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Notes

Application of the Public Policy Exception for the Enforcement of Arbitral Awards: There is No Place Like "The Home" in Saint Mary Home, Inc. v. Service Employees International Union, District 1199

I. Introduction

The English Courts recognized that public policy "is a very unruly horse, and ... once you get astride it you never know where it will carry you."¹ With more and more parties using arbitration as an alternative means for dispute resolution, the public policy exception to the enforcement of arbitral awards has emerged as a controversial check on the authority of the arbitrator.² In turn, what was thought to provide a quick and cost effective method of dispute resolution has turned full circle and landed parties back in the courtroom.³ Courts have recognized the public policy exception as a valid defense to enforcing arbitral awards, but they differ widely on how to apply the exception properly.⁴

3. See Ultracashmere House, Ltd. v. Meyer, 664 F.2d 1176, 1179 (11th Cir. 1981) (stating that goal of arbitration is "to relieve congestion in the courts and provide parties with an alternative method for dispute resolution that would be speedier and less costly than litigation"); see also Michael H. LeRoy & Peter Feuille, The Steelworkers Trilogy and Grievance Arbitration Appeals: How the Federal Courts Respond, 15 Indus. Rel. L.J. 78, 79 (1991) (documenting over 1600 federal district and circuit court decisions involving grievance appeals from arbitration process since 1960); Galbraith, supra note 2, at 242 (asserting that federal courts in United States are immensely overcrowded partially due to party dissatisfaction with arbitration process); Bret F. Randall, Comment, The History, Application, and Policy of the Judicially Created Standards of Review for Arbitration Awards, 1992 B.Y.U. L. Rev. 759, 759 (1992) (commenting that although arbitration was intended to reduce caseloads within federal court system, arbitral process is actually increasing litigation).
Although the Supreme Court attempted to establish the scope of the public policy exception in *W.R. Grace & Co. v. Local Union 759, International Union of United Rubber* and *United Paperworkers International Union v. Misco, Inc.*, the Court did not formulate a bright line rule for applying it. Subsequently, federal courts have diverged into three different lines of how to interpret the public policy exception. First, many courts follow the traditional method of interpreting the public policy exception narrowly, showing great deference to the arbitrator because the parties bargained for an arbitrator's judgment. Second, some circuits have recently proposed expanding the parameters of the public policy exception to account for general considerations of public welfare. Third and finally, recent uncertainty in federal courts concerning scope of judicial review of arbitral awards:

8. For a discussion of the three different interpretations of the scope of the public policy exception, see infra notes 58-109 and accompanying text.
9. *See* Edwards, *supra* note 1, at 3-4 (noting that for arbitration to be effective there is need for finality). Edwards stated that:
Arbitration provides a relatively speedy, informal and inexpensive alternative to litigation and to economic warfare; it is therapeutic in the sense that it allows workers to "have their day in court"; it often involves a judgment from someone who is well known and well respected by the parties; it is a flexible process that easily may be changed to suit the needs of the parties; and, most importantly, it is an extension of collective bargaining—the private system of jurisprudence created by and for the benefit of the parties. However, it has always been understood that, in order to be fully effective, arbitration must afford finality.

Id.; *see* 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, 96 (1990) ("Traditionally, the public policy exception has been narrowly construed, so that an allegation that an arbitration award violates a community sense of justice or fairness is insufficient to vacate the award."); Laurie A. Tribble, *Note, Vacating Arbitrators' Awards Under the Public Policy Exception: Are Courts Second Guessing Arbitrator's Decisions?*, 38 VILL. L. REV. 1051, 1051 (1993) (stating that judicial deference reflects recognition and application of two factors: parties' expressed intent for arbitration instead of litigation and statutory preferences to have labor disputes settled by arbitration).

10. *See* Edwards, *supra* note 1, at 4 (noting that United States Court of Appeals for Eighth Circuit adopted expansive interpretation of public policy exception after *Misco* in *Iowa Electric Light & Power Co. v. Local Union 204, International Brotherhood of the Electrical Workers*, 834 F.2d 1424 (8th Cir. 1987)). The Seventh Circuit, First Circuit and Fifth Circuit have also applied a broad interpretation of the public policy exception. *See, e.g.*, E.I. duPont de Nemours & Co. v. Grasselli Employees Independent Ass'n, 790 F.2d 611, 612 (7th Cir. 1986) (applying broad interpretation of public policy exception); United States Postal Serv. v. American Postal Workers Union, 736 F.2d 822, 826 (1st Cir. 1984) (same); Amalgamated Meat Cut-
the United States Court of Appeals for the Third Circuit has adopted a middle ground for the scope of the public policy exception.\textsuperscript{11}

In \textit{Saint Mary Home, Inc. v. Service Employees International Union, District 1199},\textsuperscript{12} an employer moved on grounds of public policy to vacate an arbitrator’s award ordering the reinstatement of an employee whom the employer discharged for possession of marijuana with intent to distribute.\textsuperscript{13} In its analysis, the United States Court of Appeals for the Second Circuit applied the threshold test formulated by the Supreme Court in \textit{Misco}, which limits a court’s authority to vacate an arbitrator’s award on public policy grounds to “situations where the contract as interpreted would violate some explicit public policy that is well-defined and dominant . . . [and] ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interest,” to determine if the arbitrator’s award violated public policy.\textsuperscript{14} The Second Circuit, although noting a strong public policy against the use, possession and sale of an illegal drug, found that the arbitrator’s award did not violate public policy because there was no well-defined and dominant public policy against the reinstatement of an employee.\textsuperscript{15} The Second Circuit’s narrow reading of the \textit{Misco} test is questionable in light of how other circuits interpret the scope and application of the public policy exception.\textsuperscript{16}

This Note discusses the Second Circuit’s narrow application of the public policy exception to the enforcement of arbitral awards in relation to how other circuits apply the public policy exception.\textsuperscript{17} First, Part II summarizes the scope of judicial review of arbitral awards, the origination of the public policy exception and the debate in the circuit courts over how to apply the public policy exception.\textsuperscript{18} Second, Part III describes the

\begin{footnotesize}
\begin{enumerate}
\item For a discussion of the Third Circuit’s approach to applying the public policy exception, see \textit{infra} notes 85-101 and accompanying text.
\item 116 F.3d 41 (2d Cir. 1997).
\item \textit{See id.} at 43.
\item \textit{Id.} at 45; \textit{see United Paperworkers Int’l Union v. Misco, Inc.}, 484 U.S. 29, 43 (1987) (noting that arbitrators’ awards are to receive great deal of deference to prevent intrusive judicial review). For a discussion and analysis of the Second Circuit’s application of the \textit{Misco} test, see \textit{infra} notes 145-70 and accompanying text.
\item \textit{See Saint Mary Home}, 116 F.3d at 45-47 (stating that arbitral award did not violate public policy and that, in fact, public policy favored tribunal’s flexible approach to reinstating discharged employee). For a discussion of the Second Circuit’s interpretation of the scope of the public policy exception in \textit{Saint Mary Home}, see \textit{infra} notes 128-44 and accompanying text.
\item For a discussion of other circuits’ approaches to interpreting the public policy exception, see \textit{infra} notes 58-109 and accompanying text.
\item For a discussion of the Second Circuit’s application of the public policy exception in \textit{Saint Mary Home}, see \textit{infra} notes 128-44 and accompanying text.
\item For a discussion of the scope of deference that courts allot to arbitral awards, the origination and recognition of the public policy exception and the debates over the proper scope of the public policy exception in the various circuits, see \textit{infra} notes 22-109 and accompanying text.
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relevant facts and legal issues addressed by the Second Circuit in *Saint Mary Home*. Third, Part IV traces how the Second Circuit interpreted and applied the public policy exception and analyzes its decision in *Saint Mary Home*. Finally, Part V addresses the likely impact of the Second Circuit's decision and concludes that the Second Circuit's overly narrow interpretation of the public policy exception, if followed by other courts or if maintained as the standard within the Second Circuit, will lead to an unattainable threshold to applying the public policy exception in cases where vacating an arbitrator's award on public policy grounds is warranted.

II. BACKGROUND: VACATING ARBITRAL AWARDS THAT VIOLATE PUBLIC POLICY

A. Scope of Judicial Review of Arbitration Awards

A standard collective bargaining agreement between a union and a company provides for an arbitrator to have the authority to settle any disputes under the agreement between the company and union employees. The Supreme Court in *United Steelworkers v. American Manufacturing Co.*, *United Steelworkers v. Warrior & Gulf Navigation Co.* and *United Steelworkers v. Gulf Oil Corp.* has explained that:

> A collective bargaining agreement is an effort to erect a system of industrial self government . . . . [It] is the means of solving the unforeseeable by molding a system of private law . . . . [An] arbitrator performs functions which are not normal to the courts . . . . [and must have qualities which] the ablest judge cannot be expected to bring . . . .

