BEAR, J., dissenting. The grievant, Leoni Spence, an employee of the plaintiff, Burr Road Operating Company II, LLC, operating as Westport Health Care Center, and a member of the defendant, New England Health Care Employees Union, District 1199, had her employment terminated by the plaintiff after she reported to a social worker, who also was employed by the plaintiff, that she had reason to suspect that one of her coworkers had abused a patient. After Spence's employment was terminated, the defendant sought arbitration pursuant to its contract with the plaintiff. After the arbitration hearing was completed, the arbitrator found no just cause for the plaintiff to have terminated Spence's employment, but he did determine that there was just cause for her to have been suspended from her job for thirty days without pay. The plaintiff moved to vacate the award in the trial court, but the court affirmed the award. The plaintiff appealed to this court, and based on a general public policy of this state protecting patients in nursing homes from abuse, the majority has decided to reverse the judgment of the court, to vacate the award, and to reinstate the plaintiff's termination of Spence's employment. I respectfully dissent.

The following facts are helpful to an understanding of the basis for my disagreement with the result reached by the majority. While on duty in the Riverside unit of the plaintiff's facility during the night shift, which began on Saturday, March 20, 2010, Spence, who is a certified nursing assistant, overheard two other employees, namely, a charge nurse who also was working in the Riverside unit, and another certified nursing assistant, who had been working in the Woodside unit, discussing a patient who had been crying, but the name of that patient was not mentioned. Spence discerned that the incident had occurred in the Woodside unit of the facility, and that Gay Muizulles, a registered nurse, who also was the shift supervisor, had been involved. Spence asked the other employees for more information, but they declined at that time. Spence was concerned that there might have been patient abuse, and she went over to the Woodside unit to investigate before the end of her shift. When she arrived at that unit, however, all of the residents were asleep. She did not report her suspicions to the incoming supervisor. On her next work shift, which began on Sunday, March 21, 2010, she also worked in the Riverside unit under Muizulles' supervision. On her next work shift, however, which began on Monday, March 22, 2010, Spence worked in the Woodside unit, discovered the name of the patient involved in the incident and confirmed that the patient was upset by the treatment she had received from Muizulles during the prior Saturday night shift. Spence com-

forted the resident and asked her if she would like Spence to arrange for someone to come in to speak to her about what had happened; the resident responded affirmatively.

After her shift ended, on March 23, 2010, Spence telephoned a social worker at the facility and left several lengthy messages about the patient. Spence was the only employee to report this suspected abuse to any representative of the plaintiff, despite other employees, including a charge nurse, having knowledge of the events. After investigating Spence's report, the plaintiff disciplined several of its employees.[1] Although other employees were suspended for various periods, Spence was the sole employee whose employment was terminated, the basis for which, according to the plaintiff, was that she had failed to report a suspicion of patient abuse in a timely manner.[2] If Spence had not reported such suspected abuse, however, the plaintiff would not have learned about it because no other employee had come forward as did Spence.[3] Because the plaintiff began to focus on Spence in the course of its investigation after her report, and it made its decision to terminate Spence's employment without any additional contact with her, it afforded Spence no pretermination hearing or meeting, and Spence had no opportunity to explain her actions or to defend herself from the plaintiff's charges. The arbitrator found that "[i]n contrast to the very thorough investigation of the possibility of resident abuse by Muizulles, the [plaintiff] carried out no separate investigation of the possibility that [Spence] had failed to make a timely report of possible patient abuse. [Spence] was never expressly informed that [the plaintiff] was at that point investigating *her* possible misconduct of failing to make a timely report of possible patient abuse, based upon information that had come to [Spence's] attention on March 20, on March 22, or on other unspecified occasions prior to the incident of March 20. [Spence] was never asked to give her side of the story regarding those possible failures to timely report. Rather, the [plaintiff] in deciding to terminate [Spence's employment] simply relied on information that had come to its attention in the course of its investigation regarding Muizulles, without ever inviting [Spence] to respond directly to the [plaintiff's] concerns about possible misconduct on her part."

