CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

TENISHA O'REGGIO *v.* COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES ET AL.
(AC 45011)

Prescott, Seeley and Eveleigh, Js.

Syllabus

The plaintiff employee appealed from the decision of the trial court affirming the decision of the defendant Commission on Human Rights and Opportunities, which concluded that the defendant employer was not liable to the plaintiff under the Connecticut Fair Employment Practices Act (CFEPA) ((Rev. to 2015) § 46a-51) for her claim of a hostile work environment created by one of its employees, K. The commission's presiding human rights referee determined that, although K, whom the referee referred to as the plaintiff's "supervisor," had created a hostile work environment, the employer had acted promptly and reasonably under the circumstances to remedy the situation and, accordingly, was not negligent. The trial court affirmed the decision of the commission, concluding that K was required to be a "supervisor," as that term had been defined by the United States Supreme Court in *Vance* v. *Ball State University* (570 U.S. 421) for purposes of CFEPA's federal counterpart, Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.), in order for liability to be imputed to the employer on the basis of a supervisor theory of liability. The trial court acknowledged that the referee's decision was ambiguous as to whether K's responsibilities satisfied such definition, but it determined that a remand was unnecessary because the plaintiff's counsel had conceded that K's responsibilities did not satisfy the definition, as she was not empowered to take tangible employment actions against the plaintiff. Accordingly, the trial court concluded that the commission had properly applied the negligence standard for harassment by a coworker to the plaintiff's claim.

On the plaintiff's appeal to this court, *held* that the definition of "supervisor" set forth in *Vance* was the appropriate definition for distinguishing between the coworker and supervisor theories of liability for hostile work environment claims brought under CFEPA and that the trial court properly applied the *Vance* test to the plaintiff's CFEPA claim: this court assumed, without deciding, that the framework for determining whether an employer could be held liable for the creation of a hostile work environment by its employees for purposes of claims brought under Title VII applied to claims brought under CFEPA, and, under that framework, an employer could be held strictly liable for the actions of a supervisor but could be held directly liable for the actions of a coworker only if the plaintiff could prove that the employer was negligent; moreover, although Connecticut appellate courts had not previously decided whether to adopt or to reject the *Vance* definition of "supervisor" for purposes of CFEPA claims, federal courts had applied it to CFEPA claims, and, in interpreting antidiscrimination statutes, our state courts consistently have looked to federal precedent for guidance; furthermore, our state courts have interpreted CFEPA differently than Title VII only in circumstances in which there is clear evidence of a contrary legislative intent, the plaintiff in the present case did not present any evidence to suggest that our legislature intended for the term "supervisor" to be more broadly construed than the definition used by the courts for Title VII purposes, and the mere facts that CFEPA was remedial in nature and was required to be construed to effectuate its beneficent purpose were not sufficient for this court to reject federal guidance; additionally, the plaintiff's argument that the broader definition of "supervisor" set forth in the United States Equal Employment Opportunity Commission's (EEOC) Enforcement Guidance was better suited for CFEPA claims than the *Vance* definition was unpersuasive, as, under either definition, employers would be prompted to focus their attention on all employees, not just on decision makers, and the plaintiff had failed to address the rationales of the United States Supreme Court for rejecting the EEOC guidance and adopting the *Vance* definition, all of which this court found compelling; accordingly, although the commission did not make a factual finding specific to whether K fell within the *Vance* definition of supervisor, because the plaintiff had conceded that K's responsibilities did not satisfy such definition and, at oral argument before this court, that she could not prove negligence on behalf of the employer as required by the coworker theory of liability, the evidence supported only one conclusion as a matter of law and a remand for further proceedings was unnecessary.

Argued October 5, 2022—officially released April 25, 2023

Procedural History

Appeal from the decision by a human rights referee for the named defendant concluding that the defendant

Department of Labor was not liable to the plaintiff for her claim of a hostile work environment, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Klau*, *J.*; judgment affirming the decision, from which the plaintiff appealed to this court. *Affirmed.*

James V. Sabatini, for the appellant (plaintiff).

Michael E. Roberts, human rights attorney, for the appellee (named defendant).

Colleen Valentine, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Michael Skold*, deputy solicitor general, for the appellee (defendant Department of Labor).

Opinion

SEELEY, J. In this appeal, we are asked to consider whether the Superior Court erred in affirming the administrative decision of the named defendant, the Commission on Human Rights and Opportunities (commission), which concluded that the defendant employer, the Department of Labor (department), was not liable to the plaintiff, Tenisha O'Reggio,[1] for the claim of a hostile work environment created by one of its employees brought under the Connecticut Fair Employment Practices Act (CFEPA), General Statutes (Rev. to 2015) § 46a-51 et seq.

The framework for determining when an employer can be held liable for a claim of the creation of a hostile work environment by its employees brought under CFEPA's federal counterpart, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (2018) (Title VII),[2] was set out in *Burlington Industries, Inc.*

[1] The plaintiff now goes by Tenisha Minfield.

[2] Title VII makes it an "unlawful employment practice for an employer—(1) to . . . discriminate against any individual . . . because of such individual's race [or] color . . . ." 42 U.S.C. § 2000e-2 (a) (2018). As discussed more fully later in this opinion, CFEPA was modeled after Title VII.

v. *Ellerth*, 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998), and *Faragher* v. *Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998). As summarized by the United States Supreme Court in *Vance* v. *Ball State University*, 570 U.S. 421, 133 S. Ct. 2434, 186 L. Ed. 2d 565 (2013), the federal framework provides that if the employee who created the hostile work environment is the plaintiff's " 'supervisor,' " then the employer will be vicariously liable, regardless of whether the harassment resulted in a "tangible employment action," unless the employer satisfies an affirmative defense; id., 429; namely, the *Ellerth/Faragher* defense, which requires showing "(1) that it exercised reasonable care to prevent and promptly correct any harassing behavior and (2) that the plaintiff unreasonably failed to take advantage of any preventative or corrective opportunities that were provided." Id., 430. If the employee is the plaintiff's coworker, then the framework provides that the employer will be liable only if the plaintiff establishes that the employer was negligent in controlling the working conditions. Id., 424.

In the present case, the Superior Court concluded that the department was not liable because the employee who created the hostile work environment, Diane Krevolin, was not the plaintiff's "supervisor" pursuant to the definition adopted by the United States Supreme Court for Title VII purposes in *Vance* v. *Ball State University*, supra, 570 U.S. 424; that is, someone "empowered by the employer to take tangible employment actions against the [plaintiff] . . . ." Id. The court determined that because Krevolin was not a supervisor, there was consequently "no merit to the plaintiff's argument that [the commission] should have imputed liability to [the department] on the basis of a supervisor theory of liability," and because the plaintiff did not challenge the decision on any other ground, it affirmed

the decision of the commission in favor of the department.

On appeal to this court, the plaintiff asks us to conclude, contrary to the determination of the Superior Court, that the *Vance* definition of a "supervisor" for Title VII purposes does not apply to hostile work environment claims that are brought under CFEPA. She asks us, instead, to adopt a broader definition of the term for CFEPA purposes that would include employees like Krevolin who cannot "take tangible employment actions" but nonetheless control the day-to-day conditions of their subordinate's work. We conclude that the Superior Court properly determined that the *Vance* definition applies to claims brought under CFEPA, and, accordingly, we affirm the judgment of the court.

The following facts, as found by the commission's presiding human rights referee (referee), and procedural history are relevant to our resolution of this appeal. The plaintiff began working for the department in 2009. In early 2012, she was promoted to the position of an adjudicator[3] in the unemployment unit of the Bridgeport office, where she reported to Krevolin, the program services coordinator. The plaintiff is Black, and Krevolin is white. On October 21, 2016, the plaintiff filed an internal complaint with the department's human resources (HR) team alleging that, over the years, Krevolin had made several upsetting and racially biased statements to her or in her presence.[4] On October 27,

[3] Ken Petow, the overseer of the department's adjudication division, explained in his testimony that, when the department identifies an eligibility issue with an unemployment benefits application, the adjudicator is the person who "calls [the applicant] up, gets a statement from them, and then just makes a decision within our laws to determine whether or not the individual is eligible for unemployment and whether or not the employer should be charged."

[4] The plaintiff described the following incidents that took place over the years: at a one-on-one meeting with Krevolin six months after the plaintiff began her adjudicator position, Krevolin asked the plaintiff what she would

2016, the plaintiff met with HR personnel and, the following day, the department placed Krevolin on paid administrative leave so it could conduct its internal investigations. The department conducted two investigations: one by HR and one by its equal employment opportunity manager. Following the completion of the investigations and a subsequent *Loudermill* hearing,[5] the department's commissioner, weighing Krevolin's nearly forty year long career at the department with an unblemished record, issued a one day suspension to Krevolin and required her to attend diversity training.

On November 22, 2016, while the department's investigations were ongoing, the plaintiff filed a complaint with the commission against the department alleging, inter alia,[6] that the department subjected her to a hostile work environment based on her race and color in viola-

do if someone called her a racial epithet; on a later date, Krevolin made a comment suggesting that the man with whom she was talking to must have been lying about looking for work because he was Black; at a meeting, Krevolin stated to the plaintiff and other adjudicators, "You know Hispanics don't have bank accounts"; Krevolin made a comment that the plaintiff believed was implying that the plaintiff had no reason to be in Sweden on vacation because she is Black; Krevolin said to the plaintiff's coworker, who had dreadlocks but then changed her hairstyle, "I'm glad you . . . took that mess out of your head, you looked like Whoopi Goldberg"; and Krevolin complimented the plaintiff's hairstyle and stated that she did not like the plaintiff's old hairstyle because it reminded her of "Aunt Jemima." (Internal quotation marks omitted.)

[5] "Pursuant to *Board of Education* v. *Loudermill*, 470 U.S. 532, 546, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985), due process entitles a tenured public employee to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. The opportunity to present one's side of the story is generally referred to as a *Loudermill* hearing." (Internal quotation marks omitted.) *Meriden* v. *American Federation of State, County & Municipal Employees, Local 1016*, 213 Conn. App. 184, 189 n.6, 277 A.3d 902 (2022).

[6] The plaintiff also alleged that she was subjected to discrimination based on her national origin and age and that she was retaliated against, but those claims were dismissed following the public hearing. The plaintiff did not challenge the dismissal of those claims on appeal to the Superior Court, and, therefore, they are not at issue in the present appeal.

tion of General Statutes (Rev. to 2015) § 46a-60 (a) (1)[7] and General Statutes §§ 46a-58 (a)[8] and 46a-70.[9] On January 31, 2018, following an initial investigation, the commission issued a finding indicating that there was reasonable cause for believing that a discriminatory practice had been or was being committed as alleged in the complaint, after which the parties unsuccessfully attempted to conciliate the matter. The case was then certified to a public hearing before the referee, which took place over three days.[10] At the close of the hearing, the plaintiff, the department, and the commission submitted posthearing briefs. Notably, the commission urged the referee to conclude that the plaintiff had been subjected to a hostile work environment for which the department was liable. On July 10, 2020, the referee

[7] General Statutes (Rev. to 2015) § 46a-60 (a) provides in relevant part: "It shall be a discriminatory practice in violation of this section: (1) For an employer, by the employer or the employer's agent . . . to refuse to hire or employ or to bar or to discharge from employment any individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment because of the individuals race [or] color . . . ."

[8] General Statutes § 46a-58 (a) provides in relevant part: "It shall be a discriminatory practice in violation of this section for any person to subject, or cause to be subjected, any other person to the deprivation of any rights, privileges or immunities, secured or protected by the Constitution or laws of this state or of the United States, on account of . . . color [or] race . . . ."

Although § 46a-58 has been amended since the filing of the plaintiff's complaint; see Public Acts 2022, No. 22-82, § 11; Public Acts 2017, No. 17-127, § 2; Public Acts 2017, No. 17-111, § 1; Public Acts, Spec. Sess., June, 2015, No. 15-5, § 73; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

[9] General Statutes § 46a-70 (a) provides in relevant part: "State officials and supervisory personnel shall recruit, appoint, assign, train, evaluate and promote state personnel on the basis of merit and qualifications, without regard for race [or] color . . . ."

Although § 46a-70 has been amended since the filing of the plaintiff's complaint; see Public Acts 2022, No. 22-82, § 16; Public Acts 2018, No. 18-72, § 44; Public Acts 2017, No. 17-127, § 8; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

[10] The hearing was held on April 30, May 1, and August 1, 2019.

issued her final decision in which she ruled in favor of the department. The referee concluded that, although Krevolin, whom the referee referred to as the plaintiff's "supervisor," had in fact created a hostile work environment, the department acted promptly and reasonably under the circumstances to remedy the situation and, therefore, was not negligent. As a result, the referee held that the department was not liable. Thereafter, the plaintiff timely appealed the commission's decision to the Superior Court pursuant to General Statutes § 4-183.[11]

On appeal to the court, the plaintiff argued in her brief that the referee failed to apply the applicable law. She specifically argued that, because the referee concluded that the plaintiff was subjected to a hostile work environment created by her supervisor, Krevolin, the referee *was required to* impute liability to the department as a matter of law unless it proved the *Ellerth/Faragher* defense. She further argued that, because the department did not prove that defense, the referee erred in declining to find it liable.

In response, the department argued in its brief that the referee's decision should be affirmed because the *Ellerth/Faragher* defense is applicable only to instances in which the employee who created the hostile work environment was a "supervisor" as defined by *Vance*, and, although the referee in her decision referred to Krevolin as the plaintiff's supervisor, she did not make a specific finding of supervisor liability, nor could she have, because the record was clear that Krevolin could not have taken " 'tangible employment actions' " against the plaintiff. The plaintiff's attorney addressed the department's contention at oral argument before the

[11] General Statutes § 4-183 (a) provides a right of appeal to the Superior Court to persons who have "exhausted all administrative remedies available within the agency and who [are] aggrieved by a final decision . . . ."

trial court. Although he conceded that Krevolin would not meet the definition of a "supervisor" under *Vance*, he argued that *Vance* is not controlling because no Connecticut case has applied it to a CFEPA claim and because CFEPA must be liberally construed in order to promote its underlying remedial purpose. He further argued that the court need not decide what the appropriate definition of a "supervisor" is for CFEPA purposes because the fact that the department itself had referred to Krevolin as the plaintiff's supervisor was dispositive of the issue.

The commission, despite having argued to the referee that the department should be liable to the plaintiff, changed its position on appeal and argued that the court should affirm the referee's decision. Like the department, it argued in its brief that the *Ellerth/Faragher* defense was inapplicable, but for different reasons. The commission contended that the defense was waived because the department failed to plead it. The commission also argued that the court should affirm the referee's decision because the plaintiff's claim was inadequately briefed. At oral argument, the commission declined to take a position on whether the *Vance* definition was applicable to the matter and, instead, argued that the court need not decide the question to resolve the appeal.

