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Vacating Arbitrators' Awards Under the Public Policy Exception: Are Courts Second-Guessing Arbitrators' Decisions?

Stroehmann Bakeries, Inc. v. Local 776, International Brotherhood of Teamsters

I. INTRODUCTION

Through the use of collective bargaining agreements, management and labor contract for “justice” from an arbitrator in settling labor disputes.¹ In these agreements, both parties waive the right to have a court resolve matters that fall within the scope of the arbitrator’s authority.²

¹ See Douglas E. Ray, Court Review of Labor Arbitration Awards Under the Federal Arbitration Act, 32 Vill. L. REV. 57, 57 n.1 (1987). A collective bargaining agreement generally sets forth the terms of employment such as wages, hours and benefits. Id. When a dispute arises over the terms of the agreement, an employee will file a grievance with the employer. Id. The employee and employer will then attempt to resolve the matter independently. Id. If this effort fails, union representatives will intervene in the matter. Id. Finally, if both of these efforts at dispute resolution fail, the union may demand that the matter be submitted to arbitration. Id. At the arbitration stage, the arbitrator, who is selected by both parties, conducts a hearing and reaches a decision on the matter. Id. Virtually all collective bargaining agreements provide that the arbitrator’s decision on the matter is “final and binding.” Id. (noting that approximately 96% of collective bargaining agreements provide for binding arbitration).

The arbitrator’s award is often termed “justice” or “industrial justice.” See, e.g., Stead Motors v. Automotive Machinists Lodge No. 1173, 886 F.2d 1200, 1206 (9th Cir. 1989) (plurality opinion) (en banc) (“The labor arbitrator’s award, often termed the rendering of ‘industrial justice,’ is simply a manifestation of the parties’ obligations under their contract.”), cert. denied, 495 U.S. 946 (1990); see also Jesse P. Schaudies, Jr. & Christopher S. Miller, The Critical Role of a Judicially Recognized Public Policy Against Illegal Drug Use in the Workplace, 12 INDUS. REL. L.J. 153, 159 (1991) (“Arbitration was designed to give life to collective bargaining agreements, to ensure procedural due process for individual employees, and to resolve conflicts peacefully through an independent third party rather than through strikes or work stoppages.”); Joseph F. Tremiti, Misco and the Enforcement of Labor Arbitration Awards: No Longer a House Divided?, 14 U. DAYTON L. REV. 279, 279 (1989) (“It is a well-established principle of American labor law that the grievance-arbitration process is the chief vehicle for resolving disputes arising from a collective bargaining agreement. In large measure, the collective bargaining agreement establishes the relationship between the employer and the employees and among the employees themselves.” (footnote omitted)). For a general discussion of arbitration principles and procedures, see Frank Elkouri & Edna Asper Elkouri, How Arbitration Works (4th ed. 1985).

² See Edgar A. Jones, Jr., “His Own Brand of Industrial Justice”: The Stalking Horse of Judicial Review of Labor Arbitration, 30 UCLA L. REV. 881, 893 (1983) (“Whatever the content or import of the challenged award, . . . the brand of
Therefore, courts generally will not review the merits of an arbitration award unless the disputed issue falls outside the scope of the collective bargaining agreement. Instead, courts will defer to the arbitrator's decision. This deference reflects the courts' recognition and appreciation that the industrial justice dispensed in that award is the precise brand the party assessed and agreed to purchase, eyes open, for better or for worse, for richer or for poorer.

See also Thomas J. McDermott, Arbitrability: The Court Versus the Arbitrator, 23 Arb. J. 18, 19 (1968) ("The uniqueness enjoyed by arbitration as a system of industrial jurisprudence is that it is the creature of the parties. It is created by them, and its limits, rules and regulations are established and may be changed by them."); Theodore J. St. Antoine, Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny, 75 Mich. L. Rev. 1137, 1140 (1977) ("[The arbitrator] is speaking for the parties, and his [or her] award is their contract . . . [and] should be treated as though it were a written stipulation by the parties setting forth their own definitive construction of the labor contract.").

3. See United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596-99 (1960). In United Steelworkers, the United States Supreme Court noted that:

The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards. . . . It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him [or her] because their interpretation of the contract is different from his [or hers].

Id. at 596, 599; see also United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 36 (1987) ("[T]he courts play only a limited role when asked to review the decision of an arbitrator."); Union Pac. R.R. v. Sheehan, 439 U.S. 89, 91 (1978) (stating that judicial review of labor arbitration awards is "among the narrowest known to the law").

4. See Richmond, Fredericksburg & Potomac R.R. v. Transportation Comm. Int'l Union, 973 F.2d 276, 278 (4th Cir. 1992) ("Our decision in this case rests upon a reluctance to undercut a process whose importance to labor-management relations has been reaffirmed repeatedly by Congress and the courts."); Stead Motors, 886 F.2d at 1206, 1209 ("Defereence is premised on the simple notion that courts do not free the individual from his [or her] obligations merely because those obligations turned sour on him [or her]. . . . Defereence is the rule; rare indeed is the exception."); Arco-Polymers, Inc. v. Local 8-74, 671 F.2d 752, 755 (3d Cir.) ("Courts should not disturb ambiguous, unclear, and even deliberately opaque arbitration opinions because 'the policy in favor of the peaceful resolution of labor disputes through arbitration outweighs any damage which arbitration might cause.' " (quoting Amalgamated Meat Cutters Local 195 v. Cross Brothers Meat Packers, Inc., 518 F.2d 1113, 1120 (3d Cir. 1975))), cert. denied, 459 U.S. 828 (1982).

One legal commentator has suggested that "one of the strongest reasons why courts should defer to the contractual findings of labor arbitrators is that the parties to a collective bargaining agreement can limit the arbitrator's authority." Douglas E. Ray, Protecting the Parties' Bargain After Misco: Court Review of Labor Arbitration Awards, 64 Ind. L.J. 1, 23 (1988). Additionally, Judge Posner has stressed the efficiency and quickness of arbitration, arguing that "[t]he most important reason for deference to labor arbitrators is that labor disputes ought to be resolved rapidly; and, to be fast, arbitration must be final." Jones Dairy Farm v. Local P-1236, United Food & Commercial Workers Int'l Union, 755 F.2d 583, 586 (7th Cir.) (Posner, J., dissenting), vacated, 760 F.2d 173 (7th Cir.), cert. denied, 474 U.S. 845 (1985).
of two important factors: the parties' expressed intent to have arbitrators, and not courts, interpret their agreements in accordance with industry practices, and a statutory preference for having parties settle

5. See Misco, 484 U.S. at 37-38. In Misco, the Supreme Court noted: [b]ecause the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept. Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts.

Id.; see also United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960) ('The labor arbitrator is usually chosen because of the parties' confidence in his [or her] knowledge of the common law of the shop and their trust in his [or her] personal judgment . . . . The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance . . . .'); Stroehmann Bakeries, Inc. v. Local 776, Int'l Bhd. of Teamsters, 969 F.2d 1436, 1441 (3d Cir.) (stating that if broad judicial review of arbitrators' awards were allowed, "the Congressional objective of settling labor disputes by arbitrators expert in industrial practices and customs would be undermined" (citing United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960))); cert. denied, 113 S. Ct. 660 (1992); Stead Motors, 886 F.2d at 1206-09 (stating that because courts are unfamiliar with practices of shop, they are in no position to second-guess arbitrator's decision).

Commentators have also noted that parties to a collective bargaining agreement select arbitrators based on their knowledge of the shop. Joseph H. Bornong, Judicial Review By Sense of Smell: Practical Application of the Steelworkers Essence Test in Labor Arbitration Appeals, 65 U. Det. L. Rev. 649, 658 (1988). Professor Bornong has commented:

[Arbitration] trades off some impartiality by seeking decision makers versed in the "common law of the shop," who are experts in the field, rather than seeking the judicial model of the generalist who is to learn everything he [or she] will know about the parties, their surroundings, and their problems from the record adduced at trial.

Id. (quoting Morelite Construction Corp. v. New York City District Council Carpenters Benefit Fund, 748 F.2d 79, 83 (2d Cir. 1984); see also ELKOURI & ELKOURI, supra note 1, at 376 ('[A]rbitrators on the whole are capable of dealing with statutes and other external law bearing upon problems the parties have brought to the arbitrator.')); Harry T. Edwards, Alternative Dispute Resolution: Panacea or Anathema, 99 Harv. L. Rev. 668, 680 (1986) ('The recent experience of labor arbitrators in the federal sector, who are required to police compliance with laws, rules, and regulations, suggests that the interpretation and application of law may not lie outside the competence of arbitrators.'); Ann C. Hodges, The Steelworkers Trilogy in the Public Sector, 66 Chi.-Kent L. Rev. 631, 635-36 (1990) (noting that private arbitrators are "chosen because of their knowledge of the industrial common law and they are expected to rely on that knowledge in issuing a decision"); Ray, supra note 4, at 2 ('Labor arbitrators, unlike judges, are selected by the parties themselves. They deal with, and are presumed to be expert in, the narrow range of issues involved in interpreting labor contracts.').

But cf. PAUL R. HAYS, LABOR ARBITRATION: A DISSERTING VIEW 37-38 (1966) (concluding that arbitrators do not have experience and knowledge of industrial relations with which Supreme Court credits them (citing United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960))); Edward Brunet, Arbitration and Constitutional Rights, 71 N.C. L. Rev. 81, 88 (1992) ('Arbitrators are often said to be experts in the subject matter of the disputes they adjudicate. . . . The growth of private arbitration, however, has produced such a demand for experts that there is reason to doubt modern arbitration expertise.').
labor disputes without government intervention. 6

While this deferential review of collective bargaining agreements gives courts a very limited power over arbitrators' decisions, exceptional circumstances do exist in which judicial review of an arbitrator's decision is proper. 7 One such circumstance occurs when the arbitrator's


Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.

7. See Gulf Coast, 991 F.2d at 248 (stating while courts should defer to arbitrators' decisions, "arbitration awards are not inviolate"). A court may review an arbitrator's award de novo if: (1) there is evidence of fraud or partiality; (2) the award violates a law; (3) the award is too ambiguous to be enforced; or (4) the award contravenes public policy. Arco-Polymers, 671 F.2d at 754 n.1 (citing Ludwig Honold Manufacturing Co. v. Fletcher, 405 F.2d 1123, 1128-29 n.27 (3d Cir. 1969)); 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, 95 (1990) (stating that allowing courts to redetermine merits of case would undermine federal policy of promoting arbitration); see also Clyde W. Summers, Judicial Review of Labor Arbitration or Alice Through the Looking Glass, 2 BUFF. L. REV. 1, 27 (1953) (stating that courts have a function [in reviewing arbitration awards], but it is the limited one of exercising only enough supervision to prevent labor arbitration from destroying itself").
award contravenes public policy. The public policy exception reflects the view that arbitrators’ decisions are bargained-for justice. Under the public policy exception, a court may not enforce a contract that is contrary to public policy.

Recently, the United States Court of Appeals for the Third Circuit examined the parameters of the public policy exception in Stroehmann Bakeries v. Local 776, International Brotherhood of Teamsters. Specifically, the Third Circuit addressed the issue of whether an arbitrator’s award, reinstating an employee accused of sexual harassment without a determination on the merits, violated the public policy against sexual harassment in the workplace. The Stroehmann Bakeries majority concluded that reinstating such an employee did violate the public policy against sexual harassment. The dissent asserted, however, that where an arbitrator’s basis for reinstating an employee is lack of industrial due process, guaranteeing procedural fairness to that employee does not violate public policy.

This Note examines the conflict among the circuit courts of appeals.

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(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.


8. See Misco, 484 U.S. at 43 ("[A] court may not enforce a collective-bargaining agreement that is contrary to public policy." (quoting W.R. Grace & Co. v. Local 759, International Union of United Rubber Workers, 461 U.S. 757, 766 (1983))); see also St. Antoine, supra note 2, at 1155 ("[T]he court will not enforce an arbitral award that either sustains or orders conduct violative of law or substantial public policy."). For a further discussion of the public policy exception, see infra notes 30-53 and accompanying text.

9. See Misco, 484 U.S. at 42 (noting that public policy exception is simply application of common-law doctrine that court cannot enforce contract that is contrary to public policy and stating that courts have used doctrine for "occasional exercises of judicial power to abrogate private agreements").

10. Muschany v. United States, 324 U.S. 49 (1945) (applying common-law principle that contracts are unenforceable if prohibited by statute or by public policy); see also RESTATEMENT (SECOND) OF CONTRACTS § 178 (1952) (stating that contract is unenforceable if against public policy); 6A ARTHUR L. CORBIN, CORBIN ON CONTRACTS § 1375, at 10 (1962) ("In thousands of cases contracts have been declared to be illegal on the ground that they are contrary to public policy . . . .")


