] The District's harassment policy implements the mandates of state and federal law on sex discrimination and sexual harassment. *R.5.Pt.A,Ex.20:21-23.*

perpetrator undermines this important public policy. *R.5.Pt.D,Dec. at 41-42;A-App.166-67.*

Title VII of the Civil Rights Act of 1964 (Pub. L. 88-352) ("Title VII") has long prohibited sexual harassment, including hostile work environment harassment. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986). The employer must have a procedure for resolving sexual harassment complaints. The procedure should be designed to "encourage victims of harassment to come forward" and should not require a victim to complain first to the offending supervisor. *Vinson*, 477 U.S. at 73.

Federal courts uniformly recognize that an employer's complaint mechanism must provide a clear path for reporting harassment.[16] Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq. *See, also, E.E.O.C. v. Mgmt. Hospitality of Racine, Inc*. 666 F.3d 422, 435 (7th Cir. 2012). The policy should provide for a meaningful process whereby an employee can express his or her concerns regarding an individual in a working environment. Civil Rights Act of 1964, § 703(a)(1), 42 U.S.C.A. § 2000e-2(a)(1). *Gentry v. Export Packaging Co*. 238 F.3d 842, 847 (7th Cir. 2001). Reporting, itself is, protected activity. *Worth v. Tyler*, 276 F.3d 249, 265 (7th Cir. 2001).

[16] Wisconsin's Fair Employment Act provides for substantially similar protections under state law. Wis. Stat. §111.31. An employer is liable for employees' sexual harassment if it fails to investigate allegations of harassment or dismisses the conduct as "horseplay" or "childishness." *Bowen v. Stroh Die Casting Co.*, ERD Case No. CR200301568, (LIRC, 10/28/11).

Federal regulations implementing federal law state that the employer must provide a harassment free working environment and protected employee reporting is essential to meeting this obligation. 29 CFR § 1604.11. The EEOC's Enforcement Guidance on Sexual Harassment also notes that an employer's sexual harassment policy should encourage victims to come forward and should ensure confidentiality as much as possible and provide effective remedies, including protection of victims and witnesses against retaliation. EEOC Policy Guidance on Current Issues of Sexual Harassment, No. N-915-050 (Mar. 19, 1990); EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, No. 915.002 (Jun. 18, 1999).

The EEOC's policy statement also prohibits retaliation:

> An employer should make clear that it will not tolerate adverse treatment of employees because they report harassment or provide information related to such complaints. An anti-harassment policy and complaint procedure will not be effective without such an assurance.

EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors , No. 915.002 (Jun. 18, 1999).

There can be no question that there is a well-defined, established public policy commitment to eliminating sexual harassment in the workplace, and to protecting and encouraging reporting of harassment.

The District has an appropriate policy to implement state and federal law. The policy defines "sexual harassment" as "any deliberate, repeated or unwanted verbal or physical sexual contact, sexually explicit derogatory statement, or

sexually discriminating remark that is offensive or objectionable to the recipient or which causes the recipient discomfort or humiliation or which interferes with the recipient's academic or work performance." The policy states that "[s]exual harassment can take the form of…display of graphic or written sexual material…". The policy separately guarantees that "[t]here shall be no retaliation against anyone who has reported harassment or cooperates in a harassment investigation." *R.5.Pt.A,Ex.20:21-23.*

The Board of Education found that Harris' behavior was "harassment" under its policy as part of its decision to discharge Harris. *R.5.Pt.A,Ex.16*. The arbitrator, however, declared that displaying pornography at professional team meetings which included Harris and three female colleagues in the classroom, at work, on school days, is not harassment. *R.5.Pt.D,Dec. at 41;A-App.166.* Indeed, the arbitrator went still further. *R.5.Pt.D,Dec. at 41;A-App.166.* The arbitrator belittled Davis' testimony and stated that "shunning" her was hardly any retaliation. *R.5.Pt.D,Dec. at 42;A-App.167.* Then, even more remarkably, the arbitrator actually stated that Davis should have dealt directly with Harris or the team about her concern over displaying pornography at team meetings, rather than act on her legally protected right to report to management. *R.5.Pt.D,Dec. at 41-42;A-App.166-67.*

The arbitrator's finding compromises the legally protected rights of District employees under established federal and state law concerning sexual harassment,

most notably protected employee reporting.[17] This finding also violates established public policy and provides additional grounds for vacating the award.

