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# Judicial Review of Arbitration Awards on Public Policy Grounds: Lessons from the Case Law

ANN C. HODGES\*

With the U.S. Supreme Court's grant of certiorari in *Eastern Associated Coal Co. v. United Mine Workers District 17*,<sup>1</sup> the public policy exception to enforcement of labor arbitration awards is once again prominent on the radar screen of arbitrators, courts, labor unions, and employers. In its 1987 decision in *United Paperworkers International Union v. Misco, Inc.*,<sup>2</sup> the Supreme Court had the opportunity to limit the public policy grounds on which courts set aside labor arbitration awards, but failed to do so.<sup>3</sup> The Court in *Eastern Associated Coal* granted certiorari to resolve the very same issue that it declined to address in *Misco*: should arbitration awards be

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\* Professor of Law, University of Richmond. The author thanks her colleague Professor Leslie M. Kelleher for her valuable comments on the sections of the article dealing with jurisdiction and venue. Any errors are attributable to the author. In addition, she acknowledges the research assistance of Lisa R. Butler, Relenee Cook, Craig J. Curwood, Michele D. Henry, Cindy L. Pressley, Tracey Watkins, and Stephen C. Williams.

<sup>1</sup> 188 F.3d 501 (4th Cir. 1999) (per curiam) (unpublished table decision), *available at* No. 98-2527, 1999 U.S. App. LEXIS 19944, *cert. granted*, 120 S. Ct. 1416 (Mar. 20, 2000) (No. 99-1038). In *Eastern*, the Fourth Circuit affirmed the district court's decision upholding an arbitration award that reinstated a mobile equipment operator who had tested positive for drugs for the second time. *Id.* at \*3-\*5. Without analysis, the court concluded that "the district court correctly decided the issues before it." *Id.* at \*5. The district court found that while there was a policy against the use of illegal drugs by employees in safety-sensitive jobs, there was no public policy against reinstatement of employees in such jobs who have tested positive for drugs in the past. *E. Associated Coal Co. v. United Mine Workers Dist. 17*, 66 F. Supp. 2d 796, 805 (S.D. W. Va. 1998).

<sup>2</sup> 484 U.S. 29 (1987).

<sup>3</sup> The Court granted certiorari because of division in the courts of appeals as to the standard for setting aside arbitration awards on public policy grounds. *Id.* at 35. The Court declined to address the argument that no arbitration award could be overturned absent a conclusion that the arbitration award violated positive law or required a violation of positive law because it decided the case on other grounds. *Id.* at 45 n.12. The Court reemphasized that public policy warranting reversal of an arbitrator's decision must be "well-defined and dominant" and "ascertained 'by reference to the laws and legal precedents,'" not "general considerations of supposed public interests." *Id.* at 44 (quoting *W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber Workers*, 461 U.S. 757, 766 (1983)). The Court concluded that the court of appeals' formulation of public policy did not meet this test. *Id.* at 44. Furthermore, the Court found that the court of appeals improperly engaged in its own fact-finding in the course of analyzing the public policy issue. *Id.* at 44-45.

vacated on public policy grounds only when the arbitration award violates positive law or requires unlawful conduct by the employer, or should a broader standard for vacating those arbitration awards apply?<sup>4</sup> Even if the Court resolves the issue of the scope of the standard, public policy challenges to arbitration awards will continue to be raised. While not large in absolute numbers,<sup>5</sup> public policy challenges remain important because they threaten the finality of labor arbitration awards.<sup>6</sup> As David Feller has pointed out, labor arbitration and commercial arbitration have reversed roles in recent years.<sup>7</sup> While it was difficult to enforce arbitration agreements in the commercial context when Taft-Hartley was passed, today labor arbitration decisions are judicially voided more easily than commercial decisions.<sup>8</sup>

Public policy challenges are important outside the labor arbitration context as well. The public policy standards developed in labor arbitration cases have been utilized by courts in reviewing commercial and employment law arbitration awards.<sup>9</sup> Thus a review of public policy challenges in the labor arbitration context provides lessons for arbitration in other areas as well. In light of the renewed judicial interest, as evidenced by the Supreme Court's decision to grant review, and the growth of employment arbitration, an analysis of judicial review of labor arbitration awards on public policy grounds is timely.

A review of the case law demonstrates that most of the labor arbitration awards challenged on public policy grounds involve reinstatement of discharged employees. This article analyzes 138 private sector federal cases

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<sup>4</sup> *Summary of Cases Granted Review*, 68 U.S.L.W. 3585 (2000).

<sup>5</sup> Peter Feuille & Michael LeRoy, *Grievance Arbitration Appeals in the Federal Courts: Facts and Figures*, 45 (1) ARB. J. 35, 44 (1990) (stating that during the 1960–1988 period only 73 of 1,043 post-arbitration appeals were based primarily on public policy arguments).

<sup>6</sup> *See id.* at 36, 41–42, 46 (stating that while less than 1% of private sector arbitration awards are appealed to federal court, in those cases that are appealed, parties have a 25% chance of overturning the arbitration award at the district court level and a 30% chance of overturning the arbitration award at the court of appeals level).

<sup>7</sup> David E. Feller, *Taft and Hartley Vindicated: The Curious History of Review of Labor Arbitration Awards*, 19 BERKELEY J. EMP. & LAB. L. 296, 302–06 (1998) (suggesting that the grounds for public policy review of commercial arbitration cases are quite narrow).

<sup>8</sup> *Id.*

<sup>9</sup> Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731, 778–79 (1996) (demonstrating that some courts are applying their view of the public policy standard from labor arbitration in commercial cases, including employment cases); *see also* Kenneth R. Davis, *When Ignorance of the Law Is No Excuse*, 45 BUFF. L. REV. 49, 110 (1997) (noting that some courts in commercial arbitration cases use the labor arbitration standard).

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in which labor arbitration awards have been contested on public policy grounds.<sup>10</sup> All the cases reviewed are discharge cases in which arbitration awards reversing the terminations were challenged.<sup>11</sup> The article attempts to determine the factors that influence courts to uphold or overturn arbitration awards. This analysis will provide assistance to arbitrators in writing opinions that are less subject to challenge, and to employers, unions, and their attorneys in making arguments to arbitrators and courts, and in deciding whether to challenge arbitration awards. Finality of arbitration awards is one of the substantial virtues of the arbitral system. It is hoped that this analysis will contribute to the finality of arbitration awards, and thereby, to industrial peace. Furthermore, the analysis offers insights to parties and arbitrators in employment law discharge arbitrations also, when similar issues are likely to arise.

### I. THE PUBLIC POLICY EXCEPTION

In the *Steelworkers Trilogy*, the Supreme Court established the basic principles for judicial involvement in labor arbitration.<sup>12</sup> The three cases together articulated the national labor policy favoring settlement of labor disputes through arbitration, and limiting judicial involvement in the arbitral

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<sup>10</sup> The arbitration awards analyzed are labor arbitration awards resulting from collectively bargained arbitration provisions and do not include arbitration awards in employment cases that arise from individual arbitration agreements in the nonunion context. Similar issues arise, however, and the applicability of this analysis for employment arbitration is discussed in Section VII. *E.g.*, *Painewebber, Inc. v. Agron*, 49 F.3d 347, 350-52 (8th Cir. 1995) (citing labor arbitration cases in analyzing the employer's argument that an award of reinstatement under an individual arbitration agreement should be overturned on public policy grounds).

<sup>11</sup> Almost all of the cases involved reinstatement orders. One case involved back pay only. *Daniel Constr. Co. v. Local 257, IBEW*, 856 F.2d 1174, 1176 (8th Cir. 1988). Three cases which did not involve actual discharges were deemed to meet the parameters of the study because they involved public policy challenges to reinstatement. *Gen. Refractories Co. v. ABGW*, 931 F.2d 893 (6th Cir. 1991) (unpublished table decision), *available at* No. 90-5588, 1991 U.S. App. LEXIS 15652, at \*2-\*3 (involving arbitration award requiring reinstatement after workers' compensation leave); *World Airways, Inc. v. Int'l Bhd. of Teamsters, Airline Div.*, 578 F.2d 800, 801-02 (9th Cir. 1978) (involving arbitration award reversing demotion which effectively terminated employee as a pilot); *Int'l Bhd. of Teamsters Local Union No. 251 v. Labor Russo Trucking Co.*, No. 92-0039P, 1992 U.S. Dist. LEXIS 12544, at \*1-\*2 (D.R.I. July 7, 1992) (involving arbitration award reinstating employee after disability leave).

<sup>12</sup> The *Steelworkers Trilogy* consists of the following cases: *USW v. Am. Mfg. Co.*, 363 U.S. 564, 567-68 (1960); *USW v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960); and *USW v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

process. In *Enterprise Wheel & Car Co.*, which dealt with judicial review of arbitration awards, the Court held that arbitral awards should be enforced so long as they draw their essence from the collective bargaining agreement.<sup>13</sup> The Court specified that in providing for arbitration of disputes about interpretation of the collective bargaining agreement, the parties bargained for the decision of the arbitrator.<sup>14</sup> Therefore, the courts “have no business overruling [the arbitrator] because their interpretation of the contract is different from his.”<sup>15</sup>

The public policy exception was first articulated by the Supreme Court in *W.R. Grace & Co. v. Local Union 759, International Union of United Rubber Workers*.<sup>16</sup> There the Court held that “a court may not enforce a collective-bargaining agreement that is contrary to public policy . . . [T]he question of public policy is ultimately one for resolution by the courts.”<sup>17</sup> The Court specified, however, that the public policy must be “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.’”<sup>18</sup>

The Court next addressed the public policy exception in *Misco*, a case whose parameters fit neatly with those in this study.<sup>19</sup> In *Misco*, the employee was “apprehended by police in the backseat of [a] car [in the company parking lot] with marijuana smoke in the air and a lighted marijuana cigarette in the frontseat ashtray.”<sup>20</sup> He was discharged for violating a rule against possession of drugs on company property.<sup>21</sup> The arbitrator reinstated the employee, finding insufficient evidence that he used or possessed drugs on company property.<sup>22</sup> Both the district court and the court of appeals set aside the arbitration award, holding that the arbitration award violated the public policy against operation of dangerous machinery under the influence of drugs or alcohol.<sup>23</sup> The Supreme Court reversed but, as noted above, did not resolve the issue of whether a violation of positive

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<sup>13</sup> 363 U.S. at 597.

<sup>14</sup> *Id.* at 599.

<sup>15</sup> *Id.*

<sup>16</sup> 461 U.S. 757, 766 (1983).

<sup>17</sup> *Id.* (citation omitted).

<sup>18</sup> *Id.* (quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945)).

<sup>19</sup> *United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29, 34–35 (1987). The opinions in *Misco*, while within the time period studied, were omitted from the analysis.

<sup>20</sup> *Id.* at 33.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 34.

<sup>23</sup> *Id.* at 34–35.

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law is required to set aside an arbitration award. Instead, the Court reiterated its position in *W.R. Grace* that the arbitration award must create an “explicit conflict with other ‘laws and legal precedents’” to violate public policy.<sup>24</sup> The Court then concluded that the court of appeals did not review laws and legal precedents to find a public policy against operation of dangerous machinery under the influence of drugs.<sup>25</sup> The fact that common sense would support that conclusion is not sufficient.<sup>26</sup> Furthermore, even assuming such a public policy existed, the Court found that the court of appeals improperly inferred from the fact that marijuana had been found in the employee’s car that he would operate dangerous machinery under the influence of drugs.<sup>27</sup> By making such an inference, the court usurped the role of the arbitrator, for whose fact-finding the parties bargained.<sup>28</sup>

While the *Misco* Court did not resolve the question of the scope of the public policy exception, it did establish a framework for courts reviewing public policy claims. First, the court must ascertain whether there is a public policy drawn from laws and legal precedents, not common sense. Second, the court must determine whether there is an explicit conflict with that public policy based on the facts found and the inferences drawn by the arbitrator. The decision highlights some of the issues that may determine the outcome of public policy claims. Others are revealed from review of the lower court cases themselves.

## II. THE CASES

A study of cases challenging arbitration awards between 1960 and 1988 found 73 cases in which the public policy argument was the primary claim.<sup>29</sup> Of those cases, eleven involved union claims that the arbitration award violated public policy.<sup>30</sup> The instant study focused only on federal, private sector cases in which the employer claimed a public policy violation based on an arbitrator’s award reversing the discharge of an employee or group of employees.<sup>31</sup> Of the public policy cases identified in research, these

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<sup>24</sup> *Id.* at 43.

<sup>25</sup> *Id.* at 44.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 44–45.

<sup>28</sup> *Id.* at 45.

<sup>29</sup> Feuille & LeRoy, *supra* note 5, at 44. The public policy cases constituted only 7% of the cases found. *Id.*

<sup>30</sup> *Id.* at 43.

<sup>31</sup> For a table of all cases considered in the study, see Appendix *infra* p. 154.

constituted the overwhelming majority. The other public policy cases contained no identifying patterns. Like the earlier study, this analysis began with 1960, the date of the *Steelworkers Trilogy*. Fifty-four of the 138 cases identified in this study were decided during the 1960–1988 time period covered by the earlier study. Accordingly, in the last eleven years there were eighty-four such cases,<sup>32</sup> far more than in the twenty-eight year period following the Supreme Court's decisions in the *Steelworkers' Trilogy*.<sup>33</sup> In the last three years, there have been either ten or eleven cases per year, suggesting a possible increase in the number of public policy challenges.<sup>34</sup>

The instant research was conducted using the computerized LEXIS and Westlaw databases and BNA's Labor Relations Reporter. Only cases decided prior to December 31, 1999 were considered. Both court of appeals cases and district court cases were included. Cases analyzed included only those cases in which a public policy argument was discussed in the opinion of the court, however briefly. In some cases this resulted in one opinion in a case being considered while another was not.<sup>35</sup> Of the 138 cases identified, sixty-three were court of appeals cases and the remainder were district court cases.

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<sup>32</sup> This study analyzed cases decided through 1999. In the years since 1988, the number of cases ranged from a high of eleven in 1990, 1997, and 1999 to a low of four in 1991. The cases were distributed as follows: five in 1989, eleven in 1990, four in 1991, nine in 1992, six in 1993, five in 1994, six in 1995, six in 1996, eleven in 1997, ten in 1998, and eleven in 1999.

<sup>33</sup> As noted *supra* notes 12–15 and accompanying text, the *Steelworkers' Trilogy*, decided in 1960, limited judicial involvement in labor arbitration and encouraged unions, employers, and courts to treat arbitral decisions as binding. Feuille & LeRoy, *supra* note 5, at 36–37.

<sup>34</sup> See *supra* note 32. A firm conclusion cannot be drawn about any increase, however, since both district court and court of appeals opinions in the same case were included, and any cases decided without published opinions were not.

<sup>35</sup> *E.g.*, *First Nat'l Supermarkets, Inc. v. Retail & Chain Store Food Employees Union Local 338*, 152 L.R.R.M. (BNA) 2963, 2965–67 (E.D.N.Y. 1996) (omitted because no discussion of public policy argument), *aff'd in part, vacated in part*, *First Nat'l Supermarkets, Inc. v. Retail, Wholesale & Chain Store Food Employees Union Local 338*, 118 F.3d 892, 897–98 (2d Cir. 1997) (included based on public policy argument).

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When the opinions of both the district court and court of appeals in a case were published and discussed the public policy issue, both were included in the analysis.<sup>36</sup> The analysis included cases officially unpublished but

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<sup>36</sup> Both opinions were included even when the court of appeals reversed the district court (eleven cases, twenty-three opinions) based on the view that analyzing all judicial opinions available would provide helpful information for arbitrators and parties. There were eleven cases in which both opinions were included and the court of appeals reversed the district court's decision in relevant part. In one case, three opinions were included because the district court decided the public policy issue on remand from the appellate court. In the following cases, both opinions were analyzed: *E. Associated Coal Co. v. United Mine Workers Dist. 17*, 66 F. Supp. 2d 796 (S.D. W. Va. 1998) (upholding arbitration award), *aff'd per curiam*, 188 F.3d 501 (4th Cir. 1999) (unpublished table decision); *Kennecott Utah Copper Corp. v. USW*, 4 F. Supp. 2d 1044 (D. Utah 1998) (upholding arbitration award), *aff'd sub nom. Kennecott Utah Copper Corp. v. Becker*, 195 F.3d 1201 (10th Cir. 1999); *Westvaco Corp. v. United Paperworkers Int'l Union, Local Union 676*, No. 97-0753-R, 1998 U.S. Dist. LEXIS 8109, at \*14-\*15 (W.D. Va. Mar. 26, 1998) (overturning arbitration award), *rev'd*, 171 F.3d 971 (4th Cir. 1999); *Local 97, IBEW v. Niagara Mohawk Power Corp.*, No. 96-CV-728, 1997 U.S. Dist. LEXIS 20578 (N.D.N.Y. Dec. 16, 1997) (overturning arbitration award), *rev'd*, 196 F.3d 117 (2d Cir. 1999); *Exxon Corp. v. Esso Worker's Union, Inc.*, 942 F. Supp. 703, 711 (D. Mass. 1996) (upholding arbitration award), *rev'd*, 118 F.3d 841 (1st Cir. 1997); *Local 97, IBEW v. Niagara Mohawk Power Corp.*, 950 F. Supp. 1227, 1236-37 (N.D.N.Y. 1996) (overturning arbitration award), *rev'd*, 143 F.3d 704 (2d Cir. 1998); *UFCW, Local 588 v. Foster Food Products*, No. CV-F-93-5557, 1994 U.S. Dist. LEXIS 21227 (E.D. Cal. May 23, 1994) (upholding arbitration award), *aff'd sub nom. UFCW, Local 588 v. Foster Poultry Farms*, 74 F.3d 169, 174-75 (9th Cir. 1995); *Union Pac. R.R. v. United Transp. Union*, 820 F. Supp. 1198, 1203-05 (D. Neb. 1993) (holding that no public policy exception for enforcement exists under Railway Labor Act), *rev'd and remanded*, *Union Pac. R.R. v. United Transp. Union*, 23 F.3d 1397, 1400 (8th Cir. 1994) (remanding to district court to apply public policy exception), *on remand*, *Union Pac. R.R. v. United Transp. Union*, 860 F. Supp. 676 (D. Neb. 1994) (finding no violation of public policy); *Exxon Shipping Co. v. Exxon Seamen's Union*, 801 F. Supp. 1379, 1392 (D.N.J. 1992) (overturning arbitration award), *aff'd*, 11 F.3d 1189, 1196 (3d Cir. 1993); *Exxon Shipping Co. v. Exxon Seamen's Union*, 788 F. Supp. 829, 846 (D.N.J. 1992) (overturning arbitration award), *aff'd*, 993 F.2d 357, 368 (3d Cir. 1993); *Union Pac. R.R. v. United Transp. Union*, 794 F. Supp. 891, 895 (D. Neb. 1992) (vacating arbitration award and remanding for another hearing), *aff'd in part, rev'd in part*, 3 F.3d 255, 264 (8th Cir. 1993) (affirming order vacating arbitration award but reversing remand to arbitration board); *Shelby County Health Care Corp. v. AFSCME, Local 1733*, 756 F. Supp. 349, 352-53 (W.D. Tenn. 1991) (overturning arbitration award), *rev'd*, 967 F.2d 1091, 1098 (6th Cir. 1992); *Stroehmann Bakeries, Inc. v. Local 776, Int'l Bhd. of Teamsters*, 762 F. Supp. 1187, 1190 (M.D. Pa. 1991) (overturning arbitration award), *aff'd*, 969 F.2d 1436, 1438, 1454 (3d Cir. 1992); *Chrysler Motors Corp. v. Int'l Union of Allied Indus. Workers*, 748 F. Supp. 1352, 1365 (E.D. Wis. 1990) (upholding arbitration award), *aff'd*, 959 F.2d 685, 690 (7th Cir. 1992); *Delta Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l*, 686 F. Supp. 1573, 1580-81 (N.D. Ga. 1987) (overturning arbitration



reported in the unofficial reporters, but no analysis was done of district court cases reported only in the opinion of the court of appeals because of the inability to review the entire opinion. The analysis also included cases in which a public policy argument was made, but the case was decided on other grounds.<sup>37</sup>

One interesting phenomenon is the number of cases involving challenges to arbitral awards by two employers. Of the 138 cases identified, ten, all in the 1990s, involved Exxon<sup>38</sup> and eleven, all in the 1980s, involved the United

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award), *aff'd*, 861 F.2d 665 (11th Cir. 1988); United States Postal Serv. v. Nat'l Ass'n of Letter Carriers, 663 F. Supp. 118, 120 (W.D. Pa. 1987) (overturning arbitration award), *rev'd*, 839 F.2d 146, 150-51 (3d Cir. 1988); United States Postal Serv. v. Nat'l Ass'n of Letter Carriers, 631 F. Supp. 599, 602 (D.D.C. 1986) (overturning arbitration award), *rev'd*, 810 F.2d 1239, 1242 (D.C. Cir. 1987); E.I. DuPont de Nemours & Co. v. Grasselli Employees Indep. Ass'n, 118 L.R.R.M. (BNA) 3312, 3316 (N.D. Ind. 1985) (overturning arbitration award), *rev'd*, 790 F.2d 611, 617 (7th Cir. 1986); Northwest Airlines, Inc. v. Air Line Pilots Ass'n, Int'l, 633 F. Supp. 779, 796-97 (D.D.C. 1985) (overturning arbitration award), *rev'd*, 808 F.2d 76, 84 (D.C. Cir. 1987); Premium Bldg. Prods. Co. v. USW, Local Union No. 8869, 616 F. Supp. 512, 516 (N.D. Ohio 1985) (upholding arbitration award), *aff'd*, 798 F.2d 1415 (6th Cir. 1986) (unpublished table decision), *available at* No. 85-3749, 1986 U.S. App. LEXIS 27197, at \*16; Am. Postal Workers Union v. United States Postal Serv., No. C-80-0748-WWS, 1980 U.S. Dist. LEXIS 13350 (N.D. Cal. Apr. 11, 1980) (overturning arbitration award), *aff'd*, 682 F.2d 1280, 1286 (9th Cir. 1982); Local 453, IUE v. Otis Elevator Co., 206 F. Supp. 853, 855 (S.D.N.Y. 1962) (overturning arbitration award), *rev'd*, 314 F.2d 25, 29 (2d Cir. 1963).

<sup>37</sup> There are six such cases in the study.

<sup>38</sup> All the cases were in the 1990s, after the Exxon Valdez disaster. For a brief explanation of the Exxon Valdez disaster, see *infra* note 41. Exxon Shipping Co. v. Exxon Seamen's Union, 73 F.3d 1287, 1297 (3d Cir. 1996) (holding reinstatement of chief pumpman for refusing drug test did not violate public policy when the arbitrator found no cause to test); Exxon Corp. v. Baton Rouge Oil & Chem. Workers Union, 77 F.3d 850, 856-57 (5th Cir. 1996) (finding that arbitration award reinstating employee in safety-sensitive position who tested positive for cocaine violated public policy); Gulf Coast Indus. Workers Union v. Exxon Co., U.S.A., 991 F.2d 244, 257 (5th Cir. 1993) (finding that arbitration award reinstating refinery process technician who tested positive for cocaine violated public policy); Exxon Corp. v. Local Union 877, Int'l Bhd. of Teamsters, 980 F. Supp. 752, 769 (D.N.J. 1997) (overturning arbitration award reinstating chemical operator-blender who tested positive for drug use, even though job not safety-sensitive); Exxon Corp. v. Esso Worker's Union, Inc., 942 F. Supp. 703, 710-11 (D. Mass. 1996) (upholding arbitration award reinstating tanker truck driver who tested positive for cocaine use when there was no finding of impairment), *rev'd sub nom.* Exxon Corp. v. Esso Workers' Union, Inc., 118 F.3d 841, 852 (1st Cir. 1997); Exxon Shipping Co. v. Exxon Seamen's Union, 801 F. Supp. 1379, 1391-92 (D.N.J. 1992) (overturning arbitration award reinstating a seaman discharged for having blood alcohol three to four times the limit allowed under Exxon and Coast Guard policy), *aff'd*, 11 F.3d 1189, 1195-96 (3d Cir. 1993); Exxon Shipping Co. v. Exxon Seamen's Union, 788 F. Supp. 829, 846 (D.N.J. 1992) (overturning arbitration award reinstating seaman on oil

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States Postal Service.<sup>39</sup> The reason for the substantial number of challenges by these employers is not clear.<sup>40</sup> They may have been more willing to challenge arbitrators' awards, or they may have had more arbitration awards lending themselves to a public policy challenge. Exxon was particularly successful at overturning arbitration awards on public policy grounds, perhaps because the cases often involved workers on oil tankers accused of alcohol or drug offenses, evoking fears of a repeat of the Exxon Valdez disaster.<sup>41</sup>

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tanker who tested positive for drugs), *aff'd*, 993 F.2d 357, 368 (3d Cir. 1993).