The arbitrator determined that Spence was guilty of the offense of failing to report to a proper person, in a timely manner, the information that she had learned during her shift, which began on March 20, 2010. The arbitrator also determined that an important mitigating consideration in Spence's favor was that Spence was the sole employee to make a report of the possible patient abuse. The arbitrator stated that the "hard question in this case" was whether that mitigating consideration was sufficient to require that the plaintiff impose on Spence some discipline short of termination, despite

her prior disciplinary record.[4] The arbitrator concluded that in view of this important mitigating consideration, the plaintiff lacked just cause to terminate Spence's employment. The arbitrator also determined, however, that "[s]evere disciplinary action just short of termination was warranted" and he determined that the plaintiff had just cause to suspend Spence for one month without pay and to issue her a final warning.

The majority, despite the broad discretion provided to the arbitrator pursuant to the unrestricted submission, and our long-standing case law requiring respect for and deference to a decision of an arbitrator in a private arbitration, reverses the decision of the court upholding the finding of the arbitrator that, on the facts of this case, there was no just cause for the termination of Spence's employment, and it concludes, rather, that the termination of her employment is supported by the public policy relating to protection of patients from abuse.[5]

The trial court affirmed the arbitrator's award. It noted that the public policy, on which the majority relies, did not apply to all of the actions of the arbitrator: "Given that a clear, dominant, well-defined public policy exists, the question is whether the award violates that public policy in ordering the reinstatement of an employee with a documented history in regard to patient abuse. There is no established dominant public policy against reinstating an employee who was terminated for failure to promptly report suspected abuse. Likewise, there is no dominant public policy against arbitrators considering mitigating facts under circumstances where the employee does have a record of prior abuse. As evidenced in *State* v. *New England Health Care Employees Union*, [271 Conn. 127, 138, 855 A.2d 964 (2004)], to conclude that the arbitrator's award violated the public policy of protecting nursing home patients from abuse would be to conclude that an employee's failure to timely report abuse is grounds for termination per se. Such a rule is not required to advance the public policy of protecting nursing home patients. Further, the arbitrator's award did not violate public policy by considering mitigating factors. Id., 139. An arbitrator may reasonably consider circumstances including the severity of the misconduct under review. Id. The arbitrator's award does not absolve any employee who eventually reports suspected abuse, rather, the arbitrator finds that termination per se is not the appropriate punishment and finds just cause for a one month suspension without pay and a final warning. Therefore, it is concluded that the arbitrator's decision does not violate public policy."

In *New England Health Care Employees Union*, our Supreme Court discussed and analyzed an incident where an employee deliberately shoved a patient and injured him, and it rejected any per se rule of automatic

termination for a violation of the applicable public policy protecting clients of the then named department of mental retardation (department): "The arbitrator found that [the employee] had deliberately shoved [the client] into the chair and concluded that he was 'culpable of patient or client abuse under these circumstances.' The arbitrator then noted that the union had cited eleven cases where department employees had been disciplined instead of discharged, notwithstanding a finding of client abuse. Although he determined that the cases cited by the union were not similar factually to this case, the arbitrator found that 'the state does not automatically terminate employees for patient abuse.' He further concluded: 'From the arbitration awards, each involving the state and this union, I can only conclude that each case was decided on its own individual merits and that misconduct as serious as client abuse need not always provide just cause for an employee's dismissal.' The arbitrator determined that although [the employee] 'could have and should have exercised better judgment . . . [i]t was because the patient was swinging his arms about in an agitated state that [the employee] reacted improperly by holding onto his arms and [shoving] him into a chair.' In light of his factual findings, coupled with his analysis of the other arbitration awards involving the state and the union, the arbitrator concluded that 'while . . . the state had just cause to discipline [the employee],' it 'did not have just cause to dismiss [him].' The arbitrator then directed the department to reinstate [the employee] with lost pay and benefits, except for a thirty day disciplinary suspension period." *State* v. *New England Health Care Employees Union*, supra, 271 Conn. 131–32. On appeal, the trial court affirmed the award, concluding that " 'the unforeseeability and exigency of the situation coupled with . . . [the employee's] attempt to control the client [and] defuse the situation . . . lead the court to conclude that the reinstatement of . . . [the employee] is not violative of [the] public policy of protecting persons with mental retardation . . . .' " Id., 133.