The court, *Klau*, *J.*, agreed with the department. It specifically determined that, for liability to be imputed to the department based on a supervisor theory of liability, Krevolin must have been a supervisor as defined by the United States Supreme Court in *Vance*. Although the court acknowledged that the referee's decision was ambiguous as to Krevolin's status as a supervisor under *Vance*, it reasoned that a remand was unnecessary because the plaintiff's counsel had conceded that Krevolin's responsibilities did not satisfy that definition. Thus, the court concluded that the referee had properly

applied the negligence standard for harassment by a coworker to the plaintiff's claim. Because the plaintiff did not challenge the referee's decision on any other ground, the court affirmed it. This appeal followed.

The plaintiff's sole claim on appeal is that the Superior Court erred in applying the *Vance* definition of a supervisor to her CFEPA claim. The plaintiff argues that the Title VII definition as set forth in *Vance* is inconsistent with the remedial nature of CFEPA, and, therefore, this court should reverse the judgment of the Superior Court. The plaintiff further asserts that, for hostile work environment claims brought under CFEPA, we should adopt a definition of supervisor that includes employees like Krevolin who have the power to control the day-to-day conditions of their subordinates' work rather than limit the definition only to those who have authority to take tangible employment actions. The department argues that this court should affirm the court's decision because it properly applied the *Vance* definition of a supervisor to the plaintiff's CFEPA claim, as "Connecticut state courts have consistently looked to federal law and Title VII when interpreting CFEPA claims, and thus the *Vance* definition of supervisor should apply."[12] We agree with the department.

[12] The commission argues on appeal that the court reached "the right destination, but by the wrong road." As a result, the commission asserts two alternative arguments for affirmance. It first argues that the court should have affirmed the referee's decision, not because Krevolin was not a supervisor under *Vance*, but because the plaintiff abandoned her claim due to inadequate briefing. Secondly, the commission argues that the court should have affirmed the referee's decision because the department waived the *Ellerth/Faragher* defense, and, therefore, the court should not have considered the merits of the plaintiff's claim. Given our conclusion that the Superior Court reached the right destination by the *right* road, we need not reach these alternative grounds.

The commission further argues that, if we are not persuaded by its alternative grounds for affirmance, we should remand the case for further proceedings because the commission never determined in its final decision whether *Vance* is applicable to CFEPA claims, and, therefore, "[i]t was not the role of the Superior Court to decide that question in the first instance; [and] it is no more the role of this court to decide the question now." To the extent

We begin by setting forth the standard of review and legal principles relevant to the plaintiff's claim. Our review of a Superior Court's decision to affirm an administrative appeal is governed by the Uniform Administrative Procedure Act (UAPA), General Statutes § 4-166 et seq. "Under the UAPA, it is [not] the function . . . of this court to retry the case or to substitute its judgment for that of the administrative agency. . . . Even for conclusions of law, [t]he court's ultimate duty is only to decide whether, in light of the evidence, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse of its discretion. . . . Cases that present pure questions of law, however, invoke a broader standard of review . . . ." (Internal quotation marks omitted.) *Commission on Human Rights & Opportunities* v. *Echo Hose Ambulance*, 156 Conn. App. 239, 245, 113 A.3d 463 (2015), aff'd, 322 Conn. 154, 140 A.3d 190 (2016). For pure questions of law, "plenary review should be applied . . . [if] the issue of law ha[s] not been time-tested by the [agency] or previously considered by the courts." (Internal quotation marks omitted.) *Longley* v. *State Employees Retirement Commission*, 284 Conn. 149, 166, 931 A.2d 890 (2007). Because the present case presents a pure question of law that never has been considered by the commission or by our appellate courts, our review is plenary.

As discussed earlier in this opinion, in *Burlington Industries, Inc.* v. *Ellerth*, supra, 524 U.S. 742, and *Faragher* v. *Boca Raton*, supra, 524 U.S. 775, the United States Supreme Court established a framework rooted in agency principles for determining when an employer can be held liable for the creation of a hostile work

that this argument by the commission is an independent challenge to the Superior Court's judgment, we decline to address it because the commission did not file a cross appeal. See Practice Book § 61-8; *Campbell* v. *Porter*, 212 Conn. App. 377, 387–88 n.11, 275 A.3d 684 (2022); *William Raveis Real Estate, Inc.* v. *Newtown Group Properties Ltd. Partnership*, 95 Conn. App. 772, 773 n.3, 898 A.2d 265 (2006).

environment by its employees for purposes of claims brought under Title VII of federal law. This framework provides that if the employee was the plaintiff's coworker, then the employer can be held directly liable only if the plaintiff can show that the employer was negligent. *Vance* v. *Ball State University*, supra, 570 U.S. 427. If, however, the employee was the plaintiff's "supervisor," then the employer's liability will depend on the circumstances. Id., 428. If the supervisor engaged in harassment that resulted in a "tangible employment action," then the employer will be strictly liable. (Internal quotation marks omitted.) Id., 428–29. If the supervisor did not take a tangible employment action, the employer will still be vicariously liable—even in the absence of negligence—*unless* the employer satisfies an affirmative defense, the *Ellerth/Faragher* defense. Id., 429–30. This defense provides that "an employer can mitigate or avoid liability by showing (1) that it exercised reasonable care to prevent and promptly correct any harassing behavior and (2) that the plaintiff unreasonably failed to take advantage of any preventative or corrective opportunities that were provided." Id., 430.

Although, to date, our appellate courts have not been presented with a CFEPA case that has required the application of this framework, there appears to be no dispute among the parties that it applies to CFEPA claims. Moreover, this framework has been applied to CFEPA claims by the United States Court of Appeals for the Second Circuit; see *Bentley* v. *AutoZoners, LLC*, 935 F.3d 76, 90–91 (2d Cir. 2019); as well as the United States District Court for the District of Connecticut; see, e.g., *Salen* v. *Blackburn Building Services, LLC*, United States District Court, Docket No. 3:14-CV-01361 (VAB) (D. Conn. January 6, 2017); and it has been acknowledged by our Supreme Court in a CFEPA case. See *Brittell* v. *Dept. of Correction*, 247 Conn. 148, 166

n.30, 717 A.2d 1254 (1998). Therefore, we will assume, without deciding, that this framework is applicable.

This framework is predicated on the distinction between a coworker and a supervisor and, thus, posits the question of who constitutes a "supervisor." The term "supervisor" does not appear within the text of CFEPA, and, consequently, it is not defined therein, nor has it been defined by a Connecticut court. Likewise, the term does not appear and, therefore, is not defined within Title VII. The United States Supreme Court thus defined it in *Vance* v. *Ball State University*, supra, 570 U.S. 424, for Title VII purposes. In doing so, the court clarified that the term is not a statutory term, but a term that must be interpreted so as to best fit within the highly structured *Ellerth/Faragher* framework. Id., 436.

"In *Vance*, the Supreme Court resolved a circuit split. Some courts [had] held that an employee is not a supervisor unless he or she has the power to hire, fire, demote, promote, transfer, or discipline the victim; other courts had substantially followed the more open-ended approach advocated by the [Equal Employment Opportunity Commission's (EEOC)] Enforcement Guidance [EEOC Guidance],[13] which tie[d] supervisor status to the ability to exercise significant direction over another's daily work. . . . The Supreme Court rejected the latter position, holding that [t]he ability to direct another employee's tasks is simply not sufficient to make one a supervisor. . . . Rather, an employee is a supervisor only when the employer has empowered that employee to take tangible employment actions against the victim, i.e., to effect a significant change in employment status, such as hiring, firing, failing to

[13] U.S. Equal Employment Opportunity Commission, Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors (June 18, 1999), available at https://www.eeoc.gov/laws/guidance/enforcement-guidance-vicarious-liability-unlawful-harassment-supervisors (last visited April 11, 2023).

promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." (Citations omitted; footnote added; internal quotation marks omitted.) *Bentley* v. *AutoZoners, LLC*, supra, 935 F.3d 91.

Although Connecticut appellate courts have not yet been presented with the opportunity to adopt or reject the *Vance* definition for purposes of CFEPA claims, it has been applied to CFEPA claims by the United States Court of Appeals for the Second Circuit; see id., 91–92; as well as the United States District Court for the District of Connecticut; see, e.g., *Salen* v. *Blackburn Building Services, LLC*, supra, United States District Court, Docket No. 3:14-CV-01361 (VAB); *Savage* v. *Southern Connecticut State University*, United States District Court, Docket No. 3:09-CV-00302 (JAM) (D. Conn. March 3, 2016). Moreover, "[i]n interpreting our antidiscrimination and antiretaliation statutes, we look to federal law for guidance. In drafting and modifying [CFEPA] . . . our legislature modeled that act on its federal counterpart, Title VII . . . and it has sought to keep our state law consistent with federal law in this area. . . . Accordingly, in matters involving the interpretation of the scope of our antidiscrimination statutes, our courts consistently have looked to federal precedent for guidance. . . . Furthermore, our Supreme Court has held that in defining the contours of an employer's duties under our state antidiscrimination statutes, we have looked for guidance to federal case law interpreting Title VII . . . the federal statutory counterpart to [CFEPA]." (Citations omitted; internal quotation marks omitted.) *Commission on Human Rights & Opportunities* v. *Echo Hose Ambulance*, supra, 156 Conn. App. 249–50.

The plaintiff argues that we should decline to adopt the "narrow" *Vance* definition for CFEPA claims

because doing so would undermine the remedial purpose of Connecticut's statutory scheme. The plaintiff contends that we should, instead, adopt a definition that is more in line with the EEOC guidance on vicarious employer liability for unlawful harassment by supervisors, which encompasses those who have the authority to direct an employee's daily work but cannot take tangible employment actions, such as Krevolin. In support of her argument, the plaintiff contends that our courts have declined to adopt federal interpretations of similar federal employment antidiscrimination statutes when doing so would not effectuate the remedial purpose of the state statute and that adopting the *Vance* definition would not effectuate the remedial purpose of CFEPA.

The plaintiff is correct that, at times, this court and our Supreme Court have interpreted CFEPA differently than its federal counterpart, Title VII. However, the court has done so "only in circumstances in which there is clear evidence of a contrary legislative intent." *Commission on Human Rights & Opportunities* v. *Echo Hose Ambulance*, 322 Conn. 154, 162, 140 A.3d 190 (2016); see also *McWeeny* v. *Hartford*, 287 Conn. 56, 69, 946 A.2d 862 (2008) ("[a]lthough it is true . . . that we generally look for guidance to case law interpreting Title VII when construing our state fair employment legislation . . . such guidance is unnecessary when the language of our statutory scheme . . . is susceptible of only one reasonable interpretation" (citation omitted)). For instance, in *Vollemans* v. *Wallingford*, 103 Conn. App. 188, 194, 928 A.2d 586 (2007), aff'd, 289 Conn. 57, 956 A.2d 579 (2008), this court was tasked with construing CFEPA's 180 day filing period, as set forth in General Statutes (Rev. to 2007) § 46a-82 (e).[14]

[14] Hereinafter, unless otherwise indicated, all references to § 46a-82 in this opinion are to the 2007 revision of the statute.

Although a federal interpretation of Title VII's analogous 180 day limitation period existed, we declined to adopt it and, instead, adopted a more liberal construction of the provision that would allow for more claims to survive the filing period. Id., 218–19. In doing so, we recognized that the legislative history surrounding § 46a-82 (e) provides "strong evidence"; id., 198; of our legislature's intent to "avoid the defeat of such complaints for filing faults rather than on their merits"; id., 219; and, accordingly, we concluded that "[o]ur interpretation of § 46a-82 (e) must be mindful of that legislative policy." Id., 218. In the present case, the plaintiff has failed to direct us to *any* evidence to suggest that our legislature, despite not having statutorily defined the term "supervisor" for CFEPA claims, intended for the term to be more broadly construed than the definition used by courts for Title VII purposes. When asked at oral argument whether there was any such evidence within the statute that the plaintiff could point to, the plaintiff's counsel stated, "All I can point to is silence." Silence is, undoubtedly, not enough to constitute clear evidence of a contrary legislative intent.

Further, the plaintiff's argument rests entirely on the fact that CFEPA is remedial in nature, but the mere fact that a statute is remedial in nature and must be construed to effectuate its beneficent purpose is not enough for this court to reject federal guidance. "*Although CFEPA is a remedial statute*, such that ambiguities in [CFEPA] should be construed in favor of persons seeking redress thereunder . . . *our fundamental objective is to ascertain and give effect to the apparent intent of the legislature*"; (citations omitted; emphasis added; internal quotation marks omitted) *Commission on Human Rights & Opportunities* v. *Echo Hose Ambulance*, supra, 322 Conn. 165; and "our

legislature's intent, in general, was to make CFEPA complement the provisions of Title VII." Id., 160.[15]

We also are not persuaded by the plaintiff's argument that the EEOC Guidance definition of a supervisor is better suited for CFEPA claims than the definition set out in *Vance*. The plaintiff has pointed us to one jurisdiction only, New Jersey, that has elected a more expansive definition of supervisor for purposes of its state law discrimination claims, and we do not find the court's reasoning to be sufficiently persuasive. In *Aguas* v. *State*, 220 N.J. 494, 107 A.3d 1250 (2015), the Supreme Court of New Jersey reasoned that adopting the EEOC Guidance would further the paramount goal of the state's antidiscrimination statute because "[i]t prompts employers to focus attention not only on an elite group of decision-makers at the pinnacle of the organization, but on all employees granted the authority to direct the day-to-day responsibilities of subordinates, and to ensure that those employees are carefully selected and thoroughly trained." Id., 528. We disagree with this rationale because adopting the *Vance* definition does not eradicate employer liability for conduct of nonsupervisory employees; rather, it requires an additional showing of negligence. Thus, we are confident that, under either definition, employers are prompted to focus their attention on *all* employees, not just decision makers.

Moreover, the plaintiff has not addressed, let alone countered, the United States Supreme Court's numerous rationales for rejecting the EEOC Guidance and

[15] The plaintiff also argues that "[r]ejecting *Vance* finds further support in retaliation claims brought under the CFEPA," because, for claims of retaliation, plaintiffs need to prove only that there was a materially adverse employment action taken against them, not an action that affects the terms and conditions of employment. We are not persuaded by this undeveloped argument. Although hostile work environment claims and retaliation claims may both fall within the realm of CFEPA, the standards that they invoke are distinctive.

instead adopting the *Vance* definition, all of which we find compelling. The United States Supreme Court reasoned: "We reject the nebulous definition of a 'supervisor' advocated in the EEOC Guidance and substantially adopted by several [c]ourts of [a]ppeals. [The] [p]etitioner's reliance on colloquial uses of the term 'supervisor' is misplaced, and her contention that our cases require the EEOC's abstract definition is simply wrong. . . . [T]he framework set out in *Ellerth* and *Faragher* presupposes a clear distinction between supervisors and co-workers. Those decisions contemplate a unitary category of supervisors, i.e., those employees with the authority to make tangible employment decisions. There is no hint in either decision that the [c]ourt had in mind two categories of supervisors: first, those who have such authority and, second, those who, although lacking this power, nevertheless have the ability to direct a co-worker's labor to some ill-defined degree. On the contrary, the *Ellerth/Faragher* framework is one under which supervisory status can usually be readily determined, generally by written documentation. The approach recommended by the EEOC Guidance, by contrast, would make the determination of supervisor status depend on a highly case-specific evaluation of numerous factors.

