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## ARBITRATION AWARD REVERSED IN FAVOR OF PUBLIC POLICY

By *Emre M. Polat*

In a rare decision, the New York State Appellate Division (the "Appellate Division") recently reversed an arbitration award and found a union contract provision unenforceable because it conflicted with a public policy against sexual harassment in the workplace. *Phillips v Manhattan & Bronx Surface Tr. Operating Auth.* - AD3d -, 2015 NY Slip Op 06564 [1st Dept 2015]. This decision is instructive because courts typically do not disturb an arbitration decision.

### BACKGROUND

A female bus dispatcher employed by the Manhattan and Bronx Surface Transit Operating Authority ("Transit Authority") filed a complaint alleging that Tony Aiken ("Aiken"), a bus operator, subjected her to unwelcome sexual remarks and retaliated against her when she complained.

Aiken, a union member, was represented by the Transport Worker's Union of America, Local 100 ("Union") pursuant to collective bargaining agreement ("CBA") between Transit Authority and the Union.

After the dispatcher made the complaint, the Transit Authority initiated an investigation. During this period, the Union requested that Aiken be put on union-paid release time. The Transit Authority approved the request to ensure that Aiken would not have any contact with the female bus dispatcher pending the investigation.

The Transit Authority's investigation concluded that reasonable cause existed to believe that Aiken had subjected the female bus dispatcher to inappropriate and unwelcome comments of a sexual nature in violation of the Transit Authority's sexual harassment policy.

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Thereafter, the Transit Authority presented disciplinary charges to the Union seeking to fire Aiken. The Union opposed and filed a grievance with the Transit Authority on behalf of Aiken, asserting that the CBA prohibits the Transit Authority from disciplining an employee who is on union-paid release time. The Transit Authority denied the grievance, and an arbitrator eventually heard the matter.

The arbitrator agreed with the Union and concluded that the Transit Authority violated the CBA by seeking to impose discipline upon Aiken while he was on approved union-paid release time and ruled that Aiken be reinstated to work. The Transit Authority objected to the award, and the Union filed a petition in the Supreme Court of New York (the "Trial Court") seeking to enforce the arbitrator's award.

The Union argued that the award should be enforced because the "grievance arbitration provision was in the contract, the parties agreed to arbitrate the issues, and the arbitrator interpreted the contract and based his decision on actual provisions of the contract." The Transit Authority opposed the petition, arguing that the award violated public policy. The Trial Court granted the Union's petition to enforce the award and the Transit Authority appealed.

## **DISCUSSION**

Arbitration agreements in contracts require parties to submit their disputes to an unbiased third person that is designated by the parties to hear the dispute. An informal hearing is conducted and the parties agree in advance to comply with a decision to be issued after the hearing. Arbitration has been a widely used means as an alternative to litigation. The arbitrator's decision is usually final and courts will rarely reverse an arbitration award.

In order to have an arbitration award vacated, it is usually necessary to demonstrate a serious conflict of interest on the part of a neutral arbitrator and the parties or, that the award covered an issue that was outside the scope of the arbitration agreement.

In fact, the Appellate Division in *Phillips* stated that the Transit Authority had a very heavy burden in seeking to overturn an arbitration award that was based on a contract upon which both parties agreed. Despite this heavy burden, the Appellate Division found it necessary to intervene based upon a narrow public policy exception to the arbitrator's award.

The Appellate Division found that the provision in the CBA that barred discipline for employees on union-paid leave conflicted with a "well-defined and dominant public policy" of prohibiting sexual harassment in the workplace. If reinstatement were required based on the CBA's language, the Appellate Division recognized that that the arbitrator effectively would preclude the Transit Authority from following its policy and legal obligations to protect its employees against sexual harassment. The Appellate Division reasoned that if the arbitrator's award were "left to stand, the arbitration award will send the wrong message - that certain employees at the Transit Authority, mainly those who performed union-related activities, may be free to create a sexually-charged atmosphere in the Transit Authority's workplace because any complaints against them will be impeded by protections."

The Appellate Division reversed the Trial Court and vacated the arbitration award, stating that "this is one of the relatively rare cases where an award - reinstating a sexual

harassment offender - runs counter to the strong public policy against sexual harassment in the workplace."

### **TAKEAWAY FOR EMPLOYERS**

Although courts rarely overturn arbitration awards, employers should be mindful that public policy interests may outweigh provisions in employment agreements and collective bargaining agreements between employers and their employees. This recent ruling highlights that courts will look to protect public policy interests rather than "rubber stamp" an arbitration award. Thus, employers should recognize that opportunities exist to overturn an arbitration award on public policy grounds.

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