4. The circuit court erred by giving great deference to the arbitrator's public policy and legal determinations.

The Court of Appeals reviews the arbitration award directly and owes no deference to the circuit court. Nevertheless, the circuit court's opinion requires brief review to illuminate the issues concerning established public policy and manifest disregard of the law that are presented on appeal.

The circuit court began by acknowledging that this case presents established public policy imperatives, stating that:

> There is strong public policy to keep pornography away from children. Nobody questions that. The arbitrator didn't question that. The arbitrator didn't say, "It's okay to have this stuff in school." The arbitrator said, "Discipline is appropriate, the discipline on Mr. Harris went too far."

R.27:62;A-App.110.

The court then referenced the *Cedarburg* case, stating that:

> Judge McCormick over in Ozaukee County in that -- the other case that's been cited overturned an arbitrator who said discharge is going to far. I think that's right. He cited 115.31. He's ultimately affirmed by the Court of Appeals.

R.27:63;A-App.111.

However, the circuit court also indicated that Harris' behavior was different "in some ways" than that of the Cedarburg teacher, because Zellner made an internet search for pornographic material, while Harris received it through email,

[17] Wis. Stat. §118.13 also prohibits pupil discrimination. This and related prohibitions also are implicated by the so-called "humor" that circulated at the high school. *R.5.Pt.A,Ex.31.*

primarily from his sister. *R.27:61-62;A-App.109-110.* Most critically, the circuit court here found that "[t]he arbitrator apparently concluded that because Mr. Harris' materials didn't make it to any pupil, no pupil was actually endangered. And I can't say that's a perverse misconstruction of the statute." *R.27:63;A-App.111*. Consequently, the court concluded that the award did not violate public policy. *R.27:64;A-App.112.*

The circuit court deferred to the arbitrator on matters that are reserved to the courts under Wis. Stat. §788.10. Arbitrators are entitled to considerable deference in resolving disputes that have been submitted to them over the interpretation and application of *contract language*. However, for purposes of review on grounds of public policy or manifest disregard of the law, the courts cannot defer to the arbitrator's determination of public policy or construction of statutes. For similar reasons, courts are not required to accept an arbitrator's determinations in reviewing an award on public policy grounds, because to do so would undermine the public policy doctrine itself. Arbitrators are restricted by public policy and law; they do not define them.

In this regard, the circuit court's comparison to the *Cedarburg* case illustrates the point. In *Cedarburg*, a teacher conducted an internet search for pornographic material that lasted barely over a minute, on a Sunday, when no students were present. In contrast, in this case a teacher (Harris) had been receiving pornographic material for roughly ten years. The volume of material that we have represents only a year or so of those communications. Almost every

time they were received, Harris responded with cheery, solicitous gratitude and -- not surprisingly -- his sister continued to send him more and more. Further, Harris' activity did take place during the school day, while he was at his desk, when children were in the building and, in at least one instance, the classroom. Finally, Harris periodically shared the pornographic images (such as the "target" picture of exposed female genitalia) at teaching team meetings.

The decision whether Harris' conduct "endangered" students' welfare or education within the meaning of Wis. Stat. §115.31 must be made by the courts. If the courts merely defer to the arbitrator, we will be left with the anomaly created by the comparison to *Cedarburg*, particularly where there is no serious support for the proposition that what Zellner did even approached the risk of harm to students created by Harris' conduct. This type of deference to arbitral determination will result in "public policy" that varies from arbitrator to arbitrator. No award could violate public policy, because the arbitrator would decide what public policy is in the first instance. Yet, arbitrators do not have, and should not have, the authority to decide what constitutes public policy.