United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 580 (1960); see 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) (noting that "the arbitrator is the parties' officially designated 'reader' of the contract" and "is their joint, *alter ego* for the purpose of striking whatever supplementary bargain is necessary to handle the unanticipated omissions of the initial agreement"). 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." Tremboli, *supra* note 7, at 279; see *Warrior & Gulf Navigation*, 363 U.S. at 578 ("[A]rbitration is the substitute for industrial strife . . . . [A]rbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself.").

19. For a discussion of the facts and legal issues addressed in *Saint Mary Home*, see infra notes 110-27 and accompanying text.

20. For a discussion of the Second Circuit’s decision in *Saint Mary Home* and the appropriateness of its determinations regarding the public policy exception, see infra notes 128-70 and accompanying text.

21. For a discussion of the impact of the Second Circuit’s decision in *Saint Mary Home* on the public policy exception, see infra notes 171-78 and accompanying text.


v. Enterprise Wheel & Car Corp., 25 also known as the Steelworkers Trilogy, in
response to collective bargaining agreements using the arbitration process
to resolve labor disputes, attempted to establish a general proposition that
courts have limited power to review arbitration awards under collective
bargaining agreements.26

26. See Enterprise Wheel, 363 U.S. at 599 (stating that parties bargained for arbitrator’s interpretation of collective bargaining agreement and “courts have no business overruling him [or her] because their interpretation of the contract is different”); American Mfg., 363 U.S. at 567-68 (noting that, when parties have agreed to submit all of contract’s questions to arbitration, court’s function “is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract”); Warrior & Gulf Navigation, 363 U.S. at 585 (holding that issue in question was for arbitrator to determine, not court); see also Local Union 59, Int’l Bhd. of Elec. Workers v. Green Corp., 725 F.2d 264, 268 (5th Cir. 1984) (recognizing narrow scope of judicial review of arbitral awards instituted in Steelworkers Trilogy); David E. Feller, Fender Bender or Train Wreck?: The Collision Between Statutory Protection of Individual Employee Rights and the Judicial Revision of the Federal Arbitration Act, 41 St. Louis U. L.J. 561, 567 (1997) (acknowledging that, in commercial arbitration cases under Steelworkers Trilogy, all doubts were to be resolved in favor of arbitration, avoiding litigation wherever possible); Amy C. Hodges, The Steelworkers Trilogy in the Public Sector, 66 Chi.-Kent L. Rev. 631, 631 (1990) (stating that Supreme Court endorsed use of limited judicial involvement in arbitration process); Edgar A. Jones, Jr., “His Own Brand of Industrial Justice”: The Stalking Horse of Judicial Review of Labor Arbitration, 30 UCLA L. Rev. 881, 884 (1983) (arguing that judges should exercise considerable restraint and not interfere with collective bargaining agreements); James Michael Magee, The Public Policy Exception to Judicial Deferral of Labor Arbitration Awards—How Far Should Expansion Go?, 39 S.C. L. Rev. 465, 468 (1988) (noting Supreme Court’s attempt to flesh out federal common law dealing with collective bargaining arbitration agreements in Steelworkers Trilogy); Chris Baker, Comment, Sexual Harassment v. Labor Arbitration: Does Reinstating Sexual Harassers Violate Public Policy?, 61 U. Cin. L. Rev. 1361, 1365 (1993) (“[T]he partial federal courts have faithfully adhered to [the Trilogy’s] mandate of almost absolute judicial deference to labor arbitral awards.”); Maria T. Roscher, Note, Public Policy Exception to the General Rule of Judicial Deference to Labor Arbitration Awards: United Paperworkers International Union v. Misco, Inc., 57 U. Cin. L. Rev. 819, 823 (1988) (“In the nearly thirty years since the Trilogy cases were decided, the general rule of judicial deference to the decisions of labor arbitrators has become a well-established principle that is one of the foremost tenets of the law of labor arbitration.”); Tribble, supra note 9, at 1057 (discussing role of courts in reviewing arbitrator’s decisions under collective bargaining agreements).

Even prior to the Steelworkers Trilogy, courts were reluctant to overturn arbitration awards. See Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 455 (1957) (expressing federal policy that federal court enforcement of arbitration agreements is best method for obtaining industrial peace). The common law exceptions under which a court could refuse to enforce the arbitrator’s award were limited to: (1) fraud; (2) partiality; (3) misconduct on behalf of the arbitrator; (4) want of jurisdiction; or (5) gross mistake on the part of the arbitrator. See Magee, supra, at 466-67 (discussing common law exceptions). Most pre-Trilogy courts at this time used the “gross mistake” exception because it essentially allowed the courts to substitute their own opinion and judgment for that of the arbitrator. See id. (citing Rice v. Southwestern Greyhound Lines, Inc., 244 S.W.2d 245, 249 (Tex. Civ. App. 1951, writ ref’d n.r.e.) (setting aside three arbitration awards in which arbitrator had reviewed evidence and construing collective bargaining clause in manner finding sufficient cause to discharge arbitrator’s award for error)).
American Manufacturing was the first Steelworkers Trilogy case that addressed the issue of judicial deference in arbitration disputes.\(^27\) The Supreme Court, in reversing the decision of the United States Court of Appeals for the Sixth Circuit, held that when a collective bargaining agreement provides for the parties to submit all grievances to arbitration, the function of a court is limited because the parties bargained for the judgment of an arbitrator.\(^28\) As a result, the Supreme Court recognized that "[w]hen the judiciary undertakes to determine the merits of a grievance under the guise of interpreting the grievance procedure of collective bargaining agreements, it usurps a function which under that regime is entrusted to the arbitration tribunal."\(^29\)

In Warrior & Gulf Navigation, the Supreme Court further emphasized the notion of deference to an arbitrator's award in industrial disputes.\(^30\) Justice Douglas recognized that arbitration of labor disputes under collective bargaining agreements is "part and parcel" of the agreement process itself, and the parties' objective in using the arbitration process is primarily to further their goal of uninterrupted production.\(^31\) The Court found that if a dispute arose and fell within the parameters of the arbitration agreement, it became a question for the arbitrator and not the courts.\(^32\)

Finally, in Enterprise Wheel, the Supreme Court held that the United States Court of Appeals for the Fourth Circuit should have upheld the decision of the district court and complied with the arbitral award calling for the reinstatement of a group of employees who had staged a walk-out to protest a fellow employee's discharge.\(^33\) In its holding, the Court stressed the importance of judicial deference to the arbitrator's award.\(^34\) Accordingly, the Court noted that if the arbitrator's award "draws its es-

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27. See American Mfg., 363 U.S. at 568 (noting that it was not court's job to determine whether claim was meritorious).

28. See id. ("The courts . . . have no business weighing the merits of the grievance . . . . The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious.").

29. Id. at 569.

30. See Warrior & Gulf Navigation, 363 U.S. at 585. Justice Douglas stated that: The judiciary sits in these cases to bring into operation an arbitral process which substitutes a regime of peaceful settlement for the older regime of industrial conflict. Whether contracting out in the present case violated the agreement is the question. It is a question for the arbiter, not for the courts.

31. See id. at 578, 582 (commenting that, in commercial cases, arbitration is substitute for litigation).

32. See id. at 582 (noting limited role of courts in labor relation conflicts and stating that orders to arbitrate particular grievances should not be denied unless "it may be said with positive assurance that an arbitration clause is not susceptible of the interpretation that covers the asserted dispute").


34. See id. at 596. The Enterprise Wheel Court also stated that "[t]his plenary review by a court of the merits would make meaningless the provisions that the
sence" from within the boundaries of the collective bargaining agreement, a court may not choose to vacate the award, even if the court disagrees with the arbitrator's reasoning, because the parties bargained for the arbitrator's construction of the agreement.35

B. Origination of the Public Policy Defense

Although the Steelworkers Trilogy provided for a limited scope of judicial review of arbitral awards, federal courts have recognized that there are exceptional circumstances under which a court may review the award of an arbitrator.36 Prior to the Steelworkers Trilogy, few courts, including the Supreme Court, recognized the public policy defense as an exception to deny the enforcement of arbitral awards.37 Beginning in 1983, however, the federal courts recognized the public policy exception as a defense to the enforcement of arbitral awards.38

The first case to address the public policy exception in detail after the Steelworkers Trilogy and which helped lay the framework for the arbitral process and the exceptions to the enforcement of an arbitrator's award was Local 453, International Union of Electrical, Radio & Machine Workers v. arbitrator's decision is final, for in reality it would almost never be final." Id. at 599.