"The *Ellerth/Faragher* framework represents what the [c]ourt saw as a workable compromise between the aided-in-the-accomplishment theory of vicarious liability and the legitimate interests of employers. The Seventh Circuit's understanding of the concept of a 'supervisor,' with which we agree, is easily workable; it can be applied without undue difficulty at both the summary judgment stage and at trial. The alternative, in many cases, would frustrate judges and confound jurors." (Footnote omitted.) *Vance* v. *Ball State University*, supra, 570 U.S. 431–32.

In sum, we conclude that the *Vance* definition of supervisor as used by the courts in Title VII cases is the appropriate definition for distinguishing between the coworker and supervisor theories of liability for hostile work environment claims brought under CFEPA. Accordingly, we further conclude that the Superior Court properly applied the *Vance* test to the plaintiff's CFEPA claim.

We acknowledge that the commission did not make the factual findings specific to whether Krevolin falls within that definition and that, typically, when "an administrative agency has made invalid or insufficient findings, the court must remand the case to the agency for further proceedings . . . ." (Internal quotation marks omitted.) *Slootskin* v. *Commission on Human Rights & Opportunities*, 72 Conn. App. 452, 466 n.12, 806 A.2d 87, cert. denied, 262 Conn. 910, 810 A.2d 275 (2002). That is not the case, however, if the evidence supports "only one conclusion as a matter of law . . . ." (Internal quotation marks omitted.) Id. The plaintiff has conceded to this court that Krevolin's responsibilities do not satisfy the *Vance* definition. Thus, the plaintiff would have to prove negligence on the part of the department, as required by the coworker theory of liability. In this case, the plaintiff has further conceded that she cannot do so.[16] Accordingly, the evidence supports only one conclusion as a matter of law:

[16] At oral argument before this court, counsel for the plaintiff specifically stated: "When the harassment is committed by a nonsupervisor, a coworker, the plaintiff is then required to prove negligence on the part of the employer in order to hold the employer liable for that employee's workplace harassment. . . . In this case, [the plaintiff] cannot prove negligence."

The commission argues that it is improper for us to rely on the plaintiff's concessions because they were made on appeal and were not in the record before the commission, which courts are confined to in reviewing administrative decisions on appeal. *Commission on Human Rights & Opportunities* v. *Echo Hose Ambulance*, supra, 156 Conn. App. 239, is instructive. There, the referee granted the defendant's motion to strike the CFEPA complaint on the ground that the plaintiff was not an employee pursuant to the federal renumeration test. Id., 244. On appeal, the plaintiff argued that the referee

the department is not liable. A remand, therefore, is unnecessary.

The judgment is affirmed.

In this opinion the other judges concurred.

ARVYS PROTEIN, INC. *v.* A/F PROTEIN, INC.
(AC 44867)

Prescott, Elgo and DiPentima, Js.

Syllabus

The plaintiff appealed to this court from the judgment of the trial court denying its application to modify or vacate an arbitration award. The plaintiff and the defendant had executed a series of contracts in which the plaintiff was to perform research services for the defendant. The defendant was dissatisfied with the plaintiff's results following the first contract, and the parties entered into a second contract. The defendant was again dissatisfied with the plaintiff's results and cancelled the second contract. Thereafter, the defendant demanded arbitration under the terms of the contracts and requested damages incurred as a result of the plaintiff's performance. Both parties voluntarily participated in the arbitration and were represented by their respective corporate presidents. The arbitrator issued a decision awarding the defendant damages in an amount exceeding the money it had paid to the plaintiff under the contracts, and the plaintiff filed an application to modify or vacate the award. The court concluded that, on the basis of the record, it could not definitively determine whether the award was beyond the scope of the submission or that the arbitrator's decision was manifestly, obviously and indisputably wrong, and it found no authority to support the plaintiff's claim that the award arose from the unauthorized practice of law and, thus, violated public policy. *Held*:

1. The plaintiff could not prevail on its claim that the trial court improperly denied its application to modify or vacate the arbitration award because

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erroneously applied the federal renumeration test and that, if it were the applicable test, she should have been afforded an opportunity to engage in further discovery or an evidentiary hearing. Id., 253. During her oral arguments before us, however, the plaintiff conceded that she was unable to satisfy the renumeration test. Id. Because we concluded that the renumeration test was the applicable test, and because the plaintiff conceded to this court that she could not satisfy it, we rejected her claim. Id. Thus, we disagree with the commission that relying on the plaintiff's concessions on appeal is improper.

it was beyond the scope of the submission: the broad, unrestricted language of the submission gave the arbitrator the authority to resolve disputes under the contracts, and the award clearly stated that it was in full settlement of all claims and counterclaims submitted in the arbitration, which included the defendant's claims under the parties' contracts; moreover, the plaintiff's claim that the arbitrator resolved the claims submitted to him incorrectly by misconstruing the parties' contracts could not be the basis for vacating an arbitration award for failure to conform to the submission.

2. The plaintiff could not prevail on its claim that the arbitrator manifestly disregarded the law in awarding breach of warranty damages and awarding damages in excess of the limitations of liability provisions in the contracts: the plaintiff failed to articulate a clearly governing legal principle that the arbitrator appreciated and ignored, and this court declined to address the plaintiff's claim that its interpretation of the contractual provisions was more correct than the arbitrator's, as it could not review the record for errors or misapplication of law.

3. The trial court properly denied the plaintiff's application to modify or vacate the arbitration award when it concluded that the arbitration proceeding did not violate public policy prohibiting the unauthorized practice of law: the plaintiff failed to establish a clear, well-defined and dominant policy against the representation of corporate entities by corporate officers in arbitration proceedings that would warrant vacating an award that was otherwise beyond challenge; moreover, there is no well-defined and dominant public policy that only licensed attorneys can represent corporate parties in arbitration proceedings in Connecticut, as the rules that govern representation in arbitration proceedings in this state clearly provide that any party, including a corporation, may participate in an arbitration proceeding with whatever representation it chooses, including self-representation; furthermore, the plaintiff voluntarily chose to be represented by its president during the proceedings and did not raise an objection to that conduct in which it willingly participated until it lost.

Argued September 12, 2022—officially released April 25, 2023

Procedural History

Application to modify or vacate an arbitration award, brought to the Superior Court in the judicial district of Fairfield, where the court, *Stevens*, *J.*, rendered judgment denying the application, and the plaintiff appealed to this court. *Affirmed.*

Peter J. Zarella, for the appellant (plaintiff).

Trevin C. Schmidt, for the appellee (defendant).

ELGO, J. The plaintiff, ARVYS Protein, Inc., appeals from the judgment of the trial court, rendered in favor of the defendant, A/F Protein, Inc., on the plaintiff's application to modify or vacate an arbitration award. On appeal, the plaintiff claims that the court improperly concluded that (1) the arbitrator's award did not exceed the scope of submission by awarding noncontractual relief, (2) the arbitrator did not manifestly disregard the law by ignoring undisputed contract provisions that limited damages and disclaimed warranties, and (3) the award did not violate public policy because it did not arise from the unauthorized practice of law. We disagree and, accordingly, affirm the judgment.

The record reveals the following facts and procedural history relevant to this appeal.[1] The plaintiff is a contract research organization (CRO)[2] that provides services to assist in the development of medical, pharmaceutical or biotechnical products. The defendant is a biotechnology company that specializes in the research and sale

[1] We note that a portion of the facts that gave rise to these claims, as presented by the parties to the trial court and to this court on appeal, remain disputed. However, because factual findings of the arbitrator "are not subject to judicial review"; *Burr Road Operating Co. II, LLC* v. *New England Health Care Employees Union, District 1199*, 316 Conn. 618, 638, 114 A.3d 144 (2015); neither the trial court nor this court can review the record to make our own independent findings with respect to disputed questions of fact. Furthermore, to the extent the arbitrator failed to make factual findings pertinent to the analysis in this case, we are not free to supplement the record with factual findings of our own. See *State* v. *Connecticut Employees Union Independent*, 322 Conn. 713, 726 n.12, 142 A.3d 1122 (2016). Instead, "[e]very reasonable presumption and intendment will be made in favor of the award and of the arbitrator's acts and proceedings." (Internal quotation marks omitted.) *Harty* v. *Cantor Fitzgerald & Co.*, 275 Conn. 72, 88–89, 881 A.2d 139 (2005).

[2] A CRO is a company retained by another company to perform clinical trials, most commonly for pharmaceutical, biotechnology and medical device industries.

of antifreeze proteins.[3] Antifreeze proteins are specific proteins, glycopeptides and peptides made by different organisms to allow cells to survive in subzero conditions.

Beginning in early 2018, the parties executed a series of contracts. Each of these contracts concerned a project focused on the purification of antifreeze proteins from fish serum, in which the plaintiff was to perform contract research services aimed at establishing a standard operating procedure to produce such antifreeze proteins. Given the experimental nature of contract research services, neither a CRO nor its client can define or predict the output of those services; therefore, to address the uncertainty, the parties adopted a "fee-for-service" contractual model. Under this contractual model, the CRO and the client negotiate prices for itemized services and use project completion "milestones," in which the client pays a percentage of the contract price at the commencement of a specific subset of services and the remaining amount on completion of all work required under the contract. The parties do not move to the next milestone in the contract until the first one is met.

The parties' first milestone of the initial contract (contract one) required the plaintiff to perform a small-scale trial of purification and, if that was successful, the second milestone of contract one required the development of a process to accomplish this purification on a larger scale. The defendant was required to pay 30 percent of the total cost for the project on commencement of the first milestone, and the remaining balance was due on its completion. At the completion of the first milestone, the defendant paid the plaintiff a total

[3] As explained by the trial court in its memorandum of decision, "[a]ntifreeze proteins are used in the medical field to aid in laboratory procedures designed to preserve live cells, tissues, and organs stored in cold conditions."

of $8500. The defendant was dissatisfied with the results of the first milestone, however, and decided not to proceed with the second milestone of contract one.

After contract one was unsuccessful, the parties agree that, at some point in mid-2018, they entered into a second contract (contract two), which modified the purification process requested by the defendant in contract one. When the purification process of contract two failed to yield the anticipated results, the defendant was once again dissatisfied with the results and cancelled the contract. As the memorandum of decision noted, however, the following factual representations are disputed between the parties. The defendant claimed that the plaintiff, during its work on contract two, contaminated the antifreeze proteins it was testing and, as a result, the defendant lost a contract with one of its leading clients. From the defendant's standpoint, the parties' relationship then ended after it rejected a proposed third contract from the plaintiff and, instead, requested the return of all materials in the plaintiff's possession derived from the plasma the defendant had provided. The plaintiff had a different point of view. It believed that contract two had been amended to reinsert a purification process that was initially removed from contract two and that this change in process produced a successful yield of antifreeze proteins, which required the parties to proceed to the next milestone in the contract. The plaintiff also took the position that the parties entered into a third contract and that the defendant initiated and paid for the first milestone of that contract, but it refused to pay the invoice for additional work.

On June 9, 2020, the defendant demanded arbitration with the American Arbitration Association (association) under the terms of the parties' contracts. Paragraph 9 of each contract provides that "[d]isputes under this [a]greement shall be resolved exclusively by final

and binding arbitration before a neutral arbitrator in accordance with the then-existing rules of the American Arbitration Association as applicable in the State of Connecticut." The demand requested damages incurred as a result of the plaintiff's performance under the contracts. The defendant specifically requested damages that included $45,200 that the defendant had paid to the plaintiff under the contracts, $13,500 for the estimated value of the original plasma the defendant provided to the plaintiff to jumpstart the purification efforts, $80,500 for the termination of the defendant's contract with its leading client, and $7095 for the loss of gross profits from sales the defendant had forgone as a result of the depletion of its inventory stemming from the plaintiff's failure to provide the necessary volume of product from purification. On June 30, 2020, the plaintiff filed a response to the defendant's demand disputing the defendant's claims and asserting defenses based on the limitation on liability term in the parties' contracts. The relevant provisions of contract one, as well as each contract thereafter, stated that the plaintiff's services were performed without guarantees and with limits on the plaintiff's liability for damages arising from its services.[4] The plaintiff also counterclaimed for $10,589.96 in damages for unpaid invoices.

[4] Specifically, paragraphs 11 and 12 of the parties' contracts state:

"11. WARRANTIES. Contract research services are provided 'as is' without any warranties of any kind. Except as provided in the terms and conditions of Quote, [the plaintiff] hereby disclaims all warranties, whether express, implied, or statutory, regarding the services, the project deliverables, including any warranties of fitness for a particular purpose and non-infringement of third party rights.

"12. LIMITATION OF LIABILITY. In no event will [the plaintiff] be liable for any consequential, indirect, exemplary, special, or incidental damages, including any lost profits, arising from or relating to the services even if [the plaintiff] has been advised of the possibility of such damages. [The plaintiff's] total cumulative liability in connection with the services will not exceed the fees paid for the services. One or more claims will not enlarge this limit."

On August 26, 2020, the arbitration hearing took place before an arbitrator who was agreed upon by the parties. Neither party was represented by an attorney at that hearing. The plaintiff was represented by its president, Yelena Sheptovitsky, and the defendant was represented by its president, Elliot Entis.

On September 4, 2020, the arbitrator issued a decision awarding the defendant $66,345 in damages, and he declined to award any damages to the plaintiff. In that decision, the arbitrator stated in relevant part: "This [a]ward is in full settlement of all claims and counterclaims submitted to this [a]rbitration. All claims not expressly granted herein are hereby denied." The defendant subsequently sought clarification of the award regarding its request that the arbitrator order the plaintiff to return the fish plasma inventory that the plaintiff retained. The arbitrator responded that he incorporated the value of the unreturned materials into the damages awarded to the defendant and, therefore, denied the defendant's request. The plaintiff did not make any requests to the arbitrator to clarify or articulate the award.

On October 2, 2020, the plaintiff filed an application to modify or vacate the arbitration award.[5] The trial

[5] The plaintiff's application to vacate, modify, or correct the arbitration award requested the following relief:

"(1) [v]acate the award under General Statutes § 52-418 (a) (1) because it was procured by the defendant's submission of a fraudulent exhibit on a central issue of the case;

"(2) vacate the award under . . . § 52-418 (a) (4) because (a) the arbitrator exceeded the scope of the submission by issuing a noncontractual remedy, (b) the arbitrator manifestly disregarded the parties' contract by awarding damages exceeding the unambiguous and uncontested limitation of liability provision, and (c) the arbitrator manifestly disregarded the [parties'] contract by ignoring the disclaimer of warranties provision;

"(3) vacate the award as it violates public policy in that it was procured pursuant to the unauthorized practice of law; or

"(4) modify or correct the award because there was a clear error in the arbitrator's calculation of damages."