<sup>39</sup> *United States Postal Serv. v. Nat'l Ass'n of Letter Carriers*, 847 F.2d 775, 777-78 (11th Cir. 1988) (denying enforcement of arbitration award reinstating employee who engaged in mail theft on other grounds, declining to rule on the public policy question because of the uncertainty of the law); *Am. Postal Workers Union v. United States Postal Serv.*, 789 F.2d 1, 8-9 (D.C. Cir. 1986) (holding reinstatement of postal employee fired for dishonesty did not violate public policy); *Am. Postal Workers Union v. United States Postal Serv.*, 682 F.2d 1280, 1286 (9th Cir. 1982) (denying enforcement because reinstatement of postal employee who participated in strike violates law); *United States Postal Serv. v. Nat'l Ass'n of Letter Carriers*, 631 F. Supp. 599, 601-02 (D.D.C. 1986) (vacating arbitration award reinstating mail carrier convicted of unlawful delay of mail as violative of public policy), *rev'd*, 810 F.2d 1239, 1242 (D.C. Cir. 1987); *United States Postal Serv. v. Am. Postal Workers Union*, No. C-80-0748-WWS, 1980 U.S. Dist. LEXIS 13350 (N.D. Cal. Apr. 11, 1980) (denying enforcement of arbitration award reinstating postal employee who engaged in an illegal strike as violative of public policy), *aff'd*, 736 F.2d 822, 826 (1st Cir. 1984); *Nat'l Rural Letter Carriers' Ass'n v. United States Postal Serv.*, 637 F. Supp. 1041, 1044 (D.D.C. 1986) (upholding arbitration award reinstating employee who committed mail theft since it did not violate the law or require an unlawful act); *Nat'l Rural Letter Carriers' Ass'n v. United States Postal Serv.*, 625 F. Supp. 1527, 1528, 1530-31 (D.D.C. 1986) (refusing to overturn arbitration award reinstating employee indicted for criminal sexual abuse of his adopted daughter, charges which were later dropped when the employee entered a voluntary deferred prosecution program and paid a fine); *United States Postal Serv. v. Nat'l Ass'n of Letter Carriers*, 663 F. Supp. 118, 120 (W.D. Pa. 1987) (overturning arbitration award reinstating employee terminated for shooting into his supervisor's unoccupied car), *rev'd*, 839 F.2d 146, 149, 150-51 (3d Cir. 1988) (finding district court exceeded its reviewing authority by overturning arbitrator's award since the arbitrator determined that the grievant had no further proclivity for aggression).

<sup>40</sup> Six opinions, all drug cases, involved *Union Pacific Railroad. United Transp. Union v. Union Pac. R.R.*, 116 F.3d 430 (9th Cir. 1997); *Union Pac. R.R. v. United Transp. Union*, 820 F. Supp. 1198, 1203-04 (D. Neb. 1993), *rev'd and remanded*, 23 F.3d 1397, 1400 (8th Cir. 1994), *on remand*, 860 F. Supp. 676 (D. Neb. 1994); *Union Pac. R.R. v. United Transp. Union*, 794 F. Supp. 891 (D. Neb. 1992), *aff'd in part, rev'd in part*, 3 F.3d 255, 264 (8th Cir. 1993).

<sup>41</sup> *See Exxon Corp. v. Esso Workers' Union, Inc.*, 118 F.3d 841, 849 (1st Cir. 1997) (specifically citing the incident in support of the decision). The Exxon Valdez accident occurred on March 24, 1989. Barbara Wickens & Bob Ortega, *Wake of the Valdez: The*

There are common causes for discharge in the cases reviewed.<sup>42</sup> By far the largest number of cases, forty-eight, involved use or possession of drugs, or involved failed or refused drug tests. Fourteen cases each involved alcohol use or abuse, and violence or threats of violence.<sup>43</sup> Thirteen cases each dealt with employees fired for sexual harassment or violations relating to patient safety. Ten cases involved vehicle safety issues not relating to alcohol or drug use,<sup>44</sup> and nine raised safety issues at nuclear facilities. In four cases, all involving the Postal Service, the employee was terminated for theft. Viewed broadly, these reasons for employee discharge might be described as involving conduct morally opprobrious, if not unlawful.

The cases were analyzed for identifying patterns that would predict success or failure in a challenge based on public policy. The following characteristics were identified: the scope of the standard of review; the public policy at issue, including implications for public safety; whether the employee's misconduct was integral to employment; the arbitrator's findings of fact; and the arbitrator's reason for overturning the termination.

### III. THE SCOPE OF THE STANDARD OF REVIEW

Two different views of the public policy standard for review have evolved in the courts. Under one interpretation, an arbitration award can be vacated on public policy grounds only if the arbitration award itself violates positive law or requires the employer to violate positive law.<sup>45</sup> This standard

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*Wrecked Tanker Inflicts New Damage*, MACLEAN'S, Apr. 17, 1989, at 49. The oil tanker Exxon Valdez hit a reef outside the shipping lane in which it was supposed to travel, tearing holes in the hull that allowed over 10 million gallons of oil to be released into the Prince William Sound. George J. Church, *The Big Spill: Bred from Complacency, the Valdez Fiasco Goes from Bad to Worse to Worst Possible*, TIME, Apr. 10, 1989, at 38, 40. At the time of the accident, the captain had returned to his cabin and left the operation of the tanker with the third mate, who was not certified to pilot in the sound. *Id.* at 40. When tested nine hours after the accident, the captain was found to have a blood alcohol level in excess of that permitted by Coast Guard regulations. *Id.* The oil spill covered almost 900 square miles within a week, creating major environmental problems. *Id.* at 38.

<sup>42</sup> Except as noted otherwise, when a discharge fell into two categories, it was counted in both.

<sup>43</sup> This included cases in which the employee was accused of having a weapon at work.

<sup>44</sup> Two of these cases involved an employer asserting that the employee did not meet federal safety regulations for driving commercial vehicles because of a disabling condition.

<sup>45</sup> *E.g.*, *Am. Postal Workers Union v. United States Postal Serv.*, 789 F.2d 1, 8 (D.C. Cir. 1986).

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has been denominated the narrow or *limitist* exception.<sup>46</sup> The alternative view, the broad public policy exception, does not require a demonstration that the arbitration award either violates positive law or requires the employer to violate positive law, but rather looks for a conflict with public policy more broadly defined.<sup>47</sup> Although in *Misco*, the Supreme Court failed to resolve the question of which standard to apply,<sup>48</sup> the Court has a second chance in *Eastern Associated Coal*. Both before and after *Misco*, scholars and courts have debated the issue of the appropriate standard.<sup>49</sup> While full discussion of the debate is beyond the scope of this article, a brief outline will aid in understanding the decisions of the courts.

The public policy exception derives from the basic notion that no court will lend its aid to one who founds a cause of action upon an immoral or illegal act, and is further justified by the observation that the public's interest in confining the scope of private agreements to which it is not a party will go unrepresented unless the judiciary takes account of those interests when it considers whether to enforce such agreements.<sup>50</sup>

Proponents of a broad public policy exception argue that it is the role of the courts to enforce public policy; should the court abandon this role, the

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<sup>46</sup> Bernard D. Meltzer, *After the Labor Arbitration Award: The Public Policy Defense*, 10 INDUS. REL. L.J. 241, 244 (1988).

<sup>47</sup> E.g., *Delta Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l*, 861 F.2d 665, 674 (11th Cir. 1988).

<sup>48</sup> *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 45 n.12 (1987).

<sup>49</sup> E.g., Theodore J. St. Antoine, *The Law of Arbitration*, in LABOR ARBITRATION UNDER FIRE 1, 39-40 (James L. Stern & Joyce M. Najita eds., 1997) (arguing for a narrow standard); Frank H. Easterbrook, *Arbitration, Contract, and Public Policy*, in ARBITRATION 1991: THE CHANGING FACE OF ARBITRATION IN THEORY AND PRACTICE, 65, 70-71 (Gladys W. Gruenberg ed., 1992) (arguing for a narrow standard); Richard Gear, *A Management Viewpoint*, in ARBITRATION 1991: THE CHANGING FACE OF ARBITRATION IN THEORY AND PRACTICE, *supra*, at 77, 88 (arguing for a broader standard using common sense); David M. Silberman, *A Union Viewpoint*, in ARBITRATION 1991: THE CHANGING FACE OF ARBITRATION IN THEORY AND PRACTICE, *supra*, at 89, 91 (arguing for a narrow standard); Harry T. Edwards, *Judicial Review of Labor Arbitration Awards: The Clash Between the Public Policy Exception and the Duty to Bargain*, 64 CHI.-KENT L. REV. 3, 4 (1988) (arguing for narrow standard); Meltzer, *supra* note 46, at 255-56 (arguing for a broad standard); Deanna J. Mouser, *Analysis of the Public Policy Exception After Paperworkers v. Misco: A Proposal to Limit the Public Policy Exception and to Allow the Parties to Submit the Public Policy Question to the Arbitrator*, 12 INDUS. REL. L.J. 89, 146 (1990) (arguing for narrow standard); Bret F. Randall, Comment, *The History, Application, and Policy of the Judicially Created Standards of Review for Arbitration Awards*, 1992 BYU L. REV. 759, 781-83 (arguing for a broad standard).

<sup>50</sup> *Misco*, 484 U.S. at 42.

public's interest will be unrepresented.<sup>51</sup> The result often will be a risk to public health and safety.<sup>52</sup>

Opponents of the broad view cite the risk to the finality of arbitration awards, which jeopardizes stable labor relations.<sup>53</sup> Invalidating arbitration awards that do not violate the law interferes with the national labor policy favoring resolution of labor disputes through free collective bargaining.<sup>54</sup> In addition, the broader public policy exception permits courts to substitute their judgment for that of the arbitrator, refusing to enforce decisions with which they disagree.<sup>55</sup> Finally, supporters of the narrow exception argue that the court, like the arbitrator, is required to enforce contracts unless they are unlawful.<sup>56</sup> Elsewhere, I have taken the position that the narrow view is the standard which best effectuates labor policy in both the private and public sectors.<sup>57</sup> Regardless of which is the appropriate standard, however, it is clear that the choice of standard often determines the outcome of the case.

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<sup>51</sup> *Id.*; Daniel Constr. Co. v. Local 257, IBEW, 856 F.2d 1174, 1181 (8th Cir. 1988); Gear, *supra* note 49, at 88.

<sup>52</sup> *Misco*, 484 U.S. at 42. Professor Meltzer suggests an additional drawback to a narrow public policy exception. A narrow approach might prevent courts from overturning arbitration awards upholding discharges that violate public policy. Meltzer, *supra* note 46, at 254–55. Since that article was written, the Supreme Court decided *Lingle v. Norge*, 486 U.S. 399, 413 (1988), in which it held that a state wrongful discharge claim was not preempted by § 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a) (1994). Indeed, Professor Meltzer suggested in the article that a *limitist* interpretation of the public policy exception might contribute to such a decision. Meltzer, *supra* note 46, at 254–55. And as he correctly pointed out, allowing such state court wrongful discharge claims despite prior arbitration of the discharge does not promote the finality of arbitration awards. *Id.*

<sup>53</sup> *Westvaco Corp. v. United Paperworkers Int'l Union, Local Union 676*, 171 F.3d 971, 977–78 (4th Cir. 1999); Edwards, *supra* note 49, at 34; Christopher T. Hexter, *Judicial Review of Labor Arbitration Awards: How the Public Policy Exception Cases Ignore the Public Policies Underlying Labor Arbitration*, 34 ST. LOUIS U. L.J. 77, 103–05 (1989). The achievement of stable labor relations is an important goal of national labor policy. A policy that establishes a broad ground for reversal threatens the stability of labor relations by encouraging more litigation: a costly effect to the parties involved as well as to the court system. Edwards, *supra* note 49, at 34.

<sup>54</sup> Edwards, *supra* note 49, at 23–29.

<sup>55</sup> *Id.* at 23, 34; Gear, *supra* note 49, at 88. *But see* Meltzer, *supra* note 46, at 251 (stating that if the public policy defense were unavailable in just cause cases, employers challenging reinstatement would likely argue that the arbitration award did not draw its essence from the agreement and a court could easily set aside the arbitration award on those grounds).

<sup>56</sup> Easterbrook, *supra* note 49, at 77.

<sup>57</sup> Ann C. Hodges, *The Steelworkers Trilogy in the Public Sector*, 66 CHI.-KENT L. REV. 631, 682–83 (1990).

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A second aspect of the scope of the standard of review also divides the courts. Some courts require a showing that the arbitration award conflicts with public policy, while others look to whether the conduct leading to termination conflicts with public policy. Thus, if the employee engaged in unlawful conduct which caused the termination, under the latter standard the court could conclude that the arbitration award violated public policy because it reinstated an employee who violated positive law. Under the former, a court could find no public policy violation unless the law explicitly prohibited employment of an individual with a record of past illegal conduct. Two similar cases with contrasting results illustrate the difference.

In both *Northwest Airlines v. Air Line Pilots Ass'n, International*<sup>58</sup> and *Delta Air Lines, Inc. v. Air Line Pilots Ass'n, International*,<sup>59</sup> arbitrators reinstated airline pilots terminated for flying so close in time to drinking alcohol that their blood alcohol levels violated company rules and Federal Aviation Administration regulations. The D.C. Circuit in *Northwest Airlines* upheld the reinstatement, finding no public policy violation,<sup>60</sup> while the Eleventh Circuit in *Delta Air Lines* overturned the arbitration award on public policy grounds.<sup>61</sup> The D.C. Circuit applied the exception narrowly, and looked to whether the arbitration award itself violated the law.<sup>62</sup> Since there was no law prohibiting reformed alcoholics from flying as pilots, the court allowed the arbitration award to stand.<sup>63</sup> In contrast to the D.C. Circuit, the Eleventh Circuit stated the issue as whether “an established public policy condemn[s] the performance of employment activities in the manner engaged in by the employee?”<sup>64</sup> The court concluded that there was an established public policy which prohibited flying while intoxicated and that the arbitrator’s finding of no just cause for termination conflicted with that policy.<sup>65</sup> Thus, one court looked at the arbitration award and specifically at the legality of reinstatement, while the other looked at the legality of the underlying conduct.

These two cases are typical of the public policy discharge cases. An employee is terminated for conduct that is either unlawful or violates a rule designed to protect against a risk to the public or other employees. The

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<sup>58</sup> 808 F.2d 76 (D.C. Cir. 1987).

<sup>59</sup> 861 F.2d 665 (11th Cir. 1988).

<sup>60</sup> 808 F.2d at 83–84.

<sup>61</sup> 861 F.2d at 668, 672–74.

<sup>62</sup> *Northwest Airlines*, 808 F.2d at 80.

<sup>63</sup> *Id.* at 83–84.

<sup>64</sup> *Delta Air Lines*, 861 F.2d at 671.

<sup>65</sup> *Id.*

arbitrator reinstates the employee and the employer either refuses to comply with the arbitration award, forcing the union to seek judicial enforcement, or seeks to have the arbitration award vacated by a court on public policy grounds. The scope of the court's application of the standard has a substantial determinative effect on the outcome of the case.

The D.C. Circuit clearly has adopted the narrowest view, holding that an arbitration award must violate positive law to be set aside. The court requires that the law clearly bar reinstatement; it is insufficient that the employee violated the law prior to termination. This narrow standard resulted in rejection of public policy challenges in each of the four D.C. circuit court cases in the study, as the court found in each case that the arbitration award did not violate the law or require the employer to do so.<sup>66</sup> The Ninth Circuit also appears to have adopted the *limitist* view. In *UFCW, Local 588 v. Foster Poultry Farms*,<sup>67</sup> the court most clearly stated the narrow interpretation of the exception, saying "[b]ecause the DOT regulations do not make it illegal to reinstate employees who test positive for drug use, it *cannot* be said that the DOT regulations 'specifically militate[] against the relief ordered by the

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<sup>66</sup> *United States Postal Serv. v. Nat'l Ass'n of Letter Carriers*, 810 F.2d 1239, 1241-42 (D.C. Cir. 1987) (finding no public policy against reinstatement of an employee who was convicted of unlawful delay of the mail); *Northwest Airlines v. Air Line Pilots Ass'n, Int'l*, 808 F.2d 76 (D.C. Cir. 1987) (finding no public policy against reinstatement of an airline pilot who flew with a blood alcohol level above the limit set by the Federal Aviation Administration regulations); *Am. Postal Workers Union v. United States Postal Serv.*, 789 F.2d 1, 8 (D.C. Cir. 1986) ("There is surely no doubt that the instant case does not pose a situation requiring the invocation of a public policy exception. The arbitrator's award was not itself unlawful, for there is no legal proscription against the reinstatement of a person such as the grievant. And the arbitration award did not otherwise have the effect of mandating any illegal conduct."). Out of the six District of Columbia district court cases identified, the court upheld the arbitrator's award in four of the cases, applying the narrow test both before and after it was adopted by the Court of Appeals. *CWA v. Bell Atlantic-West Virginia, Inc.*, 27 F. Supp. 2d 66, 71 (D.D.C. 1998) (upholding reinstatement of employee discharged for sexual harassment when arbitrator found no sexual harassment); *Nat'l Rural Letter Carriers' Ass'n v. United States Postal Serv.*, 637 F. Supp. 1041, 1043 (D.D.C. 1986) (relying on *Am. Postal Workers Union*, 789 F.2d 1 (D.C. Cir. 1986)); *Nat'l Rural Letter Carriers' Ass'n v. United States Postal Serv.*, 625 F. Supp. 1527 (D.D.C. 1986) (refusing to overturn arbitration award reinstating employee indicted for criminal sexual abuse of his adopted daughter, charges which were later dropped when the employee entered a voluntary deferred prosecution program and paid a fine); *SEIU, Local 722 v. Children's Hosp. Nat'l Med. Ctr.*, 640 F. Supp. 272, 275 (D.D.C. 1984) (applying narrow standard and upholding arbitration award). The exceptions were the district court's decisions in *National Ass'n of Letter Carriers* and *Northwest Airlines*, which were later overturned by the court of appeals. 631 F. Supp. 599 (D.D.C. 1986), *rev'd*, 810 F.2d 1239 (D.C. Cir. 1987); 633 F. Supp. 779 (D.D.C. 1985), *rev'd*, 808 F.2d 76 (D.C. Cir. 1987).

<sup>67</sup> 74 F.3d 169 (9th Cir. 1995).

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arbitrator' in this case."<sup>68</sup> Even prior to its adoption of the *limitist* view, the Ninth Circuit interpreted the standard narrowly; in the nine Ninth Circuit cases identified, the court upheld the arbitrator's decision in six, overturned the decision in two, and remanded one.<sup>69</sup>

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<sup>68</sup> *Id.* at 174 (citing *Stead Motors v. Auto. Machinists Lodge No. 1173*, 886 F.2d 1200, 1212–13 (9th Cir. 1989)). *Foster*, decided in 1995, is the most recent Ninth Circuit pronouncement, other than the remand in *Union Pacific Railroad*, see *infra* note 69, and seems to place the Ninth Circuit in the *limitist* camp. Characterization of circuits based on the scope of the standard is debatable in some cases, however, and depends on the interpretation of the language of the court. In addition, the court may use different language in different cases, thus appearing to apply a narrower standard in some cases than others, perhaps driven by the concern for public safety. For a different classification, see Scott Barbakoff, Note, *Application of the Public Policy Exception for the Enforcement of Arbitral Awards: There Is No Place Like "The Home" in Saint Mary Home, Inc. v. Service Employees International Union*, District 1199, 43 VILL. L. REV. 829, 849–52 (1998).

<sup>69</sup> Of the two cases overturning the arbitrator's award, one was a 1978 case in which the court made no specific reference to the public policy exception. *World Airways, Inc. v. Int'l Bhd. of Teamsters*, 578 F.2d 800 (9th Cir. 1978). The court relied on federal law and the policy ensuring air travel safety to uphold the district court decision, which struck down the arbitration award requiring the employer to retrain a pilot demoted for judgment errors and to give him an opportunity to requalify. *Id.* at 803. Although *World Airways* technically involved a demotion, the employee was effectively terminated as a pilot so the case was deemed to meet the parameters of the study. In the second case, the court applied the narrow exception, finding that reinstatement of a postal employee who participated in a strike would violate the federal law barring strikers from federal employment. *Am. Postal Workers Union v. United States Postal Serv.*, 682 F.2d 1280, 1286 (9th Cir. 1982). In another case, the court remanded to the arbitration board for a factual determination as to whether the employee used drugs. *United Transp. Union v. Union Pac. R.R.*, 116 F.3d 430, 435 (9th Cir. 1997). The court concluded that the district court erred in overturning the arbitration award on public policy grounds because the arbitration board made no finding that the employee used drugs. *Id.* at 434. Thus, although the statute expressly barred reinstatement of an employee who violated drug prohibitions unless the employee completed a rehabilitation program, it was not clear that the arbitration award violated public policy. *Id.* Accordingly, the appropriate course of action was a remand to the arbitration board. In the other seven cases, the court applied the narrow public policy exception to uphold arbitration awards. *Ass'n of Flight Attendants v. Aloha Airlines*, 113 F.3d 1240 (9th Cir. 1997) (unpublished table opinion), available at No. 96–15088, 96–16662, 1997 U.S. App. LEXIS 11436 (stating that issue is whether reinstatement violates public policy, not underlying conduct); *Foster Poultry Farms*, 74 F.3d at 174 (stating that DOT regulations prohibit employees who test positive for drug use from operating commercial motor vehicles but do not require their discharge or prohibit their reinstatement); *Am. Poultry Co. v. Int'l Bhd. of Teamsters Local Union No. 85*, 895 F.2d 1416 (9th Cir. 1990) (unpublished table opinion) available at No. 88–2977, 1990 U.S. App. LEXIS 2053 (assuming that a well-defined and dominant public policy exists, employer has not shown that arbitration award, rather than interpretation of



As noted above, courts that have not adopted the narrowest view of the exception may still limit the ability to overturn arbitration awards by looking for very explicit policies that would directly conflict with arbitral awards. Although this approach might be classified as an intermediate approach, the narrow and intermediate approaches may merge when the court is looking for an explicit legal prohibition on reemployment of an employee who has engaged in particular conduct. They may diverge, however, when the facts indicate some possibility that the unlawful conduct may be repeated, but when no legal prohibition on reinstatement exists. In such a case, a court taking the *limitist* view would not set aside the arbitration award, while a court taking the intermediate approach might do so. The Second Circuit has taken the intermediate approach, upholding five of seven arbitration awards in the study and remanding one. In the five cases affirming arbitration awards, the court read the public policy narrowly. For example, in *Local 453, IUE v. Otis Elevator Co.*,<sup>70</sup> the court found the public policy against gambling was vindicated by a criminal conviction and suspension and did not require sustaining the employee's termination.<sup>71</sup> Similarly, the public policy favoring nuclear safety did not bar reinstatement of an employee in a safety-sensitive position discharged after adulterating a drug test and then testing positive, when reinstatement was conditioned on rehabilitation and follow-up testing and Nuclear Regulatory Commission regulations contemplated rehabilitation.<sup>72</sup>

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the collective bargaining agreement, violates the policy); *Stead Motors v. Auto. Machinists Lodge No. 1173*, 886 F.2d 1200, 1217 (9th Cir. 1989) (stating that there can be no showing that reinstatement violates public policy unless a court assumes that employee will engage in unlawful conduct in the future, however, it is not free to assume this); *Bevles Co. v. Teamsters Local 986*, 791 F.2d 1391, 1392-93 (9th Cir. 1986) (stating that reinstatement of undocumented workers does not violate public policy or law, since state law is unclear and there is no direct conflict with federal law, because reinstatement would not encourage illegal reentry into the country); *Amalgamated Transit Union Local Div. 1307 v. Aztec Bus Lines*, 654 F.2d 642, 644 (9th Cir. 1981) (holding that it is not unlawful to employ bus drivers who have previously shown bad judgment).