12. For a discussion of the facts of Stroehmann Bakeries, see infra notes 81-101 and accompanying text.

13. For a discussion of the majority’s opinion in Stroehmann Bakeries, see infra notes 102-14 and accompanying text.

14. For a discussion of Judge Becker’s dissenting opinion in Stroehmann Bakeries, see infra notes 115-25 and accompanying text.
as to when an arbitrator's award, reinstating an employee guilty of misconduct, is contrary to public policy. As background, Section II of this Note discusses the broad deference that courts have traditionally given to arbitrators' decisions. This section also examines the public policy exception to judicial review of arbitrators' decisions, focusing on the public policy against sexual harassment in the workplace. Finally, this section discusses industrial due process, examining the procedures that an employer must follow in discharging an employee. Section III of this Note presents the facts of the Stroehmann Bakeries case and discusses both the majority and dissenting opinions of the decision. Section IV suggests that the majority, in vacating the arbitrator's award, overstepped the boundaries of judicial review of arbitration awards, and in doing so, minimized industrial due process concerns. Finally, Section V considers the impact the Third Circuit's decision will have on future cases involving application of the public policy exception.

II. BACKGROUND

A. Judicial Review of Arbitration Awards

A collective bargaining agreement between a company and a union often gives an arbitrator the authority to settle disputes that arise between the company and the union employees. In United Steelworkers of

15. For a discussion of the courts of appeals' differing interpretations as to the scope of the public policy exception, see infra notes 41-53 and accompanying text.

16. For a discussion of the deference that courts have traditionally given to arbitration awards, see infra notes 22-29 and accompanying text.

17. For a discussion of the public policy exception, see infra notes 30-53 and accompanying text. For a discussion of cases involving the public policy against sexual harassment in the workplace, see infra notes 54-73 and accompanying text.

18. For a discussion of industrial due process requirements, see infra notes 74-80 and accompanying text.

19. For a discussion of the facts of the Stroehmann Bakeries case, see infra notes 81-101 and accompanying text. For a discussion of the Third Circuit's opinion in Stroehmann Bakeries, see infra notes 102-14 and accompanying text. For a discussion of Judge Becker's dissenting opinion, see infra notes 115-25 and accompanying text.

20. For a critique of the Third Circuit's opinion, see infra notes 126-137 and accompanying text.

21. For a discussion of the impact of the Third Circuit's decision in Stroehmann Bakeries, see infra notes 138-40 and accompanying text.

22. See St. Antoine, supra note 2, at 1140. Unlike a commercial contract, which is a comprehensive agreement between the parties, a collective bargaining agreement is a skeletal document. Id. The parties to the collective bargaining agreement generally leave gaps in the agreement for circumstances the parties have not anticipated or have anticipated, but have not reduced to writing. Id. The parties select an arbitrator to fill in these gaps and to resolve the issues. See Elkouri & Elkouri, supra note 1, at 3-4 (providing overview of arbitration pro-
America v. Enterprise Wheel & Car Corp., the United States Supreme Court established the general proposition that courts have very limited power to review arbitration awards under collective bargaining agreements. In Enterprise Wheel, the Supreme Court reviewed the decision of the United States Court of Appeals for the Fourth Circuit to invalidate an arbitration award reinstating a group of employees who had staged a walk-out to protest a fellow employee's discharge. The Supreme Court stated that the Fourth Circuit should have upheld the district court's order to comply with the award. In reviewing the Fourth Circuit's decision, the Supreme Court stressed that allowing judicial review of arbitrators' awards could void the parties' agreement and, therefore, undermine the bargaining process. Accordingly, the Court held that if...
an arbitrator’s award "draws its essence" from the collective bargaining agreement, a court may not vacate the award, even if the court disagrees with the arbitrator’s award or reasoning.\(^{28}\) Unfortunately, the Enterprise Court’s "essence" test is so "uniquely unquantifiable" and subjective that it has led to differing interpretations and applications among the circuit courts of appeals.\(^{29}\)

\(^{28}\) United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 598-99 (1960). The Supreme Court stated that as long as an arbitrator’s award "draws its essence from the collective bargaining agreement," a court may not vacate an arbitrator’s award even if the court disagrees with the arbitrator’s decision. \textit{Id.} The Court further noted, however, that if the award does not draw its essence from the collective bargaining agreement, then courts "have no choice but to refuse enforcement of the award." \textit{Id.} at 597.

\(^{29}\) Bornong, \textit{supra} note 5, at 645. Professor Bornong has suggested that it is because the "essence" test is so "uniquely unquantifiable," that the courts of appeals have designed their own applications of the essence test. \textit{Id.}; see, \textit{e.g.}, Ethyl Corp. v. United Steelworkers of Am., 768 F.2d 180, 186 (7th Cir. 1985) (stating that arbitrator’s award should be upheld if award could be "rationally derived from some plausible theory of the general framework or intent of the agreement"), \textit{cert. denied}, 475 U.S. 1010 (1986); Drummond Coal Co. v. UMW Dist. 20, 748 F.2d 1495, 1498 (11th Cir. 1984) (stating that proper analysis for determining whether arbitrator’s award should be upheld is whether arbitrator’s decision is "at least rationally inferable" from collective bargaining agreement (quoting Brotherhood of Railroad Trainmen v. Central Georgia Railyard, 415 F.2d 403, 412 (5th Cir. 1969))); Meyers v. Parem, Inc., 689 F.2d 17, 18 (2d Cir. 1982) (concluding that arbitrator’s award "draws its essence" if there is even "barely colorable justification" for award); Bettencourt v. Boston Edison Co., 560 F.2d 1045, 1050 (1st Cir. 1977) (stating that arbitrator’s award fails "essence" test if it is "unfounded in reason and fact, [and] based on reasoning so palpably faulty that no judge, or group of judges, could ever conceivably have made such a ruling, or mistakenly based on a crucial assumption of fact"); Monongahela Power Co. v. Local 2332, Int’l Bhd. of Elec. Workers, 566 F.2d 1196, 1199 (4th Cir. 1976) (stating that arbitrator’s award goes beyond “essence” of agreement if arbitrator gives his or her own meaning to “plain and unambiguous” language of agreement); Brotherhood of R.R. Trainmen v. Central Ga. Ry., 415 F.2d 403, 412 (5th Cir. 1969) (declaring that arbitrator’s award should be upheld if “at least rationally inferable” from collective bargaining agreement), \textit{cert. denied}, 396 U.S. 1008 (1976); Ludwig Honold Mfg. Co. v. Fletcher, 405 F.2d 1123, 1128 (3d Cir. 1960) (stating that arbitrator’s award “draws its essence” from agreement if award could “in any rational way be derived from the agreement, viewed in the light of its language, its context, and any other indicia of the parties’ intention”); see also \textit{Robert A. Gorman, Basic Text on Labor Law, Unionization and Collective Bargaining} 586 (1976). Professor Gorman has described the "essence" standard as requiring the arbitrator’s decision to have only minimal rationality. \textit{Gorman, supra}, at 586.
B. Public Policy Exception

Although judicial review of arbitrators' decisions is typically very limited, exceptional circumstances do exist in which a court may examine an arbitrator's award.30 In W.R. Grace & Co. v. Local 759, International Union of the United Rubber Workers,31 the Supreme Court established the public policy exception as one of these exceptional circumstances.32 The W.R. Grace Court held that a court may review an arbitrator's decision and vacate that decision if the decision contravenes public policy.33 However, the Court restricted use of the public policy exception to cases in which the public policy is "well-defined and dominant" and based in "laws and legal precedent," rather than on public interest considerations.

30. See Manville Forest Prod. v. United Paperworkers Int'l, 831 F.2d 72, 74 (5th Cir. 1987). Judicial review of an arbitrator's decision is appropriate when the award "stems from fraud or partiality; ... concerns a matter not subject to arbitration under the contract; ... does not 'dra[w] its essence' from the contract; ... or ... violates public policy." Gulf Coast Indus. Work Union v. Exxon Co., 991 F.2d 244, 248 (5th Cir. 1993) (alterations in original) (quoting Manville Forest Products v. United Paperworkers International, 831 F.2d 72, 74 (5th Cir. 1987)).


32. Id. at 766. W.R. Grace involved a conflict between the provisions of a collective bargaining agreement that gave seniority to male employees and a conciliation agreement between the employer and the Equal Employment Opportunity Commission (EEOC) that settled a Title VII sex discrimination suit. Id. at 759. W.R. Grace brought an action to enjoin arbitration of employee grievances under the collective bargaining agreement. Id. The district court granted the petition of W.R. Grace, holding that the provisions of the conciliation agreement with the EEOC would override any provisions of the collective bargaining agreement that were in conflict with the conciliation agreement. Id. Two years later, the United States Court of Appeals for the Fifth Circuit reversed the district court's decision and ordered W.R. Grace to arbitrate employee grievances under the collective bargaining agreement. Id.

Following the Fifth Circuit's order to arbitrate grievances under the collective bargaining agreement, W.R. Grace agreed to arbitrate the grievances of two male employees who lost their seniority because of the conciliation agreement. Id. at 762-63. The arbitrator ultimately ordered back-pay for the two employees. Id. W.R. Grace subsequently brought an action to vacate the award. Id. The district court vacated the arbitrator's decision on the grounds that the award contravened public policy, but on appeal, the court of appeals reversed the district court's opinion. Id. at 762-63. The Supreme Court granted certiorari in W.R. Grace to consider the issue of whether a court could properly vacate an arbitrator's award on the grounds that the award contravened public policy. Id. at 764.

One commentator has suggested that, in using the public policy exception, courts may second-guess the arbitrator. See Ray, supra note 4, at 19. Professor Ray cautions that

[just as arbitrators should be careful to base their findings on the collective bargaining agreement and not on their own notions of justice, courts must be careful to base public policy arguments on 'real' public policy rather than vague and unsubstantiated notions of policy applied because they think an arbitrator erred.]

Id.

By limiting the applicability of the public policy exception, the Court attempted to preserve limited judicial review of arbitration awards under collective bargaining agreements. Unfortunately, the Court's attempt was not completely successful. Following W.R. Grace, the courts of appeals differed in their interpretations of W.R. Grace and, thus, defined the scope of the public policy exception differently.

34. Id. ("Such a 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.'") (quoting Muschany v. United States, 324 U.S. 49, 66 (1945))). In Muschany, the Court stated that to determine whether a public policy existed, a court should consider statutory enactments, longevity of governmental practice and obvious moral or ethical standards. Muschany, 324 U.S. at 66-67. In W.R. Grace, the Court cited obedience to judicial orders and voluntary compliance with Title VII of the Civil Rights Act of 1964 as examples of public policies that would meet the public policy test and would be appropriate for judicial review. W.R. Grace, 461 U.S. at 766-72.

35. See 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, 9 (1988). Judge Edwards, Circuit Judge for the United States Court of Appeals for the District of Columbia Circuit, commented that "[b]y formulating the exception in this manner, the Court clearly intended to limit severely the possibility of potentially intrusive judicial review under the guise of public policy." Id. Judge Edwards further noted that "[i]t is critical to recognize that in W.R. Grace the Court limited its inquiry to whether the award itself violated some explicit public policy or compelled conduct that violated such a policy." Id. at 10.

36. United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 35 n.7 (1987); see also Joan Parker, Judicial Review of Labor Arbitration Awards: Misco and Its Impact on the Public Policy Exception, 4 LAB. LAWYER 683, 690-91 (1988). Professor Parker has commented that "[f]ollowing the issuance of the W.R. Grace decision, the federal courts had several opportunities to interpret the public policy exception, and not surprisingly there were some significant divisions among the circuit courts as to how narrowly the public policy exception was to be applied." Id.

In interpreting W.R. Grace, the United States Courts of Appeals for the First, Fifth and Seventh Circuits took a broad view of courts' power to review arbitration awards and expanded the boundaries of judicial review. See, e.g., United States Postal Serv. v. American Postal Workers Union, 736 F.2d 822, 825-26 (1st Cir. 1984) (applying broad interpretation to find that arbitrator's award of reinstatement was properly set aside because allowing postal worker guilty of embezzlement to continue handling funds violated public policy against dishonest postal workers); Amalgamated Meat Cutters, Local Union 540 v. Great W. Food Co., 712 F.2d 122, 124-25 (5th Cir. 1983) (applying broad interpretation to find that arbitrator's award of reinstatement was properly set aside because reinstating truck driver who had operated vehicle while under influence of alcohol contravened public policy against drunk driving); Local No. P-1236, Amalgamated Meat Cutters v. Jones Dairy Farm, 680 F.2d 1142, 1144-45 (7th Cir. 1982) (holding that arbitration award upholding employer's rule requiring employees to report sanitary violations to employer before reporting such violations to United States Department of Agriculture (USDA) was properly set aside because award violated public policy of health and safety); see also E.I. DuPont de Nemours & Co. v. Grasselli Employees Indep. Ass'n, Inc., 790 F.2d 611 (7th Cir.), cert. denied, 479 U.S. 853 (1986). In DuPont, the majority stated that "[p]recisely because this doctrine allows courts to by-pass the normal heavy deference accorded to arbitration awards and potentially to 'judicialize' the arbitration process, the judiciary must be cautious about overruling an arbitration award on the ground that it conflicts with public policy." Id. at 615. However,
In response to the differing interpretations among the courts of ap-

the majority proceeded to suggest that the public policy of workplace safety al-

lowa court to properly review an arbitrator's decision, stating: "Assuming that 

workplace safety is a valid public policy, the public policy doctrine allows this 

Court to decide de novo whether the judgment made by the arbitrator . . . violates 

public policy." Id. at 617 (citation omitted).

