NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-4768

EXTENDICARE HEALTH SERVICES, INC.
doing business as
Glenshire Woods Personal Care Home

v.

DISTRICT 1199P SERVICE EMPLOYEES
INTERNATIONAL UNION, AFL-CIO, CLC

Extendicare Health Services, Inc.,
Glenshire Woods Personal Care Home,
Appellant

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil No. 05-cv-02676)
District Judge: Honorable Sylvia H. Rambo

Submitted Under Third Circuit LAR 34.1(a)
October 22, 2007

Before: SLOVITER, CHAGARES and HARDIMAN, Circuit Judges

(Filed: October 26, 2007)

OPINION

SLOVITER, Circuit Judge.

This case presents the question whether a labor arbitrator's award reinstating a terminated employee, entered pursuant to a collective bargaining agreement between a union and a personal care home, should be vacated as contrary to public policy.

I. Background

Glenshire Woods Personal Care Home ("Glenshire Woods"), which is operated by Extendicare Health Services, Inc., is a home that provides personal care services to elderly residents. Glenshire Woods hired Tracey Poth on May 16, 1998 to work as a medication aide. Poth had access to controlled substances in her capacity as a medication aide.

On July 1, 1998, the Pennsylvania General Assembly amended the Older Adult Protective Services Act, 35 Pa. Cons. Stat. Ann. §§ 10225.101-10225.5102 ("OAPSA" or "the Act"), which sets numerous requirements for employment practices in personal care homes. Of particular relevance here, the amended Act made it illegal to hire or retain an employee who had two or more misdemeanors for theft-related offenses (so-called "barrier offenses"). 35 Pa. Cons. Stat. Ann. §§ 10225.503(a)(2), 10225.505. In June 2004, management at Glenshire Woods learned that Poth had four prior misdemeanor convictions, dated October 18, 1990, for receiving stolen property. Management determined that the misdemeanor convictions were "barrier offenses" under OAPSA, and that Glenshire Woods was prohibited from continuing to employ Poth. Poth also had incurred several DUI-related convictions between 1998 and 2004, while employed at Glenshire Woods, but they were not considered "barrier offenses" under OAPSA. Glenshire Woods fired Poth on July 2, 2004.

II. Procedural History

Following her termination, Poth filed a grievance with her union, District 1199P Service Employees International Union, AFL-CIO, CLC ("Union"). Glenshire Woods and the Union were parties to a Collective Bargaining Agreement ("CBA"), effective November 1, 2002 through October 31, 2005, see App. at 158-185, that governed the terms and conditions of employment practices for Union employees at Glenshire Woods. In her grievance, Poth claimed that Glenshire Woods had terminated her in violation of Article 14 of the CBA, which stated that "no employee shall be dismissed . . . without just cause." App. at 173, 187. The CBA did not define "just cause," and the Union and Glenshire Woods could not agree on its meaning. The parties submitted their dispute to an arbitrator, as required by Article 16.1 of the CBA. In addition, under Article 16.2, "[a]ll determinations and awards of an arbitrator hereunder shall be final, conclusive and binding upon all the parties hereto, their heirs, executors, administrators, assigns or successors in interest." App. at 175.

The issue before the arbitrator was two-fold: (1) "whether or not [Poth's] criminal history required [Glenshire Woods] to discharge [Poth], as a matter of law, pursuant to the provisions of [OAPSA];" and (2) whether Glenshire Woods had "just cause" to terminate Poth based upon Poth's falsification of her employment application, a Class III violation of the employee handbook. App. at 74-75. The arbitrator determined that Poth's termination was not required by law because in Nixon v. Commonwealth, 839 A.2d 277 (Pa. 2003), the Pennsylvania Supreme Court had declared the criminal records chapter of