During oral arguments before the trial court, the plaintiff also argued that "the arbitration was a restricted one in that the arbitration provision is

court conducted a hearing on February 8, 2021, and issued a memorandum of decision on June 7, 2021, denying the plaintiff's application. With regard to the plaintiff's claim that the arbitrator went beyond the scope of the submission, the court concluded that the record is "unclear on how the arbitrator actually construed or applied the limitation of liability provisions," and, therefore, the court could not definitively determine whether the award was beyond the scope of the submission. With regard to the plaintiff's manifest disregard of the law claim, the court similarly concluded that the record and arbitration award did not definitively demonstrate that the arbitrator's decision was " 'manifestly, obviously and indisputably wrong.' " The court specifically concluded that "[t]here [was] nothing in the record to clearly establish that the arbitrator awarded what the plaintiff describes as being prohibited damages because the award does not explain what types of damages were awarded or how they were calculated." The court also concluded that the plaintiff's disagreement with the arbitrator's interpretation and application of the contract or his factual findings regarding the contract were insufficient to establish manifest disregard of the law. Last, with respect to the plaintiff's public policy claim, the court concluded that the plaintiff did not cite, nor was the court able to locate, any Connecticut authority establishing a well-defined, dominant public policy that an arbitration award "must be voided and vacated when corporate entities pursue arbitration without legal representation, particularly when both corporate parties voluntarily participated in the arbitration without exception or complaint pursuant to an arbitration clause executed by them as part of a

limited to disputes, quote, under the agreement, end quote." Nevertheless, the court concluded in its memorandum of decision that the arbitration submission was unrestricted.

commercial transaction."[6] The court therefore denied the plaintiff's application to vacate the arbitration award,[7] and this appeal followed.

The principles governing our review of the plaintiff's claims on appeal are well established. "Judicial review of arbitral decisions is narrowly confined." (Internal quotation marks omitted.) *Harty* v. *Cantor Fitzgerald & Co.*, 275 Conn. 72, 80, 881 A.2d 139 (2005). "Because we favor arbitration as a means of settling private disputes, we undertake judicial review of arbitration awards in a manner designed to minimize interference with an efficient and economical system of alternative dispute resolution. . . . Furthermore, in applying this general rule of deference to an arbitrator's award, [e]very reasonable presumption and intendment will be made in favor of the [arbitration] award and of the arbitrators' acts and proceedings. . . . When the parties agree to arbitration and establish the authority of the arbitrator through the terms of their submission, the extent of our judicial review of the award is delineated by the scope of the parties' [arbitration] agreement. . . . This is because [a]rbitration is a creature of contract and the parties themselves, by the terms of their

[6] In the plaintiff's application to vacate the arbitration award, the plaintiff also claimed that the defendant submitted a fraudulent document to the arbitrator. In this appeal, the plaintiff does not challenge the court's finding that there was no evidence of fraud. Before the trial court, the plaintiff also asserted a claim that the arbitrator's award should be corrected pursuant to General Statutes § 52-419 (a) (1) because there was a miscalculation in the damages award for the defendant. The plaintiff does not challenge on appeal the court's decision to decline modification of the award on the basis that a miscalculation was not evident on the face of the award.

[7] On June 17, 2021, the defendant filed an application to confirm the award, in which it also sought an award of attorney's fees. The plaintiff filed an objection to the defendant's request for attorney's fees but acknowledged that, short of appeal, the plaintiff could not contest the basis for confirming the award in light of the court's decision on its application to vacate. The court heard oral argument and granted the defendant's application to confirm but denied the request for attorney's fees and interest on the award.

submission, define the powers of the arbitrators." (Citations omitted; internal quotation marks omitted.) *Blondeau* v. *Baltierra*, 337 Conn. 127, 152–53, 252 A.3d 317 (2020). Thus, the standard of review of the claims in the present case is dependent on whether the submission to the arbitrator was restricted or unrestricted. See id., 153.

"A restricted submission, which expressly restrict[s] the breadth of the issues [to be resolved by the arbitrator], reserv[es] explicit rights, or condition[s] the award on court review, is subject to de novo review." (Internal quotation marks omitted.) Id. By contrast, an unrestricted submission to the arbitrator is considered "final and binding; thus the courts will not review the . . . award for errors of law or fact." (Internal quotation marks omitted.) Id. "Where the submission does not otherwise state, the arbitrators are empowered to decide factual and legal questions and an award cannot be vacated on the grounds that . . . the interpretation of the agreement by the arbitrators was erroneous. Courts will not review the evidence nor, where the submission is unrestricted, will they review the arbitrators' decision of the legal questions involved." (Internal quotation marks omitted.) Id., 153–54.

In the present case, we concur with the trial court's conclusion that the arbitration submission was unrestricted. The arbitration clauses of the parties' contracts state that "[d]isputes under this [a]greement shall be resolved exclusively by final and binding arbitration before a neutral arbitrator in accordance with the then-existing rules of the American Arbitration Association as applicable in the State of Connecticut." The plaintiff argues that the submission to arbitration was restricted because the arbitration provisions were limited to "disputes under" the contracts, rather than "any and all disputes between the parties" or "disputes related" to the contracts. The plaintiff's attempt to characterize

the broad language used in the arbitration clauses as restrictive, however, does not make it so. The arbitration provision language in the parties' contracts does not limit the breadth of issues before the arbitrator, reserve explicit rights, or condition the award on court review. See *Blondeau* v. *Baltierra*, supra, 337 Conn. 153–54. Therefore, the submission to the arbitrator was unrestricted.

"Even in the case of an unrestricted submission, we have . . . recognized three grounds for vacating an award: (1) the award rules on the constitutionality of a statute . . . (2) the award violates clear public policy . . . [and] (3) the award contravenes one or more of the statutory proscriptions of [General Statutes] § 52-418." (Internal quotation marks omitted.) *Harty* v. *Cantor Fitzgerald & Co.*, supra, 275 Conn. 81. The only statutory proscription relevant to our discussion is found in § 52-418 (a) (4) and provides that a judge shall vacate an arbitration award "if the arbitrators have *exceeded their powers* or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made." (Emphasis added.) Our Supreme Court has stated that "a claim that the arbitrators have exceeded their powers may be established under § 52-418 in either one of two ways: (1) the award fails to conform to the submission, or, in other words, falls outside the scope of the submission; or (2) the arbitrators manifestly disregarded the law." (Internal quotation marks omitted.) *Harty* v. *Cantor Fitzgerald and Co.*, supra, 85.

The plaintiff claimed to the trial court, and to this court on appeal, that the arbitration award in the present case must be vacated because it violates § 52-418 (a) (4) in that (1) the award was beyond the scope of the submission and (2) the arbitrator manifestly disregarded the law; the plaintiff also claims that (3) the

award violates public policy. Because this case implicates both a challenge under public policy and statutory proscription grounds, "[w]e review the trial court's decision with regard to each ground de novo." *Toland* v. *Toland*, 179 Conn. App. 800, 810, 182 A.3d 651, cert. denied, 328 Conn. 935, 183 A.3d 1174 (2018).

I

The plaintiff first claims that the court improperly denied its application to vacate the arbitration award when it concluded that the arbitrator's award was not beyond the scope of the submission. The plaintiff argues that the arbitrator was empowered to award relief only under the contracts but that the arbitrator nevertheless awarded noncontractual relief in violation of § 52-418 (a) (4). The defendant argues in response that, because the arbitration provisions in the contracts are devoid of any restrictive language, the submission was unrestricted and the court correctly evaluated whether the arbitrator's findings and award fell outside the scope of the submission. We agree with the defendant.

"The standard for reviewing a claim that the award does not conform to the submission requires what [our Supreme Court has] termed in effect, de novo judicial review. . . . The de novo label in this context means something very different from typical de novo review because review under this standard and in this setting is limited to a comparison of the award to the submission. Our inquiry generally is limited to a determination as to whether the parties have vested the arbitrators with the authority to decide the issue presented or to award the relief conferred. With respect to the latter, we have explained that, as long as the arbitrator's remedies were consistent with the agreement they were within the scope of the submission. . . . In making this determination, the court may not engage in fact-finding by providing an independent interpretation of the contract,

but simply is charged with determining if the arbitrators have ignored their obligation to interpret and to apply the contract as written. . . . [S]ee also *AFSCME, Council 4, Local 2663* v. *Dept. of Children & Families*, 317 Conn. 238, 252 n.8, 117 A.3d 470 (2015) (although [our Supreme Court] has stated that a court's review of an arbitration award is in effect, de novo judicial review, this means only that we draw our own conclusions regarding whether an arbitration award conforms to the submission . . .)." (Citations omitted; internal quotation marks omitted.) *Blondeau* v. *Baltierra*, supra, 337 Conn. 155–56.

For this court "[t]o justify vacating an award on the ground that the award exceeds the scope of the submission, we must determine that the award *necessarily* falls outside the scope of the submission. . . . [S]ee also *United Paperworkers International Union, AFL-CIO* v. *Misco, Inc.*, 484 U.S. 29, 38, 108 S. Ct. 364, 98 L. Ed. 2d 286 (1987) (as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision); *AFSCME, Council 4, Local 1303-325* v. *Westbrook*, 309 Conn. 767, 780, 75 A.3d 1 (2013) (It is not [the court's] role to determine whether the arbitrator's interpretation of the collective bargaining agreement was correct. It is enough to uphold the judgment of the court, denying the [union's] application to vacate the award, that such interpretation was a good faith effort to interpret the terms of the collective bargaining agreement. . . .)." (Citation omitted; emphasis in original; internal quotation marks omitted.) *Blondeau* v. *Baltierra*, supra, 337 Conn. 156.

Specifically, "[t]he question for this court is not whether the arbitrator decided the issues correctly but only whether the issues were submitted for [him] to decide. In determining whether an arbitrator has

exceeded the authority granted under the contract, a court cannot base the decision on whether the court would have ordered the same relief, or whether . . . the arbitrator correctly interpreted the contract. The court must instead focus on whether the [arbitrator] had authority to reach a certain issue . . . . [A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of the authority, the award must be enforced. The arbitrator's decision cannot be overturned even if the court is convinced that the arbitrator committed serious error. . . . [A]s long as the arbitrator's remedies were consistent with the agreement they were within the scope of the submission. . . . [T]he court may not engage in fact-finding by providing an independent interpretation of the contract, but simply is charged with determining if the arbitrators have ignored their obligation to interpret and to apply the contract as written. . . . [S]ee also *Stratford* v. *International Assn. of Firefighters*, *AFL-CIO*, *Local 998*, 248 Conn. 108, 116, 728 A.2d 1063 (1999) (it is the arbitrator's judgment that was bargained for and contracted for by the parties, and we do not substitute our own judgment merely because our interpretation of the agreement or contract at issue might differ from that of the arbitrator)." (Citations omitted; internal quotation marks omitted.) *Blondeau* v. *Baltierra*, supra, 337 Conn. 158–59.

In the present case, from the plaintiff's perspective, the contracts had clear and unequivocal provisions that limited damages to the amounts the parties paid under the contracts and disclaimed all warranties. See footnote 4 of this opinion. Specifically, the plaintiff argues that the arbitrator's award included damages amounting to $21,145 for materials under the contracts but that the materials under the contract were only valued at $13,500 with no other evidence to contradict this value. The plaintiff also claims that the arbitrator had no basis

in the contracts for awarding the value of the property as damages, regardless of what that value was determined to be, because paragraph 12 of the contracts stated that the plaintiff's liability "will not exceed fees paid for services," which, the plaintiff argues, cannot be read to include the value of materials as damages. Finally, the plaintiff argues that paragraph 5 of the contracts specifically addresses the defendant's property but does not create any contractual rights or obligations concerning the return of the defendant's property and, therefore, should not have been addressed by the arbitrator or included in the award.[8] Thus, the plaintiff argues that the arbitrator's award of damages exceeding the amount paid under the contracts cannot be reconciled with these provisions and, therefore, the arbitration award was beyond the scope of the submission. These arguments are unpersuasive in light of our governing case law.

The broad, unrestricted language of the arbitration submission gave the arbitrator the authority to resolve "[d]isputes under this [a]greement." Here, the arbitration award is clear that it was in "full settlement of all claims and counterclaims submitted in this [a]rbitration," which included the defendant's claims under the parties' agreements. The plaintiff's real complaint is not that the arbitrator failed to address the claims submitted to him but that he resolved them incorrectly by misconstruing the parties' agreements. As previously noted, such a claimed error cannot be the basis to vacate an arbitration award for failing to conform to the submission. Thus, the plaintiff has failed to show that the arbitration award was beyond the scope of the submission.

[8] Paragraph 5 of each contract states in relevant part: "[The plaintiff] agrees that all . . . materials . . . provided to [the plaintiff] by [the defendant] hereunder . . . are the sole property of [the defendant]."

II

The plaintiff next argues that the court improperly denied its application to vacate the arbitration award when it concluded that the arbitrator did not manifestly disregard the law in rendering the arbitration award. On appeal, the plaintiff claims that the arbitrator manifestly disregarded applicable law when he awarded breach of warranty damages despite the contractual warranties provisions and awarded damages in excess of the limitations of liability provisions in the contracts. The defendant argues in response that the court properly denied the application to vacate on manifest disregard of the law grounds because the arbitration award, on its face, does not show a readily and instantly perceivable error because the award does not provide an itemized breakdown of the damages award. The defendant also argues that, even if this court were to find that the arbitrator incorrectly interpreted the contract provisions, a reviewing court cannot supplant the arbitrator's interpretation of a contract for its own. We agree with the defendant.

"Manifest disregard of the law is an extremely deferential standard of review. [T]he manifest disregard of the law ground for vacating an arbitration award is narrow and should be reserved for circumstances of an arbitrator's extraordinary lack of fidelity to established legal principles. . . . This level of deference is appropriate because the parties voluntarily have chosen arbitration as a means to resolve their legal dispute. . . . As an essential component of that choice, they have agreed to bypass the usual adjudicative apparatus, including its conventional appellate features, for the advantages that accompany private arbitration. To borrow a phrase from the marriage ceremony, that choice is made for better or for worse, which, in this context, means that the arbitrator's decision is final and binding unless it is manifestly, obviously, and indisputably

wrong. Review by a judicial authority is not forfeited entirely, but it is conducted under a different and far less rigorous level of scrutiny." (Citations omitted; internal quotation marks omitted.) *Blondeau* v. *Baltierra*, supra, 337 Conn. 161.

In order for the plaintiff to prove that the arbitrator manifestly disregarded the law under this "highly deferential standard"; *Harty* v. *Cantor Fitzgerald & Co.*, supra, 275 Conn. 102; it must prove three elements: "(1) the error was obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator; (2) the [arbitrator] appreciated the existence of a clearly governing legal principle but decided to ignore it; and (3) the governing law alleged to have been ignored by the [arbitrator] is [well-defined], explicit, and clearly applicable." (Internal quotation marks omitted.) *Blondeau* v. *Baltierra*, supra, 337 Conn. 162.