35. See id. at 598-99 (denying courts' right to vacate award merely on merits of case or on arbitrator's construction of agreement).

36. See Gulf Coast Indus. Workers Union v. Exxon Co., 991 F.2d 244, 248 (5th Cir. 1993) (acknowledging that arbitration awards are not inviolate); Newsday, Inc. v. Long Island Typographical Union, No. 915, 915 F.2d 840, 844 (2d Cir. 1990) (recognizing that courts can refuse to enforce arbitral awards if award is contrary to public policy); Manville Forest Prods. Corp. v. United Paperworkers Int'l Union, 831 F.2d 72, 74 (5th Cir. 1987) (stating that it will not enforce arbitration award that concerns matters not subject to arbitration under collective bargaining agreement, fails to "draw its essence" from contract or violates public policy).

37. See Hurd v. Hodge, 334 U.S. 24, 34-35 (1948) ("The power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in the Constitution, treaties, federal statutes, and applicable legal precedents."); Black v. Cutter Lab., 43 Cal. 2d 788, 808 (1955) (stating that this was not first time this court was asked to recognize and give effect to public policy where premises are clear).

38. See United Food & Commercial Workers v. National Tea Co., 899 F.2d 386, 389 (5th Cir. 1990) (acknowledging courts may overrule arbitral awards that violate public policy); Sea-Land Serv., Inc. v. International Longshoremen's Ass'n, 625 F.2d 38, 42 (5th Cir. 1983) (stating that courts can only set aside arbitral awards under limited exceptions: (1) arbitrator misconduct, (2) lack of jurisdiction or (3) repugnancy to superior law or public policy); see also Magee, supra note 26, at 470 (recognizing that different courts have applied public policy defense to different degrees and that this exception clearly exists under federal law, although to what extent is hotly debated); Douglas E. Ray, Sexual Harassment, Labor Arbitration and National Labor Policy, 73 Neb. L. Rev. 812, 813 (1994) ("Where an issue dealt with by a labor arbitrator is also covered by public regulation, the arbitrator's award may be subject to challenge in court on grounds that it allegedly violates the public policy behind such regulation.").
Otis Elevator Co. In Otis Elevator, the Second Circuit recognized that, in limited circumstances, the courts could refuse to enforce an arbitrator’s award if it violated public policy. This limited application of the public policy exception became known as the “traditional approach.”

For the twenty years following Otis Elevator, the traditional approach was the dominant approach followed by the courts. Although most

39. 314 F.2d 25 (2d Cir. 1963). In Otis Elevator, an employee was discharged following a conviction for possessing gambling slips on his employer’s premises during work hours. See id. at 26. The parties submitted the dispute to arbitration pursuant to the collective bargaining agreement and the arbitrator found that, although the employee was guilty of serious misconduct, the company lacked just cause for his dismissal and ordered reinstatement. See id. at 26-27. On appeal, the district court determined that the award should not be enforced because it was contrary to public policy. See id. at 27 (stating that district court found "the award 'indulges crime, cripples an employer's power to support the law, and impairs his right to prevent exposure to criminal liability'" (quoting Local 451, Int'l Union of Electrical Workers v. Otis Elevator Co., 201 F. Supp. 213, 218 (S.D.N.Y. 1962)). The union appealed the district court's determination and the Second Circuit affirmed the arbitrator’s award to reinstate the employee. See id. at 29. The Second Circuit recognized that there is a public policy that condemns gambling by an employee on the premises of his employer, but there was not a public policy against the reinstatement of an employee who had been convicted, fined and subjected to serious disciplinary measures after his first offense when there was no indication that reinstatement would result in repeated offenses. See id.

40. See id. (concluding that while federal law allowed for courts to vacate arbitral awards on public policy grounds, this defense to enforcement of arbitrator's award is "subject to the restrictions and limitations of the public policy of the United States"). The Second Circuit, although recognizing that courts can refuse to enforce arbitral awards that violate public policy, concluded that the plaintiff's crime was vindicated in the very manner that the State of New York prescribed—by a criminal conviction and a seven-month layoff without compensation or accrual of seniority benefits. See id. The Court stated: “The law is not that Draconian. To enforce the arbitrator’s award in these circumstances cannot fairly be looked upon as judicial condonation of [plaintiff’s] offense.” Id.

41. See Magee, supra note 26, at 472 (recognizing that while some courts have read public policy exception in this narrow sense, others have used much broader interpretations). Compare Otis Elevator, 314 F.2d at 29 (applying narrow interpretation of public policy exception), with Amalgamated Meat Cutters & Butcher Workmen, Local Union 540 v. Great W. Food Co., 712 F.2d 122, 123 (5th Cir. 1983) (holding that award ordering reinstatement of employee for wounding tractor-trailer rig violated public policy and refusing to enforce award).

42. See Kane Gas Light & Heating Co. v. International Bhd. of Firemen & Oilers, Local 112, 687 F.2d 673, 682 (3d Cir. 1982) (stating that “only if upholding an award would amount to ‘judicial condonation’ of illegal acts, should the award be vacated on grounds of inconsistency with public policy” (citing International Ass’n of Machinists, Dist. No. 8 v. Campbell Soup Co., 406 F.2d 1223, 1227 (7th Cir. 1969); Otis Elevator, 314 F.2d at 29)); Perma-Line Corp. v. Sign Pictorial & Display Union, Local 230, 639 F.2d 890, 895 (2d Cir. 1981) (stating that arbitral award can be set aside if contrary to “well accepted and deeply rooted public policy”); Campbell Soup, 406 F.2d at 1227 (rejecting public policy attack on award ordering reinstatement without back pay of employee who pleaded guilty to misdemeanor violation of state gambling laws for taking bets on company premises); see also Magee, supra note 26, at 474 (acknowledging that courts, prior to 1983, predominately applied traditional approach of public policy exception to challenges of arbitral awards).
courts applied this traditional approach to the public policy exception, these courts failed to set any clear boundaries on the reach of the exception.43 Nevertheless, using this seemingly "limitist" interpretation, it did not preclude some courts from applying a more expansive interpretation.44 It was not until 1983 in W.R. Grace, however, that the Supreme

43. See Arco-Polymers, Inc. v. Local 8-74, 671 F.2d 752, 755 (3d Cir. 1982) (stating that "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'"


The five triggers to the public policy inquiry . . . are as follows:

1. Circumstances where the grievant's work-related conduct clearly violates, or is inconsistent with, a relevant public policy governing or regulating that work conduct . . . ;

2. Circumstances where the grievant's conduct has prevented, or could prevent, the employer from fulfilling its duty under a relevant public policy . . . ;

3. Awards wherein the arbitrator has reinstated a grievant employee whose conduct is alleged to have violated public policy without addressing the salient public policy issue . . . ;

4. Circumstances where a relevant public policy either expressly bars reinstatement of the grievant employee, by arbitral award or otherwise . . . ;

5. Circumstances where positive law, i.e., a clear, unequivocal statutory or case law directive, prohibits an arbitral order that the grievant employee be reinstated . . . ;

Id.; see Magee, supra note 26, at 474-75 (noting that Ninth Circuit and Illinois and Texas state courts applied broader interpretation of public policy exception and clarifying that prior to 1983, although most courts showed extreme deference to arbitrator's decisions, there were broader interpretations of what violated public policy).

In fact, the Ninth Circuit, and a few state courts did begin to consider a broader application of the public policy exception for vacating an arbitrator's award. See World Airways, Inc. v. International Bhd. of Teamsters, Airline Div., 578 F.2d 800, 803 (9th Cir. 1978) (ruling that reinstatement of pilot to position of Pilot-In-Command after demotion for repeated errors in judgment, which had threatened lives of passengers, would violate federal regulations that made it duty of carrier to determine, in interests of public safety, whether pilot's personal characteristics would jeopardize public safety). The Ninth Circuit, however, later narrowed the scope of the exception in Stead Motors v. Automotive Machinists Lodge No. 1173, 886 F.2d 1200 (9th Cir. 1989), and disapproved of the holding of World Airways. See id. at 1211. In Illinois, in Department of Central Management Service v. American Federation of State, County, & Municipal Employees, 554 N.E.2d 759 (Ill. App. Ct. 1990), prior to being superceded by statute, an arbitrator's award that gave priority in assigning extra work to a college teachers' union members who participated in illegal strikes violated public policy and must be vacated, even if the award would have shown proper regard towards the collective bargaining agreement and the
Court attempted to clarify the appropriate scope of the public policy exception to the vacatur of arbitral awards.\textsuperscript{45}