OAPSA unconstitutional as applied to individuals similarly situated to Poth. In addition, the arbitrator recognized that the Pennsylvania Department of Aging ("DOA") had promulgated new rules addressing employment practices for persons with barrier offenses, but noted that the rules did not proscribe employment of individuals who had a minimum five-year aggregate work history in care dependent services. Thus, Poth's employment was not prohibited by the rules because she had not been convicted of a barrier offense since October 1990, and had more than five years aggregate work history in care dependent services since then. With respect to the second issue, the arbitrator decided that Glenshire Woods did not meet its burden of proof, principally because there was no evidence that an employee handbook containing the relevant rule was in place at the time Poth was hired.[1]

Having concluded that Poth's termination was not required by law and was not otherwise supported by just cause, the arbitrator ordered her reinstated to her position as a medication aide, retroactive to July 2, 2004, including back pay, benefits, and seniority.

Glenshire Woods filed suit in federal court, seeking to modify or vacate the arbitration award. All parties agreed to dispose of the case by means of cross-motions for summary judgment. The District Court affirmed the arbitrator's award, and granted the Union's motion for summary judgment. The Court relied on the Supreme Court's decision

[1] Glenshire Woods does not pursue this argument on appeal and did not present it to the District Court; as such, we do not consider it.

in Eastern Associated Coal Corp. v. United Mine Workers, District 17, 531 U.S. 57 (2000) (emphasizing the extremely narrow scope of judicial review of an arbitrator's decision when entered pursuant to a collective bargaining agreement), in determining that the arbitrator's decision was not against public policy, as ascertained by reference to "positive law." In a thorough decision, the District Court considered each potential source of positive law cited by the parties, and ultimately concluded that Poth's reinstatement was not contrary to the public policy espoused in the qualifying sources of positive law.

Glenshire Woods appeals.

III. Discussion

A. Standard of Review

We review the District Court's order granting summary judgment de novo. Blair v. Scott Specialty Gases, 283 F.3d 595, 602-03 (3d Cir. 2002). The parties agree that there are no facts in dispute. We thus turn to examine whether we have any authority to vacate the award of the arbitrator, as Glenshire Woods requests.

"'Judicial review of a labor-arbitration pursuant to [a collective bargaining] agreement is very limited.'" Nat'l Ass'n of Letter Carriers v. U. S. Postal Serv., 272 F.3d 182, 185 (3d Cir. 2001) (quoting Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 509 (2001) (per curiam)). This deferential standard of review "derives from the [Supreme] Court's recognition that the parties to the collective bargaining agreement 'bargained for' a procedure in which an arbitrator would interpret the agreement." Id. (citing E. Associated Coal Corp., 531 U.S. at 62). Thus, when analyzing an arbitration

award reinstating an employee, a reviewing court should assume that the collective bargaining agreement itself calls for the employee's reinstatement. E. Associated Coal Corp., 531 U.S. at 61. "That is because both employer and union have granted to the arbitrator the authority to interpret the meaning of their contract's language, including such words as 'just cause.'" Id. (citing Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599 (1960)). Thus, the arbitrator's interpretation is, in effect, what the parties contracted for in their agreement. See id. When the parties have "bargained for" an "arbitrator's construction" of an agreement or a particular term in an agreement, courts should set aside the arbitrator's interpretation "only in rare instances." Id. at 62.

Glenshire Woods does not argue that the arbitrator acted outside the scope of the authority delegated to him under the CBA.[2] Rather, Glenshire Woods argues that the arbitrator's award is contrary to public policy. A "reviewing court may vacate [an] award if the arbitrator's interpretation of the collective bargaining agreement was 'contrary to public policy.'" Nat'l Ass'n. of Letter Carriers, 272 F.3d at 185 (citing E. Associated Coal Corp., 531 U.S. at 62). Therefore, "we must treat the arbitrator's award as if it represented an agreement between [Glenshire Woods] and the union as to the proper meaning of the contract's words 'just cause.'" E. Associated Coal Corp., 531 U.S. at 62. In other words,

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[2] Even if it was, "as long as [an honest] arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, the fact that a court is convinced he committed serious error does not suffice to overturn his decision." E. Associated Coal Corp., 531 U.S. at 61 (internal quotations omitted).

the arbitrator's award is, in effect, not distinguishable from the CBA for purposes of our analysis. See id. The question then becomes whether Poth's reinstatement would make the CBA itself unenforceable on the grounds that it violates public policy. See id. Importantly, the question is not "whether [Poth's] [criminal history] itself violates public policy, but whether the agreement to reinstate [her] does so." Id. at 62-63.