Further, "[t]he deference owed to the arbitrator's decision is not defeated, even if the losing party's preferred interpretation finds substantial support upon a close analysis of the controlling legal principles at issue. In other words, the plaintiff does not satisfy the manifest disregard standard simply by persuading us that the arbitrator misinterpreted [a contractual provision]. See *State* v. *Connecticut State Employees Assn., SEIU Local 2001*, [287 Conn. 258, 281, 947 A.2d 928 (2008)] ('even if the arbitrator's decision constitutes a misapplication of the relevant law, we are not at liberty to set aside an [arbitrator's] award because of an arguable difference regarding the meaning or *applicability* of laws' . . .); *Garrity* v. *McCaskey*, [223 Conn. 1, 11–12, 612 A.2d 742 (1992)] ('[W]e do not review an arbitrator's decision merely for errors of law . . . . Even if the arbitrators were to have misapplied the [applicable law], such a misconstruction of the law would not demonstrate the arbitrators' egregious or patently irrational rejection

of clearly controlling legal principles.')." (Emphasis in original; footnote omitted.) *Blondeau* v. *Baltierra*, supra, 337 Conn. 167.

In the present case, the plaintiff's claim that the arbitration award reflected a manifest disregard of the law must fail because the plaintiff has not articulated a clearly governing legal principle that the arbitrator appreciated and ignored. The plaintiff's claim rests solely on whether its interpretation of the contractual provisions is the better or more correct interpretation than that of the arbitrator. The plaintiff's argument presents a question of contract interpretation that this court cannot address on appeal because we cannot review the record for errors or misapplication of law. See id.; *State* v. *Connecticut State Employees Assn., SEIU Local 2001*, supra, 287 Conn. 281; *Garrity* v. *McCaskey*, supra, 223 Conn. 11–12. Here, the arbitration submission provided the arbitrator with the authority to hear disputes under the contract. The arbitrator did just that and issued an award. Because there is nothing in the award to indicate that the arbitrator appreciated governing legal principles and chose to ignore them, the plaintiff's manifest disregard of the law claim fails.

III

The plaintiff's third and final claim on appeal is that the court improperly denied its application to vacate when it concluded that the arbitration proceedings did not violate public policy prohibiting the unauthorized practice of law. The plaintiff contends that the arbitration proceeding violated that public policy because neither party was represented by an attorney during the proceedings before the arbitrator but, rather, both were represented by corporate officers. Specifically, the plaintiff argues that General Statutes § 51-88[9] and Prac-

[9] General Statutes § 51-88 provides in relevant part: "(a) Unless a person is providing legal services pursuant to statute or rule of the Superior Court, a person who has not been admitted as an attorney under the provisions of section 51-80 or, having been admitted under section 51-80, has been

tice Book § 2-44A (a)[10] establish a well-defined public policy in Connecticut that prohibits self-representation of a corporate party in arbitration proceedings. The defendant counters that there is no well-defined and dominant public policy in Connecticut that explicitly prohibits representation of a corporation by the corporation's president or other officer in arbitration proceedings. We agree with the defendant.

Our Supreme Court has recognized that, even in the case of an unrestricted submission, an arbitration award may be vacated if the award violates clear public policy. See *Garrity* v. *McCaskey*, supra, 223 Conn. 6. Such challenges are "premised on the fact that the parties cannot expect an arbitration award approving conduct which is illegal or contrary to public policy to receive judicial enforcement any more than parties can expect a court to enforce such a contract between them. . . . When a challenge to the arbitrator's authority is made on public policy grounds, however, the court is not concerned with the correctness of the arbitrator's decision but with the lawfulness of enforcing the award. . . . Accordingly, the public policy exception to arbitral authority should be *narrowly construed* and [a] court's

disqualified from the practice of law due to resignation, disbarment, being placed on inactive status or suspension, shall not: (1) Practice law or appear as an attorney-at-law for another in any court of record in this state, (2) make it a business to practice law or appear as an attorney-at-law for another in any such court . . . or (8) otherwise engage in the practice of law as defined by statute or rule of the Superior Court. . . .

"(d) The provisions of this section shall not be construed as prohibiting . . . (2) any person from practicing law or pleading at the bar of any court of this state in his or her own cause . . . ."

[10] Practice Book § 2-44A (a) provides in relevant part: "The practice of law is ministering to the legal needs of another person and applying legal principles and judgment to the circumstances or objectives of that person. This includes, but is not limited to . . . (4) [r]epresenting any person in a court, or in a formal administrative adjudicative proceeding or other formal dispute resolution process or in any administrative adjudicative proceeding in which legal pleadings are filed or a record is established as the basis for judicial review. . . ."

refusal to enforce an arbitrator's interpretation of [a contract] is limited to situations where the contract as interpreted would violate some explicit public policy that is well-defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests. . . . The party challenging the award bears the burden of proving that illegality or conflict with public policy is clearly demonstrated. . . . Therefore, given the narrow scope of the public policy limitation on arbitral authority, the plaintiff can prevail in the present case only if it demonstrates that the [arbitrator's] award *clearly* violates an established public policy mandate." (Emphasis added; internal quotation marks omitted.) *State* v. *AFSCME, Council 4, Local 387, AFL-CIO*, 252 Conn. 467, 474–75, 747 A.2d 480 (2000).

The question of whether an arbitral award implicates and violates public policy is subject to plenary review. See *LaSalla* v. *Doctor's Associates, Inc.*, 278 Conn. 578, 586, 898 A.2d 803 (2006); *DeRose* v. *Jason Robert's, Inc.*, 191 Conn. App. 781, 806, 216 A.3d 699, cert. denied, 333 Conn. 934, 218 A.3d 593 (2019). "Where there is no clearly established public policy against which to measure the propriety of the arbitrator's award, there is no public policy ground for vacatur. If, on the other hand, it has been determined that an arbitral award does implicate a clearly established public policy, the ultimate question remains as to whether the award itself comports with that policy. . . . [W]here a party challenges a consensual arbitral award on the ground that it violates public policy, and where that challenge has a legitimate, colorable basis, [plenary] review of the award is appropriate in order to determine whether the award does in fact violate public policy." (Internal quotation marks omitted.) *State* v. *AFSCME, Council 4, Local 387, AFL-CIO*, supra, 252 Conn. 475–76; see also *State* v. *AFSCME, Council 4, Local 391*, 125 Conn.

App. 408, 419, 7 A.3d 931 (2010) (trial court properly vacated arbitral award at issue when reinstatement of grievant as correctional officer would frustrate state's strong public policy against workplace sexual harassment); *Board of Police Commissioners* v. *Stanley*, 92 Conn. App. 723, 740, 887 A.2d 394 (2005) (trial court properly vacated arbitration award on basis of public policy against inappropriate behavior by police officer on and off duty, and against implied municipal endorsement of such conduct).

When reviewing a claim that an arbitration award violates public policy, our Supreme Court has established a two step analysis. *Stratford* v. *AFSCME, Council 15, Local 407*, 315 Conn. 49, 56, 105 A.3d 148 (2014). "First, the court must determine whether an explicit, well-defined and dominant public policy can be identified." (Internal quotation marks omitted.) Id. In making this determination, the court looks to "statutes, administrative decisions, and case law to determine the existence of public policy." Id. Second, if the court finds that there is a well-defined and dominant public policy, the court must next consider the specific facts and circumstances to determine if the relevant public policy was in fact violated. See id., 58.

In the present case, we conclude that the plaintiff has failed to meet its burden to show that the arbitration award conflicts with public policy because there is no well-defined and dominant public policy that only licensed attorneys can represent corporate parties in arbitration proceedings in Connecticut. Rule R-26 of the association's Commercial Arbitration Rules and Mediation Procedures, which governs representation in arbitration proceedings in this state, clearly provides that "[a]ny party may participate without representation (pro se), or by counsel or any other representative of the party's choosing, unless such choice is prohibited

by applicable law." Thus, as long as there is no applicable law prohibiting it, any party, including a corporation, may participate in arbitration proceedings with whatever representation it chooses.

In the context of judicial proceedings, this court has recognized that "[t]he authorization to appear [as a self-represented party] is limited to representing one's own cause, and does not permit individuals to appear . . . in a representative capacity. In Connecticut, a corporation may not appear pro se. . . . A corporation may not appear by an officer of the corporation who is not an attorney." (Internal quotation marks omitted.) *Purtill* v. *Cook*, 197 Conn. App. 22, 30, 231 A.3d 245 (2020). At the same time, the plaintiff has provided insufficient authority to meet the burden necessary to demonstrate that this precedent has been extended to the representation of corporate parties in arbitration proceedings. The lack of such authority is fatal to the plaintiff, which bears the burden of demonstrating that a clearly established, well-defined and dominant public policy requires vacatur of the arbitration award. See *State* v. *AFSCME, Council 4, Local 387, AFL-CIO*, supra, 252 Conn. 475.

Although the plaintiff is correct that the prohibition against self-representation of corporate parties is clearly defined and established in the context of judicial proceedings; see *Purtill* v. *Cook*, supra, 197 Conn. App. 30; it is less clear that Connecticut law prohibits self-representation of corporate parties in arbitration proceedings.[11] In the absence of any Connecticut appellate

[11] Although the plaintiff cites to several cases from other states as precedent to support its argument that self-representation of a corporation is prohibited in arbitration proceedings, we reiterate that Rule R-26 of the association's Commercial Arbitration Rules and Mediation Procedures provides in relevant part that "[a]ny party may participate without representation (pro se), or by counsel or any other representative of the party's choosing, unless such choice is prohibited by applicable law." Because we are obligated to narrowly construe the public policy exception to arbitral authority; see *State* v. *AFSCME, Council 4, Local 387, AFL-CIO*, supra, 252 Conn.

authority specifically so holding, the plaintiff, primarily in its reply brief, relies on various statutory provisions and rules of practice from which it argues we can infer that prohibition. The plaintiff addresses first the definitional section of Practice Book § 2-44A (a) (4), which provides in relevant part that the practice of law includes "[r]epresenting any person in a . . . formal dispute resolution process," and subsection (6), which notes that a person includes, inter alia, a corporate entity. Because there is no explicit exception that specifically permits persons to act as agents or representatives for a corporate party in domestic arbitrations, as there is for international arbitrations under § 51-88 (d) (3)[12] and for individuals participating in labor arbitrations pursuant to Practice Book § 2-44A (b) (4), the plaintiff contends that "it must be *presumed* that the drafters of these provisions intentionally declined to create a broader exception for [self-representation of corporate entities in] all arbitrations." (Emphasis added.) Finally, the plaintiff references the criminal and civil penalties pursuant to § 51-88 (b) (1) and Practice Book § 2-44A (h) to underscore the important public policy underlying the unauthorized practice of law.

Our difficulty with the plaintiff's contentions lies in our precedent which contemplates that the public policy must be not only clear, well-defined and dominant but implicate the award itself. See, e.g., *Board of Police Commissioners* v. *Stanley*, supra, 92 Conn. App. 741; see also *Groton* v. *United Steelworkers of America*, 254 Conn. 35, 36–37, 757 A.2d 501 (2000) (trial court

474–75; we decline to predicate our analysis on such nonbinding cases from other jurisdictions. To do so would cast an unreasonably wide net to create a public policy provision that does not already exist in the statutory law, administrative decisions, or decisional law of this state.

[12] General Statutes § 51-88 provides in relevant part: "(d) The provisions of this section shall not be construed as prohibiting . . . (3) any person from acting as an agent or representative for a party in an international arbitration, as defined in subsection (3) of section 50a-101 . . . ."

properly determined that arbitrator's award reinstating employee who embezzled from former employer violated public policy); *State* v. *AFSCME, Council 4, Local 387, AFL-CIO*, supra, 252 Conn. 478, (finding that award reinstating correction officer who made harassing, racist telephone calls to state legislator while on duty violated public policy because conduct violated criminal statute and employment regulations of Department of Correction); *South Windsor* v. *South Windsor Police Union*, 41 Conn. App. 649, 654, 677 A.2d 464 (finding award that reinstated police officer who deliberately revealed identity of confidential informant violated public policy), cert. denied, 239 Conn. 926, 683 A.2d 22 (1996); *State* v. *Council 4, AFSCME*, 27 Conn. App. 635, 641, 608 A.2d 718 (1992) (trial court properly determined that arbitrator's award reinstating employee who misappropriated state funds violated public policy).[13] In the present case, there is no claim that the award violated public policy. Nor is there any claim that the arbitrator violated public policy in how he rendered the award. Instead, the plaintiff seeks to vacate an award on the basis of an alleged violation of public policy in which it in fact engaged. Here, we emphasize that both corporate parties voluntarily participated in the arbitration and were represented by their respective corporate presidents. Furthermore, the plaintiff did not raise any objection or complaint related to this issue until the arbitrator ruled against it. We fail to see how public policy is served by allowing a disappointed party the opportunity to object to an arbitration award on the basis of a procedure in which it willingly participated.

[13] Like the plaintiff's claim of fraud, which was not pursued on appeal; see footnote 6 of this opinion; claims for procedural improprieties are asserted pursuant to General Statutes § 52-418 (a), which provides in relevant part: "Upon the application of any party to an arbitration, the superior court . . . shall make an order vacating the award if it finds any of the following defects: (1) If the award has been procured by corruption, fraud or undue means; (2) if there has been evident partiality or corruption on the part of any arbitrator; (3) if the arbitrators have been guilty of misconduct . . . ."

On the basis of our review of the relevant statutory authority, rules of practice and decisional law of this state, we conclude that the plaintiff has failed to establish a clear, well-defined and dominant policy against the self-representation of corporate parties in arbitration proceedings that would warrant vacating an award that is otherwise beyond challenge. This is especially so when the party challenging the award engaged in that very same conduct and raised no objection to such conduct during the arbitration proceeding. The court, therefore, properly denied the plaintiff's application to modify or vacate the arbitration award.

The judgment is affirmed.

In this opinion the other judges concurred.

STATE OF CONNECTICUT *v.* DANIEL SANTIAGO (AC 44780)

Suarez, Clark and Seeley, Js.

Syllabus

The defendant, who had been previously convicted, following a jury trial, of manslaughter in the first degree with a firearm and assault in the first degree, appealed to this court from the judgment of the trial court dismissing his motion to correct an illegal sentence. In his motion to correct, the defendant claimed that the trial court, at the time of sentencing, had not considered his youth as a mitigating factor, despite the fact that the underlying offenses occurred when he was eighteen years old and that his total effective sentence of sixty years was an effective life sentence under Connecticut law, thus violating the principles announced in *Miller* v. *Alabama* (567 U.S. 460) and *Graham* v. *Florida* (560 U.S. 48) pertaining to the sentencing of juvenile offenders. The trial court granted the state's motion to dismiss the motion to correct, on the ground that the defendant failed to raise a colorable claim pursuant to the relevant rule of practice (§ 43-22) because he was not entitled under the federal or state constitution to have the sentencing court consider his youth as a mitigating factor at the time of sentencing. After the defendant brought this appeal, he filed a motion for sentence modification pursuant to statute (§ 53a-39). The trial court granted the motion

after finding good cause to reduce the defendant's sixty year sentence. The trial court's sentence modification made the defendant eligible for parole at fifty years of age, reduced the sentence for the manslaughter conviction from forty years to thirty-seven years, reduced the sentence for the assault conviction from twenty years to fifteen years, and ordered the sentences for each conviction to run concurrently, thereby reducing the original sixty year sentence to thirty-seven years. *Held* that the defendant's appeal was dismissed as moot, as any consideration of the claims raised on appeal, in which the defendant challenged the dismissal of the motion to correct, would not result in practical relief to the defendant in light of the fact that the defendant was no longer burdened by the sentence he sought to correct; moreover, although the ruling dismissing the motion to correct had not been altered during the pendency of this appeal, it could not be disputed that the significance of that ruling nonetheless had been undermined by the fact that the subject of the motion to correct, the defendant's original sixty year sentence, had been superseded by the sentence modification.