The arbitration award reinstating Harris logically must be vacated in that it violates public policy.

II. THE ARBITRATOR'S AWARD MUST BE VACATED BECAUSE IT IS WITHOUT FOUNDATION IN REASON AND IS A PERVERSE MISCONSTRUCTION OF THE PARTIES' AGREEMENT.

An arbitrator cannot substitute his/her own discretion for that vested in one of the parties. *Nicolet High School Dist. v. Nicolet Educ. Ass'n.*, 118 Wis. 2d 707,

348 N.W.2d 175 (1984). An arbitrator's award can be reversed for "perverse misconstruction" or "gross mistake" by arbitrators. *Id*., and *Jt. School Dist. No. 10,* 78 Wis. 2d at 116-117. Similarly, an award that is "without foundation in reason" must be reversed. *City of Oshkosh v. Oshkosh Public Library Clerical and Maintenance Emp., Union Local 796-A,* 99 Wis. 2d 95, 107, 299 N.W.2d 210 (1980).[18]

These cases recognize the considerable deference that is afforded arbitration awards under Wisconsin law, but identify exceptions to that rule of deference. This case falls within these exceptions, because the arbitrator's award is a perverse misconstruction of the parties' agreement, and is itself arbitrary and without foundation in reason. The arbitrator's entire analysis and award was based on her finding that the District arbitrarily imposed disparate treatment on the employees involved, but this determination was, in itself, arbitrary. *R.5.Pt.D,Dec. at 51-53;A-App.176-78.* Therefore, the award must be vacated under applicable precedent.

The arbitrator initially interpreted the collective bargaining agreement to mean that an arbitrator should not substitute his/her judgment for that of an employer in making disciplinary decisions:

> This Arbitrator has stated in many other cases that once it is determined that there is just cause for discipline, arbitrators should hesitate to second guess the level of

[18] The Court also determined that, where a statutory duty or prerogative is reserved as a management right under a municipal labor contract, a reviewing court may assess the validity of an arbitration award in light of the employer's statutory obligation and, in such cases, the arbitrator's judgment will not be given the deference that it might otherwise be awarded in the absence of relevant statutory authority. *City of Oshkosh*, 99 Wis.2d at 109.

> discipline imposed. If arbitrators were likely to reduce penalties in arbitration, unions would take every disciplinary action to arbitration. Thus, an arbitrator should not substitute his or her judgment for that of management unless the penalty is clearly excessive, unreasonable, discriminatory, arbitrary, or management has abused its discretion.

R.5.Pt.D,Dec. at 55;A-App.180. [19]

The arbitrator then stated that the District could have discharged everyone involved and that, therefore, it has a right to discharge under the just cause provision. The arbitrator ruled:

> The District could have decided to discharge everyone. Once it decided it was not going to discharge everyone, it could have and should have looked back to see if its decision regarding Harris was in line with the others or whether it was excessive.

R.5.Pt.D,Dec. at 53;A-App.178.

This is the arbitrator's interpretation of the collective bargaining agreement. What followed was an application of that agreement that meets our courts' tests for arbitrary, perverse decision-making.

A. The Arbitrator's Disparate Treatment Analysis Lacks Foundation In Reason.

The arbitrator began her disparate treatment analysis by stating that "[w]hat the District refuses to acknowledge is the similarity between Harris and the high school teachers who were suspended" and added that, "[s]o much disparate treatment results in the discharge being unreasonable, arbitrary, excessive, and an abuse of discretion." *R.5.Pt.D,Dec. at 45,53;A-App.170,178.* On this basis, she concluded that, while the District could have discharged everyone, Harris'

[19] This is consistent with Arbitrator Mawhinney's own rulings in other cases. See, e.g., *Milwaukee County*, Case 424, WERC No. 54226, MA-9591 (Mawhinney 1996) and *Manitowoc County*, Case 399, WERC No. 64499, MA-12920 (Mawhinney 2006).