Several commentators have argued that this expansive view undercuts the 

finality of arbitration awards. See, e.g., Parker, supra, at 711. Parker has 

suggested:

[If] public policy is easily asserted as a basis for overturning arbi-

tration awards, the entire concept of arbitration as an efficient, fair, and 

relatively inexpensive alternative to judicial litigation of grievance dis-

putes is jeopardized . . . . Moreover, experience has taught that in or-

der for the arbitration process to work well, there must be finality. If 

contracting parties come to believe that arbitration awards may be easily 

overturned, they will lose respect for the process, which, in turn will 

become ineffective in eliminating work stoppages and promoting stabil-

ity in the workplace.

Id.; see also Edwards, supra note 35, at 5 (stating that "offending courts have] 

seemingly fail[ed] to recognize that, in vacating awards under a broad public 
policy exception, they [have] infring[ed] [on] the explicit public policy underly-
ing the duty to bargain"); Morley, supra note 7, at 632 ("A serious threat to the 

viability of the arbitration system would arise if the judiciary were permitted to 

exercise a liberal scope of review . . . .")

On the other hand, the United States Courts of Appeals for the Third, 

Ninth and District of Columbia Circuits attached a narrow meaning to the 

Court’s language in W.R. Grace. See, e.g., Northwest Airlines, Inc. v. Air Line 
Pilots Ass'n Int'l, 808 F.2d 76, 83-84 (D.C. Cir. 1987) (applying narrow interpre-
tation to find that arbitration board's decision to reinstate pilot charged with 

flying plane under influence of alcohol was enforceable because court found 

"nothing in the law" prohibiting reinstatement of reformed alcoholic), cert. de-
nied, 486 U.S. 1014 (1988); Bevles Co. v. Teamsters Local 986, 791 F.2d 1391, 

1394 (9th Cir. 1986) (applying narrow interpretation to find that arbitrator's 

award reinstating two undocumented aliens did not violate well-established pub-

clic policy and was not in "manifest disregard of the law"), cert. denied, 484 U.S. 

985 (1987); Super Tire Eng’g Co. v. Teamsters Local Union No. 676, 721 F.2d 

121, 125 & n.6 (3d Cir. 1984) (noting that arbitrator's award reinstating em-

ployee who was discharged for drinking during work did not conflict with state 

or federal law); Amalgamated Transit Union Local 1309 v. Aztec Bus Lines, 654 

F.2d 642, 644 (9th Cir. 1981) (applying narrow interpretation to uphold arbitra-

tor's award reinstating employee who had driven bus, knowing that bus had 

faulty brakes, because court found no statute "which would make it illegal to 

employ bus drivers who have previously shown bad judgment"). In American 

Postal Workers Union v. United States Postal Service, 789 F.2d 1 (D.C. Cir. 

1986), the Court of Appeals for the District of Columbia Circuit reasoned that 

although embezzlement was contrary to public policy, no law or regulation pro-

hibited reinstating an embezzler. Id. at 8. The American Postal Workers court 

stated:

[It] is well-understood that courts will not enforce an arbitration award 

if the award itself violates established law . . . . However, this rule, 

which is sometimes referred to as a public policy exception, is extremely 
narrow . . . . Obviously, the exception is designed to be narrow so as to 

limit potentially intrusive judicial review of arbitration awards under 

the guise of "public policy."

Id.

One commentator has explained the different approaches of the circuit 
courts of appeals by stating:
peals, the Supreme Court granted certiorari in United Paperworkers International v. Misco. The Court stated that its decision in W.R. Grace did not "sanction a broad judicial power to set aside arbitration awards as against public policy." Moreover, the Court emphasized that the W.R. Grace decision had ultimately "turned on . . . whether the award created any explicit conflict with other 'laws and legal precedents' rather than an assessment of 'general considerations of supposed public

Under the broad view, arbitration awards were overturned on public policy grounds when the policy was grounded in statutory law, in common sense, and in case law. Under the limited view, however, arbitration awards were vacated on public policy grounds when the awards were in manifest disregard of clear statutory or case law.

Tremiti, supra note 1, at 291 (footnotes omitted).

37. 484 U.S. 29 (1987). In Misco, the employer discharged an employee after finding the employee in the back seat of another employee's car and a lit marijuana cigarette in the front seat of the car. Id. at 33. Following a hearing on the matter, an arbitrator ordered the employer to reinstate the discharged employee. Id. The arbitrator concluded that the employer had discharged the employee before the employer had any evidence linking the discharged employee to the marijuana. Id. The employer, seeking to vacate the arbitrator's award, challenged the arbitrator's decision. Id. The district court vacated the arbitrator's award, finding that the arbitrator's decision contravened the public policy against operating machinery under the influence of drugs or alcohol. Id. at 34-35. The Fifth Circuit affirmed the lower court's decision, but the Supreme Court reversed the Fifth Circuit and reinstated the arbitrator's award. Id. at 35.

The Supreme Court decided to uphold the arbitrator's award because it found that there was no statutory or common-law basis to support the lower court's finding. Id. at 44. The Court stated that the court of appeals "made no attempt to review existing laws and legal precedents to demonstrate that they establish a 'well-defined and dominant' policy against the operation of dangerous machinery while under the influence of drugs." Id. Furthermore, the Court stated that even if the Fifth Circuit found a well-defined and dominant public policy, "no violation of that policy was clearly shown." Id. The Court explained that if:

the arbitrator found that [the employee] had possessed drugs on the property, yet imposed discipline short of discharge because he found as a factual matter that [the employee] could be trusted not to use them on the job, the Court of Appeals could not upset the award because of its own view that public policy about plant safety was threatened.

Id.

Several commentators have argued that the Court's decision in Misco is consistent with the narrow interpretation of the public policy exception. See Tremiti, supra note 1, at 280 ("The Court's narrow approach in Misco is consistent with the views adopted by the Third, Ninth, and D.C. Circuits."); see also Edwards, supra note 35, at 15. Judge Edwards states:

Because W.R. Grace inexplicably engendered this split in the circuits the Supreme Court received several petitions for certiorari requesting it to put the public policy dispute to rest. . . . [I]n Misco, the Court, although not settling the question once and for all, strongly suggested that the narrow interpretation of the public policy exception is the correct one.

Edwards, supra note 35, at 15.

38. Misco, 484 U.S. at 43.
39. Id.
Despite the Court's effort to clarify the appropriate scope and application of the public policy exception in Misco, the confusion among the courts of appeals has continued. Specifically, the courts have split on the issue of whether the reinstatement award itself must violate public policy or whether the employee's underlying behavior must violate public policy before a court may review an arbitrator's decision. The Misco Court stressed that its decision in W.R. Grace had "turned" on whether the arbitrator's award directly conflicted with laws and legal precedents. However, the Misco Court further stated that "[a]t the very least, an alleged public policy must be properly framed under the approach set out in W.R. Grace, and the violation of such a policy must be clearly shown" for a court to properly vacate an arbitrator's award.


41. See Parker, supra note 36, at 698-99 (stating that opinion was "purposefully narrow" and "potentially confusing" and "[n]ot surprisingly, therefore, within months after Misco was handed down, there were new splits among the federal courts as to how to apply the decision"); Schaudies & Miller, supra note 1, at 155 ("The different approaches taken by federal courts interpreting Misco's discussion of the scope of the public policy exception manifests a glaring conflict among several circuits."). One commentator has suggested that:

Some courts have decided cases on alternative grounds to avoid the public policy determination. Some courts have stressed that public safety should be the major determinant of a public policy violation. Other courts have continued to follow the narrow interpretation that the award must violate a law, but some of these have expanded this "narrow" interpretation by interpreting public policy broadly. Still other courts have held that the employer failed to prove the well-defined public policy, or if the employer did establish the public policy, that the employer failed to prove the public policy was violated. Finally, some courts have balanced two conflicting public policies to determine whether the award should be enforced.

Mouser, supra note 6, at 103 (footnotes omitted).

Following Misco, one commentator had optimistically suggested that the Supreme Court's decision in Misco would resolve the conflict between the courts of appeals. See Tremiti, supra note 1, at 294 ("[T]he Court has resolved a conflict among the courts of appeal, and, at the same time, has adopted the limited view of the Third, Ninth and D.C. Circuits. The Misco decision reduces the probability that reviewing courts will overturn arbitration awards.").

42. Compare Stead Motors v. Automotive Machinists Lodge No. 1173, 886 F.2d 1200 (9th Cir. 1989) (plurality opinion) (en banc) (reasoning that although underlying conduct may contravene public policy, award itself is not necessarily contrary to public policy), cert. denied, 495 U.S. 946 (1990) with Delta Air Lines v. Air Line Pilots Ass'n Int'l, 861 F.2d 665, 674 (11th Cir. 1988) (reasoning that if underlying conduct contravenes public policy, then award contravenes public policy), cert. denied, 493 U.S. 871 (1989).


44. Id. at 373-74 (emphasis added). The Court also noted in footnote
Some circuits have narrowly interpreted Misco's formulation of the public policy exception. These courts have construed the language in Misco to mean that a court must find that the award of reinstatement itself contravenes public policy before a court can set aside the arbitrator's award. Thus, in Stead Motors v. Automotive Machinists Lodge No. 1173, the United States Court of Appeals for the Ninth Circuit held that a public policy against underlying behavior does not necessarily make an award of reinstatement contrary to public policy. The Ninth Circuit stated that "[i]f a court relies on public policy to vacate an arbitral award, it was not necessary for the court to "address the Union's position that a court may refuse to enforce an award on public policy grounds only when the award itself violates a statute, regulation, or other manifestation of positive law." Id. at 374 n.12.

45. See, e.g., Interstate Brands Corp. v. Chauffeurs, Local Union No. 135, 909 F.2d 885, 893 (6th Cir. 1990) (stating that although there is public policy against driving under influence of alcohol or drugs, reinstating employee discharged for being intoxicated off-duty does not necessarily violate public policy); Stead Motors, 886 F.2d at 1211 n.11 (applying narrow interpretation of public policy exception and holding that reinstatement of mechanic who failed to properly secure lug bolts on vehicles did not violate public policy).

46. See, e.g., Interstate Brands, 909 F.2d at 893 (stating that courts, in deciding whether to vacate arbitration awards, must decide "not whether [the employee's] conduct for which he [or she] was disciplined violated some public policy or law, but rather whether the award requiring the reinstatement of [an employee] . . . violated some explicit public policy" (citation omitted)); Stead Motors, 886 F.2d at 1211 n.11 ("[H]owever the public policy itself is established, it is the arbitrator's award which must violate it if the public policy exception is to apply."); Laidlaw Waste Sys., Inc. v. Teamsters, Local 379, Int'l Bhd. of Teamsters, No. CIV. A. 88-0472-MC, 1990 WL 67865, at *2-3 (D. Mass. May 16, 1990) (holding that "[n]ot only must the conduct be against public policy, but the reinstatement itself must violate public policy") (citing United Paperworkers International v. Misco, Inc., 484 U.S. 36, 44 (1987)). Judge Edwards, Circuit Judge of the District of Columbia Circuit, has supported a narrow interpretation of the public policy exception following Misco. See Edwards, supra note 35, at 23, 34. Judge Edwards contends that courts should exercise deference to arbitrators' decisions and should not vacate arbitration awards unless the award itself violates a positive law found in statutes, regulations or caselaw. Id. at 33; cf. John E. Dunsford, The Judicial Doctrine of Public Policy: Misco Reviewed, 4 LAB. LAW. 669, 676 (1988). Professor Dunsford has stated that:

Even if one is sympathetic to the limitist approach of Judge Edwards, it is difficult to accept his reading of W.R. Grace as restricted merely to outright violations of law. . . . It is apparent the Court was thinking of public policy in a broader sense than solely of violations of law or directions to a party to perform an action that would violate the law.

Id.

47. 886 F.2d 1200 (9th Cir. 1989) (plurality opinion) (en banc), cert. denied, 495 U.S. 946 (1990).

48. Id. at 1217. ("[W]e reject the approach of the Eleventh Circuit that, simply because an employee has committed some act which violates a law or a public policy in the course of his [or her] employment, his [or her] reinstatement would also necessarily violate that public policy."). The employer in Stead Motors discharged the employee, a mechanic, for failing to properly secure lug bolts on customers' vehicles. Id. at 1202. The employer had previously given the employee a written warning regarding his negligence in failing to properly secure lug bolts.
tral award reinstating an employee, it must be a policy that bars reinstatement.'