Argued January 9—officially released April 25, 2023

Procedural History

Substitute information charging the defendant with the crimes of murder, manslaughter in the first degree with a firearm and assault in the first degree, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *Dewey*, *J.*; verdict and judgment of guilty of manslaughter in the first degree with a firearm and assault in the first degree; thereafter, the defendant filed a motion to correct an illegal sentence; subsequently, the court, *Graham*, *J.*, granted the state's motion to dismiss the defendant's motion to correct an illegal sentence, and the defendant appealed to this court; thereafter, the trial court, *Gold*, *J.*, granted the defendant's motion for sentence modification. *Appeal dismissed.*

James B. Streeto, senior assistant public defender, for the appellant (defendant).

Michele C. Lukban, senior assistant state's attorney, with whom, on the brief, were *Sharmese L. Walcott*, state's attorney, and *Debra A. Ware*, former senior assistant state's attorney, for the appellee (state).

Opinion

SUAREZ, J. The defendant, Daniel Santiago, appeals from the judgment of the trial court, *Graham*, *J.*, dismissing his motion to correct an illegal sentence. In the motion to correct, the defendant argued that he was serving the functional equivalent of a life sentence, despite being eligible for parole, and that, when his sentence was imposed, the sentencing court violated his rights by not taking into account his youth as a mitigating factor. The defendant claims that, in dismissing his motion, the court improperly (1) denied him the right to "an evidentiary hearing concerning the current state of science on the maturity, impulse control, and over receptiveness to peer pressure of [eighteen year olds], and the effect of science on Connecticut law" and (2) concluded that he did not present a colorable claim that he was entitled to relief under the Connecticut and United States constitutions. We dismiss the appeal as moot.

The following procedural history is relevant to our resolution of this appeal. Following a jury trial, the defendant was convicted of manslaughter in the first degree with a firearm in violation of General Statutes § 53a-55a (a), and assault in the first degree in violation of General Statutes § 53a-59 (a) (1). On April 25, 2000, the court, *Dewey*, *J.*, sentenced the defendant to a total effective sentence of sixty-five years of incarceration.[1] On July 25, 2000, the court granted the defendant's motion to correct the sentence, thereby reducing his total effective sentence by five years.[2]

[1] The court imposed a sentence of forty years for the manslaughter conviction and ordered an additional five year period of incarceration pursuant to General Statutes § 53-202k. The court imposed a sentence of twenty years for the assault conviction.

[2] The court reduced the sentence to omit the portion of the sentence that it had imposed under General Statutes § 53-202k. Both the defendant's motion to correct and the court's decision were based on the then recent decision of the United States Supreme Court in *Apprendi* v. *New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) (defendant's

The defendant appealed from the judgment of conviction to this court. This court agreed with the defendant that prosecutorial impropriety during cross-examination and closing argument had deprived him of a fair trial, reversed the judgment of conviction, and remanded the case for a new trial. *State* v. *Santiago*, 73 Conn. App. 205, 230–231, 246, 807 A.2d 1048 (2002). Our Supreme Court granted the state's petition for certification to appeal. *State* v. *Santiago*, 262 Conn. 939, 815 A.2d 673 (2003). Thereafter, our Supreme Court reversed this court's judgment and remanded the case to this court with direction to consider a remaining claim that it had not considered on its merits. *State* v. *Santiago*, 269 Conn. 726, 763, 850 A.2d 199 (2004). In compliance with the remand order, this court considered the merits of the remaining claim and affirmed the judgment of conviction. *State* v. *Santiago*, 87 Conn. App. 754, 867 A.2d 138, cert. denied, 273 Conn. 938, 875 A.2d 45 (2005).[3]

On November 1, 2019, pursuant to Practice Book § 43-22,[4] the defendant filed a motion to correct an illegal

sixth amendment right to jury trial requires that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt"). See *State* v. *Santiago*, Superior Court, judicial district of Hartford, Docket No. CR-97-514778 (July 25, 2000).

[3] The defendant applied to have his sixty year sentence modified by the sentence review division of the Superior Court pursuant to General Statutes § 51-195 and Practice Book § 43-28. He argued that the sentence was disproportionate to other sentences of a like kind and that he was "functionally illiterate." *State* v. *Santiago*, Superior Court, judicial district of Hartford, Docket No. CR-97-514778 (March 20, 2006). Pursuant to General Statutes § 51-196, in 2006, a three judge panel rendered a written decision in which it affirmed the defendant's sentence after determining that it was neither inappropriate nor disproportionate. Id.

In 2005, the defendant petitioned for a writ of habeas corpus and, after the habeas court denied his amended petition as well as his petition for certification to appeal from that judgment, this court dismissed the defendant's subsequent appeal. See *Santiago* v. *Commissioner of Correction*, 125 Conn. App. 641, 648, 9 A.3d 402 (2010).

[4] Practice Book § 43-22 provides: "The judicial authority may at any time correct an illegal sentence or other illegal disposition, or it may correct a

sentence. The trial court's resolution of that motion is the subject of the present appeal. The defendant asserted that, at the time of sentencing, Judge Dewey had not considered "[his] youth or its attendant features as a mitigating factor" despite the fact that the underlying offenses occurred when he was eighteen years of age. The defendant argued that his total effective sentence of sixty years was, as a matter of law, "a life sentence under Connecticut law." The defendant argued that the court's sentence ran afoul of the principles announced in *Miller* v. *Alabama*, 567 U.S. 460, 132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012), and *Graham* v. *Florida*, 560 U.S. 48, 130 S. Ct. 2011, 176 L. Ed. 2d 825 (2010), that pertain to the sentencing of juvenile offenders.[5] The defendant also argued that the sixty

sentence imposed in an illegal manner or any other disposition made in an illegal manner."

[5] By way of background, in *Graham* v. *Florida*, supra, 560 U.S. 79–80, 82, the United States Supreme Court barred life imprisonment without the possibility of parole for juvenile nonhomicide offenders. In *Miller* v. *Alabama*, supra, 567 U.S. 467, the United States Supreme Court held that mandatory sentencing schemes that impose a term of life imprisonment without parole on juvenile homicide offenders, thus precluding consideration of the offender's youth (and all that accompanies it) as a mitigating factor against such a severe punishment, violate the principle of proportionate punishment under the eighth amendment to the United States constitution.

"Thus, an offender's age and the hallmarks of adolescence must be considered as mitigating factors before a juvenile can serve [a mandatory sentence of life imprisonment without the possibility of parole]. [Our Supreme Court] has interpreted *Miller* to apply not only to mandatory sentences for the literal life of the offender, but also to discretionary sentences and sentences that result in imprisonment for the 'functional equivalent' of an offender's life. . . . [Our Supreme Court also has] ruled that *Miller* applies not only prospectively, but retroactively, and also to challenges to sentences on collateral review." (Citations omitted; footnote omitted.) *State* v. *McCleese*, 333 Conn. 378, 383, 215 A.3d 1154 (2019). We note that "*Miller*'s holding is limited to cases in which the defendant is younger than eighteen at the time of the crime. . . . [A]n offender who has reached the age of eighteen is not considered a juvenile for sentencing procedures and eighth amendment protections articulated in *Miller*." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Woods* v. *Commissioner of Correction*, 197 Conn. App. 597, 620, 232 A.3d 63 (2020), appeal dismissed, 341 Conn. 506, 267 A.3d 193 (2021) (certification improvidently granted).

year sentence violated his "rights under the greater protections afforded by article first, §§ 8 and 9, of the Connecticut constitution because it is a cruel and unusual punishment and violates [his] right to substantive and procedural due process" and that "[his] sentence is also illegal and imposed in an illegal manner under the greater protections afforded by article first, § 20, of the Connecticut constitution."

In the defendant's accompanying memorandum of law, he argued that, first, the court must consider whether, under the federal and state constitutions, the principles requiring sentencing courts to consider a juvenile offender's youth in mitigation against severe punishment should also be applied to individuals, like him, "who were eighteen [years old] at the time of the offense and still in the stage of development that would scientifically constitute 'adolescence.' " Essentially, he argued that the "brain science" that underlies the holdings in *Miller* and its progeny, as well as the enactment of General Statutes § 54-125a (f),[6] supports a determination that he "share[s] the lessened culpability that other adolescents have." Second, the defendant argued, the court must consider "whether [his] sixty year sentence

[6] General Statutes § 54-125a (f) provides: "(1) Notwithstanding the provisions of subsections (a) to (e), inclusive, of this section, a person convicted of one or more crimes committed while such person was under eighteen years of age, who is incarcerated on or after October 1, 2015, and who received a definite sentence or total effective sentence of more than ten years for such crime or crimes prior to, on or after October 1, 2015, may be allowed to go at large on parole in the discretion of the panel of the Board of Pardons and Paroles for the institution in which such person is confined, provided (A) if such person is serving a sentence of fifty years or less, such person shall be eligible for parole after serving sixty per cent of the sentence or twelve years, whichever is greater, or (B) if such person is serving a sentence of more than fifty years, such person shall be eligible for parole after serving thirty years. Nothing in this subsection shall limit a person's eligibility for parole release under the provisions of subsections (a) to (e), inclusive, of this section if such person would be eligible for parole release at an earlier date under any of such provisions."

of incarceration for a crime he committed when he was eighteen years old is subject to this broader application of these principles."

On May 6, 2020, the state filed a motion to dismiss the motion to correct and an accompanying memorandum of law. The state argued that the court lacked subject matter jurisdiction because (1) the defendant was eligible for parole and (2) there was no support under the federal or state constitutions for the defendant's belief that a court, sentencing a defendant who committed an offense at eighteen years of age, was bound to consider the defendant's youth as a mitigating factor. The defendant filed an objection to the state's motion to dismiss. The defendant argued therein that (1) his parole eligibility did not undermine his arguments and (2) the due process provision of the state constitution compels a conclusion that the principles of *Miller* should be extended to persons who were eighteen at the time of the offense of which they stood convicted. Thereafter, the state filed a supplemental memorandum of law in support of its motion to dismiss. The defendant filed a supplemental memorandum in support of his objection to the motion to dismiss.

On April 15, 2021, following a hearing, the court, *Graham*, *J.*, granted the state's motion to dismiss the defendant's motion to correct an illegal sentence. In its memorandum of decision, the court concluded that the defendant failed to raise a colorable claim under Practice Book § 43-22 because, in consideration of the undisputed relevant facts in the record, he was not entitled, under either the federal or state constitutions, to have the sentencing court consider his youth as a mitigating factor at the time of sentencing. The court stated: "Because the defendant was eighteen years of age at the time of the offense, and because he will be eligible for parole, he was not entitled to consideration of youth related mitigating factors in imposing his sentence. Nor

does the imposition of a sixty year sentence with the possibility of parole upon a defendant that was eighteen years old at the time of his offense violate article first, §§ 8 and 9, of the Connecticut constitution. The defendant has failed to raise a colorable claim within the scope of Practice Book § 43-22." Thereafter, the defendant filed the present appeal, in which he claims error in what he characterizes as the court "denying" him an evidentiary hearing in connection with the motion to dismiss, as well as the court's conclusion that he did not state a colorable claim for relief under the federal and state constitutions.

On January 3, 2022, after the defendant brought this appeal, he filed a motion for sentence modification pursuant to General Statutes § 53a-39.[7] In the memorandum of law in support of that motion, the defendant argued that his sixty year total effective sentence should be modified primarily because his efforts "to redeem himself . . . and to rehabilitate in prison have earned him a chance at a new sentence—one that can enable him to deepen his personal growth, and to do everything possible to right the wrongs of his adolescence." The defendant also argued that modification was warranted in light of the "sea change in legal and scientific thought" pertaining to juvenile offenders that had taken place since the time of his sentencing in 2000. In particular, the defendant relied on *Miller* v. *Alabama*, supra, 567 U.S. 467, and *State* v. *Riley*, 315 Conn. 637, 110 A.3d 1205 (2015) (interpreting and applying *Miller*), cert. denied, 577 U.S. 1202, 136 S. Ct. 1361, 194 L. Ed. 2d 376

[7] General Statutes § 53a-39 provides in relevant part: "(a) Except as provided in subsection (b) of this section, at any time during an executed period of incarceration, the sentencing court or judge may, after hearing and for good cause shown, reduce the sentence, order the defendant discharged, or order the defendant discharged on probation or conditional discharge for a period not to exceed that to which the defendant could have been originally sentenced. . . ."

(2016). On March 22, 2022, the court, *Gold*, *J.*, held a hearing on the motion.

On July 19, 2022, the court granted the motion after finding good cause to reduce the sixty year sentence. The court stated: "Having considered and balanced what it believes to be the factors relevant to determining whether the defendant's sentence should be reduced, the court has concluded that the defendant is deserving of some measure of relief. This is not to say that the [eighteen year old defendant], who in 1997 shot and killed one person and seriously injured another, and the [twenty-one year old defendant] who stood before Judge Dewey in April, 2000, did not deserve the severe sentence that was imposed. Yet, at the same time, the [forty-three year old defendant] who comes before this court is not that same individual, and, significantly, his personal transformation over the years is of a nature and breadth that would not have been foreseeable when his original sentence was imposed." Accordingly, the court crafted a new sentence so as to make the defendant eligible for parole not when he reaches seventy years of age, but fifty years of age. The court modified the sentence for the manslaughter conviction from forty years to thirty-seven years. The court modified the sentence for the assault conviction from twenty years to fifteen years. Contrary to the terms of the original sentence, the court ordered that the sentences for each conviction were to run concurrently, thereby reducing the original sixty year sentence to thirty-seven years.

The state argues that this appeal is moot because, after the defendant's sixty year sentence was modified by Judge Gold, there is no longer any practical relief that this court may afford the defendant.[8] The state

[8] The parties have thoroughly addressed the issue of whether the present appeal is moot. As we stated previously in this opinion, the defendant filed the motion for sentence modification after he filed the present appeal. In its initial brief, which the state filed before Judge Gold granted the motion for sentence modification, the state argued that this court should conclude

argues that the March 22, 2022 hearing before Judge Gold on the defendant's application for sentence reduction has rendered the present appeal moot because, by virtue of that hearing, the defendant achieved the remedy that he sought in connection with the underlying motion to correct, namely, a resentencing. Alternatively, the state argues that the appeal is moot because, assuming that the rationale of *Miller*, *Graham*, and their progeny applied to an eighteen year old offender, the fact that the defendant's modified sentence of thirty-seven years makes him eligible for parole at age fifty should compel the conclusion that he is not burdened by the functional equivalent of life without the possibility of parole. Thus, the state argues, the modified sentence falls outside of the ambit of precedent on which the defendant relies.