discharge could not be upheld because "[i]t becomes arbitrary and an abuse of discretion to hold one person accountable with the ultimate penalty while others are not held to the same standard." *R.5.Pt.D,Dec. at 56;A-App.181.* Consequently, the arbitrator determined that the District had the right to terminate under the contract, but ruled that this alleged disparate treatment empowered her to substitute her judgment for that of the District.[20]

To perfect this premise, the arbitrator began by refusing to consider the fact that the District ended its employment relationship with other employees besides Harris. *R.5.Pt.D,Dec. at 51;A-App.176.* In this regard, Dunn was responsible for sending most of the pornographic material that was then viewed by other teachers at the High School from an external email address. *R.5.Pt.A,Ex.29:9.* Falcone had an administrator's employment contract with the District and was included in the group that received pornographic email; however, in spite of his position, he did nothing to stop their circulation as an agent of management. *R.5.Pt.A,Ex.29:6;R.5.Pt.B,Tr.1767:7-18.* The District terminated its employment relationship with both, just as it did with Harris.

[20] The arbitrator confused the District administration's recommendations to terminate Harris' employment with the Board of Education's decision to discharge him. Only the Board of Education has the authority to discharge a teacher or administrator under Wisconsin law. Wis. Stats. §§118.22 and 118.24. Further, the *only* decision made by the Board of Education (now under scrutiny) was the decision to discharge Harris. All other disciplinary decisions were made by the District administration without adjudication by the Board of Education. Absent any comparison to other individuals who were disciplined by the Board, there was no rational basis to question the decision of the Board on grounds of "disparate treatment."

The arbitrator concluded that this did not count in evaluating how the District compared each employee's situation in making disciplinary decisions. In this regard, the arbitrator stated:

> The Arbitrator assumes that the District is talking about one administrator (Falcone) who was apparently forced to resign, and one substitute teacher (Dunn) who was taken off the sub list. Dunn was not an employee who could be fired by the District, although he could lose potential work opportunities by being taken off the sub list. Falcone was an administrator and as such, had no recourse to the just cause standard of a collective bargaining agreement.

R.5.Pt.D,Dec at 45;A-App.170.

The arbitrator expanded on this critical issue again at the outset of her disparate treatment analysis:

> It is not appropriate to compare Harris with Falcone and Dunn. Dunn was not an employee of the District but was a substitute teacher who had no right to continued employment. The District removed him from the substitute call list. Falcone was an administrator who was an at-will employee with no recourse to a just cause standard for termination. Neither Falcone or Dunn was similarly situated to Harris.[21]

R.5.Pt.D,Dec at 51;A-App.176.

The arbitrator deliberately skewed the disparate treatment analysis by refusing to consider the action that the District took with other employees, only because they did not involve *bargaining unit* employees. *R.5.Pt.D,Dec. at 51-54;A-App.176-179.* When the District established that it dealt most severely with the three most serious cases, the arbitrator pronounced that two of them don't count because they are not in the union and then declared the remaining dispositions inequitable. In doing so, the arbitrator created a disparate treatment

[21] Falcone's administrative employment contract was not made part of the record. Accordingly, the arbitrator had no foundation for her conclusion that Falcone was an employee at will who did not have just cause protection in his employment contract.

scenario where none existed in fact by making sure that Harris' termination was compared only to other employees that were not terminated (and who exhibited less severe behavior).