In contrast, other courts interpreting Misco have not required that the award itself contravene public policy. Some of these courts have held that even if an arbitrator's award does not encourage future misconduct, a court may vacate the award if the employee violated public policy and endangered public safety in the course of his or her employment.

The employer challenged the reinstatement as contrary to public policy because it would allow the employee "to 'endanger the lives and safety of the traveling public.'" The court stated that "it is only if the grievant is likely to engage in wrongful conduct which violates public policy in the future that his [or her] reinstatement could be said to violate public policy." The court further stated that it is the function of the arbitrator, not the court, to determine whether the employee is likely to engage in future misconduct.

The court found that the reinstatement award did not contravene public policy for two reasons: (1) there was no well-defined and dominant public policy barring reinstatement of a negligent auto mechanic; and (2) the arbitrator found that suspension would sufficiently discipline the employee and deter future employee misconduct.

49. Id. at 1212. Furthermore, the plurality stated that:

Courts cannot determine merely that there is a "public policy" against a particular sort of behavior in society generally and, irrespective of the findings of the arbitrator, conclude that reinstatement of an individual who engaged in that sort of conduct in the past would violate that policy. In our view, a faithful reading of Misco requires something more.

50. See Iowa Elec. Light & Power v. Local Union 204, Int'l Bhd. of Elec. Workers, 834 F.2d 1424, 1427-28, n.3 (8th Cir. 1987) (applying broad interpretation). The Iowa Electric court stated:

This Court is not required to find that the award itself is illegal before we overrule the arbitrator on public policy grounds. The Supreme Court in United Paperworkers declined to reach the issue of whether such a requirement is to be read into the public policy exception.

Id.; see also Delta Air Lines, Inc. v. Air Line Pilot Ass'n, 861 F.2d 665, 674 (11th Cir. 1989) (examining whether underlying conduct, rather than award itself, contravenes public policy).
ment.\textsuperscript{51} For example, in \textit{Delta Air Lines, Inc. v. Air Line Pilot Ass'n},\textsuperscript{52} the United States Court of Appeals for the Eleventh Circuit reasoned that if an employee, in the course of his or her employment, commits an act that violates public policy, then reinstating that employee would also violate public policy.\textsuperscript{53}

\textbf{C. Public Policy Against Sexual Harassment in the Workplace}

Public policy against sexual harassment in the workplace is well-defined and dominant, and therefore within the scope of \textit{W.R. Grace}.\textsuperscript{54} However, very few employers have sought to vacate arbitration awards

\textsuperscript{51} See Iowa Electric, 834 F.2d 1424, 1427-28 (8th Cir. 1987) (holding that reinstatement of nuclear power plant employee who exited through emergency door and jeopardized reactor safety system violated public policy of "strict adherence to nuclear safety rules"); Russell Memorial Hosp. v. United Steelworkers, 720 F. Supp. 583, 586 n.2 (1989) (noting that "while 'limitist' view is routinely employed in non-public safety cases, the Court declines to extend the 'limitist' view to public safety cases" (citations omitted)); Schaudies & Miller, supra note 1, at 156 (suggesting that broader view is particularly appropriate with regard to illegal drug use in workplace).

\textsuperscript{52} 861 F.2d 665 (11th Cir. 1989).

\textsuperscript{53} See id. at 674 (vacating arbitrator's order where federal government and almost every state had law making it illegal to operate aircraft while intoxicated and arbitrator's order reinstated commercial airline pilot who had flown while intoxicated). \textit{But see Stead Motors v. Automotive Machinists Lodge No. 1173}, 886 F.2d 1200, 1215-16 (9th Cir. 1989) (plurality opinion) (en banc), \textit{cert. denied}, 495 U.S. 946 (1990). The Ninth Circuit in \textit{Stead Motors} stated that:

\begin{quote}
If the performance of an illegal act while on the job is all that must be proved to demonstrate the violation of a public policy for purposes of \textit{Grace} and \textit{Misco}, then an arbitrator would be prohibited from reinstating any teamster who receives a speeding ticket while driving the company truck, or even an inventory clerk who commits a single act of petty theft.
\end{quote}

\textit{Id.} at 1215.

\textsuperscript{54} See Chrysler Motors Corp. v. International Union, Allied Indus. Workers, Local 793, 959 F.2d 685, 687 (7th Cir.) ("The public policy against sexual harassment in the workplace is 'well-recognized.' "), \textit{cert. denied}, 113 S. Ct. 304 (1992). For example, Title VII of the Civil Rights Act of 1964 provides, in pertinent part, that it is unlawful:

\begin{quote}
to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.
\end{quote}

42 U.S.C. § 2000e-2(a)(1) (1988). The Supreme Court has interpreted this provision of Title VII to include not only sexual harassment that has an economic effect on the victim, but also sexual harassment that causes a hostile or offensive working environment. \textit{Meritor Savs. Bank v. Vinson}, 477 U.S. 57, 64-67 (1986). Title VII also provides that an employer has a legal duty to maintain a workplace environment free from sexual harassment. 42 U.S.C.A. § 2000e-2(a)(1).

In addition to Title VII, the regulations of the EEOC support the proposition that the public policy against sexual harassment in the workplace is well-defined in law and legal precedent. \textit{See} \textit{Guidelines on Discrimination Because of Sex}, 29 C.F.R. § 1604 (1992) (providing guidance as to what actions constitute sexual harassment). The EEOC regulations impose liability on employers for sexual harassment if the employer "knows or should have known" about the
on public policy grounds in cases involving sexual harassment.\textsuperscript{55} This is apparently because, in most cases, arbitrators uphold employers' decisions to discharge sexual harassers.\textsuperscript{56} Therefore, it is not surprising that only three circuits have addressed the issue of whether a court may properly vacate an arbitrator's award reinstating a known sexual harasser under the public policy exception.\textsuperscript{57}

The United States Court of Appeals for the Tenth Circuit in \textit{Communication Workers v. Southeastern Electric Cooperative}\textsuperscript{58} was the first circuit court to consider this issue. In \textit{Communication Workers}, the arbitrator concluded that the company's discharge of an employee guilty of sexual harassment was inappropriate.\textsuperscript{59} Therefore, the arbitrator suspended the misconduct and failed to take appropriate preventative steps. 29 C.F.R. § 1604.11(d).


\textsuperscript{55} See Stroehmann Bakeries, Inc. v. Local 776, Int'l Bhd. of Teamsters, 969 F.2d 1436 (3d Cir.) (employer sought to vacate arbitration award on grounds that award contravened public policy), cert. denied, 113 S. Ct. 660 (1992); Chrysler Motors 959 F.2d 685 (same); Newsday, Inc. v. Long Island Typographical Union, 915 F.2d 840, 843 (2d Cir. 1990) (same), cert. denied, 111 S. Ct. 1314 (1991); Communication Workers v. Southeastern Elec. Coop., 882 F.2d 467 (10th Cir. 1989) (same).

\textsuperscript{56} See Jonathan S. Monat & Angel Gomez, \textit{Decisional Standards Used by Arbitrators in Sexual Harassment Cases}, 1986 Labor L.J. 712, 715 (“Arbitrators have routinely upheld discharge as the appropriate remedy for sexual harassment, especially: where the course of conduct extended over time; where the sexual harassment combined with an otherwise poor work record; or where the circumstances of the harassment were aggravated.”) (citations omitted). But see William A. Nowlin, \textit{Sexual Harassment in the Workplace: How Arbitrators Rule}, Arb. J., Dec. 1988, at 31, 35 (stating that “[a]rbitrators are quite consistent in upholding a discharge when a grievant is found to have made unwanted physical contact with another employee”).

\textsuperscript{57} Compare Chrysler Motors, 959 F.2d at 689 (examining arbitrator's award and upholding arbitrator's award of reinstatement of employee guilty of sexual harassment) and \textit{Communication Workers}, 882 F.2d at 469 (examining arbitrator’s award and upholding award of reinstatement of employee guilty of sexual harassment) \textit{with Newsday}, 915 F.2d at 845 (examining arbitrator's award and vacating award of reinstatement of employee guilty of sexual harassment).

\textsuperscript{58} 882 F.2d 467 (10th Cir. 1989).

\textsuperscript{59} Id. at 468. The employee in \textit{Communication Workers}, an electric company lineman, had sexually harassed a customer in the customer's home. \textit{Id.} Although the arbitrator found the employee guilty, the arbitrator reinstated the employee following a one-month suspension because the employee had a nineteen year work record with no sex-related offenses. \textit{Id.} The arbitrator de-
employee without pay. On appeal, the Tenth Circuit found that the arbitrator's award of reinstatement did not violate public policy because the arbitrator had considered all of the evidence and had determined that punishment short of discharge was sufficient to remedy the violation. Thus, the Tenth Circuit deferred to the arbitrator's decision and determined that reinstating an employee guilty of sexual harassment did not violate public policy.

The United States Court of Appeals for the Seventh Circuit, in Chrysler Motors Corp. v. International Union, Allied Industrial Workers, also deferred to the arbitrator's choice of remedy. The arbitrator in Chrysler Motors reinstated an employee guilty of sexual harassment. Although the employee had sexually harassed fellow employees on several previous occasions, the arbitrator considered only the single recent incident in making his decision because Chrysler did not know about the other incidents at the time it discharged the employee. In upholding the arbitrator's award, the Seventh Circuit deferred to the arbitrator's decision, stating that although it did "not condone [the employee's] behavior, it was within the purview of the collective bargaining agreement and public policy for the arbitrator to order his reinstatement."

The United States Court of Appeals for the Second Circuit in Newsday v. Long Island Typographical Union, No. 915, held that the arbitrator's decision that suspension, rather than discharge, was the appropriate sanction because the employee was a first-time offender. Id.

60. Id. at 468-70.
61. Id. The Communication Workers court applied a narrow interpretation of Misco. Id. at 468. The court held that the arbitrator had fully considered the evidence and brought "his informed judgment to bear in order to reach a fair solution of [the] problem." Id. at 470 (quoting United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960)).
62. Id.
63. 959 F.2d 685 (7th Cir.), cert. denied, 113 S. Ct. 304 (1992).
64. Id. at 689.
65. Id. Chrysler Motors Corporation discharged the employee following allegations that the employee sexually harassed a female co-worker, grabbing her breasts and stating, "Yup, they're real." Id. at 686 n.1. The employee filed a grievance with the union, and when Chrysler Motors denied the grievance, the matter went to arbitration. Id. at 689. The collective bargaining agreement between Chrysler Motors Corporation and the Union provided that Chrysler could discharge employees for "just cause." Id. Furthermore, the agreement provided that the arbitrator had authority to determine the proper meaning and application of the clause. Id.
66. Id. at 689. In considering only the single incident, the arbitrator determined that the employee could be rehabilitated. Id. Accordingly, the arbitrator determined that a 30-day suspension without back pay would be sufficient to deter future misconduct. Id.
67. Id. at 689. The Seventh Circuit stated that "[i]n the absence of any explicit provision, the arbitrator is free to bring 'informed judgment, . . . especially . . . when it comes to formulating remedies. '" Id. at 688 (quoting United Paperworkers International Union v. Misco, Inc., 484 U.S. 29, 41 (1987)).
reinstatement of an employee who had been found guilty of sexual harassment did violate public policy. In *Newsday*, the arbitrator considered the serious nature of sexual harassment, as well as the fact that the employee had engaged in similar misconduct in the past in deciding whether to reinstate the employee. Nevertheless, the arbitrator reinstated the employee, concluding that discharge would be too severe a penalty because the employer had not disciplined the employee for his previous misconduct. The district court in *Newsday* vacated the arbitrator's award, holding that reinstating the employee violated the public policy against sexual harassment because it returned a known sexual harasser to the workplace and, thereby, impeded the employer in preventing a hostile and offensive workplace. On appeal, the Second Circuit affirmed the lower court's decision.