In his reply brief, the defendant "acknowledges that the case law from this court and the Supreme Court would hold that [his] 'modified' sentence is no longer a life sentence within the meaning of *Miller* [and] *Graham*. Case law from this court and the Supreme Court also holds that the modification represents a change in the case which deprives this court and the trial court of jurisdiction over the defendant's motion for modification."[9] Nonetheless, the defendant, suggesting that this

that the present appeal is moot because the defendant had filed the motion and, in arguing that the motion should be granted, relied, in part, on the sentencing court's failure to view his age at the time of the offenses as a mitigating factor. After Judge Gold granted the motion, this court granted the state's subsequent motion for permission to file a supplemental brief to address the significance of Judge Gold's sentence modification on the present appeal. The state filed its supplemental brief on September 9, 2022, arguing that the appeal is moot in light of the modified sentence. On October 7, 2022, the defendant filed his reply brief, in which he responded to the state's mootness argument. Oral argument in this appeal took place on January 9, 2023.

[9] The defendant states that "there is no consensus in this nation's case law on when a lengthy sentence becomes a de facto life sentence" and "acknowledges [that] it is difficult to read [relevant precedent] without concluding that a sentence which results in a defendant's release at the age of fifty years is not a life sentence for *Miller-Graham* purposes. This would

court should consider the appeal even if it is moot, "requests the opportunity to move forward in this case" in an attempt to advocate, contrary to well established precedent, that (1) the modified sentence constitutes a life sentence, and (2) the sentencing court's failure to consider his youth as a mitigating factor constitutes a constitutional violation, "even if [he] receives a sentence of less than life in prison." The defendant argues that Judge Gold, in modifying his sentence, did not base his decision on the fact that his youth entitled him to a shorter sentence. The defendant also argues that this court can grant him relief in connection with this appeal because it may "order the trial court [to] hold an evidentiary hearing on [his] motion to correct an illegal sentence" and may "order a new sentencing hearing."

"[M]ootness implicates [this] court's subject matter jurisdiction and is thus a threshold matter for us to resolve" before we may reach the merits of an appeal. (Internal quotation marks omitted.) *In re Emma F.*, 315 Conn. 414, 423, 107 A.3d 947 (2015). "Mootness presents a circumstance wherein the issue before the court has been resolved or had lost its significance because of a change in the condition or affairs between the parties. . . . A case is moot when due to intervening circumstances a controversy between the parties no longer exists." (Internal quotation marks omitted.) *Barber* v. *Barber*, 193 Conn. App. 190, 221, 219 A.3d 378 (2019). "It is well established that an appeal is considered moot if there is no possible relief that the appeals court can grant to the appealing party, even if the court were to be persuaded that the appellant's arguments are correct." *Wallingford Center Associates* v. *Board of Tax Review*,

mean that the sentence modification court reduced the defendant's sentence to one in which he would be released and have an opportunity to engage in meaningful life activities. A careful reading of the modification decision reveals that this was the court's intention."

68 Conn. App. 803, 807, 793 A.2d 260 (2002). "[T]he existence of an actual controversy is an essential requisite to appellate jurisdiction; it is not the province of appellate courts to decide moot questions, disconnected from the granting of actual relief or from the determination of which no practical relief can follow. . . . An actual controversy must exist not only at the time the appeal is taken, but also throughout the pendency of the appeal. . . . When, during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot. . . . Because mootness implicates subject matter jurisdiction, it presents a question of law over which our review is plenary." (Citation omitted; internal quotation marks omitted.) *New Hartford* v. *Connecticut Resources Recovery Authority*, 291 Conn. 502, 506–507, 970 A.2d 578 (2009).

Generally speaking, if, during the pendency of an appeal, the ruling at issue has been superseded, the appeal becomes moot. This court has applied this principle in various contexts. See, e.g., *In re Probate Appeal of Tunick*, 215 Conn. App. 551, 553, 284 A.3d 26 (2022) (dismissing appeal as moot because "probate decree at issue in this appeal was superseded by a subsequent probate decree, which is the subject of a separate probate appeal pending in the Superior Court"); *Dempsey* v. *Cappuccino*, 200 Conn. App. 653, 659, 240 A.3d 1072 (2020) (subsequent visitation orders superseded orders challenged on appeal, rendering appeal moot); *Thunelius* v. *Posacki*, 193 Conn. App. 666, 686, 220 A.3d 194 (2019) (dismissing portion of appeal as moot because it pertained to order that was superseded by subsequent orders addressing appointment of guardian ad litem for child); *Brown* v. *Brown*, 132 Conn. App. 30, 34–35, 31

A.3d 55 (2011) (dismissing appeal as moot because "we are asked to reverse the trial court even though the order in question has been superseded"); *Kennedy* v. *Kennedy*, 109 Conn. App. 591, 599–600, 952 A.2d 115 (2008) (dismissing portion of appeal as moot because challenged order "has been superseded and is no longer in effect" and thus "[the Appellate Court] is not able to afford the [appellant] any practical relief"); *Schult* v. *Schult*, 40 Conn. App. 675, 692, 672 A.2d 959 (1996) (claim regarding temporary custody order was moot when order merged with final dissolution decree), aff'd, 241 Conn. 767, 699 A.2d 134 (1997).

This rationale applies in the present case despite the fact that Judge Graham's ruling dismissing the motion to correct has not been altered during the pendency of the present appeal. It cannot be disputed that the significance of that ruling nonetheless has been undermined by the fact that the subject of the motion to correct, the defendant's original sixty year sentence, has been superseded by Judge Gold's sentence modification on July 19, 2022. We are persuaded that any consideration of the claims raised on appeal, in which the defendant challenges the dismissal of the motion to correct, would not result in practical relief to the defendant in light of the fact that the defendant is no longer burdened by the sentence he sought to correct. The modified sentence effectively has resulted in a situation in which the issues before this court, relating to the original sentence, have lost their significance because the order that was the subject of the challenged judgment has been superseded during the pendency of the appeal.

The appeal is dismissed.

In this opinion the other judges concurred.

C. M. *v.* R. M.*
(AC 44911)

Bright, C. J., and Cradle and Seeley, Js.

Syllabus

The defendant father, whose marriage to the plaintiff mother previously had been dissolved, appealed to this court from the judgment of the trial court granting his postdissolution motion to move the parties' minor children from Greenwich to New York City. After a hearing, the court granted the defendant's motion on a temporary basis, pending a full evidentiary hearing. On appeal, the defendant argued that the trial court erred in finding that the proposed move constituted a relocation under the statute (§ 46b-56d) governing relocations because the move would not have a significant impact on the existing parenting plan, and, therefore, the motion should have been granted pursuant to the statute (§ 46b-56) governing typical modifications of parenting orders. *Held* that the defendant's appeal was dismissed for lack of subject matter jurisdiction as the defendant was not aggrieved by the order permitting him to move to New York City with his children: the defendant received the very relief sought in his motion, and, following a full hearing on his motion, the defendant will still not be aggrieved if the trial court permits him to relocate with the minor children to New York City on a permanent basis, pursuant to either § 46b-56 or § 46b-56d; moreover, the defendant would be aggrieved only if, at the conclusion of the full hearing and final resolution of his motion, the trial court determines that the defendant failed to meet his burden under either § 46b-56 or § 46b-56d; furthermore, under the facts and circumstances presented in this case, a trial court, after a full hearing, will not be bound by the court's previous determination when granting the motion on a temporary basis that this was a relocation case pursuant to § 46b-56d.

Argued January 5—officially released April 25, 2023

Procedural History

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the court, *Hon. Stanley Novack*, judge trial referee, rendered judgment dissolving the marriage and granting certain other relief

* In accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2018), as amended by the Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, § 106, 136 Stat. 49, 851; we decline to identify any person protected or sought to be protected under a protection order, protective order, or a restraining order that was issued or applied for, or others through whom that person's identity may be ascertained.

in accordance with the parties' separation agreement; thereafter, the court, *Hon. Michael E. Shay*, judge trial referee, granted the defendant's motion to relocate on a temporary basis, and the defendant appealed to this court. *Appeal dismissed.*

Jon T. Kukucka, with whom, on the brief, were *Stacie L. Provencher* and *Campbell D. Barrett*, for the appellant (defendant).

Alexander J. Cuda, for the appellee (plaintiff).

Louise Truax, guardian ad litem, for the minor children.

Opinion

SEELEY, J. The defendant father, R. M., appeals from the granting of his postdissolution motion to move to New York City with the parties' two minor children, over the objection of the plaintiff mother, C. M. Despite obtaining the relief requested, the defendant filed the present appeal, claiming that the court improperly concluded that the move to New York City constituted a relocation under General Statutes § 46b-56d and that this determination requires that, in a future proceeding, the defendant satisfy a more difficult burden as compared to a motion to modify the parties' parenting plan filed pursuant to General Statutes § 46b-56. We dismiss the defendant's appeal for lack of aggrievement.

The record reveals the following factual and procedural history. On September 18, 2018, the plaintiff commenced an action to dissolve the parties' marriage of approximately ten years. On January 30, 2019, the court approved the parties' parenting plan, providing for joint legal custody of the two children of the marriage, who would reside primarily with the defendant. With respect to the plaintiff's parenting time with the children, the parenting plan required alcohol testing of the plaintiff and the imposition of certain conditions in the event

of a positive test. Paragraph 20 of the parenting plan provided: "During the children's minority, in the event that any party wishes to relocate his or her residence, such party shall give the other at least ninety (90) days written notice of the intent to relocate, the address and/or specific locale of the new location, and the reason(s) for the move. Nothing herein shall be deemed to be an agreement for the children to relocate any particular distance, but rather is intended to allow the issue of relocation to be left to the time it becomes an issue." On July 17, 2019, the court rendered a judgment of dissolution, which incorporated the parties' separation agreement, which, in turn, adopted the terms of the parenting plan, subject to minor modification.

On February 11, 2020, the defendant filed a motion to modify the parenting plan. He alleged therein that the plaintiff had not participated in the required alcohol testing since at least October 24, 2019, she had failed to exercise her scheduled parenting time with little or no notice to the defendant, she had disparaged the defendant to the children, and there had been an increase of issues relating to the plaintiff's "serious mental health and substance abuse issues." The defendant further claimed that the plaintiff had been arrested on numerous felony and misdemeanor charges and had fled the country. The defendant requested, inter alia, that the court issue an order that any contact between the plaintiff and the children occur in the presence of a professional supervisor. On February 25, 2020, the court ordered that the plaintiff was not to have any contact with the children outside the presence of professional supervision.

On February 16, 2021, the defendant filed a motion requesting that the minor children be permitted to relocate with him from Greenwich, Connecticut, to the Upper East Side of Manhattan, New York, pursuant to

§§ 46b-56[1] and 46b-56d.[2] He claimed that the plaintiff had returned to Connecticut, posted bail with respect to her pending criminal charges, and presently resided in Bedford, New York. The defendant also stated that, on January 11, 2021, pursuant to paragraph 20 of the parenting plan, he had sent the plaintiff a letter indicating his intention to relocate to Manhattan. In his motion, the defendant stated: "The letter contained the specific reasons for the move. The letter stated that the proposed relocation was to foster the general well-being of the children, including but not limited to [the defendant's] belief that the parties' son would benefit from being in a more diverse environment. [The defendant]

[1] General Statutes § 46b-56 provides in relevant part that "[i]n any controversy before the Superior Court as to the custody or care of minor children . . . the court may make or modify any proper order regarding the custody, care, education, visitation and support of the children . . . [and] [i]n making or modifying any [such] order . . . the rights and responsibilities of both parents shall be considered and *the court shall enter orders accordingly that serve the best interests of the child* and provide the child with the active and consistent involvement of both parents commensurate with their abilities and interests." (Emphasis added.) See generally *Dolan* v. *Dolan*, 211 Conn. App. 390, 398–99, 272 A.3d 768, cert. denied, 343 Conn. 924, 275 A.3d 626 (2022).

[2] General Statutes § 46b-56d provides: "(a) In any proceeding before the Superior Court arising after the entry of a judgment awarding custody of a minor child and involving the relocation of either parent with the child, where such relocation would have a significant impact on an existing parenting plan, the relocating parent shall bear the burden of proving, by a preponderance of the evidence, that (1) *the relocation is for a legitimate purpose*, (2) *the proposed location is reasonable in light of such purpose, and* (3) *the relocation is in the best interests of the child.*

"(b) In determining whether to approve the relocation of the child under subsection (a) of this section, the court shall consider, but such consideration shall not be limited to: (1) Each parent's reasons for seeking or opposing the relocation; (2) the quality of the relationships between the child and each parent; (3) the impact of the relocation on the quantity and the quality of the child's future contact with the nonrelocating parent; (4) the degree to which the relocating parent's and the child's life may be enhanced economically, emotionally and educationally by the relocation; and (5) the feasibility of preserving the relationship between the nonrelocating parent and the child through suitable visitation arrangements." (Emphasis added.) See generally *O'Neill* v. *O'Neill*, 209 Conn. App. 165, 182–83, 268 A.3d 79 (2021).

also indicated that he believes that both children would benefit from the rich cultural environment that New York City offers. On January 12, 2021, counsel for the plaintiff responded indicating that the plaintiff did not agree to the relocation." The defendant further stated in his motion that it would be in the best interests of the children to relocate to Manhattan. The defendant then requested the following relief: "(1) that the court grant his motion and determine that his move to the Upper East Side, New York, is not a relocation under . . . § 46b-56d; or, in the alternative (2) grant the motion to relocate and permit him to move to the Upper East Side of New York City; and (3) to enter such other and further relief that the court deems appropriate under the circumstances." Following the agreement of the parties, the court ordered the appointment of a guardian ad litem on February 22, 2021.

On July 20, 2021, the plaintiff filed a motion for contempt. She claimed that, at that time, she lived in Pound Ridge, New York, while the children lived and attended a private school in Connecticut. In her motion, the plaintiff alleged that on April 27, 2021, she received an email from a school located in New York City that provided information for the upcoming 2021–2022 school year. In May, 2021, the children informed the plaintiff that they would be moving to New York City and attending a new school. In July, 2021, the defendant's counsel sent an email confirming the defendant's intention to move to Manhattan and that the children had been enrolled in a school there. The plaintiff argued that the defendant had submitted an application for the children to attend the Manhattan school in April, 2021, while his February 16, 2021 motion remained pending before the court, and that his conduct regarding this move and enrollment constituted "a wilful and intentional violation of the clear and unambiguous provisions of the parties' parenting plan . . . ." She sought, inter alia, a

finding of contempt and an order that the defendant be prohibited from having the children attend the Manhattan school until the adjudication of the defendant's February 16, 2021 motion.[3]

On August 5, 2021, the court, *Hon. Michael E. Shay*, judge trial referee, held a hearing on the defendant's motion. At the outset, the guardian ad litem recounted the procedural history and identified the present issue before the court as whether the defendant's proposed move to New York City constituted a relocation for purposes of § 46b-56d.[4] The defendant's counsel argued that this move would not have a significant impact on the parenting plan and, therefore, did not implicate that statute. During a discussion with counsel, the court observed that the start of the school year was approaching and that, in order to provide stability for the children with respect to their education, a need existed for an immediate but temporary decision with respect to the school issue.