C. W.R. Grace: Debate Over the Application of the Public Policy Exception Begins

\textit{W.R. Grace} defined the scope and application of judicial review when a party challenges an arbitral award under a claim of violation of law or public policy.\textsuperscript{46} In \textit{W.R. Grace}, the Supreme Court held that in reviewing an arbitration award, a court may not uphold a collective bargaining agreement that is contrary to public policy.\textsuperscript{47} The Court cautioned, however, that judicial refusal to enforce an arbitrator's award should be limited to situations in which the contract or collective bargaining agreement would violate a well-defined and dominant public policy.\textsuperscript{48} Furthermore, the Court held that a federal court can not overrule an arbitrator's decision simply because the court believes its own interpretation of the collective bargaining agreement would be a better one.\textsuperscript{49}

The issue that ultimately reached the Court dealt with the enforcement of an arbitration award that provided for back pay damages against W.R. Grace & Co. under a collective bargaining agreement with Local

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\item \textbf{45.} See Roebker, supra note 26, at 826 (explaining origination of circuit split regarding application of public policy exception).
\item \textbf{46.} See Magee, supra note 26, at 491 ("[C]ompliance with the requirements of \textit{W.R. Grace} is a prerequisite to overturning an arbitral award on public policy grounds.").
\item \textbf{47.} See W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber, 461 U.S. 757, 766 (1983) ("If the contract as interpreted . . . violates some explicit public policy, we are obligated to refrain from enforcing it." (citing Hurd v. Hodge, 334 U.S. 24, 35 (1948))).
\item \textbf{48.} See 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))).
\item \textbf{49.} See id. at 757. The court stated that "regardless of what this Court's view might be of the correctness of the arbitrator's contractual interpretation, petitioner and respondent bargained for that interpretation, and a federal court may not second guess it. The arbitrator's analysis of the merits of the grievance is entitled to the same deference." \textit{Id}."
\end{itemize}
Union 759 due to court-ordered layoffs the company had made. In discussing the public policy exception, Justice Blackmun, on behalf of a unanimous Court, stated that courts are required to refuse enforcement of contracts that are contrary to law and well-defined and dominant public policies.

50. See id. at 764-65. In October 1973, the Equal Employment Opportunity Commission (EEOC) found that the company's discriminatory hiring practices involving women and African-Americans were in violation of Title VII of the Civil Rights Act of 1964, citing 42 U.S.C. §§ 2000e to 2000e-17. See id. at 759. Furthermore, the Director of the EEOC found that the departmental and plant-wide seniority systems, mandated by the company's collective bargaining agreement with the Local Union No. 759, were also unlawful because they perpetuated the effects of the past discrimination at W.R. Grace. See id. The EEOC gave W.R. Grace the opportunity to conciliate the dispute pursuant to § 706(b) of the Act. See id. (citing 42 U.S.C. § 2000e-5(b) (1976)). W.R. Grace cooperated with the EEOC and reached aconciliation agreement that permitted women strike replacements to exercise shift preference seniority and assigned them positions ahead of certain men who had been provided greater shift preference under the collective bargaining agreement. See id. at 760. The conciliation agreement also provided that W.R. Grace would maintain the existing proportion of women in the plant's bargaining unit in the event of a layoff, while men with greater seniority, who were to be given preference during layoffs under the collective bargaining agreement, would fall suspect to layoffs under the collective conciliation agreement. See id. at 760-61. At the same time, the collective bargaining agreement entitled the members with longer terms of service to seniority in the event of a layoff. See id.

The conflict between the conciliation agreement and the collective bargaining agreement arose when the collective bargaining agreement expired and the failed negotiations between the plaintiff and W.R. Grace resulted in a strike. See id. at 760. W.R. Grace, in turn, hired strike replacements, some of whom were women, who W.R. Grace retained after the strike participants returned to work. See id. Upon the return of the strikers, certain male participants with more seniority were not reinstated to their prior positions and other men, pursuant to the conciliation agreement, were laid off. See id. These affected parties filed grievances. See id. at 761-62. W.R. Grace refused to participate in arbitration proceedings over these incidents, stating that they were bound by the conciliation agreement. See id. at 760. The Fifth Circuit reversed the district court's ruling that the conciliation agreement was binding on W.R. Grace and ordered arbitration of the disputes. See id. at 762.

In arbitration, the arbitrator upheld the strikers' grievances and awarded back pay based on findings that, even though W.R. Grace was acting under the terms of the EEOC agreement, the collective bargaining agreement made no allotment for good faith violations of the seniority provisions. See id. The arbitrator concluded that W.R. Grace acted at its own risk in breaching the agreement. See id. Dissatisfied with the arbitrator's decision, W.R. Grace instituted an action for vacating the award, arguing that two public policies—obedience to a court order and favoring compliance with Title VII—would be undermined if the arbitrator's award would be enforced. See id. at 766, 770. Justice Blackmun, on behalf of the Supreme Court, upheld the arbitrator's award, reflecting upon the conflict between deference to the finality of arbitrator's awards and the desire to vacate arbitral awards for violation of public policy. See id. at 767-71.

51. See id. at 764-65 (upholding policy set forth in Steelworkers Trilogy, that under well-established standards for review of arbitral awards, federal courts play limited roles, usually deferring to arbitrator's decision even if decision is ambiguous); see also Edwards, supra note 1, at 10 (noting that in W.R. Grace, "the Court's decision represents nothing 'more or different than what the courts have said over
Although the Court recognized the importance of the policies in favor of following judicial orders and complying with Title VII, it found that the enforcement of the arbitral award would not thwart public policy. 52 The Court held that the enforcement of the arbitrator's award did not create intolerable incentives to disobey future court orders because it did not require W.R. Grace & Co. to ignore the district court's order to comply with the conciliation agreement. 53 Rather, the decision simply allocated losses to an employer that forced itself into this dilemma by voluntarily committing to two conflicting contractual obligations. 54

The W.R. Grace holding provides interested parties with the ability to invoke the public policy exception in cases where they are dissatisfied with the award of the arbitrator. 55 This ability has already given rise to many requests for vacating arbitral awards. 56 Unfortunately, the varying inter-

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52. See W.R. Grace, 461 U.S. at 766-71 (finding that enforcement of employee’s award would not adversely affect either policy to comply with court orders or Title VII). In fact, the Court found that enforcement of the arbitral award in this case would “encourage compliance and true voluntary compliance with federal employment discrimination law.” Id. at 771. The unanimous Court found that, in this case, the conciliation process of Title VII and the collective bargaining process complement each other. See id. at 772.

53. See id. at 769, 771 (“Enforcement of . . . [the] award will not create intolerable incentives to disobey court orders.”). The Supreme Court also found that, although W.R. Grace and the EEOC agreed to nullify the collective bargaining agreement, this did not include the union. See id. at 771 (noting that union was not party to conciliation agreement negotiations). Absent a judicial determination, neither the EEOC nor W.R. Grace can unilaterally alter the collective bargaining agreement. See id. (“Permitting such a result would undermine the federal labor policy that parties to a collective bargaining agreement must have reasonable assurance that their contract will be honored.” (citing Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974); Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 509 (1962))). As a result, the Court found that although the ability to unilaterally do away with provisions of the collective bargaining agreement may encourage an employer to conciliate with the EEOC, the employer’s added incentive to conciliate would be compensated within the union’s contractual rights. See id.

54. See id. at 767 (analyzing aftermath of employer’s decisions regarding its contractual obligations). After discussing the dilemma into which the defendant had placed itself by entering into two conflicting contractual obligations—the conciliation agreement and collective bargaining agreement—the Court stated:

[N]othing in the collective bargaining agreement as interpreted by Barrett required the Company to violate that order. Barrett’s award neither mandated layoffs nor required that layoffs be conducted according to the collective bargaining agreement. The award simply held, retrospectively, that the employees were entitled to damages for the prior breach of the seniority provisions.

Id. at 768-69.

55. See Roebker, supra note 26, at 830 (interpreting and analyzing impact of Supreme Court’s holding in W.R. Grace on future parties who participate in collective bargaining agreements that provide for arbitration).