<sup>70</sup> 314 F.2d 25 (2d Cir. 1963).

<sup>71</sup> *Id.* at 29.

<sup>72</sup> *IBEW, Local 97 v. Niagara Mohawk Power Corp.*, 143 F.3d 704, 718 (2d Cir. 1998); *see also* *Local 97, IBEW v. Niagara Mohawk Power Corp.*, 196 F.3d 117, 130-31 (2d Cir. 1999) (upholding arbitration award reinstating nuclear security officer who was grossly negligent and lied about failure to respond to alarm, when court could not conclude with certainty that the Nuclear Regulatory Commission would find such conduct precluded reinstatement); *Saint Mary Home, Inc. v. SEIU, Dist. 1199*, 116 F.3d 41, 45 (2d Cir. 1997) (holding that public policy against possession, sale, and use of drugs does not prohibit reinstatement of health care employee arrested for drug offense on the job); *First Nat'l, Inc. v. Retail Wholesale & Chain Store Food Employees Union, Local 338*, 118 F.3d 892, 897-98 (2d Cir. 1997) (holding public policy does not prohibit

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The Sixth Circuit has taken an approach similar to the Second, requiring an explicit conflict between the arbitration award, not the underlying behavior, and a well-defined public policy found in law. This interpretation of the exception caused the court to affirm arbitration awards in all of the nine Sixth Circuit cases identified in the study.<sup>73</sup> And although Judge

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reinstatement of food store employee who reported to work under influence of alcohol and drugs and displayed gun to coworker). *But see* *Newsday, Inc. v. Long Island Typographical Union*, No. 915, 915 F.2d 840, 845 (2d Cir. 1990) (holding that reinstatement of sexual harasser violates public policy requiring employer to eliminate sexual harassment in the workplace although neither EEOC Guidelines nor court decisions require termination of harassers). Finally, in *Perma-Line Corp. of Am. v. Sign Pictorial & Display Union, Local 230*, 639 F.2d 890 (2d Cir. 1981), the court remanded to allow the union to submit evidence supporting its argument that contractual prohibition on discharge of union stewards without union consent did not violate § 8(a)(2) of the National Labor Relations Act, since the prohibition was the basis on which the arbitrator set aside the termination. *Id.* at 895–96.

<sup>73</sup> *MidMichigan Reg'l Med. Ctr. v. Prof'l Employees Div. of Local 79*, 183 F.3d 497, 505–06 (6th Cir. 1999) (finding no public policy precluding the reinstatement of a nurse “who has committed isolated acts of negligence.”); *Tenn. Valley Auth. v. Tenn. Valley Trades & Labor Council*, 184 F.3d 510, 519–21 (6th Cir. 1999) (finding no violation of public policy when arbitrator ordered reinstatement of nuclear reactor employee who failed drug test because regulations did not clearly preclude it and the employer could still conduct a fair hearing on whether the employee was fit for duty after reinstatement); *Dayton Newspapers, Inc. v. Int'l Bhd. of Teamsters, Local 957*, 181 F.3d 100 (6th Cir. 1999) (unpublished table decision), *available at* No. 98-3682, 1999 U.S. App. LEXIS 9144 (holding that arbitrator’s opinion reinstating employee discharged for absenteeism does not violate public policy established by the Americans with Disabilities Act, by contrasting absenteeism of grievant with that of employee with long term illness and suggesting the latter might be permissible); *Monroe Auto Equip. Co. v. UAW*, 981 F.2d 261, 269 (6th Cir. 1992) (citing *Interstate Brands v. Teamsters Local Union No. 135*, 909 F.2d 885, 892–94 (6th Cir. 1990), and noting that the arbitration award, rather than the employee conduct, must violate public policy, the court found that no public policy precludes reinstatement of an employee who tested positive for drugs with no evidence of impairment or drug use on duty); *Shelby County Health Care Corp. v. AFSCME, Local 1733*, 967 F.2d 1091, 1096 (6th Cir. 1992) (noting that statute providing that employee striking health care facility without proper notice loses status as employee specifically implies that employee could be reemployed); *Gen. Refractories Co. v. ABGW*, 931 F.2d 893 (6th Cir. 1991) (unpublished table opinion), *available at* No. 90–5588, 1991 U.S. App. LEXIS 15652, at \*2–\*3 (holding that arbitration award requiring reinstatement of employee after workers’ compensation leave does not violate public policy although arbitrator based reinstatement on conclusion that employee did not have silicosis despite earlier finding by the Workers’ Compensation Board that the employee had silicosis, when arbitrator’s decision assessed current condition based on new evidence); *Interstate Brands Corp. v. Teamsters Local Union No. 135*, 909 F.2d 885, 894 (6th Cir. 1990) (upholding reinstatement of truck driver charged with off-duty drug possession, and noting that even state laws don’t prohibit driving by persons convicted of

Easterbrook has persuasively argued that the narrowest interpretation is the correct one,<sup>74</sup> the Seventh Circuit as a whole has taken the intermediate approach of the Second and Sixth Circuits, upholding three arbitration awards.<sup>75</sup>

Recently, the Fourth Circuit weighed in on the public policy debate with two 1999 decisions. In the first, *Westvaco Corp. v. United Paperworkers International Union, Local Union 676*,<sup>76</sup> the court came down on the side of a narrow reading but stopped short of requiring a violation of positive law.<sup>77</sup> In *Westvaco Corp.*, the court concluded that the public policy against sexual harassment did not bar reinstatement of a harasser after a nine-month suspension.<sup>78</sup> The court stated: “[a]nything but a narrow implementation of . . . [the public policy] doctrine provides courts too much latitude. Public policy can easily become a vessel into which judges pour their own subjective preferences in derogation of the arbitral process and the contractual commitments of the parties which it represents.”<sup>79</sup> The court also noted, however, that the conduct at issue (sexual harassment) neither compromised the performance of a safety sensitive job nor constituted criminal misconduct, suggesting that a different result might obtain in such

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impaired driving unless their license is revoked); *Joseph & Feiss Co. v. ACTWU*, 861 F.2d 720 (6th Cir. 1988) (unpublished table opinion), available at No. 87-3832, 1988 U.S. App. LEXIS 14898, at \*9-\*10 (finding arbitration award does not violate public policy even if conduct leading to termination does); *Premium Bldg. Prods. Co. v. USW, Local Union No. 8869*, 798 F.2d 1415 (6th Cir. 1986) (unpublished table opinion), available at No. 85-3749, 1986 U.S. App. LEXIS 27197, at \*1-\*15 (holding that illegality of conduct not sufficient for public policy violation).

<sup>74</sup> Easterbrook, *supra* note 49; *E.I. DuPont de Nemours & Co. v. Grasselli Employees Indep. Ass’n*, 790 F.2d 611, 617-21 (7th Cir. 1986) (Easterbrook, J., concurring).

<sup>75</sup> *DuPont*, 790 F.2d at 617. In *DuPont*, the court upheld the arbitration award, deferring to the arbitrator’s factual finding that a recurrence of the employee’s violent conduct was unlikely and concluding that, accordingly, the arbitration award did not violate any public policy relating to workplace safety, see also *Chrysler Motors Corp. v. Int’l Union of Allied Indus. Workers*, 959 F.2d 685, 688 (7th Cir. 1992) (upholding arbitration award when arbitrator found that sexual harasser was subject to rehabilitation); *Int’l Ass’n of Machinists, Dist. No. 8 v. Campbell Soup Co.*, 406 F.2d 1223, 1227 (7th Cir. 1969) (finding public policy against gambling does not require discharge).

<sup>76</sup> *Westvaco Corp. v. United Paperworkers Int’l Union, Local Union 676*, 171 F.3d 971 (4th Cir. 1999).

<sup>77</sup> *Id.* See *infra* notes 81-84 and accompanying text, however, noting that the *Eastern Associated Coal* decision may indicate that the Fourth Circuit has joined the Ninth and D.C. Circuits in adopting the narrowest interpretation of the exception.

<sup>78</sup> *Westvaco Corp.*, 171 F.3d at 972.

<sup>79</sup> *Id.* at 978.

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cases.<sup>80</sup>

Subsequently, in a *per curiam* opinion in *Eastern Associated Coal*, the Court affirmed the decision of the West Virginia District Court, rejecting a public policy challenge to an arbitration award that reinstated an employee in a safety sensitive job who tested positive for drugs.<sup>81</sup> The court described the district court's decision as follows:

The court also ruled that the arbitrator's award was not contrary to a well-defined and dominant public policy because although there is a public policy against the use of illegal drugs by those in safety-sensitive positions, there is no such public policy against the reinstatement of employees who have used illegal drugs in the past.<sup>82</sup>

This description of the district court's opinion does not clearly require that the decision violate positive law. However, the court expressly adopted the district court's rationale and there is language in the district court opinion that can be read as requiring that the arbitration award violate positive law or require the employer to do so in order to be set aside. The district court, citing the Ninth Circuit's decision in *Foster Poultry Farms*, stated: "Because the DOT Regulations do not make it illegal to reinstate employees who test positive for drug use, it cannot be said that the DOT Regulations 'specifically militate against the relief ordered by the arbitrator' in this case."<sup>83</sup>

The Tenth Circuit issued two decisions that met the parameters of the study. In the first, it upheld the arbitrator's reinstatement of an employee who engaged in sexual harassment, but the scope of its standard is not clear from the decision, which was based on deference to the arbitrator's findings.<sup>84</sup> In the second, the court took the intermediate approach, refusing to invalidate an arbitration award reinstating an employee who tested positive for drugs

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<sup>80</sup> *Id.* at 977 & n.2.

<sup>81</sup> *E. Associated Coal Corp. v. United Mining Workers*, Dist. 17, 188 F.3d 501 (4th Cir. 1999) (*per curiam*) (unpublished table decision), available at No. 98-2527, 1999 U.S. App. LEXIS 19944, at \*4-\*5.

<sup>82</sup> *Id.* at \*4.

<sup>83</sup> *E. Associated Coal Corp. v. United Mining Workers*, Dist. 17, 66 F. Supp. 796, 805 (S.D. W. Va. 1998) (citing *UFCW, Local 588 v. Foster Poultry Farms*, 74 F.3d 169, 174 (9th Cir. 1995)). The employer's petition for certiorari, which was granted, characterizes the Fourth Circuit as requiring that the arbitration award violate positive law or mandate unlawful conduct by the employer to meet the public policy exception. See Victoria Roberts, *Arbitration: Justices to Review Arbitrator's Reinstatement of Equipment Operator Who Failed Drug Test*, 55 DAILY LAB. REP., Mar. 21, 2000, at AA-1.

<sup>84</sup> *CWA v. Southeastern Elec. Coop.*, 882 F.2d 467, 469 (10th Cir. 1989).

because the Utah statutory provisions relating to drugs did not “suggest that every employee in a safety sensitive position that tests positive one time, with no other evidence of drug involvement, must be fired.”<sup>85</sup>

The broadest formulation of the public policy exception has been adopted in the First, Third, Fifth, Eighth, and Eleventh Circuits. The Fifth Circuit overturned four arbitration awards, more than any other circuit, while upholding one and remanding one.<sup>86</sup> In the earliest case to address the issue, the court found a public policy violation based on the conduct for which the employee was discharged.<sup>87</sup> Citing federal motor carrier regulations against drinking and driving, the court concluded that there was a “public policy against allowing a professional driver to continue his driving duties after having been caught drinking on the job . . . .”<sup>88</sup> The court neither required a violation of positive law nor evaluated the arbitration award, rather than the underlying conduct, for public policy implications. Later, in a post-*Misco* case, the court indicated that the focus should be on whether the arbitration award violates public policy, but adhered to the view that a violation of positive law is not required, finding that reinstatement of an employee who tested positive for drugs to a safety-sensitive position was inconsistent with various regulations designed to eliminate workplace drug use.<sup>89</sup> Three years later, however, the court took a step back toward the broadest reading, holding that even back pay without reinstatement of an employee who had tested positive for drugs while working in a safety sensitive position violated

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<sup>85</sup> *Kennecott Utah Copper Corp. v. Becker*, 195 F.3d 1201, 1206 (10th Cir. 1999) (“We are not persuaded that these provisions [of Utah drug law] constitute a clear public policy that prohibits reinstatement of an employee in the grievant’s circumstances . . . .”). The court indicated that the deference due to arbitration awards supported its decision to proceed cautiously when asked to set aside an arbitration award on public policy grounds. *Id.* at 1207–08.

<sup>86</sup> See *infra* notes 88–91 and accompanying text.

<sup>87</sup> *Amalgamated Meat Cutters, Local Union 540 v. Great W. Food Co.*, 712 F.2d 122, 125 (5th Cir. 1983).

<sup>88</sup> *Id.* at 125. The court also stated that “[i]n a nation where motorists practically live on the highways, no citation of authority is required to establish that an arbitration award ordering a company to reinstate an over-the-road truck driver caught drinking liquor on duty violates public policy.” *Id.* at 124. In a 1987 case, the court relied on its opinion in *United Paperworkers Int’l Union v. Misco, Inc.*, 768 F.2d 739 (5th Cir. 1985), *rev’d*, 484 U.S. 29 (1987), to find that it was appropriate to remand the case to the arbitrator to determine whether post-arbitration award drug use precluded enforcement of an arbitral reinstatement award as against public policy. *OCAW, Local No. 4–228 v. Union Oil Co.*, 818 F.2d 437, 442 (5th Cir. 1987).

<sup>89</sup> *Gulf Coast Indus. Workers Union v. Exxon Co., U.S.A.*, 991 F.2d 244, 250–51 (5th Cir. 1993).

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public policy because it condoned misconduct.<sup>90</sup>

Despite adopting a broad standard, the Third Circuit upheld five arbitration awards and overturned three.<sup>91</sup> However, three of the cases in which the arbitration award was upheld preceded the circuit's rejection of the narrow public policy standard.<sup>92</sup> In another, the court found no laws or legal precedents setting forth a public policy that would be violated by reinstatement and retraining of a bus driver who had twenty-four accidents in twelve years.<sup>93</sup> The fifth case that survived the scrutiny of the Third Circuit involved judicial deference to the arbitrator's factual findings.<sup>94</sup> The Third Circuit articulated its broad test in *Exxon Shipping Co. v. Exxon Seamen's Union*,<sup>95</sup> stating that the court should look to the underlying purpose of a law in determining whether public policy is violated.<sup>96</sup> Thus, the Third Circuit is

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<sup>90</sup> *Exxon Corp. v. Baton Rouge Oil & Chem. Workers Union*, 77 F.3d 850, 856 (5th Cir. 1996); *see also* *Delta Queen Steamboat Co. v. Dist. 2 Marine Eng'rs Beneficial Ass'n*, 889 F.2d 599, 604 (5th Cir. 1989) (failing to reach public policy argument yet setting aside arbitration award on other grounds). In the one case upheld, the court found that assuming arguendo that the public policy exception applied under the Railway Labor Act, since the arbitration board found the drug test invalid, it did not violate any public policy to reinstate the grievant to a safety-sensitive position in the railroad industry. *Atchison, Topeka & Santa Fe Ry. v. United Transp. Union*, 175 F.3d 355, 358 (5th Cir. 1999).

<sup>91</sup> *See infra* notes 93–97 and accompanying text.

<sup>92</sup> *United States Postal Serv. v. Nat'l Ass'n of Letter Carriers*, 839 F.2d 146, 149 (3d Cir. 1988) (declining to decide the scope of the standard because assuming arguendo that a public policy in favor of protecting employees and customers from violence exists, it does not require employee's discharge when arbitrator found him amenable to discipline); *Super Tire Eng'g Co. v. Teamsters Local Union No. 676*, 721 F.2d 121, 125n.6 (3d Cir. 1983) (stating that reinstatement of tire worker who drank alcohol on work breaks does not conflict with any law or well-defined public policy); *Kane Gas Light & Heating Co. v. Int'l Bhd. of Firemen & Oilers, Local 112*, 687 F.2d 673, 682 (3d Cir. 1982) (holding that arbitration award does not condone illegal act when employee was suspended for reckless conduct which could have endangered life or caused property damage).

<sup>93</sup> *United Transp. Union Local 1589 v. Suburban Transit Corp.*, 51 F.3d 376, 382 (3d Cir. 1995). Notably, the court read the public policy more narrowly in *Suburban Transit* than in the several *Exxon* cases before the court. *See infra* notes 96–97 and accompanying text.

<sup>94</sup> *Exxon Shipping Co. v. Exxon Seamen's Union*, 73 F.3d 1287, 1295 (3d Cir. 1996) (deferring to arbitrator's finding that employer had no cause to require drug test, but stating that if there was cause to test, it would violate public policy to reinstate an employee who refused the test based on employer's duty to ensure that impaired crew members do not contribute to oil spills).

<sup>95</sup> 993 F.2d 357 (3d Cir. 1993).

<sup>96</sup> *Id.* at 364. Accordingly, the court found that reinstatement of a helmsman who

not looking solely for a conflict with the law itself, but rather a conflict with the purpose of the law, a broad interpretation of the exception.

The Eighth Circuit reviewed six awards, upholding three, overturning two, and remanding one to the district court for a decision on the public policy issue.<sup>97</sup> The Eighth Circuit adopted the broad standard in *Iowa Electric, Light & Power Co. v. Local Union 204, IBEW*,<sup>98</sup> in which the court overturned an arbitration award that reinstated an employee terminated for violating nuclear safety regulations.<sup>99</sup> The employer terminated the employee because it found the violation to be knowing and serious, such that the employee could no longer be trusted.<sup>100</sup> The Eighth Circuit clearly focused on the legality of underlying conduct, not the arbitration award. Three later cases refused to overturn arbitration awards on various grounds unrelated to the scope of the exception.<sup>101</sup> In a fifth case, the arbitration board reinstated an employee based on a due process violation without determining whether he posed a risk of working under the influence of alcohol or drugs, despite

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tested positive for drugs violated the policy protecting the public and the environment, citing Coast Guard regulations indicating that employees who tested positive “shall be denied employment . . . or removed from duties which directly affect the safety of the vessel’s navigation or operations,” and may not return to work unless rehabilitation is shown.” *Id.* (citations omitted) (omission in original); *accord Exxon Shipping Co. v. Exxon Seamen’s Union*, 11 F.3d 1189, 1195–96 (3d Cir. 1993) (barring reinstatement of oil tanker employee found intoxicated on duty despite lack of direct legal prohibition); *see also Stroehmann Bakeries, Inc. v. Local 776, Int’l Bhd. of Teamsters*, 969 F.2d 1436, 1442 (3d Cir. 1992) (finding arbitration award violated public policy against sexual harassment when arbitrator reinstated employee accused of harassment without determining whether harassment occurred).

<sup>97</sup> *See infra* notes 99–104 and accompanying text. In the remanded case, the lower court had found that there was no public policy exception under the Railway Labor Act. *Union Pac. R.R. v. United Transp. Union*, 820 F. Supp. 1198, 1203 (D. Neb. 1994). The Eighth Circuit reversed, remanding for a determination as to whether the arbitration award violated public policy. 23 F.3d 1397, 1400 (8th Cir. 1994). On remand, the lower court found no public policy violation. 860 F. Supp. 676, 679 (D. Neb. 1994).

<sup>98</sup> 834 F.2d 1424 (8th Cir. 1987).

<sup>99</sup> *Id.* at 1429.

<sup>100</sup> *Id.*

<sup>101</sup> In *Daniel Constr. Co. v. Local 257, IBEW*, 856 F.2d 1174, 1182 (8th Cir. 1988), the attack on public policy challenged the arbitrator’s authority to decide the issue. The court rejected that argument and went further to distinguish the case from *Iowa Electric* as involving only back pay to employees who failed an improper psychological screen for employment at a nuclear power plant, not reinstatement of potentially dangerous employees. *Id.* In both *Alvey, Inc. v. Teamsters Local Union No. 688*, 132 F.3d 1209, 1212 (8th Cir. 1997) and *Homestake Mining Co. v. USW, Local 7044*, 153 F.3d 678, 681 (8th Cir. 1998), the court deferred to the arbitrator’s factual findings that the employer did not prove the employee engaged in the conduct alleged, and on that basis determined that reinstatement of the employees did not violate public policy.

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federal regulations requiring that any employee who tests positive for drugs or alcohol must be removed from service and cannot be reinstated until the employee has been evaluated for dependence, completed a rehabilitation program, and tested negative.<sup>102</sup> Because the employee was reinstated without a determination as to future risk, the court concluded that the arbitration award violated public policy and remanded for further findings.<sup>103</sup>

In 1988, the Eleventh Circuit upheld one arbitration award and overturned two, one on different grounds.<sup>104</sup> The broadest interpretation was in the latest of the three cases, the *Delta Air Lines* case discussed earlier.<sup>105</sup> The court in *Delta Air Lines* stated that the test was whether “an established public policy condemn[s] the performance of employment activities in the manner engaged in by the employee.”<sup>106</sup> Thus, the Eleventh Circuit is looking at whether the underlying conduct was both unlawful or against public policy and integral to employment.<sup>107</sup>

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<sup>102</sup> *Union Pac. R.R. v. United Transp. Union*, 3 F.3d 255, 262–63 (8th Cir. 1993).

<sup>103</sup> *Id.* The court suggested the arbitrator could reinstate the employee if the arbitrator found no significant risk to the public, because the employee could be trusted to avoid substance abuse in the future. *Id.* at 263. The court appeared to be willing to defer to arbitral findings on the possibility of rehabilitation, a narrower approach than the court took in *Iowa Electric*.

<sup>104</sup> See *infra* notes 106–08 and accompanying text.

<sup>105</sup> See *supra* notes 59–65 and accompanying text.

<sup>106</sup> *Delta Air Lines, Inc. v. Air Line Pilots Ass’n, Int’l*, 861 F.2d 665, 671 (11th Cir. 1988).

<sup>107</sup> In *Florida Power Corp. v. IBEW, Local Union 433*, 847 F.2d 680 (11th Cir. 1988), the court reversed the district court’s decision setting aside on public policy grounds an arbitration award that reinstated an employee discharged because he was arrested for off-duty drug possession. The decision contains no discussion of the public policy issue, but cites to the Supreme Court’s *Misco* decision as the basis for reversal. *Id.* at 681. In a case preceding *Delta Air Lines*, the court indicated agreement with the district court’s public policy rationale for vacating the arbitrator’s award, but affirmed the decision on different grounds because of the unsettled nature of the exception. *United States Postal Serv. v. Nat’l Ass’n of Letter Carriers*, 847 F.2d 775 (11th Cir. 1988).