The guardian ad litem agreed with the defendant's counsel that § 46b-56d was not implicated by the defendant's proposed move to New York City and further opined that the move was in the best interests of the children. The guardian ad litem also acknowledged that the court might choose to issue a temporary order at the conclusion of the hearing, subject to a "fuller hearing down the road." The court subsequently stated: "Well, as far as [the children] are concerned . . . one of the things that, again, looking at the calendar, you know, the education is probably front and center. You know, in terms of your impression *of their best interests on a going forward basis even if it's on a short-term*,

[3] On July 26, 2021, the plaintiff filed an application for an emergency ex parte order of custody. The court, *Heller*, *J.*, denied this application on the same day.

[4] The guardian ad litem was not sworn in as a witness at this hearing.

you know, *temporary circumstance*." (Emphasis added.)

After hearing from the guardian ad litem, both counsel presented argument, but no witnesses testified. The court stated that it was "convinced that this is in fact a relocation case" and then determined that, "in the short run," it was in the best interests of the children to remain with the defendant in New York City and attend school there.[5] The court further stated that "we're going to revisit this because [the plaintiff] has a right to reengage on a more substantial basis with these children in the long run. [The plaintiff] has that right. And I think we need to accord her that right, and the only way we do that is not, you know, making unilateral decisions. We do that certainly in this particular forum." The court referred the matter to family services for a full evaluation and observed that there could be a hearing scheduled at some point in the future.[6] The court also issued a written order stating: "Parties are referred to family services for a full evaluation. Children to go to school in Manhattan and live with [the defendant] *on a temporary basis*." (Emphasis added.)

Although he received permission from the court to move to New York City with the children, the defendant filed the present appeal on August 24, 2021.[7] The next day, the plaintiff filed a motion to reargue pursuant to Practice Book § 11-11, which the court denied on September 6, 2021, stating, inter alia: "Although the

[5] On August 10, 2021, Judge Shay signed the transcript from the August 5, 2021 hearing in accordance with Practice Book § 64-1 (a).

[6] The full evidentiary hearing on the defendant's February 16, 2021 motion to relocate has not yet occurred.

[7] We note that a complete resolution of this matter appears to have been delayed for an extended period of time. We take this opportunity to repeat the statement from our Supreme Court that "it is the sacrosanct obligation of both the courts and the parties to these types of disputes to take all necessary steps to resolve such matters promptly." *DiGiovanna* v. *St. George*, 300 Conn. 59, 79 n.10, 12 A.3d 900 (2011).

court admonished the defendant for his unilateral action, it found that it was in the BEST INTERESTS of the minor children ON A TEMPORARY BASIS to leave undisturbed the defendant's decision to relocate with the children to New York City and to enroll the children in school there. The court finds that it had sufficient information before it to make its finding[s] that: (a) the defendant's move to New York City was a relocation within the meaning of . . . [§] 46b-56d, and (b) it was appropriate to refer the matter to Family Relations to conduct an evaluation prior to conducting a full hearing at which time, at a minimum, both parties and the guardian ad litem can have input. Among its considerations were the fact that the defendant has been the primary caregiver for the children; that the plaintiff currently resides in New York State; and that the plaintiff has had virtually no significant role in the day to day lives of the children and, in fact, has supervised visitation with them, which will not be adversely affected by the move." (Emphasis in original.)

On appeal, the defendant argues that the court's determination that the move from Greenwich to New York City constituted a relocation under § 46b-56d was improper because the existing parenting plan was not substantially impacted. He further argues that the court's determination of a relocation, as set forth in § 46b-56d, will adversely prejudice him in future hearings, as the application of § 46b-56d implicates "a different, steeper burden than a motion to modify parenting orders." The plaintiff contends, inter alia, that the appeal should be dismissed for lack of aggrievement. Specifically, she maintains that the defendant prevailed in the proceedings below in that he received the relief sought in his motion—permission to live with the minor children in Manhattan pending a full hearing—and therefore this court lacks subject matter jurisdiction to consider his appeal. In his reply brief, the defendant

responds that he is aggrieved because he "is presently bound by the higher standard imposed by the relocation statute in future proceedings. . . . This is a much higher burden than a typical modification of the parenting orders pursuant to . . . § 46b-56, which only requires [the defendant] to demonstrate that the new proposed parenting plan is in the best interests of the minor children."

We begin with the question of aggrievement, as it implicates the jurisdiction of this court. See *Healey* v. *Mantell*, 216 Conn. App. 514, 523–24, 285 A.3d 823 (2022). Issues of aggrievement implicate the subject matter jurisdiction of this court and present questions of law subject to plenary review. See *In re Ava W.*, 336 Conn. 545, 553, 248 A.3d 675 (2020). Our Supreme Court has instructed that aggrievement is essential to appellate jurisdiction and must be resolved as a threshold matter. See *Carraway* v. *Commissioner of Correction*, 317 Conn. 594, 601, 119 A.3d 1153 (2015). "It is well settled that [i]n the appellate context, aggrievement is established if there is a possibility, as distinguished from a certainty, that some legally protected interest . . . has been adversely affected." (Internal quotation marks omitted.) *Watts* v. *Commissioner of Correction*, 194 Conn. App. 558, 568, 221 A.3d 829 (2019), cert. denied, 334 Conn. 919, 222 A.3d 514 (2020). "General Statutes § 52-263 grants the right of appeal to a party who is aggrieved by the decision of the court or judge upon any question or questions of law arising in the trial . . . . Aggrievement, in essence, is appellate standing. . . . It is axiomatic that aggrievement is a basic requirement of standing, just as standing is a fundamental requirement of jurisdiction. . . . There are two general types of aggrievement, namely, classical and statutory; either type will establish standing, and each has its own unique features. . . . The test for determining [classical] aggrievement encompasses a

well settled twofold determination: first, the party claiming aggrievement must demonstrate a specific personal and legal interest in the subject matter of the decision, as distinguished from a general interest shared by the community as a whole; second, the party claiming aggrievement must establish that this specific personal and legal interest has been specially and injuriously affected by the decision." (Citations omitted; internal quotation marks omitted.) *V. V.* v. *V. V.*, 215 Conn. App. 737, 740, 283 A.3d 1045 (2022); see also *In re Ava W.*, supra, 554–55. With respect to statutory aggrievement, which exists by legislative fiat rather than judicial analysis of the particular facts of a case, "particular legislation grants standing to those who claim injury to an interest protected by that legislation." (Internal quotation marks omitted.) *State Marshal Assn. of Connecticut, Inc.* v. *Johnson*, 198 Conn. App. 392, 402, 234 A.3d 111 (2020). We conclude that the defendant was neither classically nor statutorily aggrieved by the August 5, 2021 order of the trial court finding that it was in the best interests of the children to leave undisturbed, on a temporary basis, the defendant's decision to relocate with the children to New York City.

The defendant received the relief sought in his February 16, 2021 motion. In its August 5, 2021 oral decision, the court found that it was in the children's "best interests that they follow [the defendant]; that they go to school in New York in the short run."[8] The defendant, therefore, prevailed with respect to his motion because he received the relief requested: the court permitted him to move to New York City with the children pending a full hearing. "As a general rule, a party that prevails

[8] The court also noted that the matter would need to be revisited and referred the matter to the family relations office. In the court's order denying the plaintiff's motion for reconsideration, it emphasized the temporary nature of the order permitting the defendant's move to New York City with the children.

in the trial court is not aggrieved. . . . Moreover, [a] party cannot be aggrieved by a decision that grants the very relief sought. . . . Such a party cannot establish that a specific personal and legal interest has been specially and injuriously affected by the decision . . . [see] 5 Am. Jur. 2d 47, Appellate Review § 276 (1995) (One who has received in the trial court all the relief that he or she has sought therein is not aggrieved by the judgment and has no standing to appeal. In particular, a litigant has no right to appeal a judgment in his favor merely for the purpose of having the judgment based on a different legal ground than that relied upon by the trial court . . . .). [A] prevailing party . . . can be aggrieved [however] if the relief awarded to that party falls short of the relief sought." (Citations omitted; internal quotation marks omitted.) *In re Allison G.*, 276 Conn. 146, 158, 883 A.2d 1226 (2005); see *Avon* v. *Freedom of Information Commission*, 210 Conn. App. 225, 237–38, 269 A.3d 852 (2022).

The defendant contends, however, that he has been aggrieved by the court's statement that the case constituted a relocation pursuant to § 46b-56d and, furthermore, that the present appeal is necessary to preserve his ability to challenge this determination. In support of this contention, he cites to *Bauer* v. *Bauer*, 308 Conn. 124, 60 A.3d 950 (2013), and *Fazio* v. *Fazio*, 199 Conn. App. 282, 235 A.3d 687, cert. denied, 335 Conn. 963, 239 A.3d 1213 (2020). Specifically, the defendant argues that, pursuant to these cases, if he did not challenge the determination of a relocation pursuant to § 46b-56d at this time, he would be precluded from doing so in the future. We disagree.

Both *Bauer* and *Fazio* are distinguishable from the present case. In *Bauer* v. *Bauer*, supra, 308 Conn. 126–27, the court dissolved the marriage of the parties, but the financial orders section of its memorandum of decision did not include the notation made earlier in that

decision indicating that they had agreed to split equally the pension accounts of the defendant husband. Neither party appealed from the dissolution judgment, which was rendered in 2005. Id. In 2009, the plaintiff wife filed a motion for clarification asking the court to "reconfirm its previous order" with respect to the equal sharing of these pension accounts. Id., 127. The court issued the requested clarification. Id., 127–28.

On appeal, this court reversed the judgment granting the plaintiff's requested clarification, concluding that the court's decision constituted a modification of the dissolution judgment. Id., 128–29. Our Supreme Court disagreed. Id., 129. It further noted that, if the defendant disagreed with the court's factual finding that the parties had agreed to split the pension accounts equally, he should have raised this issue in an appeal taken from the dissolution judgment, when the finding was made. Id., 135–37. The defendant husband, therefore, was aggrieved by the court's initial decision awarding the plaintiff wife an equal share of his pension accounts, but he elected not to challenge that finding until years later, after the plaintiff wife sought and obtained a confirmation of the court's earlier financial orders. Id., 126–28.

Our decision in *Fazio* likewise is distinguishable from the present case. In that case, the court dissolved the marriage of the parties in 2006. *Fazio* v. *Fazio*, supra, 199 Conn. App. 284. The separation agreement provided that the plaintiff wife would receive unallocated alimony and child support unless she cohabited as defined by General Statutes § 46b-86 (b). Id. In 2012, the defendant husband filed a motion to modify or terminate the unallocated alimony and child support on the basis of cohabitation by the plaintiff. Id., 285. The trial court found that the plaintiff had cohabitated and that the terms of the separation agreement were clear and unambiguous. Id., 286. In accordance with the separation

agreement, the court terminated the defendant's alimony obligation. Id. The plaintiff appealed, challenging the trial court's interpretation of the separation agreement that a finding of cohabitation resulted in an automatic termination of alimony. Id. The plaintiff did not, however, appeal the court's finding of cohabitation. Id. This court determined that the separation agreement was ambiguous and that additional findings of fact were needed and remanded the case to the trial court. Id., 286–87. Following our remand, the trial court again terminated the defendant's alimony obligation. Id., 287.

The plaintiff filed another appeal, claiming that the second trial court improperly concluded that it was bound by the finding of cohabitation made by the first trial court. Id. We concluded that our initial remand was limited to a consideration of the parties' intent with respect to the separation agreement. Id., 289. "Moreover, the plaintiff did not challenge [the first trial court's] finding that she had cohabitated, which, certainly, was a finding necessary to the judgment. It is well established that when a party brings a subsequent appeal, it cannot raise questions which were or could have been answered in its former appeals. . . . Failure to raise an issue in an initial appeal to this court constitutes a waiver of the right to bring the claim." (Citation omitted; internal quotation marks omitted.) Id. Thus, the plaintiff was aggrieved by the first trial court's finding of cohabitation, a necessary component of that court's ultimate determination to terminate the alimony obligation of the defendant pursuant to the parties' separation agreement. Id., 286. She chose not to challenge that finding during the initial appeal and instead focused on the court's interpretation of the separation agreement. Id. By waiting until her second appeal to challenge the cohabitation finding, she had waived the opportunity to do so. Id., 289.

Unlike *Bauer* and *Fazio*, the defendant in the present case was not aggrieved by the order issued by the trial court permitting him to relocate to New York City with the children at this time. First, as discussed earlier in this opinion, the defendant received the relief requested in his motion. Furthermore, following a full hearing on his motion, the defendant will remain not aggrieved if the trial court permits him to move to New York City on a permanent basis, whether pursuant to § 46b-56 or § 46b-56d. He would become aggrieved only if the court, at the conclusion of the hearing and final resolution of his motion, determines that the defendant failed to meet his burden under either statute. At that point, he may file an appeal to challenge the court's decision denying such a move and, if necessary, its conclusion regarding the applicability of § 46b-56d. Finally, we emphasize that, under the facts and circumstances present in this case, a court, after a full hearing, will not be bound by Judge Shay's determination that "this is . . . a relocation case" pursuant to § 46b-56d.[9] That determination was made at a hearing in which the court recognized that it needed to act expeditiously given the imminent start of the school year.[10] We therefore conclude that

[9] See, e.g., *Kellogg* v. *Middlesex Mutual Assurance Co.*, 211 Conn. App. 335, 352, 272 A.3d 677 (2022) ("The law of the case doctrine expresses the practice of judges generally to refuse to reopen what has been decided and is not a limitation on their power. . . . Where a matter has previously been ruled upon interlocutorily, the court in a subsequent proceeding in the case may treat that decision as the law of the case . . . . [T]he law of the case doctrine does not preclude a judge from deciding an issue in a way contrary to how it was decided by a predecessor judge in the same case. . . . [It] provides that judges may treat a prior ruling as the law of the case if they agree with the determination. He or she may, however, decide the issue differently if he or she is convinced that the prior decision is wrong." (Internal quotation marks omitted.)).

[10] In the present case, the court noted that the school year was about to start and that it was important to provide stability to the children with regard to their education, particularly following the negative effects from the COVID-19 pandemic. It explained: "The question is, though, what are you going to do in the short run because this is something that the court ultimately would want to get the guardian ad litem's input. But the court

the defendant has not been aggrieved, and, therefore, we lack subject matter jurisdiction over his appeal.

The appeal is dismissed.

In this opinion the other judges concurred.

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would also want an evaluation. I mean, the court would want to look at the entire panoply of . . . issues here, so whether it's the [plaintiff's] progress toward . . . full recovery, how is this going to impact the children?" It also pointed out that an evaluation from family relations would take approximately three to four months to complete. In conclusion, the court stated: "That's not fair. That's just not . . . right, so this may call . . . for some Solomonesque approach to this particular . . . problem in the short run so that in the long run it can be all sorted out. It may actually work out in the fullness of time when everybody gets to digest all of the little pieces of it."