D. Industrial Due Process Requirements

Collective bargaining agreements generally do not set forth the procedures for discharging an employee. Rather, most collective bargaining agreements merely provide that an employer may not discharge an employee without "just cause." However, arbitrators have gener-

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69. Id. at 845.
70. Id. at 843.
71. Id. The arbitrator decided that progressive discipline, rather than discharge, would be an appropriate remedy. Id. Therefore, the arbitrator ordered the employer to reinstate the employee without back pay. Id.
72. Id. Commenting on the public policy against sexual harassment in the workplace, Judge Glasser, writing for the court, stated that, "[a] clearer expression of a well defined public policy . . . will not be more readily found. That policy is subverted when an employer is required to reinstate an employee who is a chronic sexual harasser and an award which has that effect should be vacated." Id. (quoting Newsday v. Long Island Typographical Union, (E.D.N.Y.) (unpublished opinion), aff'd, 915 F.2d 840 (2d Cir. 1990), cert. denied, 111 S. Ct. 1314 (1991)).
73. Id. at 845. The Second Circuit noted that the arbitrator failed to take into account the fact the arbitrator who held a hearing on the employee's previous misconduct had ruled that any future acts of sexual harassment would be grounds for discharge. Id. In affirming the district court's decision, the court stated that the arbitrator's decision to reinstate the employee "perpetuate[d] a hostile, intimidating and offensive work environment," and prevented the employer from "carrying out its legal duty to eliminate sexual harassment in the workplace." Id.
74. See Anaconda Co. v. District Lodge No. 27, 693 F.2d 35, 37 (6th Cir. 1982). The collective bargaining agreement in *Anaconda* required management and supervisors to treat employees "fairly and justly." Id.; see also Federated Dep't Stores v. United Food & Commercial Workers Union, Local 1442, 901 F.2d 1494, 1495 (9th Cir. 1990) (discharge provision in collective bargaining agreement stated that employees may be discharged for "good cause"); Safeway Stores, Inc. v. United Food & Commercial Workers Union, Local 400, 621 F. Supp. 1233, 1237 (D.D.C. 1985) (agreement provided management with right to discipline or discharge employee for "good cause").
75. See, e.g., Super Tire Eng'g. Co. v. Teamsters Local Union No. 676, 721 F.2d 121, 122 n.1 (3d Cir. 1983) (discharge provision in collective bargaining
ally found procedural requirements implicit in the language of collective bargaining agreements.\footnote{Stroehmann Bakeries, Inc. v. Local 776, Int'l Bhd. of Teamsters, 969 F.2d 1436, 1444 (3d Cir.)} Accordingly, arbitrators have required employers to follow fair procedures in disciplinary actions, affording employees "industrial due process."\footnote{Julius G. Getman, Labor Arbitration and Dispute Resolution, 88 Yale L.J. 916, 921 (1979).} Courts of several circuits have

agreement provided that "[n]o employee may be discharged or suspended without just cause"), cert. denied, 469 U.S. 817 (1984); Chauffeurs Local Union No. 878 v. Coca-Cola Bottling Co., 613 F.2d 716, 718 (8th Cir.) ("The Employer shall not discharge, suspend or take other disciplinary action with respect to any employee without just cause."), cert. denied, 446 U.S. 988 (1980).

76. See Stroehmann Bakeries, Inc. v. Local 776, Int'l Bhd. of Teamsters, 969 F.2d at 1436, 1444 (3d Cir.) ("When arbitrators interpret collective bargaining agreements containing broad clauses that require employers to follow fair procedure before disciplining employees, they consistently give meaning to those clauses by applying concept called 'industrial due process.'"); cert. denied, 113 S. Ct. 660 (1992); Burke Distrib. Corp. v. Professional Salesman's Union, No. CIV. A. 84-3246-N, 1986 WL 7230, at *2 (D. Mass. June 23, 1986) ("[A]rbitrators generally interpret 'just cause' provisions as imposing basic procedural requirements to satisfy minimum standards of fairness."); Lockheed Aircraft Corp., 27 Lab. Arb. Rep. (BNA) 512, 514 (Nov. 6, 1956) (Warns, Arb.) ("On the face of it, 'just cause' appears so vague as to give no guidance at all to the arbitrator. This is not true, however. Over the years, the 'common law of arbitration' has defined this phrase in fairly understandable terms."); Clyde W. Summers, Individual Protection Against Unjust Dismissal: Time for a Statute, 62 VA. L. REV. 481, 500 (1976) (noting that arbitrators have built body of procedural law on phrase "just cause").

Commentators have disagreed over whether the notion of industrial due process in arbitration is related to constitutional due process. See Owen Fair-weather, Practice and Procedure in Labor Arbitration, 267-68 (Ray J. Schoonhoven ed., 1973) (stating that "most arbitrators find that the strictures that result from too free borrowing of due process principles from criminal law are out of place in the 'shirt sleeves business of arbitration'"); Edgar A. Jones, Jr., Evidentiary Concepts in Labor Arbitration: Some Modern Variations on Ancient Legal Themes, 13 UCLA L. Rev. 1241, 1286-90 (1966) (stating that privilege against self-incrimination should be inapplicable in labor arbitration hearings). But see Brunet, supra note 5, at 91-92 (stating that "labor arbitrators do not systematically ignore assertions of constitutional rights," but rather that "some measure of civil liberties protection is present in the arbitral process by virtue of labor arbitrators' use of their unique brand of 'due process of arbitration'" (citing Goddard Space Flight Center, NASA, 89-1 Lab. Arb. Awards (CCH) ¶ 8038 (June 21, 1988) (Berkeley, Arb.) (arbitrator reversing discharge of employee who pled guilty to charge of cocaine possession because employer failed to specify charges and because supervisor was biased by report from prison inmate who allegedly sold cocaine to employee); Red Wing Co., 79-1 Lab. Arb. Awards (CCH) ¶ 8254 (March 26, 1979) (Denson, Arb.) (arbitrator reversed employer's decision to demote two employees based on their answers to hypothetical safety questions, reasoning that employer did not give employees prior notice that their answers could cause demotion); and City of Detroit, 79-2 Lab. Arb. Awards (CCH) ¶ 8533 (Aug. 30, 1979) (Roumell, Arb.) (reversing suspension of prison guard because employer decided to sanction employee before allowing employee to present his version of incidents)).

77. See Julius G. Getman, Labor Arbitration and Dispute Resolution, 88 Yale L.J. 916, 921 (1979). In examining whether employers have afforded "industrial due process" to employees, arbitrators will generally examine whether (1) the employer imposes equal punishments for similar offenses, (2) the employer gave the employee advance notice of the company's rules and regulations, and (3) the employer gave the employee an opportunity to explain his or her version of the
supported arbitrators' findings that procedural requirements are implicit in collective bargaining agreements.\(^7\)\(^8\)

Thus, if an arbitrator finds that a discharged employee was not afforded industrial due process, the arbitrator may refuse to enforce the employer's decision to discharge the employee.\(^7\)\(^9\) Courts have given

\[\text{id.}\]

An arbitrator will find a lack of industrial due process if the employer has not met all three of these requirements. \(\text{id.}\); see also \(\text{Federated Dep't Stores, 901 F.2d at 1495 (arbitrator reinstating employee after finding that employer did not give employee opportunity to present his version of facts); Super Tire, 721 F.2d at 125 (upholding arbitrator's award of reinstatement based on company's failure to give employee warning of discharge); Chauffeurs, 613 F.2d at 717 (arbitrator reinstating employee after finding employer did not give employee opportunity to present his version of facts prior to termination).}\)

In addition, an arbitrator may determine that the employer did not afford the employee industrial due process if key witnesses did not testify at the arbitration hearing, or if the employer failed to conduct an adequate investigation of the alleged charges. See Ken Jennings & Roger Wolters, \(\text{Discharge Cases Reconsidered, 31 Arb. J. 164, 178 (1976) (discussing requirements of industrial due process); see also Pan Am. Corp. v. Air Line Pilots Ass'n, 140 B.R. 336, 339-40 (S.D.N.Y. 1992) (arbitrator reinstated employee upon finding that employer did not conduct adequate investigation of charges against employee); Burke, 1986 WL 7230, at *2-3 (arbitrator reinstated employee upon finding that employer did not conduct fair and complete investigation of charges against employee).}\)

In examining discharge cases, Professors Jennings and Wolters found that:

\(\text{[the most commonly cited violation of due process which did occur revolved around the investigation of the incident. More specifically, the grievant was not permitted to explain his [or her] actions prior to the time the decision to discharge him [or her] was made, or key witnesses to the incident in question were not present to give first-hand testimony at the arbitration hearing.}^{\text{\textsuperscript{78}}}\)

\(\text{Jennings & Wolter, supra, at 178.}\)

\(\text{\textsuperscript{78}} \text{See, e.g., Federated Dep't Stores, 901 F.2d at 1497 ("When interpreting a collective bargaining agreement, the 'arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it." (quoting United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 564, 581-82 (1960)); Johnston Boiler Co. v. Local Lodge 893, Int'l Blvd. of Boilermakers, 753 F.2d 40, 43 (6th Cir. 1985) (holding that arbitrator's decision to reinstate employee on procedural grounds was justified because "[t]he determination of procedural fairness is sufficiently integral to 'just cause' to sustain arbitrator's decision to decide that issue"); Arco-Polymers, Inc. v. Local 8-74, 671 F.2d 752, 756 (3d Cir.) (holding that contract clause requiring "just cause" for discharge gives arbitrator power to "apply all the surrounding facts and circumstances to his [or her] interpretation of the contract to determine whether or not discharge is proper"), cert. denied, 459 U.S. 828 (1982); Anaconda, 693 F.2d at 37 ("The arbitrator was not modifying the provisions of the collective bargaining agreement . . . but rather was interpreting . . . 'fairly and justly.' While this provision is very broad and gives the arbitrator great discretion, the Company agreed to such discretion when it signed the agreement.'); Chauffeurs, 613 F.2d at 719 (stating that because "just cause" term is ambiguous as to its procedural implications, interpretation by arbitrator is appropriate); Burke, 1986 WL 7230, at *4 ("Case law plainly supports the arbitrator's decision that the phrase 'just cause' included elements of procedural due process . . . .")}.\)

\(\text{\textsuperscript{79}} \text{See, e.g., Anaconda, 693 F.2d at 35 (arbitrator reinstating employee after}}\)
substantial weight to due process concerns, upholding arbitrators’ decisions to reinstate employees because of lack of industrial due process even where the employee was guilty of the alleged misconduct.\textsuperscript{80}

III. \textit{STROEHMANN BAKERIES v. LOCAL 776, INTERNATIONAL BROTHERHOOD OF TEAMSTERS}

A. Facts

On November 20, 1989, Stroehmann Bakeries dismissed one of its delivery drivers for violating a company policy that prohibited immoral conduct while on duty.\textsuperscript{81} Specifically, Stroehmann discharged the delivery driver for allegedly sexually harassing a customer's employee during the driver's November 12, 1989 delivery.\textsuperscript{82}

Stroehmann first learned about the incident that led to the delivery driver's dismissal on November 14, 1989.\textsuperscript{83} On that day, the manager of one of its customer stores, Stauffer's, contacted Stroehmann's Sales Activator and Stroehmann's Branch Manager to report that the Stroehmann delivery driver had sexually harassed Stauffer's night clerk.\textsuperscript{84} The manager told Stroehmann officials that because of the incident, he did not want the Stroehmann delivery driver to make any more deliveries to Stauffer's.\textsuperscript{85} Later that day, Stroehmann's Sales Activator and its Branch Manager called the Stauffer's night clerk and asked her about the incident that her manager had reported.\textsuperscript{86}

finding that employer did not allow employee to have union representation when charges were presented against him); see also Leslye M. Fraser, \textit{Sexual Harassment in the Workplace: Conflicts Employers May Face Between Title VII's Reasonable Woman Standard and Arbitration Principles}, 20 N.Y.U. REV. L. & SOC. CHANGE 1, 20 (stating that arbitrator may refuse, on grounds of industrial due process, to enforce employer's decision to discharge employee and may reinstate employee or reduce discharge to suspension).

80. \textit{See}, e.g., \textit{Super Tire}, 721 F.2d at 125 (upholding arbitrator's award of reinstatement on due process grounds even though arbitrator found employee guilty of consumption of alcohol during working hours); \textit{Safeway}, 621 F. Supp. at 1239-41 (upholding arbitrator's award of reinstatement on due process grounds even though employee guilty of insubordination and threatening supervisor).


82. \textit{Id.}

83. \textit{Id.}

84. \textit{Id.} at 1438. Stauffer's night clerk had told her mother that a Stroehmann employee had sexually harassed her on the evening of November 12, 1989. \textit{Id.} The night clerk's mother subsequently called Stauffer's manager to report the incident. \textit{Id.} According to the clerk's mother, the Stroehmann driver had touched one of the night clerk's breasts without her consent and made offensive remarks to her. \textit{Id.}

85. \textit{Id.}

86. \textit{Id.} at 1438-39. The night clerk told the Branch Manager and the Sales Activator that when the employee came into the store to make his delivery on
Following Stroehmann's discussion with the night clerk, Stroehmann's Branch Manager contacted the delivery driver and asked him to come to the office. The employee asked the Branch Manager if he should bring a union representative with him to the meeting, and the Branch Manager said that the employee could make that decision for himself. When the Sales Activator, the Branch Manager and the employee's supervisor told the employee about the night clerk's allegations, the employee denied the allegations. At that meeting, Stroehmann's Branch Manager prepared a report containing the employee's version of the incident, and the employee signed the report. The written report of the meeting stated that the employee was "suspended pending further investigation of the alleged incident."

Over the next few days, the Branch Manager met with his superiors and with Stroehmann's attorney to discuss the incident. The Branch Manager also met with the manager at Stauffer's to discuss the meeting with the delivery driver. On November 20th, the Branch Manager discharged the employee-driver for violating a company policy prohibiting

November 12, 1989, he told her that he was excited by a conversation he had heard on his citizen's band (CB) radio about an orgy. The night clerk claimed that the employee then tried to pull her shirt up to feel her breasts, but that she resisted. She also stated that she walked to the front of the store to see if the other night clerk had arrived. As she did so, the employee came up behind her, reached around her and grabbed her breasts. She said she told the employee to leave, and when he left, she locked the door behind him.