The First Circuit set aside two cases, one in 1984 and one in 1997.<sup>108</sup> In the first, the court struck down an arbitration award reinstating an employee who embezzled from the Postal Service, citing statutes relating to conduct and honesty of postal employees, as well as the importance of public trust and the need to set an example for other employees.<sup>109</sup> In the second, another *Exxon* case, the court overturned an arbitration award reinstating a truck driver who tested positive for drugs based on the “expanding public policy,” noting that “[i]t makes no sense to construe public policy as encouraging—and in some cases mandating—employers to establish and enforce drug-testing programs, yet to preclude them from taking decisive action against those employees who test positive.”<sup>110</sup>

While the correlation is not complete, it is clear from the above discussion that, not surprisingly, in the circuits that have adopted narrower public policy exceptions, the arbitration award is less likely to be overturned. This is true both in the circuits that clearly require that the arbitration award violate positive law and those that have looked for a direct conflict between the law or public policy and the arbitration award. A review of the district court decisions shows that of the twenty-five cases in which the courts indicated whether they were applying a broad or narrow standard, twenty-three applied a narrow standard<sup>111</sup> and upheld the arbitration award while only one court that applied a narrow standard struck down the arbitration award. Of the courts expressly applying a broad standard, ten vacated the arbitration award and three upheld it. Unquestionably, the scope of the standard is not the only determinative factor, however, as courts applying a narrow standard sometimes set aside arbitration awards, while courts

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<sup>108</sup> See *infra* notes 110–11 and accompanying text. Three other First Circuit cases involved S.D. Warren Co. In the first, the court relied on criminal laws against drug use and sale to vacate the arbitrator’s reinstatement award on public policy grounds. S.D. Warren Co. v. United Paperworkers Int’l Union, Local 1069, 815 F.2d 178, 187 (1st Cir. 1987). The Supreme Court vacated and remanded after *Misco*. 484 U.S. 983 (1987). The court then reaffirmed its decision vacating the arbitration award, but did so on the ground that the arbitrator exceeded her contractual authority. S.D. Warren Co. v. United Paperworkers Int’l Union, Local 1069, 845 F.2d 3, 7 (1st Cir. 1988). In a companion case involving the same facts but a different arbitration award, the court followed the earlier decision, concluding that the arbitrator exceeded authority. S.D. Warren Co. v. United Paperworkers Int’l Union, Local 1069, 846 F.2d 827, 828 (1st Cir. 1988).

<sup>109</sup> *United States Postal Serv. v. Am. Postal Workers Union*, 736 F.2d 822, 825 (1st Cir. 1984). The court appeared to rely on the relationship of the conduct to employment, disclaiming any public policy against requiring government to employ anyone convicted of a crime. *Id.* at 825–26.

<sup>110</sup> *Exxon Corp. v. Esso Workers’ Union*, 118 F.3d 841, 850 (1st Cir. 1997).

<sup>111</sup> In this analysis, both the positive law approach and the intermediate approach of the Second, Sixth, Seventh, Tenth, and Fourth Circuits are classified as narrow.

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applying a broad standard sometimes vacate them.

### IV. THE PUBLIC POLICY AT ISSUE

As noted above, there are common causes of discharge in the cases, and accordingly, there are several public policies that repeatedly serve as the basis for arbitral award challenges. The most common are policies against drugs, alcohol, sexual harassment, and violent behavior, and the policies relating to vehicular safety, patient safety, and safety at nuclear facilities.<sup>112</sup> Of the forty-eight cases involving drug use or drug testing, the arbitration award was upheld in twenty-eight. In several, the courts found no public policy against reinstating an employee who used drugs, declining to find such a public policy in general criminal laws or laws authorizing employer drug tests.<sup>113</sup> In others, the courts relied on the arbitrator's factual findings that a test was improper or that the employee did not receive due process and accordingly, the arbitration award did not establish that the employee used drugs.<sup>114</sup> Those cases in which the arbitration award was overturned frequently involved jobs, such as truck drivers, railroad crew members, or seamen, in which federal regulations against on-the-job drug use existed.<sup>115</sup>

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<sup>112</sup> This categorization is based on the cause for discharge, although the public policy articulated by the court or urged by the employer is not always directly related to the cause for discharge. *E.g.*, *Park Plaza Hotel v. Local 217, Hotel & Rest. Workers Union*, No. N-89-183, 1990 U.S. Dist. LEXIS 15863 (D. Conn. Aug. 21, 1990) (rejecting employer's public policy argument based on public policy against perjury, when employer alleged arbitration award reinstating employee who violated alcohol policy was "procured by the grievant's perjured testimony"). Because the public policy was in most cases directly related to the cause for discharge, however, and because in a number of cases the opinion did not reflect the public policy on which the employer based its argument and the court found no public policy violation, the cases in this section were categorized by cause for discharge.

<sup>113</sup> *E.g.*, *Kennecott Utah Copper Corp. v. Becker*, 195 F.3d 1201, 1206 (10th Cir. 1999); *Saint Mary Home, Inc. v. SEIU*, Dist. 1199, 116 F.3d 41, 46 (2d Cir. 1997).

<sup>114</sup> *E.g.*, *Exxon Shipping Co. v. Exxon Seamen's Union*, 73 F.3d 1287, 1295 (3d Cir. 1996); *Atchison, Topeka & Santa Fe Ry. v. United Transp. Union*, 175 F.3d 355, 358 (5th Cir. 1999).

<sup>115</sup> The arbitration award was overturned in twelve cases, three on grounds other than public policy. For cases overturned on public policy grounds, see *Exxon Corp. v. Esso Workers' Union*, 118 F.3d at 850; *Exxon Corp. v. Baton Rouge Oil & Chem. Workers Union*, 77 F.3d 850, 856 (5th Cir. 1996); *Gulf Coast Indus. Workers Union v. Exxon Co., U.S.A.*, 991 F.2d 244 (5th Cir. 1993); *Union Pac. R.R. v. United Transp. Union*, 3 F.3d 255, 262-63 (8th Cir. 1993); *Exxon Shipping Co. v. Exxon Seamen's Union*, 788 F. Supp. 829 (D.N.J. 1992), *aff'd*, 993 F.2d 357 (3d Cir. 1993); *S.D. Warren Co. v. United Paperworkers Int'l Union, Local 1069*, 815 F.2d 178, 187 (1st Cir. 1987);

In most of these cases, however, the courts applied a broad view of the public policy exception as the regulations did not expressly forbid reinstatement of an employee who used drugs.<sup>116</sup>

Fifteen cases involved alcohol use, seven vacating the arbitration award and eight sustaining it. The seven cases vacating the arbitration award involved cases in which Coast Guard, Federal Aviation Administration, Federal Railroad Administration, or Department of Transportation regulations applied to pilots, railroad crews, tanker crews, or truck drivers.<sup>117</sup> As noted above, however, application of the narrow standard resulted in upholding reinstatement of a pilot who flew while intoxicated.<sup>118</sup> Similarly, the District Court in Massachusetts refused to set aside reinstatement of a truck driver who was terminated for drinking on the job despite federal

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Exxon Corp. v. Local Union 877, Int'l Bhd. of Teamsters, 980 F. Supp. 752 (D.N.J. 1997); Ga. Power Co. v. IBEW, Local 84, 707 F. Supp. 531, 536 (N.D. Ga. 1989). For cases overturned on other grounds, see S.D. Warren Co. v. United Paperworkers Int'l Union, Local 1069, 845 F.2d 3, 7 (1st Cir. 1988); S.D. Warren Co. v. United Paperworkers Int'l Union, Local 1069, 846 F.2d 827, 828 (1st Cir. 1988); Logistics Pers. Corp. v. Truck Drivers Local Union No. 299, 6 F. Supp. 2d 650 (E.D. Mich. 1998). Five cases were remanded for further findings, including one in which the arbitration award was set aside. See United Transp. Union v. Union Pac. R.R., 116 F.3d 430, 435 (9th Cir. 1997); Union Pac. R.R. v. United Transp. Union, 23 F.3d 1397, 1400 (8th Cir. 1994); Union Pac. R.R. v. United Transp. Union, 3 F.3d 255, 262-63 (8th Cir. 1993) (vacating arbitration award and remanding); OCAW, Local No. 4-228 v. Union Oil Co., 818 F.2d 437, 442 (5th Cir. 1987). In *Alvey, Inc. v. Teamsters Local Union No. 688*, the court found no public policy violation, but remanded on other grounds. 132 F.3d 1209, 1212-13 (8th Cir. 1998).

<sup>116</sup> E.g., Exxon Corp. v. Baton Rouge Oil & Chem. Workers Union, 77 F.2d 850 (5th Cir. 1996) (finding that arbitration award reinstating employee in safety-sensitive position who tested positive for cocaine violated public policy); Gulf Coast Indus. Workers Union v. Exxon Co., U.S.A., 991 F.2d 244 (5th Cir. 1993) (holding that arbitration award reinstating refinery process technician who tested positive for cocaine violated public policy).

<sup>117</sup> Exxon Shipping Corp. v. Exxon Seamen's Union, 801 F. Supp. 1379 (D.N.J. 1992) (overturning arbitration award reinstating a seaman discharged for having blood alcohol three to four times the limit allowed under Exxon and Coast Guard policy), *aff'd*, 11 F.3d 1189, 1195-96 (3d Cir. 1993); Union Pac. R.R. v. United Transp. Union, 794 F. Supp. 891 (D. Neb. 1992) (overturning arbitration award reinstating employee who tested positive for alcohol and drugs but remanding for a new hearing), *aff'd in part, rev'd in part*, 3 F.3d 255 (8th Cir. 1993); Delta Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l, 686 F. Supp. 1573 (N.D. Ga. 1987), *aff'd*, 861 F.2d 665 (11th Cir. 1988); Amalgamated Meat Cutters, Local Union 540 v. Great W. Food Co., 712 F.2d 122 (5th Cir. 1983) (overturning arbitration award reinstating truck driver who was drinking on duty and had an accident); Northwest Airlines v. Air Line Pilot's Ass'n, Int'l, 633 F. Supp. 779 (D.D.C. 1985), *rev'd*, 808 F.2d 76 (D.C. Cir. 1987).

<sup>118</sup> See *supra* notes 58-63 and accompanying text.

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regulations prohibiting the behavior, finding that the regulations did not require discharge.<sup>119</sup> Again the scope of the standard had more impact than the specific public policy at issue.

Of the fourteen cases involving employee violence or threats of violence, only two arbitration awards were overturned and both were reversed on appeal.<sup>120</sup> Despite the growing concern about workplace violence, courts refused to set aside these arbitration awards even when applying a broad public policy standard.<sup>121</sup>

Of the thirteen cases involving sexual harassment, six overturned the arbitrator's decision and seven upheld it. The primary difference between the cases upheld and those overturned was whether the court deemed upholding the discharge necessary to effectuate the public policy against sexual harassment.<sup>122</sup> Under a narrow view, it is clear that reinstatement does not violate Title VII because courts in Title VII cases have held that the employer can remedy sexual harassment with lesser penalties for the harasser.<sup>123</sup> Thus, the scope of the exception is an important determinant in sexual harassment cases. In addition, the arbitrator's findings regarding the seriousness of the harassment, or the lack of such findings, appeared to influence the courts as the severity of the harassment impacted the necessity for severe punishment.<sup>124</sup>

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<sup>119</sup> *Laidlaw Waste Sys., Inc. v. Int'l Bhd. of Teamsters, Local 379*, No. 88-0472, 1990 U.S. Dist. LEXIS 6106 (D. Mass. May 16, 1990).

<sup>120</sup> *United States Postal Serv. v. Nat'l Ass'n of Letter Carriers*, 663 F. Supp. 118 (W.D. Pa. 1987), *rev'd*, 839 F.2d 146 (3d Cir. 1988); *E.I. DuPont de Nemours & Co. v. Grasselli Employees Indep. Ass'n*, 118 L.R.R.M. (BNA) 3312 (N.D. Ind. 1985), *rev'd*, 790 F.2d 611 (7th Cir. 1986). One court remanded the case to an arbitrator to reconsider the remedy on the basis that the prohibition on holding union office for one year, a condition of reinstatement, conflicted with public policy. *Hyde Park Cmty. Hosp. v. Allied Serv. Div., Bhd. of Ry. Employees*, No. 87-C-1315, 1987 U.S. Dist. LEXIS 12053 (N.D. Ill. Dec. 28, 1987).

<sup>121</sup> *E.g.*, *G.B. Goldman Paper Co. v. United Paperworkers Int'l Union, Local 286*, 957 F. Supp. 607, 618-22 (E.D. Pa. 1997) (failing to find that reinstatement would violate the public policy of workplace safety, even though the court reviewed the arbitrator's judgment in reinstating the employee *de novo*).

<sup>122</sup> *Compare Westvaco Corp. v. United Paperworkers Int'l Union, Local Union 676*, 171 F.3d 971, 977 (4th Cir. 1999) (holding that while there is a public policy against sexual harassment, "[t]here is no public policy that every harasser must be fired.") *with* *Newsday, Inc. v. Long Island Typographical Union*, No. 915, 915 F.2d 840, 845 (2d Cir. 1990) (holding that reinstatement of employee fired for sexual harassment condones misconduct and interferes with employer's legal duty to eliminate sexual harassment).

<sup>123</sup> Douglas E. Ray, *Sexual Harassment, Labor Arbitration, and National Labor Policy*, 73 NEB. L. REV. 812, 833 (1994) and cases cited therein.

<sup>124</sup> *Stroehmann Bakeries v. Local 776, Int'l Bhd. of Teamsters*, 969 F.2d 1436, 1442

Thirteen cases involved the public policy variously described as insuring patient safety or insuring competent, licensed health care employees.<sup>125</sup> Of these cases, two were overturned and one court stayed reinstatement pending arbitration of new charges.<sup>126</sup> In one overturned case, the arbitrator found that the employee had been seriously negligent, had a propensity for misconduct, and was reluctant to change her ways.<sup>127</sup> In the other, the arbitrator also found that the employee committed serious patient abuse, but set aside the decision because the employee's supervisor had improperly absented herself from the workplace.<sup>128</sup> In each of the cases upheld, the court found that the public policy did not bar reinstatement<sup>129</sup> or deferred to the arbitrator's findings that the employee did not commit patient abuse or was unlikely to repeat the conduct.<sup>130</sup>

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(3d Cir. 1992) (overturning arbitration award when arbitrator failed to determine whether harassment occurred, thereby interfering with employer's duty to eliminate harassment); *Newsday*, 915 F.2d at 845 (holding that arbitrator's award of reinstatement interferes with duty to eliminate harassment when employee had engaged in prior sexual harassment which was the subject of a previous arbitrator's award indicating that any further harassment should be grounds for immediate discharge).

<sup>125</sup> Interestingly, all but one were district court cases.

<sup>126</sup> In *Washington Heights-W. Harlem-Inwood Mental Health Council, Inc. v. Dist. 1199 Nat'l Union of Hosp. & Health Care Employees*, the court, on public policy grounds, stayed the reinstatement of a mental health worker charged with sexual abuse of patients, enforcing only the arbitration award of back pay pending arbitration of new issues raised by an amended complaint. 608 F. Supp. 395, 396 (S.D.N.Y. 1985).

<sup>127</sup> *Russell Mem'l Hosp. Ass'n v. USW*, 720 F. Supp. 583, 587 (E.D. Mich. 1989). The court in *Russell* expressly rejected the narrow or *limitist* view of the public policy exception in public safety cases. *Id.* at 586 n.2. As noted previously, the Sixth Circuit has adopted the intermediate view of the exception, requiring an explicit conflict with the arbitration award, but has upheld the arbitration award in each of the nine cases it has decided, most after the *Russell* case was decided. See *supra* note 73 and accompanying text.

<sup>128</sup> *Highlands Hosp. v. AFSCME*, 151 L.R.R.M. (BNA) 2629, 2630 (W.D. Pa. 1996).

<sup>129</sup> *Jacksonville Area Ass'n for Retarded Citizens v. Gen. Serv. Employees Union, Local 73*, 888 F. Supp. 901, 908 (C.D. Ill. 1995) (holding that the issue is not whether conduct for which employee was terminated violates public policy but whether reinstatement of the employees who engaged in such conduct violates public policy).

<sup>130</sup> E.g., *UPMC, Braddock v. Teamsters Local 250*, 32 F. Supp. 2d 231, 235 (W.D. Pa. 1998) (holding that reinstatement of long service employee with good record does not violate public policy protecting psychiatric patient safety when policy allegedly violated was not consistently enforced); *Cabrini Med. Ctr. v. Local 1199, Drug, Hosp., & Health Care Employees Union*, 731 F. Supp. 612, 618-19 (S.D.N.Y. 1990) (finding no public policy violation when the arbitrator made no clear finding of patient abuse); *Brigham & Women's Hosp. v. Mass. Nurses Ass'n*, 684 F. Supp. 1120, 1125 (D. Mass. 1988) (finding no public policy violation when arbitrator reinstated registered nurse with

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There were ten vehicle safety cases that did not involve the use of drugs or alcohol by the operator.<sup>131</sup> Only two of the ten cases overturned the arbitrator's award. The first was an early case in which the Ninth Circuit found that the arbitrator exceeded his authority by ordering an airline to allow a demoted pilot to retrain and attempt to requalify as a pilot after repeated errors of judgment.<sup>132</sup> The court did not expressly use a public policy exception, but in support of its decision cited Federal Aviation Act regulations that impose a duty on the carrier to determine pilot qualifications.<sup>133</sup> In the other case, the court similarly overturned the arbitration award reinstating a riverboat captain who was found to be grossly careless on the basis that the arbitrator exceeded contractual authority, but did not reach the public policy issue raised by the employer.<sup>134</sup>

Of the nine cases raising nuclear safety issues, three arbitration awards were overturned, but two of those were reversed on appeal.<sup>135</sup> In one case, the court justified its refusal to overturn the arbitration award on the basis that the employees were only awarded back pay without reinstatement.<sup>136</sup> In

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excellent work record who failed to follow set procedure in a few instances); *see also* *Maggio v. Local 1199*, 702 F. Supp. 989, 996 (E.D.N.Y. 1989); *Flushing Hosp. & Med. Ctr. v. Local 1199, Drug, Hosp. & Health Care Employees Union*, 685 F. Supp. 55, 57 (S.D.N.Y. 1988).

<sup>131</sup> Two cases involved bus drivers, two involved airlines, four involved truck drivers, one involved a river boat pilot, and the final case involved a mechanic who failed to tighten lug nuts on vehicles on which he worked.

<sup>132</sup> *World Airways v. Int'l Bhd. of Teamsters*, 578 F.2d 800, 803-04 (9th Cir. 1978).

<sup>133</sup> *Id.*

<sup>134</sup> *Delta Queen Steamboat Co. v. Dist. 2, Marine Eng'rs Beneficial Ass'n*, 889 F.2d 599, 603 n.10 (5th Cir. 1989).

<sup>135</sup> *Iowa Elec. Light & Power v. Local Union 204, IBEW*, 834 F.2d 1424 (8th Cir. 1987); *Local 97, IBEW v. Niagara Mohawk Power Corp.*, No. 96-CV-728, 1997 U.S. Dist. LEXIS 20578 (N.D.N.Y. Dec. 16, 1997) (holding that reinstatement of employee who failed to respond to an alarm and lied about it conflicts with Nuclear Regulatory Commission (NRC) regulations requiring trustworthy and reliable employees and threatens public safety), *rev'd*, 196 F.3d 117 (2d Cir. 1999) (refusing to set aside arbitration award because of uncertainty as to whether NRC would bar reinstatement based on its regulations); *IBEW, Local 97 v. Niagara Mohawk Power Corp.*, 950 F. Supp. 1227 (N.D.N.Y. 1996) (overturning arbitration award reinstating employee who adulterated drug test based on NRC regulations requiring trustworthy and reliable employees who do not threaten public safety), *rev'd*, 143 F.3d 704 (2d Cir. 1998) (reversing because NRC regulations do not impose any sanctions for adulterating drug tests and they encourage rehabilitation for first drug offense).

<sup>136</sup> *Daniel Constr. Co. v. Local 257, IBEW*, 856 F.2d 1174, 1182 (8th Cir. 1988); *see also* *Tenn. Valley Auth. v. Tenn. Valley Trades & Labor Council*, 184 F.3d 510, 520 (6th Cir. 1999) (refusing to set aside arbitration award reinstating nuclear reactor operator

another, the award was upheld because the drug charges were not proven.<sup>137</sup> Other cases turned on the court's application of the narrow exception requiring a conflict between reinstatement and law or public policy.<sup>138</sup>

### A. Public Safety

Closely related to the issue of which public policy is involved is the matter of whether the court viewed the case as implicating public safety. Some courts and commentators have emphasized the importance of the public safety factor in public policy cases.<sup>139</sup> For example, the Eighth Circuit stated in *Iowa Electric*, that “[o]ur decision today is in keeping with the line of cases vacating arbitrators’ awards that direct the reinstatement of employees whose deliberate acts have jeopardized public health or safety.”<sup>140</sup> The court went on to distinguish cases not involving public safety, noting “labor awards directing the reinstatement of employees whose acts posed no danger to public health or safety are usually upheld.”<sup>141</sup> In the analysis on this issue, cases were categorized as involving public safety when the court expressly recognized that factor. Included were cases in which the court demonstrated concern for the safety of other workers as well as for the general public.<sup>142</sup> Of the forty cases in which courts overturned arbitration awards, twenty-three were cases in which the court viewed public safety as a factor in the decision.<sup>143</sup> In a number of cases in which public safety was

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who tested positive for drugs, finding that the arbitration award did not violate law or regulations when it merely required reinstatement and a fair hearing to determine whether the employee was fit for duty and entitled to a security clearance).

<sup>137</sup> *Bechtel Constr. Co. v. Laborers Dist. Council*, No. 95-C-2616, 1988 U.S. Dist. LEXIS 3832 (E.D. Pa. Mar. 25, 1988).

<sup>138</sup> *Niagara Mohawk*, 196 F.3d at 117; *Niagara Mohawk*, 143 F.3d at 718.

<sup>139</sup> *E.g.*, *Exxon Shipping Co.*, 993 F.2d at 364; *Delta Air Lines, Inc. v. Air Line Pilots Ass’n, Int’l*, 861 F.2d 665, 673 (11th Cir. 1988); *Gear*, *supra* note 49, at 87; Stephen L. Hayford & Anthony V. Sinicropi, *The Labor Contract and External Law: Revisiting the Arbitrator’s Scope of Authority*, 2 J. DISP. RESOL. 249, 279 (1993).

<sup>140</sup> *Iowa Elec. Light & Power v. Local Union 204, IBEW*, 834 F.2d 1424, 1428 (8th Cir. 1987).

<sup>141</sup> *Id.* at 1429.

<sup>142</sup> In several of the cases in this category, the court expressly discussed worker safety. *E.g.*, *G.B. Goldman Paper Co. v. United Paperworkers Int’l Union, Local 286*, 957 F. Supp. 607, 618-20 (E.D. Pa. 1997); *S.D. Warren Co. v. United Paperworkers Int’l Union, Local 1069*, 815 F.2d 186 (1st Cir. 1989).

<sup>143</sup> *E.g.*, *Exxon Corp. v. Esso Workers’ Union*, 118 F.3d 841, 851 (stating that forcing employer to reinstate employee who has no commitment to its drug free workplace program to a safety-sensitive job thwarts employer’s efforts to eliminate a threat to the public); *Amalgamated Meat Cutters, Local Union 540 v. Great W. Food Co.*,

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discussed but the arbitration award was upheld, the court used the narrow public policy exception to find that although public safety might be implicated by the conduct, it was not threatened by reinstatement of the employee, either because the law did not prohibit reinstatement or because the arbitrator made no finding that the conduct was likely to be repeated.<sup>144</sup> Clearly, the court's perception that public safety was at issue was an important factor since over half of the vacated arbitration awards evidenced a concern for public safety.<sup>145</sup> The concern was overcome in many cases, however, when the courts found no real threat to public safety resulting from

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712 F.2d 122, 124 (5th Cir. 1983) (stating in overturning arbitration award reinstating truck driver, "[a] driver who imbibes the spirits endangers not only his own life, but the health and safety of all other drivers."). Two of the cases were decided on other grounds. *Delta Queen Steamboat Co. v. Dist. 2, Marine Eng'rs Beneficial Ass'n*, 889 F.2d 599 (5th Cir. 1989) (holding that the court need not decide public policy issue when 40 year employee was reinstated based on disparate treatment because arbitrator had no authority to determine appropriate discipline once he found employee committed offense); *Logistics Pers. Corp. v. Truck Drivers Local Union No. 299*, 6 F. Supp. 2d 650, 654-55 (E.D. Mich. 1998) (holding that arbitrator exceeded contractual authority by imposing additional requirements regarding drug testing so it was unnecessary to reach public policy issue regarding reinstatement to safety-sensitive position of employee who tested positive for drugs). These cases were included because the broad standard of review suggests that the court may have been influenced by public safety concerns to reverse on other grounds. In addition, the *World Airways, Inc. v. International Brotherhood of Teamsters*, 578 F.2d 800 (9th Cir. 1978), case was officially decided on other grounds but relied on a public policy analysis without articulating it as such. See *supra* note 69. Also, one case cited worker safety as an important issue. *S.D. Warren Co. v. United Paperworkers Int'l Union, Local 1069*, 815 F.2d 178 (1st Cir. 1987), *vacated*, 484 U.S. 983 (1987) (vacating and remanding for reconsideration based on *Misco*). See *supra* note 109. Therefore, only seventeen overturned cases did not cite public or worker safety.