56. See S.D. Warren Co. v. United Paperworkers’ Int’l Union, Local 1069, 815 F.2d 178, 186-87 (1st Cir. 1987) (arguing that requiring arbitral award, which mandated that employer reinstate employees who were discharged for possession of
D. No "Saving Grace": Three-Way Split Defined

Following the decision in *W.R. Grace,* three lines of authority developed regarding a court's authority to set aside arbitral awards for violating public policy.\(^\text{58}\) Several courts, following the broad view of *Amalgamated Meat Cutters & Butcher Workmen, Local Union 540 v. Great Western Food Co.\(^\text{59}\)* recognizing the court's power to set aside an arbitration award, viewed the public policy exception as an avenue through which courts could bypass the traditional judicial deference based upon "common sense" considerations.\(^\text{60}\) In comparison, other courts applied a limited scope of review by


57. See United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 35 n.7 (1987) (comparing application of *W.R. Grace* in various circuits). The Court in *Misco* noted that the First and Seventh Circuits took a broader view of the public policy exception, while the Ninth and District of Columbia Circuits took a much narrower view of the public policy exception. See id. (demonstrating split in jurisdictions regarding ability of courts to vacate arbitral awards on public policy grounds (citing Northwest Airlines, Inc. v. Air Line Pilots Ass'n, Int'l, 808 F.2d 76, 84 (D.C. Cir. 1986) ("But, so long as the Board acts within its jurisdiction and its awards draw their essence from the collective bargaining agreement, and neither contravene established law nor require an unlawful act . . . [precedent requires] that such awards be enforced."); Bevles Co., Inc. v. Teamsters Local 986, 791 F.2d 1391, 1393 (9th Cir. 1986) (ruling that arbitrator's decision granting reinstatement and back pay to two undocumented aliens was not rendered in "manifest disregard of the law" and thus was not reviewable); E.I. DuPont de Nemours & Co. v. Grasselli Employees Indep. Ass'n, 790 F.2d 611, 617 (7th Cir. 1986) (holding, at time of case, that award ordering reinstatement of employee who had been discharged after mental breakdown was enforceable); American Postal Workers Union v. United States Postal Serv., 789 F.2d 1, 9 (D.C. Cir. 1986) (stating that even if arbitrator's view of law was wrong, decision to exclude grievant's statements did not violate law or policy or require employer to act unlawfully); United States Postal Serv. v. American Postal Workers Union, 756 F.2d 822, 826 (1st Cir. 1984), holding that arbitration award requiring reinstatement of employee who was convicted of embezzling postal funds was unenforceable for violation of public policy)).

58. For a discussion of courts that have broadly applied the public policy exception, see infra notes 60, 64-72 and accompanying text. For a discussion of courts that narrowly apply the public policy exception, see infra notes 73-84, 102-09 and accompanying text. For a discussion of the middle ground approach, see infra notes 85-101 and accompanying text.

59. 712 F.2d 122 (5th Cir. 1983).

60. See, e.g., *American Postal Workers Union,* 736 F.2d at 825 (refusing to enforce arbitration award because policies violated by award were "clear dictates of com-
relying on the Steelworkers Trilogy and *Misco* and emphasizing the “extreme narrowness” of the public policy exception. The Third Circuit, mon sense”); *Amalgamated Meat Cutters*, 712 F.2d at 125 (stating that public policy against drinking alcohol and driving was embodied in pure common sense). The broad view of the public policy exception has been applied by the First, Fifth, Seventh and Eighth Circuits. See Iowa Elec. Light & Power Co. v. Local Union 204 of the Int'l Bhd. of Elec. Workers, 834 F.2d 1424, 1428-29 (8th Cir. 1987) (ruling that because nuclear power plant machinist jeopardized public health and safety, although this is not justification to discharge every employee that violates public safety regulations, reinstatement of this employee would violate public policy); *S.D. Warren*, 815 F.2d at 186 (looking beyond laws against sale and use of drugs, considering “corrosive consequences of drug sale and use” and finding that such activity is dangerous and constitutes threat to safety of all employees); *Keystone Consol. Indus.*, 793 F.2d at 818 (refusing to apply waiver provision provided in ERISA when interpreting annual funding requirement of pension agreement based on collective bargaining agreement); *American Postal Workers Union*, 756 F.2d at 825-26 (finding that, although there is no specific statute prohibiting postal workers from stealing, “given its important trust and its mandate of efficiency, it violates public policy to force the Postal Service to reinstate an employee who was...convicted of directly violating his fiduciary duties through the embezzlement of a large sum of money from it”); *Amalgamated Meat Cutters*, 712 F.2d at 125 (including common sense considerations in public policy analysis).

61. See, e.g., *Northwest Airlines*, 808 F.2d at 78, 83 (describing public policy exception as very limited, stating that it is “extremely narrow” and should only be applied when public policy emanates from clear statutory case law). The Second, Fourth, Sixth, Ninth, Tenth, Eleventh and District of Columbia Circuits have adopted a narrow approach to the public policy exception. See *First Nat'l Supermarkets Inc. v. Retail, Wholesale & Chain Store Food Employees Union Local 338*, 118 F.3d 892, 897-98 (2d Cir. 1997) (stating that “courts may invoke public policy to vacate an arbitral award ‘only in those rare cases where enforcement of the award would be directly at odds with a well-defined and dominant public policy resting on clear law and legal precedent’” (quoting *Saint Mary Home, Inc. v. Service Employees Int'l Union*, Dist. 1199, 116 F.3d 41, 46 (2d Cir. 1997))); *Mountaineer Gas Co. v. Oil Chem. Workers Int'l*, 76 F.3d 606, 608 (4th Cir.) (advocating deference to arbitrator because parties to collective bargaining agreement opted for arbitrator’s interpretation and resolution of their dispute and holding award must be in “manifest disregard of law” for courts to vacate award), *cert. denied*, 117 S. Ct. 80 (1996); *Bowles Fin. Group v. Stifel, Nicolaus & Co.*, 22 F.3d 1010, 1012 (10th Cir. 1994) (“To stress the narrowness of our [judicial] review, however, we look solely to statutory and other legal requirements imposed upon arbitration contracts, proceedings and awards.”); *Brown v. Rauscher Pierce Refsnes*, Inc., 994 F.2d 775, 782 (11th Cir. 1993) (noting that courts can vacate arbitral awards as violating public policy only if policy is well-defined, dominant and drawn from laws and legal precedent); *Seymour v. Blue Cross/Blue Shield*, 988 F.2d 1020, 1023 (10th Cir. 1993) (“If a court is to disturb an award, it can only do so under strict statutory or judicially-created standards.”); *Shelby County Health Care Corp. v. American Fed'n of State, County & Mun. Employees*, Local 1733, 967 F.2d 1091, 1095 (6th Cir. 1992) (holding that courts may refuse to enforce arbitral awards that violate public policy when decisions will clearly violate well-defined and dominant public policy); *Sheet Metal Workers Int'l Ass'n, Local Union No. 33 v. Power City Plumbing*, 954 F.2d 557, 561 (4th Cir. 1991) (“[A]n arbitration award is final if the arbitration decision ‘draws its essence from the collective bargaining agreement’” (quoting United Steelworkers v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960))); *Federated Dep't Stores, Inc. v. J.V.B. Indus. Inc.*, 894 F.2d 862, 866 (6th Cir. 1990) (applying “manifest disregard of the law” test for vacatur of arbitrator’s award on public policy grounds); *United Food & Commercial Work-
ers, Local Union No. 7R v. Safeway Stores, Inc., 889 F.2d 940, 946 (10th Cir. 1989) (stating that courts can vacate arbitrator’s award when it “manifest[s] an infidelity” to arbitrator’s obligation to have award draw its essence from collective bargaining agreement); Stead Motors v. Automotive Machinists Lodge No. 1173, 886 F.2d 1200, 1211 (9th Cir. 1989) (emphasizing narrow view of public policy exception); Pack Concrete, Inc. v. Cunningham, 886 F.2d 283, 285 (9th Cir. 1989) (deferring to arbitrator’s award if it “draws its essence from the collective bargaining agreement”); Apperson v. Fleet Carrier Corp., 879 F.2d 1334, 1353 (6th Cir. 1989) (“[F]ederal courts do not have plenary power to review the merits of an arbitration decision. Rather, the courts should defer to the agreed upon tribunal’s interpretation of the contract ‘as long as the award draws its essence from the bargaining agreement.’” (quoting Wood v. International Bhd. of Teamsters, Local 406, 807 F.2d 493, 500 (6th Cir. 1986))); Board of County Comm’rs v. L. Robert Kimball & Assocs., 860 F.2d 683, 686 (6th Cir. 1988) (stating that power to set aside arbitrator’s award on public policy grounds is not broad in scope); Local Joint Executive Bd. v. Riverboat Casino, Inc., 817 F.2d 524, 526 (9th Cir. 1987) (holding that district court’s review of arbitral award is limited); United States Postal Serv. v. National Ass’n of Letter Carriers, 810 F.2d 1239, 1241 (D.C. Cir. 1987) (stating that public policy exception is designed to be narrow to prevent potentially intrusive judicial review of arbitral awards); Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker, 808 F.2d 930, 933 (2d Cir. 1986) (“To adopt a less strict standard of judicial review [than manifest disregard of the law] would be to undermine our well-established deference to arbitration as a favored method of settling disputes when agreed to by the parties.”); Northwest Airlines, 808 F.2d at 83 (providing for extremely narrow interpretation of public policy exception); Bevles, 791 F.2d at 1394 (upholding arbitrator’s award unless it is “manifest disregard of the law”); United States Postal Serv., 789 F.2d at 7 (“Our review of an arbitrator’s award is strictly limited to determining whether the award draws its essence from the contract.”); Orange Belt Dist. Council of Painters No. 48 v. Kashak, 774 F.2d 985, 990 (9th Cir. 1985) (“The only exception to this broad deference justifies reversal of ‘an award which actually violates the law or any explicit, well-defined and dominant public policy.’” (quoting George Day Constr. Co. v. United Bhd. of Carpenters & Joiners, Local 354, 722 F.2d 1471, 1477 (9th Cir. 1984)); Washington Hosp. Ctr. v. Service Employees Int’l Union, Local 772, 746 F.2d 1503, 1514 (D.C. Cir. 1984) (“An arbitrator’s interpretation of a collective bargaining agreement, whether on questions of substance or of procedure, is entitled to great deference” and award will not be overturned unless arbitrator’s words fail to draw their essence from collective bargaining agreement); George Day Constr. Co. 722 F.2d at 1477 (“[I]f on its face, the award represents a plausible interpretation of the contract, judicial inquiry ceases and the award must be enforced.”). Recently, the First Circuit has moved to the narrow interpretation of the public policy exception that the Second and Eleventh Circuits follow. See Prudential-Bache Sec., Inc. v. Tanner, 72 F.3d 234, 239, 241 (1st Cir. 1995) (holding that courts can vacate arbitral awards only if they are in “manifest disregard of the law”); Service Employees Int’l Union v. Local 1199 N.E., 70 F.3d 647, 652 (1st Cir. 1995) (finding that for courts to vacate arbitrator’s award, award must violate well-defined and dominant public policy); El Dorado Technical Servs., Inc. v. Union General de Trabajadores de Puerto Rico, 961 F.2d 317, 319 (1st Cir. 1992) (“Put succinctly, then, a court should uphold an award that depends on an arbitrator’s interpretation of a collective bargaining agreement if it can find, within the four corners of the agreement, any plausible basis for that interpretation.”); Advest, Inc. v. McCarthy, 914 F.2d 6, 8-10 (1st Cir. 1990) (applying “manifest disregard of the law” threshold for vacating arbitral awards on public policy grounds); Georgia-Pac. Corp. v. Local 27, Paperworkers Int’l Union, 864 F.2d 940, 944 (1st Cir. 1988) (stating that court’s role in reviewing arbitrator’s decision is very limited); Local 1445, United Food & Commercial Workers Int’l Union v. Stop & Shop Co., 776 F.2d 19, 21 (1st Cir. 1985) (finding that arbitrator’s decision may be reviewed by courts under public policy exception only if it is in
however, is the only circuit to adopt a middle road approach in applying the public policy exception.\textsuperscript{62} Ironically, although the Supreme Court in \textit{W.R. Grace} attempted to clearly define the scope of the public policy exception, its ambiguous decision actually resulted in a three-way circuit split.\textsuperscript{63}