"[P]ublic policy must be explicit, well defined, and dominant." Id. at 62 (internal quotations omitted). Public policy must be ascertained by reference to positive law, that is, from laws and legal precedents, not from "general considerations of supposed public interests." Id. at 63. The "public policy exception" to the rule that courts should generally uphold labor arbitration awards is "narrow." See id. In sum, the Supreme Court has set forth the question we must ask: "does a contractual agreement to reinstate [Poth] . . . run contrary to an explicit, well-defined, and dominant public policy, as ascertained by reference to positive law and not from general considerations of supposed public interests?" Id.

B. Whether the Arbitrator's Decision is Contrary to Public Policy

The parties have identified two principal sources of positive law relevant to the determination whether the arbitrator's award violates public policy: (1) OAPSA and (2) the laws governing personal care homes under the Public Welfare Code, 62 Pa. Cons. Stat. Ann. §§ 1001-1087. We analyze each in turn.

1. OAPSA

The criminal history reporting chapter of OAPSA must be read in conjunction with

the Pennsylvania Supreme Court's decision in Nixon v. Commonwealth, 839 A.2d 277 (Pa. 2003), which held that some of OAPSA's requirements were unconstitutional. The parties dispute whether a document issued by the DOA following the Nixon decision constitutes positive law, and hence, whether it has any bearing on our public policy analysis.

In 1987, the Pennsylvania General Assembly enacted OAPSA for the purpose of protecting "older adults who lack the capacity to protect themselves" and are at risk of "abuse, neglect, exploitation or abandonment," that is, for purposes of this appeal, residents of personal care homes. 35 Pa. Cons. Stat. Ann. § 10225.102. The General Assembly granted the DOA, in consultation with the Department of Health and Department of Public Welfare ("DPW"), the power to promulgate regulations necessary to carry out the purposes of OAPSA. Id. § 10225.504.

Effective July 1, 1998, OAPSA delineated various requirements for employment practices in personal care homes, including a chapter regulating the treatment of employees and applicants for employment with a criminal history. Specifically, OAPSA provided that a personal care home may not hire or retain an employee who has been convicted of certain prohibited offenses. Id. § 10225.503. Relevant for our purposes, the Act prohibited hiring or retaining an employee with two or more misdemeanor convictions for theft-related offenses. Id. § 10225.503(a)(2). The amended Act also provided that "[a]n individual who, on the effective date of this chapter [July 1, 1998], has continuously for a period of one year been an employee of the same facility shall be exempt from" the

criminal history reporting requirements set forth in section 10225.502. Id. § 10225.508(1).

Subsequently, in Nixon, 839 A.2d at 290, the Pennsylvania Supreme Court held that the criminal history chapter of OAPSA was unconstitutional. In Nixon, the plaintiffs were individuals who had convictions for barrier offenses that were 12-29 years old. Id. at 283 n.9. Subsequent to those convictions, each plaintiff had worked in a personal care home for times ranging from "several" to over twenty years, without incurring another barrier offense. Id. The plaintiffs' supervisors submitted declarations, stating that they would rehire the plaintiffs if permitted by OAPSA. Id. at 283-84 n.10.