<sup>144</sup> E.g., *Stead Motors v. Auto. Machinists Lodge No. 1173*, 886 F.2d 1200, 1216 (9th Cir. 1989) (holding that despite public interest in safe cars and trucks, there was no showing that reinstatement of mechanic who failed to tighten lug nuts violates public policy because there was no showing that he would engage in such wrongful conduct in the future); *Saint Mary Home, Inc. v. SEIU, Dist. 1199*, 116 F.3d 41, 47 (2d Cir. 1997) (holding that despite extensive regulation in the health care industry, no law prohibits reinstatement of employee convicted of a drug offense).

<sup>145</sup> In other cases, courts expressed concerns for public safety in ordering remands for additional arbitral determinations. In *OCAW, Local No. 4-228 v. Union Oil Co.*, the court remanded for a determination of whether reinstatement would violate public policy because of the employee's post-arbitration award drug use, which contradicted the arbitrator's prediction regarding rehabilitation. 818 F.2d 437, 442-43 (5th Cir. 1987). In *Union Pacific Railroad v. United Transportation Union*, the court remanded because the arbitration board reinstated the employee based on a due process violation without making any findings as to whether the employee was impaired by drugs or posed a risk to the public because of drug use. 3 F.3d 255, 262 (8th Cir. 1993).



reinstatement. Notably, many of the courts rejecting arbitration awards applied the broad public policy exception; the concern for public safety was based on the conduct that led to the termination.<sup>146</sup>

The *Shelby County* district court and court of appeals cases illustrate the impact of the public safety concern. The United States District Court for the Western District of Tennessee set aside the arbitral reinstatement of Deborah Howery, who was discharged for participation in an illegal strike against the Regional Medical Center.<sup>147</sup> The arbitrator had reinstated Howery without back pay because he concluded that although Howery's behavior was wrong, termination was too severe a penalty.<sup>148</sup> The employer filed suit to vacate based on public policy articulated in the National Labor Relations Act (NLRA), which prohibits strikes at health care institutions absent ten days notice to the employer.<sup>149</sup> The NLRA also provides that any employee who strikes during the notice period loses status as an employee of the employer, unless and until he or she is reemployed by the employer.<sup>150</sup> The district court emphasized that the notice requirements were essential to prevent strikes that could "endanger the lives and health of patients in health care institutions."<sup>151</sup> The court went on to find that both elements of the public policy test were met. The NLRA provision established an explicit public policy "intended to protect public safety" and the policy was violated by the arbitration award because it ordered the employer to reinstate Howery when the statute terminated her employee status and left reinstatement to the employer's discretion.<sup>152</sup>

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<sup>146</sup> *E.g.*, *Delta Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l*, 861 F.2d 665, 674 (11th Cir. 1989) (refusing to reinstate pilot who flew intoxicated because his conduct violated FAA regulations); *Amalgamated Meat Cutters*, 712 F.2d at 124 (overturning arbitration award reinstating truck driver who drove while intoxicated based on laws prohibiting such conduct).

<sup>147</sup> *Shelby County Health Care Corp. v. AFSCME, Local 1733*, 756 F. Supp. 349, 350 (W.D. Tenn. 1991).

<sup>148</sup> *Id.* The court of appeals elaborated on the reasons for reinstatement, noting that Howery was a leader in the strike but not the instigator, and that she was a good, long-term employee engaged in atypical conduct that she reasonably believed would not risk her job. *Shelby County Health Care Corp. v. AFSCME, Local 1733*, 967 F.2d 1091, 1093 (6th Cir. 1992). In addition, at the request of management she helped return employees to work and the suspension period resulting from the arbitration award of reinstatement with no back pay was over one year. *Id.* at 1094.

<sup>149</sup> *Shelby County*, 756 F. Supp. at 351 (citing 29 U.S.C. § 158(g) (1994)).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* (quoting *NLRB v. Stationary Eng'rs, Local 39*, 746 F.2d 530, 533 (9th Cir. 1984)).

<sup>152</sup> *Id.* at 352.

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By way of contrast, the Sixth Circuit Court of Appeals never mentioned public safety except in its quote from the district court's opinion.<sup>153</sup> Instead, the court emphasized the limited role of the courts in reviewing arbitration awards.<sup>154</sup> In reversing the district court, the court of appeals held that the statute did not mandate termination, but merely permitted it, and the arbitration award did not take away the employer's discretion because the employer had exercised its discretion in agreeing to arbitrate the issue of Howery's termination.<sup>155</sup> Accordingly, there was no conflict between the arbitration award and the statute; the employer was merely seeking to escape the consequences of its decision to arbitrate the termination.<sup>156</sup>

The distinction between these two decisions could be viewed in two ways. One view is that the court that sees a threat to public safety is more likely to invalidate an arbitration award. Another is that a court that disagrees with an arbitration award may use public safety as a vehicle to overturn the award. Regardless of the reason, it is apparent that judicial invocation of public safety is strongly associated with decisions to vacate arbitration awards.

### *B. Misconduct Integral to Employment*

One factor cited by a few courts in determining whether public policy is violated is whether "an established public policy condemn[s] the performance of employment activities in the manner engaged in by the employee[.]"<sup>157</sup> As articulated in *Delta Air Lines*, the argument is that public policy is offended when an employer retains an employee who violated public policy in the performance of employment duties, but not when the

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<sup>153</sup> *Shelby County*, 967 F.2d at 1096.

<sup>154</sup> *Id.* at 1094–95.

<sup>155</sup> *Id.* at 1096–97.

<sup>156</sup> *Id.* at 1097.

<sup>157</sup> *Delta Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l*, 861 F.2d 665, 671 (11th Cir. 1989). Later the court refers to whether the public policy "addresses disfavored conduct which is inextricably related to the performance of employment duties . . ." *Id.* at 674. While the court purports to draw this principle from *Misco*, its precise origin seems to be the court's attempt to distinguish *Delta Air Lines* from *Misco* and *Florida Power Corp. v. IBEW, Local Union 433*, 847 F.2d 680 (11th Cir. 1988). *Id.* at 670. In each of those cases, according to the court, the employee engaged in wrongdoing involving illegal drug use, but was not making an employment decision in so doing as the drug use was either off-premises (*Florida Power*) or in the company parking lot (*Misco*). *Id.* at 671; *see also* *Ga. Power Co. v. IBEW, Local 84*, 707 F. Supp. 531, 536 (N.D. Ga. 1989) (relying on *Delta Air Lines* to find reinstatement of drug abuser violated public policy because his drug use was integral to his employment).

employer retains a person who has, for example, violated drug laws while on vacation.<sup>158</sup> Although this argument was influential in *Delta Air Lines*, it was rarely articulated in the cases studied. In vacating an arbitration award in *United States Postal Service*, the First Circuit noted that the misconduct was directly related to the employee's job.<sup>159</sup> In another case, the Sixth Circuit upheld reinstatement of a truck driver charged with illegal drug use off duty, distinguishing *Delta Air Lines* and *Iowa Electric* as involving on-the-job misconduct.<sup>160</sup> This distinction was made based on the company's reliance on the two cases, but the court's decision actually turned on the conclusion that the arbitration award, as opposed to the conduct leading to termination, did not conflict with public policy.<sup>161</sup> In several other cases, the court clearly rejected the argument that misconduct integrally related to employment conflicts with public policy, while off-duty misconduct does not.<sup>162</sup> In the overwhelming majority of cases, however, there was no mention of this factor. Nevertheless, it is fair to say that most of the cases challenging arbitration awards as violative of public policy involved employees terminated for misconduct on the job.

## V. THE ARBITRATOR'S DECISION

The Supreme Court in *Misco* clearly directed the courts to defer to factual findings of the arbitrator in reviewing arbitration awards on public policy grounds.<sup>163</sup> Thus, the study looked at the impact of deference to

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<sup>158</sup> *Delta Air Lines*, 861 F.2d at 671.

<sup>159</sup> *United States Postal Serv. v. Am. Postal Workers Union*, 736 F.2d 822, 825 (1st Cir. 1984).

<sup>160</sup> *Interstate Brands Corp. v. Teamsters Local Union No. 135*, 909 F.2d 885, 893-94 (6th Cir. 1990); *see also Chrysler Motors Corp. v. Int'l Union of Allied Indus. Workers*, 748 F. Supp. 1352, 1362 (E.D. Wis. 1990) (upholding reinstatement of employee who sexually harassed coworker, noting that the assault did not involve an act integral to the employee's job as a fork lift operator). In a few other cases, the court appears to rely, in part, on the fact that misconduct was unrelated to the job in finding no conflict between reinstatement and a public policy against the misconduct. *Monroe Auto Equip. v. UAW*, 981 F.2d 261, 269 (6th Cir. 1992) (citing *Interstate Brands*); *Rack Eng'g Co. v. USW*, No. 90-246, 1990 U.S. Dist. LEXIS 19945 (W.D. Pa. June 22, 1990); *Equitable Gas Co. v. USW*, 676 F. Supp. 648, 655 (W.D. Pa. 1987).

<sup>161</sup> *Interstate Brands*, 909 F.2d at 893-94.

<sup>162</sup> *Stead Motors v. Auto. Machinists Lodge No. 1173*, 886 F.2d 1200, 1215-16 (9th Cir. 1989) (upholding arbitration award); *UAW Local 771 v. Micro Mfg. Co.*, 895 F. Supp. 170, 174-75 (E.D. Mich. 1995) (upholding arbitration award); *Exxon Co. v. Esso Workers' Union, Inc.*, 118 F.3d 841, 849 (1st Cir. 1997) (overturning arbitration award on basis that job relatedness not required for public policy conflict).

<sup>163</sup> *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 44-45 (1987). The

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arbitral findings of fact on outcomes of court decisions. A second, but related, factor is the reason for the arbitrator's decision. Are courts more likely to overturn awards when the arbitrator voids a termination based on due process, disparate treatment, or mitigating factors such as length of service rather than lack of proof of the misconduct?

### A. *The Arbitrator's Factual Findings*

In thirty-two cases in the survey, the court specifically relied on deference to the arbitrator's findings of fact to uphold the decision of the arbitrator against a public policy challenge.<sup>164</sup> In some cases, the court relied on the arbitrator's factual findings that the employee was amenable to discipline or rehabilitation and this was an important factor for the court.<sup>165</sup> In others, the arbitrator's finding that the employer did not prove that the employee committed the violation alleged was a significant factor.<sup>166</sup> In still others, as in *Misco*, the arbitrator did not draw the inference requested by the employer and the court refused to do so. For example, in *Brigham & Women's Hospital*, the arbitrator set aside the termination of a nurse for failure to meet expected nursing standards when the hospital failed to follow

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Court stated:

To conclude from the fact that marijuana had been found in Cooper's car that Cooper had ever been or would be under the influence of marijuana while he was on the job and operating dangerous machinery is an exercise in fact-finding about Cooper's use of drugs and his amenability to discipline, a task that exceeds the authority of a court asked to overturn an arbitration award. The parties did not bargain for the facts to be found by a court, but by an arbitrator chosen by them who had more opportunity to observe Cooper and to be familiar with the plant and its problems. Nor does the fact that it is inquiring into a possible violation of public policy excuse a court for doing the arbitrator's task.

*Id.*

<sup>164</sup> In one of the thirty-two cases the court found no public policy violation based on the arbitrator's findings of fact, but overturned the decision on other grounds. *Alvey, Inc. v. Teamsters Local Union No. 688*, 132 F.3d 1209, 1211-12 (8th Cir. 1997).

<sup>165</sup> *E.g.*, *United States Postal Serv. v. Nat'l Ass'n of Letter Carriers*, 839 F.2d 146, 149 (3d Cir. 1988); *Rack Eng'g Co. v. USW*, No. 90-246, 1990 U.S. Dist. LEXIS 19945 (W.D. Pa. June 22, 1990) (upholding arbitration award on basis, *inter alia*, that arbitrator may have concluded that employee was amenable to discipline). Included in this category are cases in which the arbitrator found that the conduct that led to the termination was unlikely to recur. *E.g.*, *Jacksonville Area Ass'n for Retarded Citizens v. Gen. Serv. Employees Union, Local 73*, 888 F. Supp. 901, 908, n.9 (C.D. Ill. 1995).

<sup>166</sup> *E.g.*, *Maggio v. Local 1199*, 702 F. Supp. 989, 996 (E.D.N.Y. 1989) (holding that reinstatement did not violate public policy against patient abuse since the arbitrator did not find that employee abused patients).

its own disciplinary rules.<sup>167</sup> The employer argued to the court that the decision violated the public policy requiring competent registered nurses.<sup>168</sup> In rejecting the employer's plea, the court stated:

The arbitrator did not find that Morgan was incompetent, or that Morgan was unable to properly carry out the basic responsibilities of an RN. Nor is this Court in a position to make such a finding. The parties bargained for the arbitrator, not the courts, to be the factfinder in labor disputes.<sup>169</sup>

The factual findings of the arbitrator were also relied on by a few courts to overturn arbitral decisions. The cases were primarily those in which the arbitrator concluded that the employee committed the termination offense, but set aside the decision on other grounds, such as due process<sup>170</sup> or disparate treatment.<sup>171</sup> For example, in *Niagara Mohawk*, the arbitrator reinstated a nuclear security officer discharged for failure to answer an alarm and lying about it to his superiors.<sup>172</sup> The arbitrator's decision was based both on violation of due process and on the severity of the discharge in relation to the violation.<sup>173</sup> The court reversed the decision of the arbitrator, holding that NRC regulations require employees to be trustworthy and reliable and the employee here could be neither since the arbitrator specifically found him to be untruthful.<sup>174</sup> This decision, however, was reversed by the Second Circuit.<sup>175</sup>

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<sup>167</sup> *Brigham & Women's Hosp. v. Mass. Nurses Ass'n*, 684 F. Supp. 1120, 1121-22 (D. Mass. 1988).

<sup>168</sup> *Id.* at 1125.

<sup>169</sup> *Id.*

<sup>170</sup> Arbitrators frequently reverse termination decisions by employers that do not comport with "basic notions of fairness or due process." ELKOURI & ELKOURI, *HOW ARBITRATION WORKS* 918 (Marlin M. Volz & Edward P. Goggin eds., 5th ed. 1997).

<sup>171</sup> Inconsistent enforcement of rules frequently will result in arbitral invalidation of termination absent justification for differential treatment. *Id.* at 934-35.

<sup>172</sup> *Local 97, IBEW v. Niagara Mohawk Power Corp.*, No. 96-CV-728, 1997 U.S. Dist. LEXIS 20578, at \*1 (N.D.N.Y. Dec. 16, 1997).

<sup>173</sup> *Id.* at \*6.

<sup>174</sup> *Id.*; see also *Exxon Corp. v. Local Union 877, Int'l Bhd. of Teamsters*, 980 F. Supp. 752 (D.N.J. 1997) (setting aside arbitral decision reinstating employee who tested positive for drug use after rehabilitation based on lack of proof that chain of custody of specimen was followed); *Westvaco Corp. v. United Paperworkers Int'l Union, Local Union 676*, No. 97-0753-R, 1998 U.S. Dist. LEXIS 8109, at \*15 (W.D. Va. Mar. 26, 1998) (setting aside decision of arbitrator reinstating employee who engaged in sexual harassment because company did not follow progressive discipline), *rev'd*, 171 F.3d 971 (4th Cir. 1999).

<sup>175</sup> *Local 97, IBEW v. Niagara Mohawk Power Corp.*, 196 F.3d 117, 130-31 (2d

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Despite *Misco*, a few courts have suggested that when public policy is at issue, less deference is due to arbitral fact-finding.<sup>176</sup> Apparently following this reasoning, in some cases the court has engaged in its own fact-finding. In *Stroehmann Bakeries, Inc. v. Local 776, International Brotherhood of Teamsters*, the Third Circuit upheld the district court's decision to vacate an arbitration award reinstating an employee accused of sexual harassment.<sup>177</sup> The arbitrator did not decide whether the employee engaged in sexual harassment, but overturned the discharge because the employer violated the employee's right to due process by failing to give him a complete opportunity to tell his side of the story. The court found that the decision violated public policy because the arbitrator reinstated the employee without fully considering the evidence of sexual harassment.<sup>178</sup> Furthermore, the court determined that the arbitrator erred in concluding that the grievant's due process rights were violated, agreeing with the district court's decision to remand for a determination by a different arbitrator.<sup>179</sup> In dissent, Judge Becker roundly criticized the majority opinion for lack of deference to the arbitrator's fact-finding, citing *Misco*.<sup>180</sup> *Stroehmann* provides a telling example of the concern of opponents of a broad public policy exception. The majority clearly disagreed with the decision, perhaps rightly so,<sup>181</sup> and therefore reached out for grounds on which to reverse the arbitrator, intruding impermissibly into the fact-finding function of the arbitrator.

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Cir. 1999).

<sup>176</sup> *E.I. DuPont de Nemours & Co. v. Grasselli Employees' Indep. Ass'n*, 790 F.2d 611, 617 (7th Cir. 1986) (suggesting but not deciding that less deferential review of facts might be more appropriate in public policy cases); *Exxon Shipping Co. v. Exxon Seamen's Union*, 788 F. Supp. 829, 840 (D.N.J. 1992) (applying less deferential review of facts to strike down arbitration award reinstating helmsman who tested positive for drugs after ship ran aground).

<sup>177</sup> *Stroehmann Bakeries, Inc. v. Local 776, Int'l Bhd. of Teamsters*, 969 F.2d 1436, 1438 (3d Cir. 1992).

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* Judge Hutchinson, in a footnote, indicated that he would overturn the arbitrator's award even if he agreed that the grievant's due process rights were violated since public policy trumps due process concerns. *Id.* at 1445 n.7.

<sup>180</sup> *Id.* at 1447-54.

<sup>181</sup> The arbitrator's opinion contained disturbing suggestions of insensitivity to sexual harassment claims, including emphasis on such irrelevant facts as the appearance and social life of the woman who complained about the harassment, and the marital status of the accused harasser. *Id.* at 1440. In addition, the arbitrator ignored testimony that confirmed the woman's version of the facts. *Id.*

## B. *The Arbitrator's Reason*

In twenty-six cases in the sample, the arbitrator reversed an employer's decision to discharge at least in part on due process grounds.<sup>182</sup> In twelve cases, the court overturned the decision, in thirteen the court upheld the decision, and the other case was remanded to the district court to apply the public policy exception. The difference between the cases overturned and those upheld was often whether the court applied a broad or a narrow standard.<sup>183</sup>

The impact of the standard chosen is less clear in the fifty-two cases in which the arbitrator determined that the discipline was too severe based on the nature of the violation, the employee's work record, or both.<sup>184</sup> In eighteen of those cases, the court overturned the arbitration award on public policy grounds. In eight of the eighteen, the court clearly used a broad test.<sup>185</sup> In the others, the test applied was unclear, except for one case, which used the narrow test.<sup>186</sup> In the other thirty-three, the court declined to reverse the

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<sup>182</sup> If the arbitrator mentioned several bases for the decision, the case was counted in each category.

<sup>183</sup> In seven of the eleven cases reversed, the trial court applied a broad standard, while only one court applied the narrow standard; in the other three, the standard applied was unclear. In *Union Pacific Railroad v. United Transportation Union*, 794 F. Supp. 891 (D. Neb. 1992), the court used an intermediate standard to vacate the arbitrator's award—the court based its decision on the conflict between reinstatement and the public policy against employing a railway employee who uses drugs or alcohol, as well as a regulation that conditioned reinstatement upon evaluation for substance abuse problems, rehabilitation, and testing negative for drugs or alcohol. *Id.* at 894–95. For the purposes of this study, cases in which the intermediate standard was applied were considered to have used a narrow standard. More typical is *Amalgamated Meat Cutters, Local Union 540 v. Great Western Food Co.*, 712 F.2d 122, 125–26 (5th Cir. 1983), in which the court, based on due process violations, applied the broad standard to overturn an arbitrator's reinstatement of a truck driver caught drinking on the job. In eight of the thirteen cases upheld, the court applied a narrow standard, in one case the broad standard, and in the other four cases the standard applied was unclear. *IBEW, Local 97 v. Niagara Mohawk Power Corp.*, 143 F.3d 704 (2d Cir. 1998), is typical of the cases upholding the arbitration award based on a narrow standard. *Id.* at 714–28 (upholding an arbitration award which reinstated, on due process grounds, a nuclear plant employee who tested positive for drugs); see also *supra* notes 72–73, 131 and accompanying text. Again in these statistics, the intermediate approach was considered narrow.

<sup>184</sup> This category includes cases in which the arbitrator found that the employer improperly failed to apply progressive discipline.

<sup>185</sup> *E.g.*, *Gulf Coast Indus. Union v. Exxon Co., U.S.A.*, 991 F.2d 244, 254–55 (5th Cir. 1993); *Exxon Shipping Co. v. Exxon Seamen's Union*, 11 F.3d 1189, 1195 (3d Cir. 1993).

<sup>186</sup> *Shelby County Health Care Corp. v. AFSCME, Local 1733*, 756 F. Supp. 349

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arbitrator's decision. In sixteen of the cases upheld, the court expressly applied the narrow public policy exception.<sup>187</sup> Only two cases upholding an arbitration award applied the broad exception;<sup>188</sup> in the others, the scope of the exception was unclear. Although the correlation is less complete than in the due process cases, that is so because a larger number of cases did not specify the standard being applied. Courts rarely overturned cases using the narrow standard or upheld them using the broad standard.

In twenty-three cases, the arbitrator found that the employer did not prove that the employee committed the conduct alleged.<sup>189</sup> Seventeen of these decisions were upheld, five overturned, and one remanded. In four of the five cases overturned, the court applied the broad test. Three were drug cases, two in which the arbitrator found that proper testing requirements were not met, and one in which the arbitrator found no violation of the drug policy, without finding no drug use.<sup>190</sup> The other two cases were the two

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(W.D. Tenn. 1991), *rev'd*, 967 F.2d 1091, 1098 (6th Cir. 1992); *see supra* notes 148–57 and accompanying text. In some cases, the scope of the standard was not addressed in the decision because the court found no well-defined and dominant public policy. In others, the court, without specifically determining the standard, found that the arbitration award did not conflict with the policy. In the remaining cases, the court found a conflict without addressing the scope of the standard.

<sup>187</sup> *E.g.*, *Shelby County*, 967 F.2d at 1096–97; *Jacksonville Area Ass'n for Retarded Citizens v. Gen. Serv. Employees Union, Local 73*, 888 F. Supp. 901, 909 (C.D. Ill. 1995) (upholding reinstatement of employees who mentally abused client when no law prohibited their reinstatement). As defined here, the narrow exception included the approach of the D.C. Circuit, requiring a violation of positive law, and the intermediate approach of the Second Circuit, requiring a clear conflict between public policy and reinstatement. *See supra* notes 66, 70–72 and accompanying text.

<sup>188</sup> In both cases, the factual evidence presented to the arbitrator played an important role in the court's decisions. *G.B. Goldman Paper Co. v. United Paperworkers Int'l Union, Local 286*, 957 F. Supp. 607, 618–22 (E.D. Pa. 1997) (applying broad public policy and reviewing arbitrator's determination on reinstatement *de novo*, but declining to overturn arbitration award, because despite employer's argument to the court alleging the dangerous propensities of the employee, no such evidence was presented to the arbitrator); *UPMC, Braddock v. Teamsters Local 250*, 32 F. Supp. 2d 231, 233, 235 (W.D. Pa. 1998) (applying broad public policy, yet reinstating employee, deferring to arbitrator's factual findings regarding severity of conduct and likelihood of repetition).

<sup>189</sup> Included in this category are cases in which the arbitrator excluded evidence or found a drug or alcohol test unjustified under the requirements of the collective bargaining agreement.