At the time that Stroehmann's Sales Activator and Branch Manager spoke with the night clerk, the clerk was "emotionally upset" and cried during the conversation. The Sales Activator and Branch Manager prepared a written report of the phone conversation with the night clerk that the night clerk signed two months later. Because the details in the night clerk's signed report differed from the details provided in the report the night clerk's mother relayed to Stauffer officials, the exact details of the incident are unclear. According to the version the clerk told to her mother, the Stroehmann employee harassed her after making his deliveries. In the version that the night clerk reported to the Stroehmann management, the employee harassed her immediately after entering the store. The clerk also related the Stroehmann employee's comments about the CB radio conversation and about her breast being shaped like an orange to Stroehmann management, but she omitted these details in her first version to her mother.

87. Id. at 1439.
88. Id.
89. Id. The employee denied all the allegations and stated that the night clerk was "wacko," and he would not do anything to "jeopardize his marriage."
90. Id. Moreover, the employee asserted that the clerk's allegations about his CB radio conversation were obviously untrue because his CB radio was broken. The employee asked the Sales Activator, Branch Manager and his supervisor to look at his radio, however, they declined to do so.
91. Id. The Branch Manager's report did not include any of the employee's comments about the radio.
92. Id.
93. Id.
immoral conduct while on duty.94

Following his discharge, the employee-driver filed a grievance with Local 776 International Brotherhood of Teamsters pursuant to the collective bargaining agreement between Stroehmann and the Teamsters.95 An arbitration hearing was held on March 29, 1990 to determine whether Stroehmann had just cause for discharging the employee-driver.96 The arbitrator determined that Stroehmann had inadequately investigated the night clerk’s and manager’s allegations before dismissing the delivery driver.97 The arbitrator concluded that Stroehmann did not have just cause for the employee’s discharge and reinstated the employee to his former position.98

Following the arbitrator’s decision, Stroehmann brought an action in the United States District Court for the Middle District of Pennsylvania seeking to vacate the arbitrator’s award.99 The district court vacated the award and remanded the matter for a de novo hearing before a different arbitrator to determine whether Stroehmann properly

94. Id. When the Branch Manager told the Stroehmann employee that he was being discharged for immoral conduct while on duty, the employee responded that it was the night clerk who had made unreciprocated sexual advances. Id. The Stroehmann employee “accused the victim of ‘talking sex’ to him and making sexual advances toward him.” Stroehmann Bakeries, Inc. v. Local 776 Int’l Bhd. of Teamsters, 762 F. Supp. 1187, 1189 n.4 (M.D. Pa. 1991), aff’d, 969 F.2d 1436 (3d Cir.), cert. denied, 113 S. Ct. 660 (1992).

95. Stroehmann Bakeries, Inc. v. Local 776, Int’l Bhd. of Teamsters, 969 F.2d 1436, 1439 (3d Cir.), cert. denied, 113 S. Ct. 660 (1992). The collective bargaining agreement between Stroehmann and the Local 776 provided that Stroehmann would “exercise the power of discipline and discharge fairly and with regard for the reasonable rights of the employees.” Id. (quoting App. at 10). The Agreement also provided that “[a]ny employee who has been disciplined or discharged for any reason shall have the right to a hearing under the grievance and arbitration provisions.” Id. at 1439-40.

96. Id. at 1440.

97. Id. The arbitrator’s report stated: “If Stroehmann’s investigation had been at all consistent with the severity of [the clerk’s] accusations and of their consequences for [the employee’s] life and if that investigation had provided an adequate basis to believe that [the employee] had behaved as charged, Stroehmann’s discharge decision would have been unassailable.” Id. at 1448 (Becker, J., dissenting). The arbitrator also noted in his opinion that Stroehmann based its decision on information that was “double hearsay.” Id. (Becker, J., dissenting). Furthermore, the arbitrator noted that if he had considered the credibility of the two witnesses, the night clerk and the Stroehmann employee, Stroehmann management would “have had to lose [its challenge of the employee’s reinstatement] for having failed to bear its burden of proof.” Id. (Becker, J., dissenting).

98. Id. at 1440. The arbitrator ordered the employee’s “reinstatement with full back pay less interim earnings.” Id.

The Union appealed from the district court's decision, claiming that the district court made three errors: (1) the district court examined whether the means of determining the award, not the award itself, contravened public policy; (2) the district court did not give sufficient weight to the industrial due process concerns; and (3) the district court unfairly characterized the arbitrator as insensitive to victims of sexual harassment and biased toward the employee.\footnote{Id.}

**B. Judge Hutchinson's Majority Opinion**

The United States Court of Appeals for the Third Circuit began its determination of whether the district court had properly vacated the arbitrator's award by examining when courts should apply the public policy exception.\footnote{Stroehmann Bakeries, Inc. v. Local 776, Int'l Bhd. of Teamsters, 969 F.2d 1436, 1441 (3d Cir.), cert. denied, 113 S. Ct. 660 (1992). Judge Scirica joined in the majority opinion written by Judge Hutchinson. Id. at 1437. Judge Becker filed a dissenting opinion in the case. Id. at 1447 (Becker, J., dissenting). For a discussion of the majority's opinion, see infra notes 102-14 and accompanying text. For a discussion of Judge Becker's dissent, see infra notes 115-25 and accompanying text.} Although the Third Circuit had not previously considered whether the public policy exception was applicable to claims of sexual harassment in the workplace, the court determined that "[t]here is a well-defined and dominant public policy concerning sexual harassment in the workplace which can be ascertained by reference to law and legal precedent."\footnote{Stroehmann Bakeries, 969 F.2d at 1441-44. Id. at 1441. The court arrived at this conclusion by examining Title VII of the Civil Rights Act of 1964, the Supreme Court's decision in Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), and the EEOC regulations on sexual harassment. Stroehmann Bakeries, 969 F.2d at 1441-42. For a discussion of the law and legal precedent concerning sexual harassment in the workplace, see supra note 53. Although the Third Circuit had not previously considered whether the public policy exception against sexual harassment in the workplace was well-defined and dominant, with a basis in law and legal precedent, the Courts of Appeals for the Seventh, Second and Tenth Circuits had previously considered the issue. See Chrysler Motors Corp. v. International Union, Allied Indus. Workers, 959 F.2d 685, 687 (7th Cir.) (concluding that "the public policy against sexual harassment in the workplace is well-defined"), cert. denied, 113 S. Ct. 304 (1992); Newsday,}
policy existed with regard to “favoring voluntary employer prevention and application of sanctions against sexual harassment in the workplace.”

In examining the district court’s application of the public policy exception, the Third Circuit determined that an award reinstating an employee accused of sexual harassment without a finding on the merits contravened both the public policy prohibiting sexual harassment in the workplace and the public policy favoring employer prevention of such harassment. The court examined other circuit’s decisions and concluded that the district court had properly vacated the arbitrator’s award on public policy grounds.

Inc. v. Long Island Typographical Union, No. 915, 915 F.2d 840, 845 (2d Cir. 1990) (finding that “there is an explicit, well-defined, and dominant public policy against sexual harassment in the workplace”), cert. denied, 111 S. Ct. 1314 (1991); Communication Workers v. Southeastern Elec. Coop., 882 F.2d 467, 469 n.5 (10th Cir. 1989) (noting that Tenth Circuit had recently recognized public policy against sexual harassment in workplace in Williams v. Maremont Corp., 875 F.2d 1476 (10th Cir. 1989)). For a discussion of Newsday, Chrysler Motors and Communication Workers, see supra notes 54-73 and accompanying text.

104. Stroehmann Bakeries, 969 F.2d at 1442. The court quoted the EEOC regulations:

Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

Id. (quoting Guidelines On Discrimination Because of Sex, 29 C.F.R. § 1604.11(f) (1991)). The court stated that Stroehmann’s actions in dealing with the clerk’s allegations complied with the EEOC regulations promoting the public policy favoring employer prevention of sexual harassment in the workplace. Id.

105. Id. The court stated that:

[the arbitrator] construed the Agreement between the parties in a manner that conflicts with the well-defined and dominant public policy concerning sexual harassment in the workplace and its prevention. His award would allow a person who may have committed sexual harassment to continue in the workplace without a determination of whether sexual harassment occurred. Certainly, it does not discourage sexual harassment. Instead, it undermines the employer’s ability to fulfill its obligation to prevent and sanction sexual harassment in the workplace.

Id.

106. Id. at 1444. The court based its decision on the rationale of the Second, Seventh and Tenth Circuits. See id. at 1442-44. In Newsday, the Second Circuit vacated the arbitrator’s award because it returned a known sexual harasser to the workplace. Newsday, 915 F.2d at 845. The Stroehmann court reasoned that such an award “perpetuate[d] a hostile and offensive work environment and inhibit[e]d the employer from performing its duty to prevent sexual harassment.” Stroehmann Bakeries, 969 F.2d at 1443. The Stroehmann court further reasoned that the Tenth Circuit’s holding in Communication Workers supported its decision to vacate the arbitrator’s award. Stroehmann Bakeries, 969 F.2d at 1443. The Tenth Circuit upheld an arbitrator’s award because the arbitrator considered the merits of the case and imposed some disciplinary measures in
The Third Circuit next considered the Union’s claim that the district court failed to give sufficient weight to industrial due process concerns and found this claim to be “meritless.” The court acknowledged the importance of industrial due process and conceded that the cases the Union offered stood “for the unobjectionable general proposition that arbitrator’s awards that reinstate discharged employees are not subject to judicial interference if the employer did not afford the employee industrial due process.” The court further stated, how-

suspending the employee. Communication Workers, 882 F.2d at 469. The Stroehmann court distinguished Communication Workers from the case before it, noting that unlike the arbitrator in Communication Workers, the arbitrator in Stroehmann did not consider the merits of case and failed to take any disciplinary measures against the employee. Stroehmann, 969 F.2d at 1443. The Stroehmann court stated that Communication Workers “does not stand for the proposition that objectively unwelcome sexual advances can be ignored by a labor arbitrator.” Id. According to the Stroehmann court, “[t]he Tenth Circuit merely deferred to the arbitrator’s choice of remedy.” Id. Finally, in a footnote, the Stroehmann court cited the Seventh Circuit’s decision in Chrysler Motors as standing for the same proposition. Id. at 1443 n.4. For a discussion of Newsday, Chrysler Motors and Communication Workers, see supra notes 54-73 and accompanying text.

107. Stroehmann Bakeries, 969 F.2d at 1444. The court commented, “[w]e recognize the importance of industrial due process in the workplace and in the day-to-day administration of the labor contracts there, but nothing the Union has presented to us, nor that we have discovered through our own research demonstrates that Stroehmann did not respect it.” Id.

The court’s reference to “our own research” is puzzling because it suggests that the Third Circuit conducted its own factfinding of the incident in Stroehmann. According to the Supreme Court’s decision in Misco, it is impermis-
sible for a court to conduct its own factfinding. United Paperworkers Int’l Union v. Misco, Inc. 484 U.S. 29, 45 (1987). In Misco, the Court stated that:

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 [the employee] and to be familiar with the [company] and its problems.

Nor does the fact that it is inquiring into a possible violation of public policy excu-
cise a court for doing the arbitrator’s task.

Id. (emphasis added). For a general discussion of industrial due process and the procedural requirements an employer must follow to discharge an employee, see supra notes 74-80 and accompanying text.

108. Stroehmann Bakeries, 969 F.2d at 1445. For support of this proposition, see Federated Department Stores v. United Food & Commercial Workers Union, Local 1442, 901 F.2d 1494, 1498 (9th Cir. 1990) (upholding arbitrator’s decision to reinstate employee based on employer’s failure to give employee opportunity to present his version of facts); Super Tire Engineering Co. v. Teamsters Local Union No. 676, 721 F.2d 121, 125 (3d Cir. 1983) (deferring to arbitrator’s decision to reinstate, on due process grounds, employee found guilty of consumption of alcohol during work hours), cert. denied, 469 U.S. 817 (1984); Anaconda Co. v. District Lodge No. 27 of the International Ass’n of Machinists, 693 F.2d 35, 37 (6th Cir. 1982) (upholding arbitrator’s decision to reinstate employee on grounds that employer did not allow employee to have union representation when charges were presented against him); Chauffeurs Local Union No. 878 v. Coca-Cola Bottling Co., 613 F.2d 716, 720-21 (8th Cir.) (upholding arbitrator’s decision to reinstate employee on grounds that employer did not give employee opportunity to present his version of facts), cert. denied, 446 U.S. 988 (1980); and Safeway Stores, Inc. v. United Food Workers Union, Local 400, 621 F. Supp. 1233, 1299-41 (D.D.C. 1985) (deferring to arbi-
ever, that these cases were "inapposite" because Stroehmann did afford the employee industrial due process. The court noted that Stroehmann confronted the employee with the allegations, allowed the employee to respond to the charges, provided adequate notice in its company policies that immoral conduct could result in discharge and allowed the employee to have union representation during his meetings with management. Moreover, the court reasoned that the decision to suspend the employee prior to confrontation was not a denial of industrial due process, nor a "prejudgment." In reviewing the district court's decision, therefore, the Third Circuit found that the district court had given sufficient weight to industrial due process considerations.