In *New England Health Care Employees Union*, the state argued that the trial court improperly granted the union's application to confirm the arbitrator's award ordering the employee's reinstatement despite the arbitrator's finding that the employee had abused a client, because there is a clear and dominant public policy, expressed in numerous statutes and regulations, requiring the department to provide its clients with an environment free from the risk of abuse by its employees. Id., 136–37. The union countered that the trial court properly confirmed the arbitrator's award because it did not violate the explicit, well-defined and dominant public policy of this state as set forth in General Statutes § 17a-247c. Id. Our Supreme Court agreed with the union, and affirmed the arbitrator's award, explaining its reasoning as follows: "Addressing the second prong

of the inquiry—whether the arbitrator's award violated the public policy of protecting persons in the custody of the department from abuse—the trial court concluded that, because [the employee] had not intended to harm the client and had never been disciplined for abusing a client prior to this incident, the record did not support a finding that continuing [the employee's] employment would place department clients at risk of abuse. It concluded, therefore, that reinstating [the employee] would not violate public policy. We agree. To conclude that the arbitrator's decision and award violated the public policy of protecting persons in the custody of the department from abuse, the court would have had to conclude that, if a single instance of deliberate conduct results in any injury to a client, no matter how inadvertent or minor, the conduct is grounds for termination, per se. We agree with the union that such a rule is not required to advance the public policy of protecting clients from mistreatment. *Rather, an arbitrator reasonably may consider circumstances such as the length of employment, previous instances of harmful conduct by the employee, and the circumstances and severity of the misconduct under review in determining the likelihood of future misconduct and whether discipline less severe than termination would constitute a sufficient punishment and deterrent. We also agree with the union that the rule urged by the state effectively would grant authority to the state to discharge an employee for such conduct without review, thereby undermining both the collective bargaining process and the arbitration process voluntarily agreed to by the parties.* Accordingly, we conclude that the trial court properly concluded that the arbitrator's decision and award did not violate the public policy of protecting department clients from mistreatment." (Emphasis added.) Id., 138–39.

In view of our Supreme Court's clear analysis of the proper application of public policy considerations in *New England Health Care Employees Union*, I cannot agree with the majority's application of such public policy solely to reverse the arbitrator's determination that "[s]evere disciplinary action just short of termination was warranted" in the form of a thirty day suspension without pay for the even more severe termination of employment that the majority imposes.

The majority's elevation of the general public policy relating to protection of patients from abuse results, in this case, in such public policy improperly and unnecessarily displacing our courts' long-standing protection of the private arbitration process, which has been supported, respected and deferred to by our courts for decades. "This court has for many years wholeheartedly endorsed arbitration as an effective alternative method of settling disputes intended to avoid the formalities, delay, expense and vexation of ordinary litigation. . . . When arbitration is created by contract, we recognize

that its autonomy can only be preserved by minimal judicial intervention. . . . Because the parties themselves, by virtue of the submission, frame the issues to be resolved and define the scope of the arbitrator's powers, the parties are generally bound by the resulting award. . . . [Finally] [t]he party challenging the award bears the burden of producing evidence sufficient to invalidate or avoid it . . . ." (Citations omitted; internal quotation marks omitted.) *O & G/O'Connell Joint Venture* v. *Chase Family Ltd. Partnership No. 3*, 203 Conn. 133, 145–46, 523 A.2d 1271 (1987); see also *Stutz* v. *Shepard*, 279 Conn. 115, 129–30, 901 A.2d 33 (2006) (expressing "clear preference for making every reasonable presumption in favor of the arbitration award and the arbitrator's acts and proceedings"); *Board of Education* v. *Civil Service Employees Affiliates, Local 760*, 88 Conn. App. 559, 566–67, 870 A.2d 473 (2005) ("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 [arbitral] award and of the arbitrators' acts and proceedings" [internal quotation marks omitted]); *Metropolitan District Commission* v. *AFSCME, Council 4, Local 184*, 37 Conn. App. 1, 7, 654 A.2d 384 (1995) ("the trial court [is] required to presume that the actions of the [arbitrator] were proper" in the absence of affirmative evidence to the contrary), aff'd, 237 Conn. 114, 676 A.2d 825 (1996).