<sup>190</sup> *Exxon Corp. v. Baton Rouge Oil & Chem. Workers Union*, 77 F.3d 850, 853 (5th Cir. 1996) (upholding reinstatement by arbitrator who found that the employee did not violate a drug policy that specified certain offenses as justifying termination without advance notice); *Logistics Pers. Corp. v. Truck Drivers Local Union No. 299*, 6 F. Supp. 2d 650, 655 (E.D. Mich. 1998) (overturning arbitration award because arbitrator



opinions in the *Stroehmann* case in which the arbitrator not only found insufficient evidence to show that sexual harassment occurred, but also found a due process violation.<sup>191</sup> As noted, the courts rejected the arbitrator's factual findings, suggesting arbitrator bias and insensitivity.

Two cases upholding decisions applied the narrow standard, and two the broad standard. However, most cases did not specify the standard. Many of these cases relied on deference to arbitral fact-finding, making it unnecessary to discuss the standard explicitly.

The arbitrator in ten cases set aside the termination based on the employer's disparate treatment of the grievant. In six of the cases, the court upheld the arbitrator's award, while it overturned the arbitration award in the other four cases. Of the six cases in which the arbitration award was upheld, four courts expressly applied a narrow standard of review.<sup>192</sup> Another case arose in the District Court for the District of Columbia, and while the court did not expressly cite the standard of review,<sup>193</sup> it is clear from prior cases that the narrow standard would apply.<sup>194</sup> The fifth case upheld, an early case from the Eastern District of Missouri, rejected the public policy argument without discussion.<sup>195</sup> Two of the four cases overturning arbitration awards

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exceeded authority by imposing additional testing requirements on the employer that were not in the collective bargaining agreement); *Exxon Corp. v. Local Union 877, Int'l Bhd. of Teamsters*, 980 F. Supp. 752, 769 (D.N.J. 1997) (overturning based on broad public policy against drug use, not because position was safety-sensitive, but because reinstatement would condone employee's conduct).

<sup>191</sup> See *supra* notes 178-82 and accompanying text.

<sup>192</sup> *Dyno-Nobel, Inc. v. USW, Local 13226*, 77 F. Supp. 2d 307, 308 (N.D.N.Y. 1999) (applying the Second Circuit standard); *Container Corp. v. United Paperworkers Int'l Union, Local 208*, No. CV-93-5773, 1994 U.S. Dist. LEXIS 19934 (C.D. Cal. Mar. 31, 1994); *Park Plaza Hotel v. Local 217, Hotel & Rest. Workers' Union, No. N-89-183*, 1990 U.S. Dist. LEXIS 15863 (D. Conn. Aug. 21, 1990) (refusing to set aside arbitration award on public policy grounds when relief ordered did not violate public policy); *Laidlaw Waste Sys. v. Int'l Bhd. of Teamsters, Local 379, No. 88-0472*, 1990 U.S. Dist. LEXIS 6106 (D. Mass. May 16, 1990) (upholding reinstatement because no public policy requires permanent discharge of vehicle operator drinking on the job and other employees were not terminated).

<sup>193</sup> *CWA v. Bell Atlantic-West Virginia*, 27 F. Supp. 2d 66, 71 (D.D.C. 1998). The court did not discuss the standard because it found that enforcement of the arbitration award reinstating an accused sexual harasser did not violate public policy since the arbitrator found, as a factual matter, that no sexual harassment occurred. *Id.*

<sup>194</sup> See *supra* note 66 and accompanying text.

<sup>195</sup> *Vulcan-Hart Corp. v. Stove, Furnace & Allied Appliance Workers Int'l Union, Local No. 110*, 516 F. Supp. 394, 399 (E.D. Mo. 1981), *aff'd*, 671 F.2d 1182, 1185 (8th Cir. 1982). Since the case was affirmed on other grounds without mention of the public policy issue, the court of appeals opinion was not included in the cases analyzed in the study.

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were decided on other grounds, and the other two were the two opinions in the *Delta Air Lines* case discussed in Part III, in which a broad standard was applied.<sup>196</sup> Again the standard applied had a strong effect on the outcome.

Finally, some courts evinced a concern for arbitral decisions that reinstated employees on due process or other grounds without determining whether the employee committed the acts alleged. These courts overturned the arbitral decision, and, in most cases, remanded to the arbitrator for further proceedings. The rationale of the courts was that it violated public policy to reinstate an employee who might have committed a violation without first determining whether in fact the employee engaged in the alleged misconduct. For example, in *Union Pacific Railroad*, the court overturned the decision of the arbitration board to reinstate, based on due process violations, an employee who tested positive for drugs and alcohol, because regulations required rehabilitation and counseling of drug and alcohol abusers prior to returning them to employment.<sup>197</sup> The court ordered a remand to the arbitration board for additional factual investigation and reconsideration of the remedy.<sup>198</sup> Similarly, even without such express regulations, the court in *Stroehmann* overturned an arbitration award reinstating an employee accused of sexual harassment when the arbitrator failed to determine whether the harassment occurred.<sup>199</sup>

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<sup>196</sup> *Delta Queen Steamboat Co. v. Dist. 2 Marine Eng'rs Beneficial Ass'n*, 889 F.2d 599, 603–04 & n.10 (5th Cir. 1989) (finding that the arbitrator exceeded his authority by reinstating the employee after finding proper cause for discipline and therefore declining to reach the public policy issue); *S.D. Warren Co. v. United Paperworkers Int'l Union, Local 1069*, 846 F.2d 827, 828 (1st Cir. 1988) (after remand from the Supreme Court to reconsider the decision in light of *United Paperworkers Union v. Misco, Inc.*, 484 U.S. 29 (1987), the court decided that the arbitrator exceeded his authority in ordering reinstatement after finding a rule violation); *Delta Air Lines v. Air Line Pilots Ass'n, Int'l*, 686 F. Supp. 1573, 1580 (N.D. Ga. 1987), *aff'd*, 861 F.2d 665, 672–73 (11th Cir. 1988)

<sup>197</sup> *Union Pac. R.R. v. United Transp. Union*, 3 F.3d 255, 262 (8th Cir. 1993); *cf.* *Union Pac. R.R. v. United Transp. Union*, 860 F. Supp. 676, 679 (D. Neb. 1994) (upholding reinstatement under similar circumstances when the arbitration board required rehabilitation prior to reinstatement); *see also* *United Transp. Union v. Union Pac. R.R.*, 116 F.3d 430, 435 (9th Cir. 1997) (reversing district court's decision to overturn arbitration award and remand for determination as to whether employee used drugs).

<sup>198</sup> *Union Pac. R.R.*, 3 F.3d at 264.

<sup>199</sup> *Stroehmann Bakeries, Inc. v. Local 766, Int'l Bhd. of Teamsters*, 969 F.2d 1436, 1442, 1446–47 (3d Cir. 1992) (affirming the district court). The court in *Stroehmann* went so far as to remand to a different arbitrator based on the bias exhibited by the arbitrator. *Id.* at 1447; *see also* *United Transp. Union v. Burlington N. R.R.*, 864 F. Supp. 138, 142 (D. Ore. 1994) (finding that public policy against sexual harassment conflicts with arbitrator's reinstatement of an employee on due process grounds without

## VI. ANALYSIS OF THE DATA

What can be learned from the above discussion that would be of value to arbitrators and parties involved in arbitration? The analysis suggests the importance of certain factors in the arbitrator's decision as well as the importance of the standard of review used by the court. This information is useful to both parties and arbitrators in planning the factual and legal presentation to the arbitrator, in drafting the opinion, in deciding whether and where to challenge or seek enforcement of the decision, and in making arguments to the court.

*A. The Arbitration*

Recognizing cases that are likely to generate public policy challenges will enable parties to make necessary arguments to the arbitrator. As noted, cases in which the employee has engaged in conduct arguably affecting public safety are ripe for public policy arguments, to which courts are frequently receptive. Employees involved in transportation of the public or of environmentally dangerous substances, as well as employees in industries using nuclear power or chemical substances, are likely to see such challenges. Similarly, reinstatements of employees in health care positions that involve patient safety are often subject to public policy challenge. Discharges for drug use are by far the most common in the public policy arena. When the Drug Free Workplace Act or regulations of the Department of Transportation, Coast Guard, Federal Railroad Administration, or Federal Aviation Administration apply, a public policy issue is most likely to be raised because of the statutory or regulatory source for the public policy. Alcohol use and sexual harassment, which is prohibited by Title VII of the Civil Rights Act and many state laws, run close behind. When these factors are present, the parties and the arbitrator should anticipate possible public policy issues.

The employer recognizing this possibility must determine whether to raise the public policy issue before the arbitrator or leave it to the courts. The risk in raising it before the arbitrator is that an adverse determination by the arbitrator might make a judicial challenge more difficult. The Supreme Court has said, however, that the public policy issue is for the courts.<sup>200</sup> The arbitrator may address the issue, but clearly cannot preclude judicial reconsideration. While some courts have held that an arbitral error in

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determining whether he engaged in sexual harassment).

<sup>200</sup> W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber Workers, 461 U.S. 757, 766 (1983).

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interpreting law is not a basis for overturning an arbitration award, when the public policy issue is deemed within the judicial role, the court may be more likely to review the matter *de novo*. Moreover, failure to present to the arbitrator the evidence necessary for a determination that reinstatement violates public policy may later prevent the employer from proving its case in court.<sup>201</sup> However, raising the issue creates a risk that the arbitrator might make a factual determination that makes it difficult for a court to find that public policy has been violated. For example, if the arbitrator finds that the employee did not violate law creating the public policy, then even courts that apply a broad standard may uphold the arbitration award.

Raising the public policy issue may prompt the arbitrator to address the possibility of rehabilitation or recurrence of the conduct. A factual finding that the employee is rehabilitated or unlikely to repeat the conduct renders the employer's challenge more difficult, as many courts defer to the arbitrator's findings of fact. Nevertheless, a persuasive argument by the employer on the public policy issue may win the arbitration, making judicial challenge unnecessary. This provides substantial time and cost savings to the employer and encourages finality of labor arbitration awards. Moreover, the arbitrator may well address these factual issues regardless of whether the employer urges a public policy basis for upholding the termination.

The employer could present evidence that would support factual findings that rehabilitation is unlikely. For example, in a drug or alcohol abuse case, evidence of prior unsuccessful rehabilitation, or of addiction, may persuade the arbitrator or the court that recurrence of the conduct is more likely. Even if the arbitrator makes no such finding, a court applying a broad test and concerned about public safety may make an inference the arbitrator did not.<sup>202</sup> However, failure to present such evidence to the arbitrator may lead the court to find no public policy violation because of the lack of such evidence.<sup>203</sup>

From the union's perspective, recognition of the possibility of a public policy challenge to a successful grievance should prompt consideration of the

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<sup>201</sup> G.B. Goldman Paper Co. v. United Paperworkers Int'l Union, Local 286, 957 F. Supp. 607, 622 (E.D. Pa. 1997).

<sup>202</sup> In my view, such an inference by the court is improper under *Misco*. But see *Exxon Corp. v. Local Union 877, Int'l Bhd. of Teamsters*, 980 F. Supp. 752, 769 (D.N.J. 1997) (setting aside arbitrator's award reinstating drug user who had relapsed after rehabilitation and adulterated a test, applying a broad exception as employee was not in a designated safety-sensitive job and regulations did not directly apply).

<sup>203</sup> *E.g., Goldman*, 957 F. Supp. at 622 (refusing to infer that employee is too dangerous for reinstatement when employer had opportunity to present such evidence to the arbitrator and did not do so).

arguments to be made. Because a number of courts have upheld decisions based on deference to arbitral factual findings regarding existence of a violation or possibility of rehabilitation, union evidence and arguments should be tailored to lead to such findings when possible. When there is an argument that the employee did not commit an act in violation of law, success on such an argument will limit the possibility that the arbitration award will be overturned. This may require not only factual evidence as to whether the employee committed the act, but some knowledge of the law. For example, an element of a claim for hostile environment sexual harassment is that the harassment is unwelcome.<sup>204</sup> When the conduct is not unwelcome by the person harassed, no violation of the law has occurred. In *CWA v. Bell Atlantic-West Virginia*,<sup>205</sup> the arbitrator found that both the male employee discharged and the female employee complaining of sexual harassment participated in improper sexual conduct and therefore, the male employee's conduct was not unwelcome.<sup>206</sup> The arbitrator found disparate treatment based on the discharge of the male and retention of the female and set aside the termination.<sup>207</sup> The court rejected the employer's public policy challenge, deferring to the arbitrator's conclusion that the male employee's conduct did not constitute sexual harassment.<sup>208</sup> Since there was no sexual harassment, reinstatement of the employee could not violate the public policy against sexual harassment in the workplace.<sup>209</sup>

A union's thorough understanding of federal or state regulations relating to workplace drug or alcohol use could lead to similar arguments. When the regulations require removal, from safety-sensitive positions, of an employee testing positive for drug or alcohol use, for example, the union might have an argument as to what constitutes a safety-sensitive position.<sup>210</sup> Alternatively,

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<sup>204</sup> *E.g.*, *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65 (1986). While it has been argued strongly that unwelcomeness is an inappropriate criterion to apply in sex discrimination cases, it remains a part of the standard at present. For scholars arguing against application of this criterion, see Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1729-32 (1998); Linda E. Epstein, *What is a Gender Norm and Why Should We Care? Implementing a New Theory in Sexual Harassment Law*, 51 STAN. L. REV. 161, 181 (1998); Miranda Oshige, *What's Sex Got to Do with It?*, 47 STAN. L. REV. 565, 576-83 (1995).

<sup>205</sup> 27 F. Supp. 2d 66 (D.D.C. 1998).

<sup>206</sup> *Id.* at 68.

<sup>207</sup> *Id.* at 70-71.

<sup>208</sup> *Id.* at 71.

<sup>209</sup> *Id.*

<sup>210</sup> *But see Exxon Corp. v. Local Union 877, Int'l Bhd. of Teamsters*, 980 F. Supp. 752, 769 (D.N.J. 1997) (overturning arbitration award although position not designated as safety-sensitive).

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the union could urge that the arbitrator's remedy be tailored to the requirements of the statute. The union could seek back pay only, reinstatement to a non-safety-sensitive position, or reinstatement conditioned upon successful completion of a rehabilitation program, perhaps paid for by the employer.<sup>211</sup> The precise argument, of course, will depend upon the facts relating to the termination, the language of the statute or regulations, and the provisions of the collective bargaining agreement. A remedy calculated to anticipate public safety concerns could go a long way toward shielding the arbitration award from successful challenge.

Similarly, when facts and the collective bargaining agreement permit, the union should argue that the employee can be rehabilitated with a lesser penalty than discharge, or that the conduct was an aberration unlikely to be repeated. An argument for use of progressive discipline also fits clearly in this category. If the arbitrator makes such a finding, the union can urge a court to defer to that conclusion. While many courts have done so, such a finding does not insulate the decision from an activist court. In *Exxon Shipping Co.*, the court set aside the arbitrator's reinstatement of an employee, despite the absence of evidence or findings relating to the

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<sup>211</sup> In *Misco*, the Court noted that the arbitration award required the employee to be reinstated to his former job or an equivalent job for which he was qualified, stating that "[i]t is by no means clear from the record that Cooper would pose a serious threat to the asserted public policy in every job for which he was qualified." 484 U.S. 29, 45 (1987); see also *MidMichigan Reg'l Med. Ctr. v. Prof'l Employees Div. of Local 79*, 183 F.3d 497, 505 (6th Cir. 1999) (upholding reinstatement of nurse when arbitrator found that her errors were minor and allowed hospital to reinstate her to any job, not limiting the hospital to reinstatement to the intensive/progressive care unit with the most critically ill patients); *United Transp. Union Local 1589 v. Suburban Transit Corp.*, 51 F.3d 376, 382 (3d Cir. 1995) (upholding arbitration award reinstating bus driver who had a number of accidents when the arbitrator's award encouraged retraining); *Union Pac. R.R. v. United Transp. Union*, 3 F.3d 255, 263 (8th Cir. 1993) (suggesting that the arbitrator could order the railroad to reimburse the employee for a rehabilitation program, order reinstatement to a position that does not implicate public safety, or create another unique sanction that prevents employer abuse while protecting the public safety); *Daniel Const. Co. v. Local 257, IBEW*, 856 F.2d 1174, 1182 (8th Cir. 1988) (public policy considerations not implicated by an arbitration award of back pay as opposed to reinstatement); *Washington Heights-W. Harlem-Inwood Mental Health Council, Inc. v. Dist. 1199, Nat'l Union of Hosp. & Health Care Employees*, 608 F. Supp. 395, 396 (S.D.N.Y. 1985) (staying reinstatement of mental health worker accused of sexual abuse of patients but requiring payment of back pay). *But see Exxon Corp. v. Baton Rouge Oil & Chem. Workers Union*, 77 F.3d 850, 855-56 (5th Cir. 1996) (refusing to enforce arbitration award despite the fact that the arbitrator's award provided for a year's back pay if the grievant was unavailable for reinstatement and both the union and the employer agreed that he was unavailable. The court found that even back pay would condone misconduct, thereby violating public policy).

likelihood of repetition or future violations.<sup>212</sup> The court relied on the Coast Guard regulations, which required termination or removal from safety-sensitive duties after a positive drug test, and conditioned reinstatement on the determination of the company's Medical Review Officer that the employee was drug free and the risk of future drug use was low enough to justify a return to work.<sup>213</sup> Notably, however, the employee tested negative at the Coast Guard screening level and the Coast Guard took no action against him.<sup>214</sup>

Successful arguments for findings that conduct is unlikely to be repeated may be made when the employee conduct was unintentional or unknowing. When a rule is not clear, or when insufficient notice was given to the employee that conduct was wrongful, the union should not only make the due process argument, but should go on to argue that the conduct is unlikely to be repeated after clarification of the rule. For example, in *Braddock*, the court upheld the arbitrator's award reinstating a hospital employee terminated for failing to keep a suicidal patient under constant observation.<sup>215</sup> The court relied on the arbitrator's finding that the hospital had never indicated to the admittedly competent and experienced employee that his interpretation of the policy was incorrect, stating: "[t]here was simply no evidence indicating that Simko would refuse to act in a manner consistent with the newly clarified 'arm's length' policy."<sup>216</sup>

With the exception of these issues, the reason for the arbitrator's decision does not seem to have a significant impact. The arbitrator's factual findings regarding whether the employee committed the offense and whether the employee is amenable to discipline are clearly significant. The success of the public policy challenge does not seem to be affected substantially by whether the discharge was overturned on due process grounds, disparate treatment grounds, or the severity of the discipline in relation to the violation and the

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<sup>212</sup> *Exxon Shipping Co. v. Exxon Seamen's Union*, 993 F.2d 357, 365-67 (3d Cir. 1993).

<sup>213</sup> *Id.* at 365.

<sup>214</sup> *Id.* at 366.

<sup>215</sup> *UPMC, Braddock v. Teamsters Local 250*, 32 F. Supp. 2d 231, 235 (W.D. Pa. 1998).

<sup>216</sup> *Id.* The court also relied on the arbitrator's finding that the most serious of the charges against the employee was unproven. *Id.*; see also *Flushing Hosp. & Med. Ctr. v. Local 1199, Drug, Hosp., & Health Care Employees Union* 685 F. Supp 55, 56-57 (S.D.N.Y. 1988) (holding that when employee was not told conduct was prohibited and her experience suggested that she could change IV bags under limited circumstances, her reinstatement after termination for performing an unauthorized procedure in what she reasonably believed to be an emergency did not violate public policy, since there is no threat of continuing improper conduct).

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employee's record. Nor does the question of whether the employee's conduct is integral to employment matter to most courts. In courts that have emphasized that factor, however, the union defending a decision reinstating an employee for off-the-job conduct should consider the argument. In addition, when the conduct is off-duty, i.e., a positive drug test with no evidence of impairment, the union should urge an arbitral conclusion that there is no evidence that suggests that such conduct will occur on the job, thereby threatening public health or safety.<sup>217</sup> Similarly, when the conduct is job-related, the employer will want to make that point to the court in such a jurisdiction.

The arbitrator desiring to shield the arbitration award from challenge and preserve its finality should take note of the concerns articulated above. Recognizing cases in which a public policy argument may be raised is the first step. In considering whether just cause exists, the arbitrator must determine whether to consider the external law creating the public policy issue. There is an ongoing debate in the arbitral community about whether arbitrators can or should consider external law in their decisions.<sup>218</sup> The decisions at issue here will primarily involve construction of the terms "just cause," "cause" or "good cause" for termination, as most collective bargaining agreements contain such a provision.<sup>219</sup> The agreement may further incorporate specific rules of conduct or authorize the employer to establish reasonable rules, which then, of course, must be considered by the arbitrator.<sup>220</sup> In some cases, the agreement may actually contain a reference to external law, either generally, stating that the employer agrees to comply

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<sup>217</sup> See, e.g., *Kennecott Utah Copper Corp. v. Becker*, 195 F.3d 1201, 1206 (10th Cir. 1999); *Monroe Auto Equip. Co. v. UAW*, 981 F.2d 261, 269 (6th Cir. 1992).

<sup>218</sup> See generally David E. Feller, *The Coming End of Arbitration's Golden Age*, 29 NAT'L ACAD. OF ARBITRATORS 97 (1976); Robert G. Howlett, *A Reprise*, 21 NAT'L ACAD. OF ARBITRATORS 64 (1968); Robert G. Howlett, *The Arbitrator, the NLRB, and the Courts*, 20 NAT'L ACAD. OF ARBITRATORS 67 (1967); Bernard D. Meltzer, *The Role of Law in Arbitration: A Rejoinder*, 21 NAT'L ACAD. OF ARBITRATORS 58 (1968); Bernard D. Meltzer, *Ruminations About Ideology, Law, and Labor Arbitration*, 20 NAT'L ACAD. OF ARBITRATORS 1 (1967); Richard Mittenthal, *The Role of Law in Arbitration*, 21 NAT'L ACAD. OF ARBITRATORS 42 (1968); Michael I. Sovern, *When Should Arbitrators Follow Federal Law?*, 23 NAT'L ACAD. OF ARBITRATORS 29 (1970); Theodore J. St. Antoine, *Discussion*, 21 NAT'L ACAD. OF ARBITRATORS 75 (1968); see also Hayford & Sinicropi, *supra* note 140, at 276-81 (discussing the external law debate in the context of the public policy exception).

<sup>219</sup> LAURA J. COOPER & DENNIS R. NOLAN, *LABOR ARBITRATION: A COURSEBOOK* 87 (1994) (citing *Basic Patterns in Union Contracts* 7 (13th ed. 1992) (stating that 97% of collective bargaining agreements provide for discharge only for "just cause" or "cause")).

<sup>220</sup> See, e.g., *Champion Int'l*, 96 Lab. Arb. Rep. (BNA) 325, 328-30 (1991).



with the law, or specifically, agreeing to comply with discrimination laws.<sup>221</sup> While a full discussion of the question of authority to consider external law is beyond the scope of this article, it is clear that upon agreement of the parties, either expressly in the agreement or in the submission to the arbitrator, the arbitrator can consider external law.<sup>222</sup> If there is no such agreement apparent, the arbitrator must determine the role of external law.<sup>223</sup> Many arbitrators consider external law in determining what is just cause for termination.<sup>224</sup> In such a situation, the arbitrator is using external law as an interpretive aid to determine what the parties intended in the agreement. Consideration of the law under such circumstances may vitiate a public policy challenge and reversal, but only if both the employer and the court agree with or defer to the arbitrator's interpretation of the law. In some cases, however, the arbitrator's consideration of the law may lead to factual findings that insulate the decision from challenge, such as in *CWA*.<sup>225</sup> Thus, an arbitrator desiring a decision less amenable to judicial reversal may want to consider the legal implications of the arbitration award. If the arbitrator chooses not to consider the law and reinstates the employee, a public policy challenge may be raised.