The arbitrator continued to contort the disparate treatment analysis with perverse equations where no actual equivalence exists. She referred to the "target picture" that Harris showed at the end of a team meeting as an image "of a woman with a target painted on her butt," a portrayal that seriously and willfully deviates from indisputable fact. *R.5.Pt.D,Dec at 25;A-App.150.* She treated the fact that the District viewed off-site laptop use as different from viewing pornography on a computer during school hours as evidence of District inconsistency.[22] *R.5.Pt.D,Dec at 39;A-App.164.* She acknowledged that Harris showed pornography in team meetings "once or twice a year for several years," but maintained that others were doing "the same or similar" things simply by viewing pornographic email "privately" and without any record or testimony concerning "several years" at the high school. *R.5.Pt.D,Dec at 55;A-App.180.* She acknowledged that the pornographic film "Lucky Midget" is "really offensive" and "probably the worst of it," but dismissed the argument that it constitutes "the most shocking of pornography" on grounds that it did not involve violence or children. *R.5.Pt.D,Dec at 44;A-App.169.* She recognized that -- unlike teachers at the high school -- the investigation showed that Harris had been receiving

[22] The arbitrator disregarded the relative risks to children and the educational environment that are captured by making this distinction, concluding that this factor "should not be considered." *R. Pt. D, Dec at 48;A-App.173.*

pornography for several years, but parried nonsensically that "the District did not know about (the years of misconduct) at that time," as if being unaware of what Harris was doing while it was going on means it does not constitute misconduct at all. *R.5.Pt.D,Dec at 44;A-App.169.* She concluded that the volume of pornographic email attachments submitted into evidence that were received by Harris in one calendar year was "not overwhelming by any means," begging the question of just how many three ring binders might overwhelm. *R.5.Pt.D,Dec at 47;A-App.172.* She posited that "Gundrum and Johnson used reasonable factors to determine discipline" but then did not credit their conclusions as such. *R.5.Pt.D,Dec at 47;A-App.172.*

The arbitrator continued to undermine her own disparate treatment analysis by absolving employees (particularly Harris) of responsibility for receiving sizable volumes of pornography on grounds that it had been sent to them, while simultaneously holding that they knew all along that they should not have it in the first place and acknowledging that they encouraged it. On the subject of the District's AUP, the arbitrator ultimately stated:

> First of all, it must be said that with or without a policy or several policies, everyone knows that you can't have porn on your employer's computer, especially if your employer is a school district…even if there were no policy, the conduct at issue would be objectionable and subject to discipline. No one needs a policy to tell them that.

R.5.Pt.D,Dec at 37-38;A-App.162-63.

She even acknowledged that Harris in particular knew about the prohibition all along, in spite of his testimony where -- for days – he denied even knowing

about an AUP, when the evidence showed he knew about it all along, as well as the laws relating to pornography in the schools. *R.5.Pt.D,Dec. at 38;A-App.163.* However, while acknowledging Harris' cheery, solicitous responses to his sister's pornographic email, the arbitrator concluded that Harris' conduct was not purposeful and could not be sanctioned as such. *R.5.Pt.D,Dec. at 48;A-App.173.* The arbitrator actually stated:

> No one believes that a person can be discharged for what he or she receives on the e-mail…Employees should be disciplined for their **own conduct**, not what others do to them. Receiving email is a passive thing and to a great extent out of one's control. That of course does not mean that the recipient should let it go on forever.

R.5.Pt.D,Dec at 56;A-App.186 (emphasis in original).

This conclusion was central to the arbitrator's disparate treatment analysis, the very foundation on which her Award was made to rest. It was vital to her conclusion that Harris and other employees at the high school were similarly situated. *R.5.Pt.D,Dec at 55-56;A-App.180,186.* The arbitrator made no attempt to reconcile this conclusion with her premise that everyone knows that having pornography on a school computer is prohibited and cause for more immediate corrective action than simply not "allow(ing) it to go on forever." *R.5.Pt.D,Dec at 56;A-App.186.*

Consequently, the arbitrator contradicted her own rationale at almost every point. In addition, the arbitrator adopted the patently illogical conclusion that this must be a case of disparate treatment by finding that all employees were similarly situated – a conclusion which can be reached only by refusing to consider certain

persons who were sanctioned before evaluating the disparate treatment issue. The arbitrator engaged in arbitrary decision-making by evaluating a sample after deliberately compromising that sample herself.