With respect to the public policy exception, "[a] two-step analysis . . . [is] often employed . . . . First, the court determines whether an explicit, well-defined and dominant public policy can be identified. If so, the court then decides if the arbitrator's award violated the public policy. . . . We note that [t]he 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 . . . only if it demonstrates that the [arbitrators'] award clearly violates an established public policy mandate. . . . It bears emphasizing, moreover, that implicit in the stringent and narrow confines of this exception to the rule of deference to arbitrators' determinations, is the notion that the exception must not be interpreted so broadly as to swallow the rule. . . . *Hartford* v. *Hartford Municipal Employees Assn.*, [134 Conn. App. 559, 568, 39 A.3d 1146, cert. denied, 305 Conn. 904, 44 A.3d 180 (2012)]." (Internal quotation marks omitted.) *Stratford* v. *American Federation of State, County & Municipal Employees, Council* 15, *Local 407*, 140 Conn. App. 587, 592–93, 60 A.3d 288 (2013).

As set forth previously in this dissenting opinion, in contrast to the very thorough investigation of the possibility of resident abuse by Muizulles, the plaintiff carried out no separate investigation of the allegations against Spence, including the possibility that Spence had failed to make a timely report of possible patient

abuse. Spence never was informed expressly that the plaintiff was at that point investigating her possible misconduct of failing to make a timely report of possible patient abuse, based upon information that had come to Spence's attention during her night shift beginning on March 20, or on other unspecified occasions prior to the incident of March 20. Spence never was asked by the plaintiff to give her side of the story regarding a possible failure to report her suspicion in a timely manner. Rather, the plaintiff in deciding to terminate Spence's employment simply relied on information that had come to its attention in the course of its investigation regarding Muizulles, without ever inviting Spence to respond directly to the plaintiff's concerns about possible misconduct on her part. The arbitrator also found that "[h]owever, the [defendant] is correct that the [plaintiff] did nothing to further investigate in response to the information which the [plaintiff] had learned from [Spence's] telephone messages to the social worker. [Spence] never was told that the [plaintiff] was concerned about these comments [about possible additional instances of abuse by Muizulles] she had made in her messages, and most importantly, she never was given the opportunity to respond with any explanation or clarification that she might wish to provide. The most rudimentary due process was not afforded to [Spence]. Given that absolute lack of any investigation regarding what [Spence] may have intended to convey by her comments in the phone messages, the [plaintiff] cannot rely at arbitration upon an argument that [Spence] in fact had knowledge of possible abuse prior to March 20, but made no report." The arbitrator thus found that the procedure, or lack thereof, utilized by the plaintiff in deciding to terminate Spence's employment woefully was inadequate, and that it clearly denied her contractual due process.

After thoroughly weighing the claims of the parties, including the plaintiff's complete failure to afford Spence notice of its claims and the opportunity for a pretermination presentation of her position in response thereto, and the criteria set forth in *New England Health Care Employees Union*, including the length of her employment, previous instances of harmful conduct by her, and the circumstances and severity of the misconduct under review in determining the likelihood of future misconduct and whether discipline less severe than termination would constitute a sufficient punishment and deterrent, the arbitrator determined that termination of her employment was too severe a punishment and that the plaintiff thus lacked just cause to terminate her employment. Instead, the arbitrator, as he was entitled to do under the unrestricted submission, determined that there were mitigating factors and that severe disciplinary action just short of termination of employment was warranted, and, accordingly, he determined that the plaintiff had just cause to suspend her

without pay for one month and to issue her a final warning. The unrestricted submission was made to the arbitrator, not to this court.

The majority, under the facts and circumstances of this case, applies the general public policy concerning protection of patients from abuse to reverse the arbitrator's determination that a serious punishment less than termination of employment was appropriate under the specific circumstances of this case. As determined by the trial court, however, there is no established dominant public policy against an arbitrator who is acting pursuant to an unrestricted submission reinstating an employee whose employment was terminated for failure to report suspected abuse promptly. To conclude that the arbitrator's award violated the public policy of protecting nursing home patients from abuse would be to conclude that an employee's failure to report abuse timely is grounds for per se termination of employment, which is not our law. Additionally, the arbitrator did not violate any public policy by considering the mitigating factors applicable to Spence set forth throughout this dissent. See *State* v. *New England Health Care Employees Union*, supra, 271 Conn. 139.