1. \textit{Expanding Beyond Traditional Lines of the Public Policy Exception}

After the dust cleared from the decision in \textit{W.R. Grace}, the federal courts had to clarify their own interpretation of the public policy exception.\textsuperscript{64} Courts that adopted the expansive view of the public policy exception found that enforcement of an arbitrator’s award would be denied “to safeguard public welfare under changing conditions, mores and values.”\textsuperscript{65}

“manifest disregard of the law”). The Seventh and Eighth Circuits have also generally shifted to a narrower interpretation. See Schiltz v. Burlington N. R.R., 115 F.3d 1407, 1414 (8th Cir. 1997) (“Under narrow circumstances, the public policy ground disallows the courts to lend their authority to a board decision which might harm the public.”); International Bhd. of Teamsters, Local 878 v. Commercial Warehouse Co., 84 F.3d 299, 302 (8th Cir. 1996) (recognizing that courts have authority to vacate arbitral awards only where award violates well-defined and dominant public policy); Union Pac. R.R. Co. v. United Transp. Union, 23 F.3d 1397, 1399-1400 (8th Cir. 1994) (applying well-defined and dominant public policy threshold for vacating arbitrator’s award on public policy grounds); Ethyl Corp. v. United Steelworkers, 768 F.2d 180, 183 (7th Cir. 1985) (noting that scope of judicial review is extremely narrow).

62. See Gregory T. Mayes, \textit{Labor Law—The Third Circuit Defines the Public Policy Exception to Labor Arbitration Awards—Exxon Shipping Co. v. Exxon Seamen’s Union, 993 F.2d 357 (3d Cir. 1993)}, 67 \textit{Temp. L. Rev.} 493, 503 (1994) (defining Third Circuit test for vacating arbitral award for violation of public policy). The Third Circuit takes a middle of the road approach to the public policy exception by applying a two-prong test: (1) does a well-defined and dominant public policy exist and (2) does the award itself violate a statute, regulation or other manifestation of positive law or compel conduct by an employer that would violate such a law. See Exxon Shipping Co., 993 F.2d at 360 (applying two-prong test for vacatur of arbitral awards); Stroehmann Bakeries, Inc. v. Local 776, Int’l Bhd. of Teamsters, 969 F.2d 1436, 1442 (3d Cir. 1992) (same).

63. For a further discussion of the three-way circuit split in the application of the public policy exception and an explanation of how \textit{W.R. Grace} did not clarify the scope of the public policy exception, see infra notes 64-109 and accompanying text.

64. See Magee, \textit{supra} note 26, at 476 (discussing beginning of broader application of public policy exception and noting that expansion had been presaged in \textit{Local No. P-1236, Amalgamated Meat Cutters & Butchers Workmen v. Jones Dairy Farm, 680 F.2d 1142, 1145 (7th Cir. 1982)}, and \textit{Johns-Manville Sales Corp. v. International Ass’n of Machinists Local Lodge 1609, 621 F.2d 756, 759 (5th Cir. 1980))}

65. Bernard D. Meltzer, \textit{After the Labor Arbitration Award: The Public Policy Defense, 10 Indus. Rel. L.J.} 241, 244, 255-56 (1988). After \textit{W.R. Grace}, the circuits were essentially at two ends of a spectrum regarding the public policy exception: “(1) the expansive or broader view in which enforcement would be denied ‘to safe guard public welfare under changing conditions, mores and values’; and (2) the ‘limitist’ view that an arbitration award will only be vacated if the award itself is unlawful or compels unlawful conduct.” Eileen Nowikowski, \textit{Public Policy Exception to the Enforcement of Labor Arbitration Awards, 68 Mich. B.J.} 626, 626 (1989) (quoting United States Postal Serv. v. American Postal Workers Union, 736 F.2d 822, 826
The decision in *W.R. Grace* marked the first time that a federal court (1st Cir. 1984); see *Northwest Airlines*, 808 F.2d at 84 (applying “limitist” view in enforcing award).

The Fifth Circuit was the first circuit court to examine the scope of the public policy exception after *W.R. Grace*. See *Amalgamated Meat Cutters & Butcher Workmen, Local Union 540 v. Great W. Food Co.*, 712 F.2d 122, 122 (5th Cir. 1983) (applying public policy exception to enforcement of arbitral awards). *Amalgamated Meat Cutters* dealt with an arbitration award ordering an employer to reinstate a company truck driver with full seniority who was discharged after a traffic accident when cited for drinking while on duty or within four hours prior. See id. at 123. Despite the fact that the employee was cited with consuming alcohol within four hours before going on duty and speeding, the arbitrator ordered the employer to reinstate the employee with full seniority. See id. In that case, the Fifth Circuit concluded that the reinstatement of the truck driver would violate the public policy of “preventing people from drinking and driving [that] is embodied in the case law, applicable regulations, statutory law, and pure common sense.” Id. at 125.

The Fifth Circuit cited the Federal Motor Carrier Safety Regulations, 49 C.F.R. § 392.5 (1997), as further evidence of this policy. See id. Section 392.5 provides:

(a) No driver shall—

(1) Use alcohol . . . or be under the influence of alcohol, within 4 hours before going on duty or operating, or having physical control of, a commercial motor vehicle; or

(2) Use alcohol . . . while on duty, or operating, or in physical control of a commercial motor vehicle . . . .

(b) No motor carrier shall require or permit a driver to—

(1) Violate any provision of paragraph (a) of this section; or

(2) Be on duty or operate a commercial motor vehicle if, by the driver’s general appearance or conduct or by other substantiating evidence, the driver appears to have used alcohol within the preceding 4 hours.