In a suit filed by plaintiffs under Article I, section 1 of the Pennsylvania Constitution, which guarantees the right to pursue a lawful occupation, the Pennsylvania Supreme Court held that there was no rational basis for distinguishing caretakers with barrier offenses who had worked in a single personal care home for one year immediately prior to the effective date of the Act from those who had successfully worked in the industry for more than a year but had not held one continuous job in a single facility since July 1, 1997. Id. at 289. The Court reasoned that the "only conceivable explanation" for the distinction was that those who had worked at one facility for at least a year presented less of a risk because they had proven that they were able to work with patients and had established a level of trust with management. Id. Thus, the Court concluded, there was no reason to distinguish between employees who had worked for one year immediately prior to the effective date of the Act and those who had previously successfully worked in covered facilities for many years because both categories of employees demonstrated that

they were capable of rehabilitating themselves. Id. In sum, the Court held that "the criminal records chapter [of OAPSA], particularly with regard to its application to the Employees, does not bear a real and substantial relationship to the Commonwealth's interest in protecting the elderly, disabled, and infirm from victimization, and therefore unconstitutionally infringes on the Employees' right to pursue an occupation." Id. at 290.

Glenshire Woods argues that the District Court applied the wrong legal standard in finding that "Ms. Poth is more like the Nixon plaintiffs than not." App. at 22. Glenshire Woods, citing Anker Energy Corp. v. Consolidation Coal Co., 177 F.3d 161 (3d Cir. 1999), argues that the District Court should have instead determined if Poth is "substantially identical" to the Nixon plaintiffs because, under Glenshire Woods' view, the Nixon decision was splintered, and thus is binding only in its specific result. Id. at 170.

We disagree. Nixon was not a "splintered" decision, and therefore, the "substantially identical" test does not apply. In Anker,[3] we explained that "'[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds.'" Anker, 177 F.3d at 169 (quoting Marks v. United States, 430 U.S. 188, 193 (1977) (internal quotations

[3] Anker addressed how to analyze a fragmented United States Supreme Court decision, and thus involved a nine Justice panel. Although this case involves a Pennsylvania Supreme Court decision, involving a seven Justice panel, the relevant principle is analogous.

omitted)). When applying the principle of a splintered decision to another case, the splintered decision is binding only if the factual scenario is "substantially identical" to the subsequent case. Id. at 170.

Nixon was not a splintered decision because there is a common denominator of the Court's reasoning that "'constitute[s] the controlling holding.'" Id. (citation omitted). In Nixon, three justices joined the majority. A fourth, Justice Castille, wrote separately only to add that, in addition to the equal protection analysis relied on by the majority, he also would have found that the lifetime ban on employment violated the Due Process Clause. Nixon, 839 A.2d at 291. The common denominator of the Court's reasoning is, therefore, the majority opinion in its entirety, as it was joined by four justices. See id. Two other justices concurred based upon different reasoning altogether, and one justice dissented. Because there is a controlling majority in Nixon, we need not apply the "substantially identical" test as required when a decision is "splintered."[4]

Although the criminal records chapter of OAPSA, as enacted, would have prohibited Poth's continued employment, the Act as modified by Nixon does not prohibit her reinstatement. Poth had been convicted of barrier offenses, that is, two theft-related misdemeanors. She did not work at Glenshire Woods continuously for the year prior to

[4] Because there is no need to apply the "substantially identical" test, we make no determination whether the District Court accurately applied that test. It is sufficient for our purposes that the District Court applied the holding of Nixon when analyzing OAPSA.

July 1, 1998. Prior to her termination in 2004, however, Poth worked at Glenshire Woods for six years without incurring another barrier offense.

Glenshire Woods argues that Nixon does not apply to Poth because she was convicted of several DUI offenses between 1998 and 2004 and received numerous disciplinary infractions during her employment at Glenshire Woods.[5] Poth did incur several disciplinary infractions and was convicted of three misdemeanor DUI charges, but none of those incidents are disqualifying barrier offenses under OAPSA.[6] Nixon does not suggest that incurring a non-barrier offense misdemeanor charge would change the analysis.

Because the mandatory termination provision of OAPSA is unconstitutional as applied to Poth under the holding in Nixon, there is no provision of OAPSA that prohibits Poth's continued employment at Glenshire Woods. It was not contrary to public policy, as governed by the positive law of OAPSA and Nixon, for the arbitrator to reinstate Poth. We will affirm the District Court on this point.