In examining the Union's third claim of error, that the district court improperly characterized the arbitrator as biased toward the employee

109. Stroehmann Bakeries, 969 F.2d at 1445. The Union had also argued that Stroehmann failed to afford the employee industrial due process because the Stroehmann officials did not investigate the employee's claim that his CB radio was broken. Id. The court dismissed this argument stating that "[t]he broken radio would be evidence that he had not been listening to such [erotic] conversations . . . not evidence that he did not tell [the clerk] he had been doing so." Id. For a discussion of how the dissent interpreted this evidence, see infra note 124 and accompanying text.

110. Stroehmann Bakeries, 969 F.2d at 1445. In addition, all of the key witnesses, including the victim testified at the arbitration hearing. Id. For a discussion of industrial due process requirements, see supra notes 74-80 and accompanying text.

111. Stroehmann Bakeries, 969 F.2d at 1445. The court stated that although Stroehmann officials had decided to suspend the employee-driver before speaking to him, they had not decided to discharge the employee-driver until after they had spoken to him twice. Id. For a discussion of the dissent's view of the extent to which Stroehmann afforded the employee industrial due process, see infra notes 122-25 and accompanying text.

Although the court determined that Stroehmann had properly followed the procedures for discharge, Judge Hutchinson noted in a footnote that even if Stroehmann had not met the procedural requirements, judicial review under the public policy exception would still be appropriate. Stroehmann Bakeries, 969 F.2d at 1445 n.7. Judge Hutchinson commented:

The writer of this opinion believes this case could be decided on an alternate ground. Even if Stroehmann did not fully afford [the employee] industrial due process, the writer believes that failure cannot completely override all other public policy concerns. In this respect, he would be careful to distinguish the concept of industrial due process from due process as required by the Constitution. The writer further believes that the Supreme Court's public policy exception . . . implies that a labor arbitrator's concept of industrial due process does not override a definitive public policy. Thus, he concludes that a lack of full industrial due process, had it occurred, would not provide a reason for reversing the district court's order . . . .

Id.

112. Stroehmann Bakeries, 969 F.2d at 1445.
and insensitive toward victims of sexual harassment, the court agreed that the district court had taken some of the arbitrator's comments out of context.\textsuperscript{113} However, the court further noted that the district court's decision to vacate the arbitrator's award was still proper because it was based on public policy grounds, not on bias.\textsuperscript{114}

C. Judge Becker's Dissenting Opinion

Judge Becker, in his dissent, agreed with the majority that there is a strong public policy against sexual harassment.\textsuperscript{115} He contended, however, that the majority, in its "zeal to advance that public policy . . . committed two fundamental errors that seriously undermine[d] its position."\textsuperscript{116} The first error that Judge Becker identified was the court's misapplication of the public policy exception.\textsuperscript{117} Judge Becker con-

\textsuperscript{113} Id. at 1446.

\textsuperscript{114} Id. (citing Stroehmann Bakeries, Inc. v. Local 776 International Brotherhood of Teamsters, 762 F. Supp. 1187, 1190 (M.D. Pa. 1991)). In deciding whether the district court's decision to remand the matter to a different arbitrator was the proper remedy, the court noted that the standard of review was abuse of discretion. Id. at 1446 (citing Pennsylvania v. Local Union 542, International Union of Operating Engineers, 807 F.2d 330, 334 (3d Cir. 1986)). The court concluded that the district court did not abuse its discretion in remanding to a new arbitrator. Id. The court decided that even if the record did not support the contention that the arbitrator was generally biased against sexual harassment claimants, the record did show partiality toward the employee. Id. The court found that the arbitrator demonstrated a partiality toward the employee by examining the arbitrator's statements and behavior at the hearing. Id. For example, the arbitrator allowed the employee's attorney to ask the question, "Would you think an average man or yourself would make a pass at a woman that weighs 225 pounds?" Id. (quoting App. at 174-75). The arbitrator also characterized the alleged victim as "unattractive and frustrated." Id. (quoting App. at 32, 41). In addition, the court noted that the arbitrator disregarded the employee's admission that he made sexual comments to the clerk. Id. In regard to the comments, the arbitrator stated that the comments would not have been "culpable under or inconsistent with Stroehmann's rules, acceptable standards of social intercourse, or what [the clerk's] and [the employee's] bantering business relationship had been." Id. (quoting App. at 36). In contrast, the dissent stated that the majority's examples of bias did not exhibit partiality when put into context. Id. (Becker, J., dissenting). Judge Becker stated:

\begin{quote}
The arbitrator did allow questions about whether an "average man" would sexually harass [the clerk]. But the arbitrator's opinion itself suggests that such considerations were irrelevant to his decision and that he found them offensive . . . . The majority further engages in mischaracterization of the arbitrator's opinion by excerpting the phrase "unattractive and frustrated." In fact, the arbitrator suggested that to conclude that [the clerk] had not been sexually harassed because she was unattractive and frustrated would be an "illogical conclusion."
\end{quote}

Id. (Becker, J. dissenting).

\textsuperscript{115} Id. at 1447 (Becker, J., dissenting). Judge Becker stated that he "applaud[ed] the court's recognition of the importance of vindicating the rights of women in the workplace." Id. (Becker, J., dissenting).

\textsuperscript{116} Id. (Becker, J., dissenting).

\textsuperscript{117} Id. at 1450 (Becker, J., dissenting). Judge Becker claimed that the majority merely examined whether the case involved a well-defined and dominant
ceded that the public policy against sexual harassment in the workplace is well-defined and dominant, and thus within the scope of *W.R. Grace.* In contrast to the majority opinion, however, Judge Becker contended that the arbitrator’s award did not contravene such public policy. Judge Becker stated that, contrary to the majority’s view, the arbitrator did make a determination on the merits of the case, finding insufficient evidence to support a claim of sexual harassment. In addition, Judge Becker stated that even if the arbitrator had failed to make a determination on the merits, the employee’s reinstatement still would not have violated public policy because guaranteeing procedural fairness to employees is not contrary to public policy.

public policy and did not properly consider whether the award violated public policy. *Id.* (Becker, J., dissenting). In contending that the majority did not go far enough in its public policy analysis, Judge Becker asserted that, “in reviewing arbitrator’s decisions, we must do more than merely ascertain that a genuine public policy is involved. We must also determine based on facts that the arbitrator has found, that the award would violate public policy.” *Id.* (Becker, J., dissenting). Judge Becker’s interpretation of the public policy exception is similar to the Ninth Circuit’s. See, e.g., Stead Motors v. Automotive Machinists Lodge No. 1173, 886 F.2d 1200 (9th Cir. 1989) (holding that reinstatement of employee who had failed to secure lug bolts on vehicle was not contrary to public policy because there is no public policy barring reinstatement of negligent auto mechanic), cert. denied, 495 U.S. 946 (1990).

118. *Stroehmann Bakeries*, 969 F.2d at 1450 (Becker, J., dissenting).

119. *Id.* (Becker, J., dissenting) (“[A] public policy against sexual harassment in the workplace can be readily derived from federal statutes and regulations as well as from judicial decisions . . . . [I]f the public policy against sexual harassment were offended by this arbitrator’s decision, the award could not stand.”).

120. *Id.* (Becker, J., dissenting). Judge Becker stated that the arbitrator had not refused to find whether sexual harassment occurred, but rather had considered the claim and found the evidence insufficient to support a charge. *Id.* at 1448 (Becker, J., dissenting).

121. *Id.* at 1450 (Becker, J., dissenting). Judge Becker stated that the majority’s public policy analysis was “deeply flawed” because he could not understand “how guaranteeing procedural fairness to employees accused of sexual harassment [could] violate the public policy against sexual harassment.” *Id.* at 1451 (Becker, J., dissenting).

After examining decisions of other circuits, Judge Becker asserted that the majority’s holding was “unprecedented.” *Id.* (Becker, J., dissenting). Judge Becker contended that the Tenth Circuit’s decision in *Communication Workers* did not support the majority’s conclusion, as the majority contended, but rather “strongly militate[d] against the majority’s conclusion.” *Id.* (Becker, J., dissenting) (citing Communication Workers v. Southeastern Electric Cooperative, 882 F.2d 467 (10th Cir. 1989)). Judge Becker pointed out that the award at issue in *Stroehmann* was less likely to contravene public policy than the award in *Communication Workers* because the *Stroehmann* award would return an accused sexual harasser, rather than a known sexual harasser, to the workplace. *Id.* (Becker, J., dissenting). In addition, Judge Becker cited the Seventh Circuit’s recent decision in *Chrysler Motors Corp. v. International Union, Allied Industrial Workers of America*, in support of the proposition that reinstatement of an known sexual harasser does not violate the public policy against sexual harassment in the workplace. *Id.* (Becker, J., dissenting) (citing Chrysler Motors Corp. v. Interna-
On the issue of lack of industrial due process, the second error that Judge Becker identified in the majority's opinion, Judge Becker stated that Stroehmann did not meet the collective bargaining agreement's procedural requirements. Judge Becker noted that the agreement required Stroehmann's "higher management" to conduct an investigation and required Stroehmann to carry the burden of proving that the alleged conduct actually occurred. In finding that Stroehmann did not meet either of these requirements, Judge Becker stated that the arbitrator's reinstatement of the employee was proper. Further, Judge Becker commented that courts should subject arbitrators' awards that reinstate employees on the basis of lack of industrial due process to an "exceedingly narrow scope of judicial review."

IV. ANALYSIS

The majority in Stroehmann Bakeries broadly interpreted the public policy exception in an effort to promote the public policy against sexual harassment in the workplace. However, the majority, in its "zeal" to...
advance public policy, arguably added more confusion to the already problematic public policy exception, overstepped the boundaries of judicial review and minimized industrial due process concerns.

First, in broadly interpreting the public policy exception, the majority expanded the exception. In *Stroehmann Bakeries*, the arbitrator allegedly failed to make findings on the merits because he decided that Stroehmann did not afford the employee industrial due process.\(^{127}\) By vacating this award on public policy grounds, the majority essentially implied that guaranteeing procedural fairness to employees can be contrary to public policy.\(^{128}\) Moreover, by basing its decision on public policy grounds, the majority arguably broadened the scope of the public policy exception to include awards that reinstate accused sexual harassers.\(^{129}\)

In addition to expanding the scope of the public policy exception, the majority also overstepped the boundaries of judicial review by second-guessing the arbitrator’s interpretation of the collective bargaining agreement and the arbitrator’s fact-finding. In reviewing the issue of industrial due process, the majority conceded that the cases the Union

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\(^{127}\) *Stroehmann Bakeries*, 969 F.2d at 1438. The majority found that the arbitrator’s award contravened public policy because the arbitrator did not make a determination on the merits. *Id.* The arbitrator interpreted the collective bargaining agreement to mean that if the employer dismisses an employee without just cause, the arbitrator may reinstate the employee on that basis, regardless of whether the employee was guilty of the underlying misconduct. *Id.*

\(^{128}\) *Stroehmann Bakeries*, 969 F.2d at 1436; cf. *Pan Am. Corp. v. Air Line Pilot Ass’n*, 140 B.R. 336, 337-38 (S.D.N.Y. 1992) (finding arbitrator did not exceed authority in ordering reinstatement of employee for lack of industrial due process without making findings on merits); *Nowlin*, supra note 56, at 40 (stating that “[t]o have discipline sustained for sexual harassment, it must be clear that the grievant knew or should have known of the rules; there must have been an investigation, even if the grievant was previously warned; and there must have been testimony from the victim”).

\(^{129}\) *See Stroehmann Bakeries*, 969 F.2d at 1451 (Becker, J., dissenting). Judge Becker, in his dissent, posited that the majority’s public policy analysis was deeply flawed for this reason. *Id.* (Becker, J., dissenting). Judge Becker also stated that the majority’s application of the public policy exception places the burden on proof on the employee to prove that the sexual harassment did not occur. *Id.* at 1447 (Becker, J., dissenting). Such shifting of the burden of proof, Judge Becker stated, “would directly contravene the just cause clause for which the parties have bargained.” *Id.* at 1451 (Becker, J., dissenting); *see also Fraser*, supra note 79, at 39 (stating that majority’s holding in *Stroehmann* “improperly places the burden of proof on the accused to show that he did not sexually harass the complainant”).
cited did support the general proposition that judicial review of arbitrator's awards is improper if the employer failed to afford the employee industrial due process.\textsuperscript{130} However, the majority found that these cases were not relevant because "Stroehmann did not reach its decision to discharge [the employee] without respecting industrial due process."\textsuperscript{131} While the majority's conclusion that Stroehmann afforded the employee industrial due process is correct, such a determination is for the arbitrator, not the court.\textsuperscript{132} Even if the arbitrator in \textit{Stroehmann Bakeries} was wrong in construing the scope of the "high-level management investigation," under \textit{Misco}, the court still owes deference to the arbitrator's finding that Stroehmann did not afford the employee industrial due process.\textsuperscript{133} The industrial due process cases, therefore, are not inappo-

\textsuperscript{130}. \textit{Stroehmann Bakeries}, 969 F.2d at 1445. The majority in \textit{Stroehmann Bakeries} stated that:

[t]he cases the Union cited for the court at oral argument stand for the unobjectionable general proposition that arbitrators' awards that reinstate discharged employees are not subject to judicial interference if the employer did not afford the employee industrial due process.