While arbitrators are not required to explain thoroughly the rationale for their decisions, or even to write an opinion at all,<sup>226</sup> a clear articulation of factual findings and arbitral reasoning may minimize the possibility of judicial review and reversal.<sup>227</sup> *Misco* directs courts to defer to arbitral findings of fact. However, lack of clarity of the findings may limit the deference applied. If the arbitrator's reason for upholding the grievance is a conclusion that the employee did not commit the alleged conduct, clear specification of that determination will be helpful to the parties and the court.

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<sup>221</sup> See ELKOURI & ELKOURI, *supra* note 171, at 548–49.

<sup>222</sup> See Hayford & Sinicropi, *supra* note 140, at 280; ELKOURI & ELKOURI, *supra* note 171, at 534 (citing David E. Feller, *Relationship of the Agreement to External Law*, LABOR ARBITRATION DEVELOPMENT: A HANDBOOK 33 (1983)).

<sup>223</sup> Hayford & Sinicropi, *supra* note 140, at 276–81 (arguing that arbitrators and advocates must address the public policy dimensions of a dispute, including consideration of external law, in order to assure finality).

<sup>224</sup> E.g., Meltzer, *Ruminations*, *supra* note 219, at 14–15; Mallinckrodt, Inc., 83–2 Labor Arb. Awards (CCH) ¶ 8358, 4591, 4597 (1983); Walker Mfg. Co., 81 Lab. Arb. Rep. (BNA) 1169, 1174 (1983).

<sup>225</sup> See *supra* notes 206–210 and accompanying text.

<sup>226</sup> *USW v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598 (1960).

<sup>227</sup> For a suggestion of a framework for arbitral analysis of cases implicating public policy, see Hayford & Sinicropi, *supra* note 140, at 282. The arbitrator might also consider whether to make findings regarding whether or not the employee committed the misconduct, even when the termination is reversed on other grounds. See *supra* notes 198–200 and accompanying text.

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If the arbitrator concludes that the conduct is unlikely to be repeated, he or she should state that in the opinion, along with the reasons for the decision. Such a conclusion might be based, *inter alia*, on the employee's lack of intent, the lack of notice of any prohibition on the conduct, the application and effectiveness of progressive discipline, completion of rehabilitation, or the employee's prior work record.<sup>228</sup> The parties are more likely to accept the decision if the arbitrator's reasoning is clear and supported by the facts, and the courts are more likely to defer to it. In the absence of a clear statutory or regulatory prohibition on employment of an employee who has committed the particular offense, and faced with a persuasively reasoned conclusion that an employee is unlikely to repeat unlawful conduct, even an activist court will be hard-pressed to find that reinstatement of the employee will violate public policy.

### B. *Judicial Action*

Once the arbitration decision overturning a discharge has issued, the employer must decide whether to comply with the arbitration award or whether to file an action to vacate. If the employer refuses to comply with the arbitration award, but files no action to vacate, the union must file an enforcement action. In either case, the action would be brought under Section 301 of the Labor Management Relations Act,<sup>229</sup> or under the Railway Labor Act if the employer is an airline or railroad.<sup>230</sup>

Although suits under § 301 can be filed in either state or federal court,<sup>231</sup> most actions are filed in federal court. An action filed in state court could be removed to federal court by the defendant.<sup>232</sup> Because the public policy standard applied by the court has a significant impact on the outcome of the decision, the employer and the union may want to consider where to file an action for enforcement or vacation of the arbitration award.<sup>233</sup> The employer

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<sup>228</sup> See *supra* notes 202–218 and accompanying text.

<sup>229</sup> 29 U.S.C. § 185(a) (1994); see also *USW v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 577–78 (1960).

<sup>230</sup> 45 U.S.C. § 153(m), (p), (q) (1994 & Supp. 1997).

<sup>231</sup> *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 506 (1962).

<sup>232</sup> 28 U.S.C. § 1441(a) (1994).

<sup>233</sup> The Supreme Court's decision in *Eastern Associated Coal Corp. v. United Mine Workers, District 17* might render the choice of forum irrelevant. 66 F. Supp. 2d 796 (S.D. W. Va. 1998), *aff'd*, 188 F.3d 501 (4th Cir. 1999), *cert. granted*, 120 S. Ct. 1416 (2000). If the Court decides that the public policy exception justifies invalidation of an arbitration award only when it violates positive law, then there will be little, if any, room for circuit differentiation in application of the exception. On the other hand, if the court

has more control over the initial filing since it makes the decision regarding compliance or challenge. While the union could file an action for enforcement immediately upon receipt of the arbitration award to control the forum, the suit would be unnecessary if the employer chose to comply with the arbitration award. In addition, it might prompt an action to vacate.<sup>234</sup> Thus, the union is likely to await the employer's decision about compliance, which provides the employer with an opportunity to file an action to vacate the arbitration award in the chosen jurisdiction. However, the jurisdictional choices are not unlimited.

Section 301 provides that actions may be brought in any district court having jurisdiction of the parties.<sup>235</sup> Thus, venue would be proper in any court that has personal jurisdiction over the party being sued. Section 301 contains a special jurisdiction provision for suits by or against labor organizations in federal district courts.<sup>236</sup> The provision states that "district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members."<sup>237</sup> The Supreme Court has recognized that under this provision venue is proper in any district in which jurisdiction applies.<sup>238</sup> And the Court has held that venue under the Railway Labor Act is the same as that under § 301.<sup>239</sup> To obtain jurisdiction, the employer would have to properly serve the union under Rule 4 of the Federal

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decides that a broader exception applies, there may remain variations in the application of the standard among the circuits.

<sup>234</sup> Due to the short statute of limitations for actions to vacate in many jurisdictions, the union may want to wait until the statute has run before instituting an enforcement action. *SEIU, Local 36 v. City Cleaning Co.*, 982 F.2d 89, 93-94 (3d Cir.1992) (stating that defenses to enforcement of an arbitration award should be raised in an action to vacate and if not raised before expiration of the statute of limitations, they cannot be raised in a later proceeding for enforcement of the arbitration award); *ILA, Local 953 v. Cataneo, Inc.*, 990 F.2d 794, 800 (4th Cir. 1993) (stating that employer could not assert, in a later enforcement action, a defense that it could have raised in a motion to vacate when the action to vacate was time-barred).

<sup>235</sup> 29 U.S.C. § 185(a) (1994). In *Textile Workers Union v. Lincoln Mills*, the Supreme Court held that § 301 is more than merely jurisdictional. 353 U.S. 448, 455 (1957). It requires the court to create substantive federal common law to decide the merits of disputes brought under this section. *Id.* at 456-57.

<sup>236</sup> 29 U.S.C. § 185(c) (1994).

<sup>237</sup> *Id.*

<sup>238</sup> *Denver & Rio Grande W. R.R. v. Bhd. of R.R. Trainmen*, 387 U.S. 556, 562-63 (1967).

<sup>239</sup> *Id.*

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Rules of Civil Procedure.<sup>240</sup> Section 301 permits service on any officer or agent of the union.<sup>241</sup> Based on these provisions the employer could sue the union defendant in the jurisdiction where the dispute arose, in the jurisdiction in which the union maintains its principal office, or anywhere that the union is acting as a representative of employees.<sup>242</sup> In cases involving an international union, this rule might provide the employer with a number of options. When only a local union is involved in the dispute, the options will almost certainly be quite limited, as a local union is far less likely to have a principal office or even represent employees outside the district in which the dispute arose.

The union suing an employer must file the action in a court with jurisdiction over the employer. Federal Rule of Civil Procedure 4(k)(1) provides that service of process creates jurisdiction so long as a state court would have jurisdiction, thereby incorporating the minimum contacts analysis under the 14th amendment.<sup>243</sup> In the jurisdiction in which the dispute leading to the arbitration award arose, jurisdiction over the employer will undoubtedly lie as the employer operates its business there, providing sufficient contacts, and the claim arises from those contacts.<sup>244</sup> A suit in which the employer is incorporated would most likely be jurisdictionally proper under notions of "general jurisdiction."<sup>245</sup> If decisions regarding labor relations matters are made at a corporate level, an action in which the corporate headquarters is located may be proper as well.<sup>246</sup> In other jurisdictions in which the employer does business, the argument for jurisdiction becomes more tenuous. While the employer may have sufficient contacts with the forum, the lack of a relationship between the contacts and

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<sup>240</sup> FED. R. CIV. P. 4.

<sup>241</sup> 29 U.S.C. § 185(d) (1994).

<sup>242</sup> In any of these locations the jurisdictional provisions would withstand constitutional scrutiny because the union would have sufficient contacts. *See Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (requiring that a defendant have sufficient minimum contacts with a forum so that "fair play and substantial justice" would not be offended by the assertion of jurisdiction (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940))).

<sup>243</sup> FED. R. CIV. P. 4; *Int'l Shoe*, 326 U.S. at 316.

<sup>244</sup> *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 (1984).

<sup>245</sup> *Id.* at 414–15 n.9 (defining general jurisdiction as jurisdiction asserted when the defendant has such pervasive contacts with the forum state that jurisdiction over a claim unrelated to those contacts is justified); *cf. Milliken v. Meyer*, 311 U.S. 457, 462 (1940) (stating that domicile is sufficient to bring absent citizen within personal jurisdiction of the court).

<sup>246</sup> In that case, the union could establish that the claim arose out of the contacts with the forum. *Helicopteros*, 466 U.S. at 414.

the claim may defeat jurisdiction unless the contacts are sufficiently "continuous and systematic."<sup>247</sup>

If the action is filed in a court that is either improper or substantially less convenient for the defendant than another appropriate venue, the defendant can request a change of venue and the district court can transfer the action for the convenience of the parties and witnesses, in the interests of justice.<sup>248</sup> In ruling on the request for transfer, the court considers whether there would be personal jurisdiction in the transferee district, whether venue would have been proper if the action were filed there originally, and whether service of process would be possible in the transferee district.<sup>249</sup> The transfer motion will be denied if the action could not have been brought in the transferee court originally.<sup>250</sup> The plaintiff's choice of forum is a factor to be considered in determining whether to grant the transfer.<sup>251</sup>

If the case is transferred pursuant to § 1404 to a more convenient forum, the question arises as to the law to be applied if the transferee court has interpreted the public policy section differently than the transferor court.<sup>252</sup> While the Supreme Court has held that in diversity cases the laws of the state of the transferor court must be applied,<sup>253</sup> the Court has not decided whether the same rule applies when the case involves a federal question. Several lower courts have addressed the question in the context of venue transfers pursuant to § 1407, which allows transfers in order to coordinate or consolidate pretrial proceedings in cases involving common questions of fact.<sup>254</sup> The courts in these cases have split. In *In re Korean Air Lines Disaster*,<sup>255</sup> the United States Court of Appeals for the District of Columbia decided that "the transferee court [should] be free to decide a federal claim

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<sup>247</sup> *Id.* at 416–18.

<sup>248</sup> 28 U.S.C. §§ 1404(a), 1406 (1994).

<sup>249</sup> JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 2.17, at 87 (3d ed. 1999).

<sup>250</sup> 28 U.S.C. § 1404(a) (1994); *Hoffman v. Blaski*, 363 U.S. 335, 342–44 (1960) (stating that the action "might have been brought" originally in the transferee court if the plaintiff could have sued there, served the defendant, asserted personal jurisdiction, and established proper venue without any waiver by the defendant).

<sup>251</sup> 15 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3848, at 375–76 (2d ed. 1986).

<sup>252</sup> For a thorough discussion of this issue, see Richard L. Marcus, *Conflicts Among Circuits and Transfers Within the Federal Judicial System*, 93 YALE L.J. 677 (1984).

<sup>253</sup> *Van Dusen v. Barrack*, 376 U.S. 612, 621 (1964); see also *Ferens v. John Deere Co.*, 494 U.S. 516, 519 (1990) (stating that same rule applies when plaintiff rather than defendant initiated the transfer).

<sup>254</sup> 28 U.S.C. § 1407 (1994). For discussion of the cases, see *infra* notes 256–61 and accompanying text.

<sup>255</sup> 829 F.2d 1171 (D.C. Cir. 1987).

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in the manner it views as correct without deferring to the interpretation of the transferor circuit.”<sup>256</sup> The court, in an opinion by current Justice, then Judge, Ruth B. Ginsburg relying on Professor Marcus’s article in the *Yale Law Review*, concluded that the *Van Dusen* rule for diversity cases was motivated by considerations of judicial competence that dictated a different result in federal question cases.<sup>257</sup> Federal courts have the competency and the duty to decide federal law issues and should not accept, without independent review, the interpretation of another court outside their chain of direct review.<sup>258</sup> By way of contrast, in diversity cases the issues involve state law, and there is no federal principle by which to select the state law that is to govern in diversity cases.<sup>259</sup>

Other courts have reached a different result, finding no reason to apply a different principle in federal question cases.<sup>260</sup> Since a plaintiff in a diversity case can choose a venue that provides favorable law and then take the law along when venue transfers, plaintiffs in federal question cases arguably should have the same right when the law differs by circuit.

Since § 1407 contemplates that these cases would be returned to their original district for trial, it might be argued that a different rule regarding the applicable law should apply to transfers under § 1404.<sup>261</sup> A transfer under § 1404 which required the transferee court to apply the law of the transferor court would require the transferee court to disregard the law of the circuit, or the circuit court on appeal to ignore its own precedent.<sup>262</sup> But in § 1404 cases, the courts also have split, essentially along the same lines.<sup>263</sup>

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<sup>256</sup> *Id.* at 1174 (quoting Marcus, *supra* note 253, at 721); *accord* *Satellite Fin. Planning Corp. v. First Nat’l Bank of Wilmington*, 633 F. Supp. 386, 393–94 (D. Del. 1986).

<sup>257</sup> *In re Korean Airline Disaster*, 829 F.2d at 1175.

<sup>258</sup> *Id.* (quoting Marcus, *supra* note 253, at 702).

<sup>259</sup> *Id.*

<sup>260</sup> *E.g.*, *In re: The Dow Co. “Sarabond” Prods. Liab. Litig.*, 666 F. Supp. 1466, 1469 (D. Colo. 1987); *In re United Mine Workers Employee Benefit Plans Litig.*, 854 F. Supp. 914, 921–22 (D.D.C. 1994); *see also In re Plumbing Fixtures Litig.*, 342 F. Supp. 756, 758 (J.P.M.L. 1972) (transferring case under § 1407 despite plaintiff’s concern that the transferee court would not apply law of transferor court because the panel thought it clear that the transferor court’s law would apply).

<sup>261</sup> *In re: Dow*, 666 F. Supp. at 1469.

<sup>262</sup> *Satellite Fin. Planning*, 633 F. Supp. at 393–94.

<sup>263</sup> *Compare* *Eckstein v. Balcor Film Investors*, 8 F.3d 1121, 1126–27 (7th Cir. 1993) (stating “when the law of the United States is geographically non-uniform, a transferee court should use the rule of the transferor forum in order to implement the central conclusion of *Van Dusen* and *Ferens*: that a transfer under Section 1404(a) accomplishes ‘but a change of courtrooms.’” (citing *Van Dusen v. Barrack*, 376 U.S. 612,

Thus, in determining where to file, the parties must not only consider whether they can obtain jurisdiction, and thus venue, in a jurisdiction where the law is favorable, but also whether, if the case is transferred to a more convenient forum with less favorable law, that forum will apply the substantive law of the transferor court. This issue might also arise with respect to the statute of limitations, since many circuits have applied the most analogous state statute of limitations.<sup>264</sup>

Consider the following example. The arbitration award is issued in Pennsylvania, where the employer's unionized facility, which gave rise to the grievance, is located. However, the employer is headquartered in West Virginia. The international union, which is a party to the contract and participated in the arbitration, represents employees in both states. If the employer seeks to overturn an unfavorable arbitration award, a Pennsylvania court located in the Third Circuit would be more favorable than a West Virginia court located in the Fourth. The Pennsylvania statute of limitations for vacating arbitration awards is thirty days,<sup>265</sup> while the Fourth Circuit has applied a three-month statute in West Virginia cases.<sup>266</sup> If the employer missed the statute of limitations in Pennsylvania and filed in West Virginia, the union would be unlikely to seek a change of venue. Suppose the situation were reversed, with the facility in West Virginia and the headquarters in Pennsylvania. If the employer filed a timely action in Pennsylvania, the union might well seek a change of venue despite its presence in Pennsylvania. If the court were to grant the motion, moving the case to West Virginia where the facility is located for the convenience of the parties and witnesses, the decision as to what substantive law to apply might determine the outcome of the case.

If the union filed the enforcement action under either scenario, it would certainly prefer to file in West Virginia. Venue would appear to be proper there under the second scenario as the facility that gave rise to the arbitration award is located in West Virginia. Under the first scenario, the employer

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639 (1964))) with *Garrel v. NYLCARE Health Plans, Inc.*, 98 Civ. 9077, 1999 U.S. Dist. LEXIS 9778 (S.D.N.Y. June 29, 1999) (awarding transfer based on the doctrine of forum non conveniens rather than improper venue, court states that defendants' fears that the transferee court will apply the substantive law of the transferor court in a federal question case are "unfounded" since *Van Dusen* relies on the Erie doctrine and federal law is uniform) and *Satellite Fin. Planning*, 633 F. Supp. at 393-94.

<sup>264</sup> 1 THE DEVELOPING LABOR LAW 972 & n.112 (Patrick Hardin et al. eds., 3d ed. 1992); THE DEVELOPING LABOR LAW 448-49 (Christopher N. Hexter, et al. eds., 3d ed. Supp. 1999).

<sup>265</sup> *SEIU, Local 36 v. City Cleaning Co.*, 982 F.2d 89, 93 (3d Cir. 1992).

<sup>266</sup> *Sheet Metal Workers Int'l Ass'n, Local Union No. 33 v. Power City Plumbing & Heating, Inc.*, 934 F.2d 557, 560 (4th Cir. 1991).

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might have insufficient relevant contacts with the West Virginia forum unless the corporate headquarters participated in labor relations. Accordingly, the case might be dismissed or transferred. Even if venue was proper in West Virginia, a change of venue for forum non conveniens might relocate the case to Pennsylvania under the scenario in which the facility is located there. Again the court's decision about which substantive law to apply, the transferee court's or the transferor court's, could be determinative. In addition, the statute of limitations would be six years in Pennsylvania, but only one year in West Virginia.<sup>267</sup> Accordingly, if the union missed the statute in West Virginia, it would have to file in Pennsylvania or find another court in which venue would be proper. If, as is often the case, the employer was incorporated in Delaware, the union would still face the broad standard of review in the Third Circuit. Under a national collective bargaining agreement that applied in other jurisdictions, the union might be able to obtain jurisdiction over the employer in another circuit.

Unquestionably, both the union and the employer must be alert to these issues and aware of the time limits for filing and of the jurisdictional and venue options in order to take advantage of the most favorable law available.

## VII. THE NONUNION WORKPLACE

Given the continuing proliferation of arbitration in the nonunion sector,<sup>268</sup> a determination of whether the foregoing analysis provides any insight into nonunion employment arbitration is appropriate. Employees and employers may voluntarily agree to arbitrate claims arising out of employment even when no union is present. In addition, more employers are requiring employees to agree to arbitration as a condition of employment.<sup>269</sup> A discharge arbitration in the nonunion setting might involve an allegation that an employer breached a contractual requirement of just cause or an allegation that a termination violated a federal or state discrimination statute.

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<sup>267</sup> Both West Virginia and Pennsylvania have relatively lengthy statutes of limitations for contract enforcement actions. *SEIU, Local 36*, 982 F. 2d at 95 (stating that six years is the appropriate statute of limitations); *Dist. 1199, Health Care & Soc. Servs. Union v. Coordinated Council for Indep. Living*, 919 F. Supp. 946, 953 (N.D. W. Va. 1996) (ruling that the statute of limitations for enforcement of arbitration awards is the one year time period from the United States Arbitration Act, rather than West Virginia's contract enforcement statute or the six month statute from the National Labor Relations Act).

<sup>268</sup> RICHARD A. BALES, *COMPULSORY ARBITRATION: THE GRAND EXPERIMENT IN EMPLOYMENT 1-2* (1997).

<sup>269</sup> *Id.*



If the arbitration reinstated the employee under either circumstance, an action for enforcement or vacation similar to those arising out of collectively bargained arbitration agreements could be filed.<sup>270</sup>

### A. Judicial Review

The standard of review for employment arbitration decisions outside the collective bargaining context is unsettled. While most courts have determined that employment arbitration is encompassed in the Federal Arbitration Act (FAA),<sup>271</sup> not all courts have agreed because of the employment contract exception contained in the statute.<sup>272</sup> The Supreme Court did not decide the issue in *Gilmer v. Interstate/Johnson Lane Corp.*, when it held that a plaintiff's agreement to arbitrate all claims arising out of employment encompassed his statutory age discrimination claim.<sup>273</sup> If employment arbitration cases are not governed by the FAA, they will be governed by state law.<sup>274</sup>

The statutory grounds for review in the FAA are extremely narrow. The four statutory grounds upon which an arbitration award may be vacated are: (1) the arbitration award was "procured by corruption, fraud or undue

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<sup>270</sup> E.g., *PaineWebber, Inc. v. Agron*, 49 F.3d 347, 351–52 (8th Cir. 1995) (involving contractual just cause provision); *Collins v. Blue Cross Blue Shield*, 916 F. Supp. 638, 643–44 (E.D. Mich. 1995) (involving statutory discrimination claims), *vacated on other grounds*, 103 F.3d 35 (6th Cir. 1996).

<sup>271</sup> BALES, *supra* note 269, at 44–48 (noting that most courts have interpreted the exclusion for contracts of employment (quoted *infra* note 273) to cover only those workers involved directly in interstate commerce such as transportation workers).

<sup>272</sup> Section 1 of the FAA states: "nothing herein contained shall apply to contracts of employment of seamen, railroad employees or any other class of worker engaged in . . . interstate commerce." 9 U.S.C. § 1 (1994). For discussions of the scope of the exception, see BALES, *supra* note 269, at 30–59; Robert N. Covington, *Employment Arbitration After Gilmer: Have Labor Courts Come to the United States?*, 15 HOFSTRA LAB. & EMP. L.J. 345, 359–70 (1998); Matthew W. Finkin, "Workers' Contracts" Under the United States Arbitration Act: An Essay in Historical Clarification, 17 BERKELEY J. EMP. & LAB. L. 282, 289, 297 (1996); Martin H. Malin, *Arbitrating Statutory Employment Claims in the Aftermath of Gilmer*, 40 ST. LOUIS U. L.J. 77, 88–91 (1996); Christine Godsil Cooper, *Where Are We Going with Gilmer?—Some Ruminations on the Arbitration of Discrimination Claims*, 11 ST. LOUIS U. PUB. L. REV. 203, 226–34 (1992).

<sup>273</sup> 500 U.S. 20, 20–22 (1991). Because *Gilmer's* agreement to arbitrate was contained in a securities registration agreement, it was not a part of a contract of employment; therefore, the Court did not have to determine the scope of the FAA's exclusion for contracts of employment. *Id.* at 25 n.2. However, the Supreme Court granted certiorari in *Circuit City Stores v. Adams*, 120 S. Ct. 2004 (2000), to determine the scope of the FAA's exclusion for employment contracts.

<sup>274</sup> Malin, *supra* note 273, at 91.

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means”; (2) the arbitrator was corrupt or partial; (3) the arbitrator was guilty of prejudicial misconduct such as refusing to hear material evidence or to postpone the hearing when good cause is shown; or (4) the arbitrator exceeded his or her powers, “or so imperfectly executed them that a mutual, final, and definite arbitration award upon the subject matter submitted was not made.”<sup>275</sup> The Uniform Arbitration Act (UAA), which has been adopted in some form by a majority of states, contains similar statutory grounds for vacation of arbitration awards.<sup>276</sup> Despite the narrow statutory grounds for review, the courts have added nonstatutory bases for review. Professor Hayford, reviewing appellate case law, has identified the following nonstatutory grounds for vacatur in commercial arbitration cases: (1) Arbitration awards in “manifest disregard” of the law; (2) Arbitration awards in direct conflict with “public policy”; (3) “Arbitrary and capricious” arbitration awards; (4) “Completely irrational” arbitration awards; and (5) Arbitration awards that fail to draw their essence from the parties underlying contract.<sup>277</sup> The latter standards suggest more substantive review than the statutory standards, which, with the exception of the fourth standard, regarding the arbitrator who exceeds authority, focus primarily on procedural issues.<sup>278</sup>

In employment arbitration cases involving statutory claims, some courts have applied the “manifest disregard of the law” standard.<sup>279</sup> The public policy exception has also been utilized by some courts reviewing employment arbitration cases.<sup>280</sup> Courts applying the public policy exception

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<sup>275</sup> 9 U.S.C. § 10(a) (1994).