I thus cannot agree that it is proper for this court to apply any public policy exception to the arbitration award solely to increase Spence's punishment from a one month suspension without pay to a termination of her employment, especially in light of the arbitrator's thoughtful weighing of the factors to be considered in determining the award, including but not limited to the public policy relied on by the majority. See id., 138–39.

The majority's general invocation of the public policy relating to protection of patients from abuse as set forth previously has the unfortunate result of diminishing this court's respect for and deference to the private arbitration process, and it also results in an expansion of the public policy exception from its intended narrow application in these circumstances. Taken to its logical conclusion, the majority sets forth a rule that requires an employer to terminate the employment of any employee who does not report a suspicion of elder abuse immediately, without consideration of any mitigating factors or whether the employer itself would be in violation of any public policy. The implication of the majority position is that, in this case, the plaintiff's failure to terminate the employment of each of the employees who knew of the suspected abuse, but failed to report it, amounts also to a violation by the employer of the public policy against patient abuse. I thus conclude that the broad expansion of this narrow exception is unwarranted, and not in the interest of employers or employees in this health care sector. Therefore, I respectfully dissent.

[1] Following its investigation, the plaintiff found that, although Muizulles had acted insensitively toward the resident in question, she had not abused or neglected the resident. Muizulles, who had no prior disciplinary record,

was suspended for five days and given a final warning. The certified nursing assistant whom Spence had overheard discussing the incident with a charge nurse received a two day suspension and a final warning for failing to report it. The assistant director of nursing also was suspended because she failed to follow the proper notification procedure after the social worker informed her of these events. Finally, there is nothing in the record regarding any discipline administered to the charge nurse whom Spence overheard discussing the incident.

[2] The general public policy against patient neglect, mistreatment or abuse that is relied on by the majority and was considered by the arbitrator is reflected in General Statutes § 17b-451 (a): "Any . . . registered nurse, any nursing home administrator, nurse's aide or orderly in a nursing home facility, any person paid for caring for a patient in a nursing home facility, any staff person employed by a nursing home facility, any . . . social worker . . . who has reasonable cause to suspect or believe that any elderly person has been abused, neglected, exploited or abandoned, or is in a condition which is the result of such abuse, neglect, exploitation or abandonment, or is in need of protective services, shall, not later than seventy-two hours after such suspicion or belief arose, report such information or cause a report to be made in any reasonable manner to the Commissioner of Social Services or to the person or persons designated by the commissioner to receive such reports. . . ."

[3] This case has a subtext of the age old response of unfair punishment of the bearer of bad tidings. "[T]he notion of 'shooting the messenger' dates back to Sophocles and Shakespeare . . . ." *RHJ Medical Center, Inc.* v. *Dubois*, 754 F. Sup. 2d 723, 764 and nn.41–42 (W.D. Pa. 2010), referencing Sophocles, Sophocles, Volume II. Antigone. The Women of Trachis. Philoctetes. Oedipus at Colonus (Hugh Lloyd-Jones trans., Loeb Classical Library 1994) (442 B.C.) ("[n]o one loves the messenger who brings bad news . . ." [internal quotation marks omitted]), and William Shakespeare, Anthony and Cleopatra, act 1, sc. 2 ("[t]he nature of bad news infects the teller . . ." [internal quotation marks omitted]), respectively.

[4] Spence's previous disciplinary record included: (1) a prior incident of patient abuse in 2005; (2) a written warning in April, 2009, for speaking in an inappropriate manner to a resident and for being insubordinate and disrespectful to Muizulles, her shift supervisor; and (3) a "2nd" and "final" written warning for addressing a resident in a disrespectful manner and for touching the resident without giving the resident an explanation of the procedure she was performing.

[5] The issue stipulated by the parties for decision by the arbitrator was: "Was Leoni Spence terminated for just cause? If not, what shall the remedy be?" The award of the arbitrator in direct response to that stipulated issue was in relevant part as follows: "The [plaintiff] lacked just cause to terminate [Spence's] employment. However, the [plaintiff] had just cause to suspend [Spence] without pay for a month and to issue her a final warning."