B. The Arbitrator's Award Is Arbitrary And Perverse Because It Logically Contradicts Her Entire Disparate Treatment Analysis.

The final point in the arbitrator's analysis removes all doubt that the arbitrator's ruling was arbitrary and lacked foundation in reason, even if we accept the notion that all unit employees were, in fact, similarly situated. The arbitrator concluded that '[t]he high school teachers who received suspensions were engaged in similar conduct as Harris." *R.5.Pt.D,Dec at 45;A-App.170*. This is the lynchpin for the award: she ruled that the District's disciplinary decisions should not be interfered with under the collective bargaining agreement unless exceptional circumstances are established, but found that those exceptional circumstances did exist because there was disparate treatment of similarly situated individuals.

Astonishingly, the arbitrator then concluded that the grievants at issue *were not at all alike*. The arbitrator actually found that widely differing disciplinary action was required, even though disparate treatment was her sole justification for interfering with the employer's decision in the first place; a decision that she otherwise found supported by just cause. *R.5.Pt.D,Dec. at 57;A-App.182.* In this regard, she reduced Harris' discharge to a 15 day suspension, but reduced Cramer's and Duren's discipline to written reprimands. *R.5.Pt.D,Dec. at 57;A-*

App.182. Therefore, she turned about completely and concluded in her award that Harris' misconduct was more severe than that of Cramer or Duren.

In the end, the arbitrator directly violated the just cause provision of the collective bargaining agreement as she herself interpreted it. Put simply, she acknowledged the District's contractual right to terminate and then proceeded to take that right away on grounds that the District treated similarly situated employees differently (and was thereby "excessive"), but ultimately concluded that Harris deserved completely different and more severe disciplinary action than Cramer and Duren.

This constitutes arbitrary, perverse misconstruction that is without foundation in reason. Accordingly, the award must be vacated.

CONCLUSION

Federal and State law establish a public policy commitment to protect school children from pornography in our schools. Federal and state law also aim to eradicate discrimination and sexual harassment in our schools and workplaces. The Middleton-Cross Plains Area School District took reasonable disciplinary action to satisfy these public policy mandates, to protect its children and employees, and to support the integrity of its educational program.

The Arbitrator disregarded federal and state law on pornography and discrimination, and violated the public policy those laws establish. Further, the Arbitrator ruled that the parties' collective bargaining agreement protected the District's discretion to address the situation, but then concluded that the District's

discretion was limited by an exception that, ultimately, the arbitrator herself did not find to be present. The arbitrator's award must be vacated under Wisconsin law.

Respectfully submitted this 11th day of January, 2013.

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FORM AND LENGTH CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stat. §809.19(8)(b) and (c), for a brief and appendix produced with a proportional serif font: The length of this brief is 10,329 words.

I further certify that the text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

Dated: January 11, 2013.

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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of Respondents-Appellants' brief, excluding the appendix, which complies with the requirements of s. 809.19(12).

I further certify that this electronic brief is identical in context and format to the printed form of the brief filed as of January 14, 2013.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated: January 11, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on January 14, 2013, in accordance with § 809.80(3), ten copies of the Respondents-Appellants' brief and appendix will be hand delivered to the Clerk of the Court of Appeals, 100 E. Main Street, Suite 215, Madison, WI 53701.

I further certify that on January 14, 2013, three copies of Respondents-Appellants' brief and appendix will be hand delivered to William Haus, Haus, Roman and Banks LLP, 148 E. Wilson Street, Madison, WI 53703.

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APPENDIX CERTIFICATION

I hereby certify that filed with this brief, as a part of this brief, is an appendix that complies with § 809.19(2), which contains:

1) a table of contents;

2) the findings and opinion of the circuit court;

3) portions of the record essential to an understanding of the issues raised, including oral and written rulings or decisions showing the circuit court's reasoning regarding those issues; and

4) the Arbitration Award

I further certify that this record is not required by law to be confidential.

Dated: January 11, 2013.

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