<sup>276</sup> Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GA. L. REV. 731, 739 n.14 (1996) (stating that 47 states have adopted some form of the UAA); Covington, *supra* note 273, at 368 (noting that 30 states have adopted the Act, most without any change in the vacatur section).

<sup>277</sup> Hayford, *supra* note 277, at 764. Hayford notes that only the Fourth Circuit has limited itself to the statutory grounds for review. *Id.*; see also Kenneth R. Davis, *When Ignorance of the Law is No Excuse*, 45 BUFFALO L. REV. 49, 88–89 (1997).

<sup>278</sup> See Davis, *supra* note 278, at 87–88. Some courts have linked the nonstatutory grounds for review of commercial arbitration awards to the fourth statutory standard, authorizing vacation of arbitration awards in which the arbitrator exceeded authority. Hayford, *supra* note 277, at 756–63.

<sup>279</sup> BALES, *supra* note 269, at 136. For example, in *Cole v. Burns International Security Services*, 105 F.3d 1465 (D.C. Cir. 1997), the D.C. Circuit rejected a plaintiff’s attempt to resist arbitration on the basis of the limited scope for review of the arbitrator’s decision on a statutory discrimination claim, stating that review based on the “manifest disregard of the law” standard would “ensure that arbitrators have properly interpreted and applied statutory law.” *Id.* at 1487.

<sup>280</sup> *E.g.*, cases cited *supra* note 271. For a discussion of the application of the public

in the commercial context, including the employment law context, have utilized the standard developed in labor arbitration cases.<sup>281</sup>

There has been substantial scholarly debate about the appropriate scope of review for employment arbitrations involving statutory claims. Some commentators have favored de novo review of questions of law.<sup>282</sup> Others have urged more limited review.<sup>283</sup> Most of the commentary is focused on arbitration of statutory claims. As noted, employment arbitration claims might also involve purely contractual issues, and the arguments for more extensive review are less compelling in that context.<sup>284</sup>

With respect to public policy issues, it might be argued that review under either the de novo standard or the manifest disregard of the law standard would obviate the need for a specific public policy review in employment cases.<sup>285</sup> The court reviewing the case de novo for errors of law would certainly set aside an arbitration award that was illegal or mandated unlawful conduct. Under the broader public policy review, however, public policy issues not involving the statutory claim of the employee might arise. For example, consider the employee in a safety-sensitive position terminated for a positive drug test. A white employee alleges that the termination constituted race discrimination, because African American employees who tested positive were not terminated.<sup>286</sup> The arbitrator, finding disparate treatment based on race, sets aside the termination and orders reinstatement.

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policy exception in commercial law, see Hayford, *supra* note 277, at 779–85.

<sup>281</sup> Davis, *supra* note 278, at 110 & n.326; Hayford, *supra* note 277, at 779–82; see also cases cited *supra* note 271.

<sup>282</sup> Martin H. Malin & Robert F. Ladenson, *Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the Steelworkers Trilogy to Gilmer*, 44 HASTINGS L.J. 1187, 1238, 1240 (1993). Commentators have also suggested de novo review of all issues. See Covington, *supra* note 273, at 387–88.

<sup>283</sup> BALES, *supra* note 269, at 137 (urging manifest disregard of the law standard); Covington, *supra* note 273, at 398–410.

<sup>284</sup> The strongest arguments for more extensive review of employment arbitration cases evoke concern for the public interest in just and proper application of the law to achieve the statutory goals. *E.g.*, BALES, *supra* note 269, at 135; Malin, *supra* note 273, at 100–105; Malin & Ladenson, *supra* note 283, at 1226–38.

<sup>285</sup> Hayford, *supra* note 277, at 783–84. Hayford suggests, that despite the similarities in the standards, there are differences when the standards are appropriately applied. *Id.* According to Hayford, the manifest disregard standard focuses on how the arbitrator discovered and applied the law, while the public policy standard focuses on the extent and effect of an arbitrator's error of law. *Id.*

<sup>286</sup> See *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976) (finding white employees terminated for misappropriation of company property stated a claim for discrimination under § 1981 and Title VII because an African American employee who engaged in the same conduct was not terminated).

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The employer files a motion to vacate the arbitration award, challenging both the arbitrator's legal findings on the discrimination issue and the reinstatement as violative of public policy. A review of the arbitrator's legal determination of discrimination, whether de novo or based on the manifest disregard standard, would not necessarily address the public policy issue regarding reinstatement, particularly if it was not raised before or addressed by the arbitrator. Accordingly, there is still a role for the public policy standard to play in employment arbitration. Moreover, some courts have applied the manifest disregard of the law standard to require that the arbitrator be aware of the law and intentionally disregard it.<sup>287</sup> If the arbitrator misinterpreted or misapplied the law, the arbitration award would not be subject to vacation.<sup>288</sup> Under these circumstances, public policy review might require vacation even when a manifest disregard standard did not.

In an arbitration based on a just cause contract rather than a statutory claim, the public policy standard also retains a role to play. For example, in *PaineWebber, Inc. v. Agron*, an employee was terminated for signing a client's name on an account transfer form with the client's consent.<sup>289</sup> Based on the employee's contract for termination for cause, the arbitrator found the termination improper and ordered damages.<sup>290</sup> When the employer sought review, the court, citing authority from labor arbitration cases, found no "well defined and dominant policy ascertainable from 'laws and legal precedents'" requiring honesty in the securities industry and further concluded that, assuming there were such a policy, the arbitration award did not violate the policy.<sup>291</sup>

We intimate no agreement with the arbitration panel's ruling. Indeed, the panel's seeming willingness to prevent PaineWebber from strictly adhering to proper procedures and ethical considerations in policing its own brokers is troubling. Agron's actions were undeniably ill-conceived and in violation of PaineWebber and NASD rules. However, PaineWebber has identified no federal or state statutes, regulations, or judicial decisions that expose either

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<sup>287</sup> Hayford, *supra* note 277, at 777-78 (discussing the interpretation of manifest disregard of the law by the courts) & n.224 (citing the discussion of the Eleventh Circuit in *Brown v. Rauscher Pierce Refsnes, Inc.*, 994 F.2d 775, 781-82 (11th Cir. 1993) (distinguishing manifest disregard of the law from the public policy exception on this basis)).

<sup>288</sup> Hayford, *supra* note 277, at 777-78.

<sup>289</sup> 49 F.3d at 349.

<sup>290</sup> *Id.* at 349-50.

<sup>291</sup> *Id.* at 351.

Agron's conduct, or, most importantly the arbitration ruling itself as violative of a fundamental policy. Given our limited review, we cannot supplant what we believe to be an improper decision without such a showing.<sup>292</sup>

In the nonunion arbitration context, if courts utilize the labor arbitration public policy precedent, then the circuit differences in the standard will persist. Currently, there are also circuit differences in interpretation of the other standards of review under the FAA, so uniformity is hardly to be expected on the public policy question unless the Supreme Court dictates a narrow standard in *Eastern Associated Coal*, and such standard is applied to employment arbitration.<sup>293</sup> If circuit differences in the interpretation of the public policy exception remain, a party seeking a favorable court for review of an arbitration award must determine venue options. If employment arbitration review comes under the FAA,<sup>294</sup> § 10 provides that if the standards for vacation of an arbitration award are met, the court "in and for the district wherein the award was made may make an order vacating the award upon application of any party to the arbitration . . . ."<sup>295</sup> Similarly, § 9 provides for confirming arbitration awards by the "United States court in and for the district within which such award was made" unless the arbitration agreement specifies a different court.<sup>296</sup> The Supreme Court recently held that these venue provisions are permissive, not mandatory, and that venue is appropriate in any court that is proper under the general venue statute.<sup>297</sup>

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<sup>292</sup> *Id.* at 351–52 (citing *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 43 (1987)).

<sup>293</sup> See Hayford, *supra* note 277, at 746, 756, 764–65, 772–74, 777–78.

<sup>294</sup> If the case arises under state arbitration law, the state statutory provisions would control venue. See, e.g., ARIZ. REV. STAT. ANN. § 12-1516 (West 1994) (providing venue is determined as it would be in any other civil action); GA. CODE ANN. § 9-9-84 (1982) (providing venue is appropriate in the county specified in the agreement. If no county is specified, the court in the county where the arbitration hearing was conducted or where party resides or conducts business is appropriate); 710 ILL. COMP. STAT. ANN. 5/17 (West 1993) (providing for venue in the court of the county provided in the agreement or the county where the hearing was held); MICH. COMP. LAWS ANN. § 600.5031 (West 2000) (providing that venue shall be in the circuit court of the county specified in the agreement).

<sup>295</sup> 9 U.S.C. § 10 (1994).

<sup>296</sup> 9 U.S.C. § 9 (1994). Section 9 goes on to provide that "[n]otice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding" and to specify the manner of notice depending on the residency of the adverse party. *Id.*

<sup>297</sup> *Cortez Byrd Chips v. Bill Harbert Constr. Co.*, 120 S. Ct. 1331 (2000).

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The FAA, however, does not confer subject matter jurisdiction on the federal courts.<sup>298</sup> Accordingly, to file an action to confirm or vacate an arbitration award in federal court, an employer or employee would have to provide a basis for either federal question or diversity jurisdiction.<sup>299</sup> A number of courts have held that the federal nature of the arbitrated claim, e.g., a federal statutory claim such as Title VII or the Age Discrimination in Employment Act, does not confer federal question jurisdiction in an action to confirm or vacate the arbitration award.<sup>300</sup> An alternative basis for jurisdiction would be diversity, if the amount in controversy exceeds \$75,000.<sup>301</sup> Diversity jurisdiction would lie only if the employee and employer were citizens of different states.<sup>302</sup>

The employee's citizenship is based on her domicile, which is her residence if she intends to make it her present home.<sup>303</sup> A corporation is a citizen both where it is incorporated and where it maintains its principal place of business.<sup>304</sup> The principal place of business may be the site of the corporate headquarters or the site of the major business operations, whether production or service.<sup>305</sup> If the employee is domiciled where the employer is incorporated or where its principal place of business is located, diversity will

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<sup>298</sup> *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25n.32 (1983).

<sup>299</sup> *Id.*

<sup>300</sup> *E.g.*, *Collins v. Blue Cross Blue Shield*, 103 F.3d 35 (6th Cir. 1996) (holding no federal jurisdiction over action to enforce arbitration award although underlying claim was based on Americans with Disabilities Act (ADA)); *V.I. Hous. Auth. v. Coastal Gen. Constr. Serv. Corp.*, 27 F.3d 911, 915–16 (3d Cir. 1994) (holding no federal jurisdiction over action to vacate arbitrator's award involving contract to renovate housing project financed with federal funds); *Lipton v. Shearson*, 934 F. Supp. 638, 639 (S.D.N.Y. 1996) (finding no federal jurisdiction over action to vacate arbitration award although arbitration award involved federal securities law and Racketeering Influenced and Corrupt Organization Act (RICO)); *O'Leary v. Fanghella*, 866 F. Supp. 1119, 1120–21 (N.D. Ill. 1994) (holding no federal jurisdiction over action to confirm arbitration award although underlying claim involved federal securities law); *Giangrande v. Shearson Lehman/E.F. Hutton*, 803 F. Supp. 464, 468–74 (D. Mass. 1992) (holding no federal jurisdiction over action to vacate arbitration award, despite fact that claims arbitrated based on federal securities law).

<sup>301</sup> 28 U.S.C. § 1332(a) (1994), amended by 28 U.S.C. § 1332(a) (Supp. IV 1999).

<sup>302</sup> *Id.* This assumes that the employer and the employee are the only two parties to the case. Complete diversity is required so if there are other parties, no plaintiff and defendant can be citizens of the same state. FRIEDENTHAL, *supra* note 250, § 2.6, at 28.

<sup>303</sup> FRIEDENTHAL, *supra* note 250, § 2.6, at 29–30.

<sup>304</sup> 28 U.S.C. § 1332(c) (1994).

<sup>305</sup> FRIEDENTHAL, *supra* note 250, § 2.6 at 34–5 (discussing various tests).

not lie. Diversity is determined as of the time an action is filed.<sup>306</sup> Accordingly, in an action under the FAA, the initial determination must be made as to whether jurisdiction in the federal court exists. If federal jurisdiction exists, appropriate venue must be determined.

The location where the arbitration award was made is clearly a venue option for either the employer or the employee under the FAA, although there may be an issue as to where the arbitration award was made. Courts generally have found that the arbitration award was made where the arbitration hearing was held, despite arguments that the arbitration award is "made" where it is written, signed, and mailed by the arbitrator.<sup>307</sup>

Under the general venue statute either the employer or the employee could file an action where the defendant resided or where "a substantial part of the events or omissions giving rise to the claim occurred."<sup>308</sup> If the employer initiates an action, which is most often the case, the venue may be limited, as often the hearing is held where the employee worked, which is likely to be where the events that gave rise to the claim occurred and where the employee resides. If not, the options increase. If the employee files the action, he or she will have to discover the corporate residence to determine whether it provides a different and better venue option than the location where the claim arose or where the hearing was held (if they differ).

Although venue may be determined by the arbitration agreement, it is unlikely that an employee would have sufficient foresight or bargaining

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<sup>306</sup> *Id.* § 2.5, at 27.

<sup>307</sup> *E.g.*, Motion Picture Lab. Technicians, Local 780 v. McGregor & Werner, Inc., 804 F.2d 16, 16 (2d Cir. 1986); Cent. Valley Typographical Union No. 46 v. McClatchy Newspapers, 762 F.2d 741, 744 (9th Cir. 1985); T & R Enterprises, Inc. v. Cont'l Grain Co., 613 F.2d 1272, 1279 (5th Cir. 1980) (stating that "made" is not necessarily construed as the location where the arbitration award was signed, but rather where the arbitration was held).

<sup>308</sup> 28 U.S.C. § 1391(a) (1994), *amended by* 28 U.S.C. § 1391 (Supp. IV 1999) (diversity jurisdiction only); *id.* at § 1391(b) (jurisdiction not founded solely on diversity). The venue provisions differ slightly depending on whether jurisdiction is based on federal question or diversity. There is no difference with respect to the grounds of residency of the defendant or the district where the events giving rise to the claim arose. The difference lies in the third alternative where § 1391(a) states: "or (3) a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought." Section 1391(b) states: "or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought." These two provisions would apply if there were no personal jurisdiction over the defendant in any other appropriate venue, an unlikely situation in the circumstances that give rise to the actions that are the subject of this discussion. *Id.* *Cortez* finds venue proper under the diversity provisions of the general venue statute. 120 S. Ct. 1331, 1332 (2000).

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power to negotiate a favorable venue prior to any dispute. Moreover, a venue favorable for public policy arguments might be unfavorable for other reasons.

Given that the employee could not anticipate which disputes would arise, venue control for public policy arguments by the employee is not likely to occur. The employer who attempts to provide for venue in the agreement faces the same difficulties, but will be more likely to foresee the issue and, if desired, may specify venue in the agreement without employee constraint in most circumstances.

Venue options may enable the moving party to find a favorable jurisdiction. If venue is limited to a jurisdiction where the public policy law relating to collectively bargained agreements is unfavorable, and the court has not spoken to the public policy issue in the employment arbitration context, the employer or employee might argue for a standard that differs from the labor arbitration standard. In the instant context, the employee would argue for the narrow standard in order to uphold the favorable arbitration award reversing termination, and the employer would support the broad standard. When, as is often the case, the employer imposed the arbitration agreement unilaterally, the employee might argue that a broad standard allows the employer to require the employee to arbitrate, but then refuse to abide by the result if it is unfavorable to the employer.<sup>309</sup> This argument is unlikely to persuade a court which has adopted a broad standard in order to guard the public interest, since the principle of holding the employer to its arbitration commitment may not outweigh a risk to public, patient, or worker safety.

More likely, the employer may persuade a court that has adopted the narrow view in labor cases to consider the broad exception in the employment context.<sup>310</sup> The narrow standard furthers the national labor policy favoring collective bargaining and peaceful settlement of disputes.<sup>311</sup> Labor arbitration is the substitute for strikes rather than litigation. In addition, unlike an arbitration dealing with statutory claims, the parties to a labor

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<sup>309</sup> The policy underlying the FAA is to enforce the parties' bargain by holding them to their agreements to arbitrate and limiting the ability to vacate arbitration awards. Hayford, *supra* note 277, at 742.

<sup>310</sup> Of course, the downside to this argument is that under many circumstances, the employer may prefer narrow review in order to preserve favorable arbitration awards, but arguments that differentiate labor arbitration from employment arbitration support broader review generally. Malin & Ladenson, *supra* note 283, at 1219-38.

<sup>311</sup> Frank H. Easterbrook, *Arbitration, Contract and Public Policy*, ARBITRATION 1991, THE CHANGING FACE OF ARBITRATION IN THEORY AND PRACTICE, 44 PROCEEDINGS OF THE ANNUAL MEETING, NAT'L ACADEMY OF ARBITRATORS 65, 73 (1992).



contract can renegotiate at contract expiration to correct any arbitral errors.<sup>312</sup> Thus, encouraging finality of arbitral decisions in labor cases furthers a national policy that may be more compelling than any policy supporting finality in employment cases. This is particularly true if the arbitration deals with a statutory issue.<sup>313</sup> Thus, if a court is considering the legal issues in any event, encouraging a broader review of the public policy question is not a significant additional step.

If the only jurisdiction available under the FAA is state court, federal substantive law will still apply<sup>314</sup> and the same arguments can be made regarding the applicable law.<sup>315</sup> If, however, the state arbitration law applies, rather than the FAA, the parties will need to look to state law. Some states have addressed the public policy issue in the labor arbitration context under state collective bargaining statutes, which typically apply to the public sector.<sup>316</sup> If that law is favorable, it can be cited. If not, both arguments that employment arbitration differs from labor arbitration and arguments differentiating the public sector from the private sector can be utilized.<sup>317</sup>

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<sup>312</sup> Malin & Ladenson, *supra* note 283, at 1228.

<sup>313</sup> *Id.* at 1219–38.

<sup>314</sup> Allied-Bruce Terminix Co. v. Dobson, 513 U.S. 265, 272 (1995) (declining to overrule *Southland Corp. v. Keating*, 465 U.S. 1, 15–16 (1984), which held that the FAA preempts state law); FRIEDENTHAL, *supra* note 250, at § 4.8, 241, (citing *Testa v. Katt*, 330 U.S. 386, 394 (1947)). The Supreme Court stated in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), however, that under the FAA courts should apply ordinary principles of state contract law in determining whether the parties agreed to arbitrate an issue. *Id.* at 944.

<sup>315</sup> The state court may follow the law of the federal circuit in which it sits in order to avoid forum shopping. *Mech. Contractors Ass'n v. Greater Bay Area Ass'n of Plumbing & Mech. Contractors*, 78 Cal. Rptr. 2d 225 (1998). The parties can argue for the most favorable law, however, urging the persuasive force of a particular view. In addition, the distinction between labor and employment arbitration can be argued by the party whom it benefits. *See supra* notes 309–14 and accompanying text; *see also* *Tretina Printing, Inc. v. Fitzpatrick & Assocs., Inc.*, 640 A.2d 788 (N.J. Sup. Ct. 1994) (declining to follow labor arbitration cases in dispute involving commercial arbitration because of the different role that arbitration plays in labor law as the “heart of the system of industrial self government”).

<sup>316</sup> *See* Hodges, *supra* note 57, at 665–74 and cases cited therein.

<sup>317</sup> For arguments that arbitration awards require greater scrutiny in the public sector, *see* Hodges, *supra* note 57, at 661–83. For the argument that the standards should be the same and that the narrow public policy standard should apply in both sectors, *see id.*

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### B. *The Arbitration*

With respect to the arbitration, the guidance in Section VI.A. regarding recognition of potential public policy cases and arguments to the arbitrator applies equally to employment arbitration. The same issues that arise in labor cases—drug and alcohol use, patient safety, violence, nuclear safety, and sexual harassment—are likely to trigger public policy arguments in employment cases. Assuming that the standards do not differ substantially, arbitral factual findings regarding whether the employee committed the offense and whether he or she is likely to repeat it, may be determinative of the outcome. In-depth understanding by both parties of the potential legal issues will enable them to tailor their arguments to the law. In addition, thorough arbitral opinions with explanatory reasoning are more likely to be upheld.<sup>318</sup> In sum, employers, employees, their attorneys, and arbitrators in employment cases, as in labor cases, must be alert to public policy issues and the relevant law in their jurisdictions, in order to identify the issues and make appropriate arguments at an early stage in any proceedings relating to employee discharge.

## VIII. CONCLUSION

Judicial reversal of labor arbitration awards undermines the finality of the arbitration awards, thus thwarting national labor policy. Employers, unions, and arbitrators should strive to insure finality by recognizing cases that are likely to give rise to public policy issues and by addressing those issues at the arbitration stage. The varying public policy standards of the courts encourage the parties to seek judicial review. The Supreme Court has an opportunity to settle the disagreement over the standard in *Eastern Associated Coal* and should do so, adopting the narrow approach to further the goal of finality. Public policy issues have begun to arise in employment arbitration as well, and the similarities suggest similar approaches at the arbitration stage for employers, employees, attorneys, and arbitrators. Whatever the decision in *Eastern Associated Coal*, the parties, arbitrators, and the courts will have to determine the appropriate role of public policy in employment arbitration.

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<sup>318</sup> It has not been common practice for arbitrators in commercial cases in the United States to write detailed arbitration awards. Hayford, *supra* note 277, at 734–35; see also Covington, *supra* note 273, at 393–94 (discussing employment case upholding arbitration award despite lack of findings of fact and explanatory rationale).

APPENDIX – TABLE OF CASES

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Northwest Airlines v. Air Line Pilots Ass'n, Int'l, 808 F.2d 76 (D.C. Cir. 1987).

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Exxon Corp. v. Esso Workers' Union, Inc., 118 F.3d 841, 852 (1st Cir. 1997).

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First Nat'l Supermarkets, Inc. v. Retail, Wholesale & Chain Store Food Employees Union Local 338, 118 F.3d 892 (2d Cir. 1997).

Newsday, Inc. v. Long Island Typographical Union, No. 915, 915 F.2d 840 (2d Cir. 1990).

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- Exxon Shipping Co. v. Exxon Seamen's Union, 993 F.2d 357 (3d Cir. 1993).
- Exxon Shipping Co. v. Exxon Seamen's Union, 11 F.3d 1189 (3d Cir. 1993).
- Stroehmann Bakeries, Inc. v. Local 776, Int'l Bhd. of Teamsters, 969 F.2d 1436, 1438 (3d Cir. 1992).
- United States Postal Serv. v. Nat'l Ass'n of Letter Carriers, 839 F.2d 146 (3d Cir. 1988).
- Super Tire Eng'g Co. v. Teamsters Local Union No. 676, 721 F.2d 121 (3d Cir. 1983).
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- E. Associated Coal Co. v. United Mine Workers, Dist. 17, 188 F.3d 501 (4th Cir. 1999) (per curiam) (unpublished table decision), *available at* No. 98-2527, 1999 U.S. App. LEXIS 19944, *cert. granted*, 120 S. Ct. 1416 (Mar. 20, 2000) (No. 99-1038).
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- Gulf Coast Indus. Workers Union v. Exxon Co., U.S.A., 991 F.2d 244 (5th Cir. 1993).
- Delta Queen Steamboat Co. v. District 2 Marine Eng'rs Beneficial Ass'n, 889 F.2d 599 (5th Cir. 1989).
- OCAW, Local No. 4-228 v. Union Oil Co., 818 F.2d 437 (5th Cir. 1987).
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United Transp. Union v. Union Pac. R.R., 116 F.3d 430 (9th Cir. 1997).

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