49 C.F.R. § 392.5. In *Amalgamated Meat Cutters*, the Fifth Circuit vacated the arbitrator’s award on public policy grounds and started a new trend of adopting an expanded view of the public policy exception. See *Amalgamated Meat Cutters*, 712 F.2d at 125; see also *Exxon Corp. v. Baton Rouge Oil*, 77 F.3d 850, 855 (5th Cir. 1996) (stating that reinstatement of employee who tested positive for cocaine while occupying safety-sensitive position violated public policy for drug-free society); *Gulf Coast Indus. Workers Union v. Exxon Co.*, 991 F.2d 244, 248-55 (5th Cir. 1993) (overruling arbitrator’s award reinstating employee who occupied safety-sensitive position after testing positive for cocaine while on duty because it violated public policy of prohibiting illicit drugs from workplace).

The next circuit to follow the broad interpretation of the public policy exception, at least temporarily, was the First Circuit. See *American Postal Workers Union, 736 F.2d at 824* (disagreeing with *Local 453, International Union of Electric Workers v. Otis Elevator Co.*, 314 F.2d 25, 29 (2d Cir. 1963), when it stated that in looking at “important role which employment plays in implementing public policy of rehabilitating those convicted of a crime, there can hardly be a public policy that a man who has been convicted, fined, and subjected to serious disciplinary measures, can never be ordered reinstated to his former employment”). In *American Postal Workers Union*, the First Circuit dealt with an appeal of an arbitrator’s award that ordered reinstatement of a postal worker who embezzled Postal Service funds. See id. at 823-24. An arbitrator found that the embezzlement of postal funds violated a federal statute, but after ordering suspension and full restitution, the arbitrator reinstated the employee because the employee intended to repay the embezzled money. See id. at 825. Though the First Circuit recognized a well-defined positive law that would be violated if the employee was reinstated, it focused its justification for its decision on common sense implications against the employee’s reinstate-
broadly interpreted the public policy exception.\textsuperscript{66} By 1984, the United States Courts of Appeals for the First, Fifth and Seventh Circuits had adopted a broader application of the public policy exception.\textsuperscript{67} Subsequently, the United States Court of Appeals for the Eighth Circuit would also apply the broad interpretation of the public policy exception.\textsuperscript{68}

In \textit{Iowa Electric Light & Power Co. v. Local Union 204 of the International Brotherhood of Electrical Workers},\textsuperscript{69} the Eighth Circuit stated that its decision to vacate an arbitrator's decision to reinstate an employee who breached a public safety regulation was not a blanket justification for the discharge of such employees, but rather a call for a subjective approach in the review of such arbitral awards, which looks to the severity of the employee's action.\textsuperscript{70} In its analysis, the Eighth Circuit considered the common sense applications of rehiring an employee who showed no respect for the safety implications of his or her actions and was willing to jeopardize the public welfare for unjustifiable acts.\textsuperscript{71} Although the First, Fifth, Seventh and Eighth Circuits have adopted the broad interpretation of the public policy

\textit{Id.}

66. See Magee, supra note 26, at 476 (illustrating movement away from traditional interpretation of public policy exception towards broader interpretation, taking into account general considerations of public policy).

67. For a further discussion of the broad interpretation of the public policy exception for the enforcement of arbitral awards in the First, Fifth and Seventh Circuits, see supra note 60 and infra notes 102-09 and accompanying text.


69. 834 F.2d 1424 (8th Cir. 1987).

70. See id. at 1429-30 (recognizing that although there are times when safety violation may be excused, employee's attempt to beat noon rush at nuclear power plant did not justify defeating safety system to leave).

71. See id. The court noted that "[o]ur decision today is in keeping with the line of cases vacating arbitrators' awards that direct the reinstatement of employees whose deliberate acts have jeopardized public health or safety." \textit{Id.} at 1428 (citing S.D. Warren Co. v. United Paperworkers Int'l Union, Local 1069, 815 F.2d 178 (1st Cir. 1987); Amalgamated Meat Cutters & Butcher Workmen, Local Union 540 v. Great W. Food Co., 712 F.2d 122 (5th Cir. 1983); Local No. P-1256, Amalgamated Meat Cutters & Butchers Workmen v. Jones Dairy Farm, 680 F.2d 1142 (7th Cir. 1982)).
exception since the decision in W.R. Grace, this interpretation remains the minority view.\textsuperscript{72}

2. \textit{Deferece to Arbitrator: Majority Still Feels That You Should Get What You Pay For}

As the fortieth anniversary of the Trilogy approaches, the conventional wisdom that continues to emerge from these three cases is that arbitral awards should be protected from judicial intervention.\textsuperscript{73} Although lower federal courts have tried to stray from the precedent established by the Steelworkers Trilogy, the majority of the federal courts have upheld arbitral awards under the Trilogy's protective principles.\textsuperscript{74}

Proponents of the limited scope of the public policy exception argue that courts should not unduly interfere with an arbitrator's decisions in contract disputes.\textsuperscript{75} The essential argument of the traditionalists and those in favor of deference to an arbitrator's judgment is that the parties to a collective bargaining agreement that contains an arbitration clause have bargained for the decision of an arbitrator and not a judge and, therefore, should be bound by the arbitrator's findings.\textsuperscript{76}

\textsuperscript{72} For a further discussion of the narrow application of the public policy exception, which the majority of the circuits use, see supra note 61, infra notes 73-84, 102-09 and accompanying text.

\textsuperscript{73} See LeRoy & Feuille, supra note 3, at 79 (assessing impact of Trilogy and noting that in recent years, lower federal courts have been criticized for straying from principle of judicial deference that Trilogy promulgated).

\textsuperscript{74} See id. at 83 ("[O]nly a tiny fraction of private sector arbitration awards (i.e., less than one percent) are appealed to the federal courts, and . . . most post-arbitration attempts to escape from an arbitrator's ruling are unsuccessful.").

\textsuperscript{75} See Mouser, supra note 9, at 91 (advocating narrow view of public policy exception because it protects parties' agreement to have arbitrator resolve dispute and result is consistent with Supreme Court's emphasis on judicial deference).

\textsuperscript{76} See Hodges, supra note 26, at 672 (supporting narrow scope of public policy exception). Professor Hodges stated that:

\textquote{Not only does a broad public policy exception interfere with collective bargaining policy, but it invites the court to substitute its views as to the meaning of the contract for those of the arbitrator. Such judicial activism is directly contrary to the principles underlying the policy favoring arbitration as a method of dispute resolution, and will negate the benefits of arbitration.}

\textit{Id.;} see Bernard Dunau, \textit{Three Problems in Labor Arbitration}, 55 VA. L. REV. 427, 427 (1969) (stressing importance of finality in arbitration awards and need to limit judicial review to situations inherent in arbitration process or to instances where external criteria mandate accommodation); Magee, supra note 26, at 489 (analyzing principles of judicial deference applied in United Paperworkers International Union v. Misco, Inc., 484 U.S. 29, 36 (1987)); Randall, supra note 3, at 767 (illustrating extreme judicial deference in Second Circuit where "the federal circuits have erected a virtually insurmountable standard of review. Before a court can review the propriety of an award, there must be a showing that the arbitrator first correctly ascertained the applicable law and then expressly manifested an intention, on the record, to disregard it").
Perhaps the most significant case maintaining this traditional interpretation is Misco.\textsuperscript{77} The Supreme Court in Misco found that the Fifth Circuit, in vacating the arbitrator’s award, “made no attempt to review existing laws and legal precedents, but simply formulated a public policy against the operation of dangerous machinery while under the influence of drugs based on ‘general considerations of supposed public interests.’”\textsuperscript{78} In concluding that the Fifth Circuit erred in setting aside the arbitral award on public policy grounds, the Court followed the traditional approach, stating that a court’s refusal to enforce an arbitrator’s award is limited to situations where the arbitrator’s interpretation violates “‘some explicit public policy’ that is ‘well-defined and dominant, and is to be ascertained by reference to the laws and legal precedents.’”\textsuperscript{79} In following W.R. Grace, the Court concluded that a court may refuse to enforce a collective bargaining agreement when the specific terms in the agreement violate public policy, but the policy must be clearly shown.\textsuperscript{80}

The United States Courts of Appeals for the District of Columbia and Second Circuits have adopted what appears to be the most narrow application of the circumstances that may enable a court to engage in a Misco or

\textsuperscript{77} See Roebker, supra note 26, at 831 (discussing impact of Misco, which held that appellate court could not refuse to enforce arbitrator’s award requiring company to reinstate employee who operated hazardous machine and whose company discharged employee for allegedly violating company rule pertaining to use of marijuana on company property, and finality of arbitral awards with respect to public policy exception).