Glenshire Woods also argues that a document issued by the DOA on the subject of

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[5] We note that Glenshire Woods does not now argue and did not argue in arbitration that the DUI offenses and disciplinary infractions created "just cause" to terminate Poth. Rather, it argues that these infractions change the Nixon analysis regarding whether Poth's continued employment was prohibited by law, and hence whether her reinstatement was contrary to public policy.

[6] Poth also received numerous commendations for her work at Glenshire Woods. See App. at 362-369.

criminal background checks following the Nixon decision is positive law that we should examine. See Commonwealth of Pennsylvania Department of Aging, Older Adults Protective Services Act – Criminal Background Check Provisions, at http://www.aging.state.pa.us/aging/CWP/view.asp?a=284&Q=228847 (follow "Notice - Nixon Decision Appealed - How does this impact employment decisions?" hyperlink) (Feb. 2004); see also App. at 359.

Positive law includes statutes, legal precedent, and agency regulations. See E. Associated Coal Corp., 531 U.S. at 63. The public policy espoused in the positive law must be explicit, well-defined, and dominant. Id. It does not include general considerations of supposed public interests. Id.

Unlike a regulation, a "statement of policy" is a document "promulgated by an agency which sets forth substantive or procedural personal or property rights, privileges, immunities, duties, liabilities or obligations of the public . . . and includes . . . any document interpreting or implementing any [statute] . . . enforced or administered by such agency." 45 Pa. Cons. Stat. Ann. § 1102(13). It is forward-looking in nature, expressing the agency's future intentions. Borough of Pottstown v. Pa. Mun. Ret. Bd., 712 A.2d 741, 743 n.8 (Pa. 1998). Importantly, a statement of policy does not have the force of law. Id.

Therefore, because the DOA document is a statement of policy that does not have the force of law, it is not within the umbrella of "positive law" that we should consider in determining whether the arbitrator's award was contrary to public policy. The District

Court did not err in refusing to consider this document.[7]

2. Department of Public Welfare Regulations/Public Welfare Code

Glenshire Woods also argues that regulations of DPW issued under the Public Welfare Code compel us to determine that the arbitrator's decision to reinstate Poth is contrary to public policy. The DPW is the agency charged with licensing personal care homes. 62 Pa. Const. Stat. Ann. § 1007. If a facility does not comply with applicable statutes, ordinances, and regulations, id., the DPW can revoke its license. Id. § 1026(b). Operation without a license can render the facility operator criminally and/or civilly liable. Id. §§ 1031, 1055-56.

One of the requirements to obtain or renew a license is compliance with DPW's regulations with respect to employment practices. Those regulations provide, in relevant part, that "[h]iring, retention and utilization of staff persons shall be in accordance with the Older Adult Protective Services Act . . . ." 55 Pa. Code § 2600.52. We agree with the District Court's determination that by incorporating OAPSA into the licensing regulations, the DPW also necessarily incorporates the Nixon decision's interpretation of OAPSA. The regulations, therefore, add nothing new to what has already been discussed. See 1 Pa. Cons. Stat. Ann. § 1922(4). Thus, we read the DPW regulations as compelling compliance

[7] The District Court also determined that the document was too ambiguous to constitute a proper source of public policy. Because we have already determined that the document is not positive law at all, we need not consider the District Court's alternative basis for rejecting the document.

with OAPSA, except to the extent restricted by Nixon.

IV. Conclusion

For the above stated reasons, we conclude that the labor arbitrator's decision to reinstate Poth, entered pursuant to a contractual agreement between the Union and Glenshire Woods, does not "run contrary to an explicit, well-defined, and dominant public policy, as ascertained by reference to positive law and not from general considerations of supposed public interests." See E. Associated Coal Corp., 531 U.S. at 63. We therefore affirm the judgment of the District Court entered on October 17, 2006 that, in turn, upheld the arbitrator's award dated December 1, 2005.