\textit{Id.} (emphasis added).

\textsuperscript{131}. \textit{Id.} The majority emphasized that Stroehmann confronted the employee with the allegations against him, afforded him an opportunity to present his version of the alleged incident, allowed him to have union representation at his meeting with the management and presented all of the key witnesses at the arbitration hearing. \textit{Id.} For a general discussion of the requirements of industrial due process, see \textit{supra} notes 74-80 and accompanying text.


Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept . . . . To resolve disputes about the application of a collective bargaining agreement, an arbitrator must find facts and a court may not reject those facts simply because it disagrees with them. The same is true of the arbitrator's interpretation of the contract.

\textit{Id.}

The \textit{Stroehmann} majority stated that nothing in its finding suggested that Stroehmann denied the employee his industrial due process rights. \textit{Stroehmann Bakeries}, 969 F.2d at 1444. Such a determination is for the arbitrator, not the court, however, because the parties to a collective bargaining agreement authorize the arbitrator to conduct fact-finding and to interpret the contract. \textit{See Elkouri & Elkouri, supra} note 1, at 5.

\textsuperscript{133}. \textit{See Misco}, 484 U.S. at 38 (stating that court owes deference to arbitrator even when arbitrator is arguably wrong in construing the collective bargaining agreement); \textit{see also} United States Postal Serv. v. National Ass'n of Letter Carriers, 839 F.2d 146, 149 (3d Cir. 1988) (stating that "[c]ourts are prohibited from second-guessing the arbitrator's fact-finding and contract interpretation 'as long as the arbitrator is even arguably construing or applying the contract within the scope of his [or her] authority' rather than simply applying his [or her] own brand of industrial justice" (quoting United Paperworkers International Union v. Misco, Inc. 484 U.S. 29, 38 (1987))). Following \textit{Misco}, in \textit{United States Postal Service}, the Third Circuit identified three circumstances in which judicial review of an arbitration award would be inappropriate. \textit{United States Postal Service}, 839 F.2d at 148. The Third Circuit identified the following grounds as inappropriate bases for judicial review of an arbitration award:
site as the majority suggests, because the decision was properly that of the arbitrator, not the court.\textsuperscript{134}

Finally, in suggesting that even if Stroehmann failed to fully afford the employee full industrial due process, public policy concerns would override procedural concerns and permit a court to vacate the award,\textsuperscript{135} Judge Hutchinson minimized industrial due process concerns. Although Judge Hutchinson cited the Supreme Court's decision in \textit{Misco} as support for this proposition,\textsuperscript{136} nothing in the Court's decision in \textit{Misco} supports Judge Hutchinson's conclusion. Instead, \textit{Misco} would appear to support the proposition that unless the parties prohibited the

\begin{itemize}
  \item \textbf{(1)} asserting a public policy without substantiating its existence within existing laws and legal precedents, and thereby failing to distinguish its pedigree as a "well-defined and dominant" public policy as opposed to a "general consideration of supposed public interests;"
  \item \textbf{(2)} second-guessing the arbitrator's fact-finding particularly insofar as the conclusion that the asserted public policy would be violated by the employee's reinstatement depends on drawing factual inferences not made by the arbitrator and;
  \item \textbf{(3)} second-guessing the arbitrator's reasonable construction of the "just cause" clause, and the rules of evidence and procedure appropriate to a "just cause" determination under the collective bargaining agreement.
\end{itemize}

\textit{Id.} In \textit{Stroehmann Bakeries}, the Third Circuit seemingly ignored its own language and exceeded its reviewing authority in second-guessing the arbitrator's interpretation of the just cause provision of the collective bargaining agreement.

\textsuperscript{134} For a discussion of the majority's analysis of industrial due process concerns, see \textit{supra} notes 107-12 and accompanying text.

\textsuperscript{135} \textit{Stroehmann Bakeries}, 969 F.2d at 1445 n.7. Under Judge Hutchinson's formulation, a court may vacate an arbitrator's award on the grounds that the arbitrator's failure to make findings on the merits violates public policy. See \textit{Stroehmann Bakeries}, 969 F.2d at 1444-45 & n.7. \textit{But see} Pan Am. Corp. v. Air Line Pilots Ass'n, 140 B.R. 336, 337-38 (S.D.N.Y. 1992) (finding arbitrator did not exceed authority in ordering reinstatement of employee for lack of industrial due process without making determination on merits).

In reaching his conclusion, Judge Hutchinson stated that he "would be careful to distinguish the concept of industrial due process from due process as required by the Constitution." \textit{Stroehmann Bakeries}, 969 F.2d at 1445 n.7. Judge Hutchinson does not, however, give a reason for distinguishing between the two concepts. By upholding reinstatement awards on procedural grounds even where the employee was guilty of the underlying conduct, courts have established a body of law that can be analogized to the constitutional due process case law. See, \textit{e.g.}, \textit{Super Tire Eng'g Co. v. Teamsters Local Union No. 676}, 721 F.2d 121, 125 (3d Cir. 1983) (upholding arbitrator's award of reinstatement on due process grounds even though arbitrator found employee guilty of consumption of alcohol during working hours); Safeway Stores, Inc. v. United Food & Commercial Workers Union, Local 400, 621 F. Supp. 1233, 1239-41 (D.D.C. 1985) (upholding arbitrator's award of reinstatement even though employee guilty of insubordination and threatening supervisor). For a discussion of \textit{Super Tire} and \textit{Safeway}, see \textit{supra} notes 74-80 and accompanying text.

\textsuperscript{136} \textit{Stroehmann Bakeries}, 969 F.2d at 1445 n.7 (citing United Paperworkers International Union v. \textit{Misco}, Inc., 484 U.S. 29, 56-40 (1987)). Judge Hutchinson stated in \textit{Stroehmann Bakeries} that "the Supreme Court's public policy exception to the general rule against court review of the merits of a labor arbitration decision implies that a labor arbitrator's concept of industrial due process does not override a definitive public policy." \textit{Id.}
arbitrator from dismissing claims for failure to afford the employee full industrial due process, the arbitrator should be free to base his or her decision on procedural issues.\textsuperscript{137}

V. CONCLUSION

Although the ultimate result in Stroehmann Bakeries is not troubling because Stroehmann did appear to have afforded the employee adequate industrial due process, the implications of the Third Circuit's holding are troubling.\textsuperscript{138} While the Third Circuit's decision takes a commendable step toward promoting the public policy against sexual harassment in the workplace, it simultaneously threatens the finality of arbitration awards.\textsuperscript{139} Soon other courts may begin conducting their

\textsuperscript{137} See Misco, 484 U.S. at 39. In considering the propriety of vacating the arbitrator's award in Misco, the Court stated that "it was not open to the Court of Appeals to refuse to enforce the award because the arbitrator, in deciding whether there was just cause to discharge, refused to consider evidence unknown to the Company at the time the [employee] was fired." Id. The Court further stated that "[t]he parties bargained for arbitration to settle disputes and were free to set the procedural rules for arbitrators if they chose." Id.

\textsuperscript{138} See Stroehmann Bakeries, 969 F.2d at 1451 (Becker, J., dissenting). Judge Becker stated in his dissent that the majority could have overturned the arbitrator's award on other grounds. Id. (Becker, J., dissenting). In his dissent, Judge Becker noted that "[i]f the majority believes this case to be unique because the arbitrator was biased, then the case alone can be resolved on the basis of his bias alone without reference to public policy," Id. at 1451 (Becker, J., dissenting) (citing United Paperworkers International Union v. Misco, Inc. 484 U.S. 29, 40-41 & n.10 (1987)). Third Circuit precedent also supports the proposition that arbitrator's awards can be set aside on the basis of arbitrator bias. See Arco-Polymers, Inc. v. Local 8074, 671 F.2d 752, 754 n.1 (3d Cir. 1982) (stating that "[a]n award may be vacated where it is shown that there was . . . partiality . . . on the part of the arbitrator" (citing Ludwig Honold Manufacturing Co. v. Fletcher, 405 F.2d 1123, 1128-29 n.27 (3d Cir. 1969))). Although the Stroehmann Bakeries majority disagreed with the district court's finding that the arbitrator was biased against sexual harassment claimants generally, the majority stated that the arbitrator's "partiality in this case [was] demonstrated by his behavior and comments during the hearing." Stroehmann Bakeries, 969 F.2d at 1446. As a result, the majority could have followed Judge Becker's suggestion and vacated the award on the grounds of partiality, remanded the matter to a new arbitrator and avoided the complications of the invoking the public policy exception. See id. at 1451 (Becker, J., dissenting).

One commentator has suggested that the majority could have also reached the same result by vacating the majority's decision on the ground that the arbitrator dispensed "his own brand of industrial justice." See Fraser, supra note 79, at 40 (suggesting that based on evidence that arbitrator characterized victim as "unattractive and frustrated," Third Circuit could have concluded that arbitrator was applying his own standards of right and wrong and vacated award on that ground).

\textsuperscript{139} See Mouser, supra note 6, at 95. Mouser has stated that:

The federal legislative policy of encouraging arbitration to resolve labor disputes would be undermined if federal courts were free to re-determine the facts of disputes and the merits of awards. . . . If a court could re-determine the merits, the party who lost the arbitration award would view the arbitrator's determination as having little decisive effect
own factfinding and applying their own notions of industrial due process. Moreover, as a result of Judge Hutchinson's suggestion that public policy outweighs industrial due process, the importance of protecting employees from the "impulses of their employers" will ultimately be minimized.¹⁴₀

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and the party who won the arbitration would not be able to rely on the arbitrator's decision.

Id.

¹⁴₀. See Stroehmann Bakeries, 969 F.2d at 1451 (Becker, J., dissenting). If an employer discharges an employee guilty of sexual harassment, that employee generally may seek to recover damages from their former employers. See Grace M. Kang, Laws Covering Sex Harassment and Wrongful Dismissal Collide, WALL ST. J., Sept. 24, 1992, at B1, B10 (noting that increasing number of employees who have lost their jobs following sexual harassment charges are bringing wrongful discharge claims against their former employers). Following the Third Circuit's decision in Stroehmann Bakeries, however, it may be more difficult for an employee to bring a wrongful discharge claim against his or her former employer. See Frazer, supra note 79, at 39 (stating that Third Circuit's decision in Stroehmann Bakeries "allows an employer to inadequately investigate a complaint of harassment, terminate the alleged harasser to limit the employer's liability, and then be held unaccountable to the alleged harasser").

Subsequent to the Third Circuit's decision in Stroehmann Bakeries, at least one court has examined the issue of whether public policy concerns override industrial due process concerns and concluded that reinstating an employee without making findings of fact did not violate public policy. See Pan Am. Corp. v. Air Line Pilot Ass'n, 140 B.R. 336, 337-38 (S.D.N.Y. 1992). In In re Pan American v. Air Line Pilots Association, Pan American World Airways (Pan Am) discharged an airline pilot because of allegations that the pilot allowed a flight attendant to take charge of the plane's controls. Id. at 337. Upon finding that Pan Am had not conducted a full and fair investigation of the allegations, the arbitration board reinstated the pilot on due process grounds without making any findings on the merits of the claim. Id. at 338. In challenging the arbitrator's award, Pan Am contended that the arbitrator's decision to reinstate the employee without making findings of fact contravened the well-established public policy favoring airline safety. Id. at 341. The court rejected Pan Am's argument, holding that the arbitrator's decision to reinstate the employee, without making findings of fact, did not violate public policy. Id. In reaching this conclusion, the court stated that "the risk that an arbitration award may violate some explicit public policy is not an 'excuse' for courts to perform the work of arbitrators." Id. Until the Supreme Court provides guidance in this area, employers can try to protect themelves from liability by limiting an arbitrator's authority. See id. at 341 n.3 (noting that arbitrator only has authority in "absence of an explicit provision" and therefore, "had Appellant been particularly concerned about the public policy . . . , it could have created an exception to the arbitration provision of the collective bargaining agreement, for example, forbidding the arbitration of grievances involving airline safety"); see also ELKOURI & ELKOURI, supra note 1, at 413 (stating that parties may amend collective bargaining agreements to restrict arbitrator from hearing future cases); FAIRWEATHER, supra note 76, at 33 (stating that if parties exclude sexual harassment cases from arbitration, then employer can dismiss sexual harasser without having arbitrator hear claim).