\textsuperscript{78} Misco, 484 U.S. at 31. In Misco, the Supreme Court reversed the decision of the Fifth Circuit, finding that the court identified no law or legal precedent that supported an “explicit public policy” against the operation of dangerous machinery while under the influence of drugs. See id. The Court held that even if the formulation could be accepted, no violation of the policy was even shown because the connection between the marijuana found in Cooper’s car and the actual use of drugs while in the workplace was tenuous at best. See id. The Supreme Court found that it was inappropriate for the Fifth Circuit to make this inference because fact-finding is the task of the arbitrator. See id. Justice White, in delivering the opinion for a unanimous Court, stated that “[t]he federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards.” Id. at 36 (quoting United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960)).

\textsuperscript{79} Id. at 31 (quoting W.R. Grace & Co. v. Local Union, Int’l Union of Rubber Workers, 461 U.S. 757, 766 (1983)). Accordingly, the Supreme Court ordered the employee’s reinstatement to his old job or a reasonably equivalent position that the employee was qualified for because it was not clear whether he would pose a threat to the contested public policy in every alternative job. See id. at 45.

\textsuperscript{80} See id. at 43 (“It is clear that our decision . . . does not otherwise sanction a broad judicial power to set aside arbitration awards against public policy.”). Justice Blackmun, with whom Justice Brennan joined, concurred, but wrote separately to emphasize the narrow grounds on which the decision rested. See id. at 46; see also Nowikowski, supra note 65, at 626 (stating that Supreme Court in Misco stressed narrowness of public policy defense); Roebker, supra note 26, at 834 (discussing limitations of scope of public policy exceptions under Misco, where arbitral award violated well-defined and dominant public policy founded on laws and legal precedents).
81. See Hayford & Sinicropi, supra note 44, at 265 (commenting on scope of application of public policy exception for vacating arbitral awards among various federal circuit courts). The D.C. Circuit has adopted what appears to be the most narrow application of the circumstances that may enable a court to engage in a
Misco or W.R. Grace public policy analysis. See Hugh D. Jascourt, Federal Service Labor and Employment Law, 5 Lab. Law. 357, 378 (1989) (noting narrow scope of public policy exception applied by D.C. Circuit). In fact, since the Great Western case in 1983, the D.C. Circuit has been the only circuit that has openly refused to adopt the expanded view. See Magee, supra note 26, at 487 (stressing extremely narrow application of public policy exception by D.C. Circuit and contending that it makes sense for courts to correct mistakes made by arbitrators, but recognizing that if public policy exception is to be expanded beyond its traditional scope, Supreme Court will have to clarify exact parameters of expansion and will have to provide clear guidelines to lower courts regarding factors that should be considered in applying public policy exception). The D.C. Circuit followed the interpretation that "an arbitration award may not be enforced if it transgresses well-defined and dominant laws and legal precedents . . . . Thus, the exception applies only when the public policy emanates from clear statutory or case law." Edwards, supra note 1, at 13-14. This trigger to the public policy exception recognized by the D.C. Circuit has been classified as the "positive law" standard. See American Postal Workers Union v. United States Postal Serv., 789 F.2d 1, 8 (D.C. Cir. 1986) (holding that public policy exception is extremely narrow); see also Northwest Airlines, Inc. v. Air Line Pilots Ass'n, Int'l, 808 F.2d 76, 85 (D.C. Cir. 1987) ("Obviously, the [public policy] exception is designed to be narrow so as to limit potentially intrusive judicial review of arbitration awards under the guise of public policy.") (quoting American Postal Workers Union, 789 F.2d at 8)); Washington-Baltimore Newspaper Guild, Local 35 v. Washington Post Co., 442 F.2d 1234, 1239 (D.C. Cir. 1971) ("[A]n award will not be vacated even though the arbitrator may have, in the eyes of judges, errors of fact and law unless it 'compels the violation of law or conduct contrary to accepted public policy.'" (quoting Gulf States Tel. Co. v. Local 1692, Int'l Bhd. of Elec. Workers, 416 F.2d 198, 201 (5th Cir. 1969))). The "positive law" standard provides that the most extreme deference should be given to an arbitrator's award under the application of the public policy exception. See Washington Hosp. Ctr. v. Service Employees Int'l Union, Local 722, 746 F.2d 1503, 1514 (D.C. Cir. 1984) ("An arbitrator's interpretation of a collective bargaining agreement, whether on questions of substance or of procedure, is entitled to great deference [and] . . . . [t]he federal policy of settling labor disputes by arbitration would be undermined if courts had final say on the merits of the awards.") (quoting Enterprise Wheel & Car Corp., 363 U.S. at 597)); Revere Copper & Brass Inc. v. Overseas Private Inv. Corp., 628 F.2d 81, 84 (D.C. Cir. 1980) (finding that strong federal policy in favor of voluntary commercial arbitration, embodied in Federal Arbitration Act, 9 U.S.C. § 1-307 (1994), would be undermined if courts intervened in job of arbitrator to hear merits of case).

The Second Circuit has also adopted a narrow approach by applying a test that allows for arbitral awards to be vacated if they are in "manifest disregard of the law." See Reed Architectural Prods., Inc. v. United Steelworkers, Local 6674, 916 F.2d 63, 65 (2d Cir. 1990) ("[T]he scope of our review of an arbitration award is limited: . . . . This great deference . . . . is not the equivalent of a grant of limitless power."); Capital Dist. Chapter v. International Bhd. of Painters, Local Union No. 201, 745 F.2d 142, 147 (2d Cir. 1984) (noting that arbitrator's decision is subject only to limited review); Ottley v. Sheephead Nursing Home, 688 F.2d 883, 890 (2d Cir. 1982) (same); Local 771, I.A.T.S.E. v. RKO General, Inc. WOR Div., 546 F.2d 1107, 1113 (2d Cir. 1977) (allowing for vacatur of arbitral award if it is in manifest disregard of law); Parsons & Whittemore Overseas Co. v. Societe Generale De L'Industrie Du Papier, 508 F.2d 969, 977 (2d Cir. 1974) (applying manifest disregard for law test for arbitral award); In re Arbitration Be-
between Sobel & Hertz, Warner & Co., 469 F.2d 1211, 1213 (2d Cir. 1972) (using manifest disregard of law test); Office of Supply v. New York Navigation Co., 469 F.2d 377, 380 (2d Cir. 1972) ("[A] court may vacate an award which is the product of 'manifest disregard' of applicable law."). Manifest disregard is defined as a standard of review that "might be present when arbitrators understand and correctly state the law, but proceed to disregard the same." See Kenneth R. Davis, When Ignorance of the Law Is No Excuse: Judicial Review of Arbitration Awards, 45 BUFF. L. REV. 49, 95 (1997) (citing San Martine Compania De Navigacion, S.A. v. Saguenay Terminals, Ltd., 293 F.2d 796, 800 (9th Cir. 1961)). The Second Circuit took this definition one step further in stating that "manifest disregard" implies more than an error of law. Rather, '[t]he error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator." Id. at 94 (quoting Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bobker, 808 F.2d 930, 933 (2d Cir. 1986)). The Second Circuit interpreted manifest disregard of the law to mean "that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it." Merrill Lynch, 808 F.2d at 933. Manifest disregard, as defined by Merrill Lynch, is nearly impossible to prove because even when an arbitrator deliberately ignores controlling law, the arbitrator will not usually announce his or her other misconduct. See id. (interpreting manifest disregard test); see also Davis, supra, at 94 (noting difficult threshold for demonstrating "manifest disregard of the law"). Thus, the Second Circuit, like the D.C. Circuit, applies a very narrow scope of review to the public policy exception. See id. ("After centuries of antagonism towards arbitration, judges have embraced the national policy favoring agreements to arbitrate, if not a policy promoting arbitration itself. In the hope of fostering a just yet efficient system, this [manifest disregard] policy substantially removes arbitration from the oversight of the judiciary.").

The manifest disregard test has drawn both challenges and support from the other circuits. See id. at 95-101 (analyzing circuit interpretations of manifest disregard test). The First Circuit has adopted a liberal approach to the manifest disregard test, finding that "[i]n certain circumstances, the governing law may have such widespread familiarity, pristine clarity, and irrefutable applicability that a court could assume the arbitrators knew the rule and, notwithstanding, swept it under the rug." Advest, Inc. v. McCarthy, 914 F.2d 6, 10 (1st Cir. 1990) (ruling that Advest failed to show that arbitrators inevitably recognized applicable damage rule).

The D.C. Circuit adopted the broadest possible definition of manifest disregard by allowing for plenary review of legal errors stemming from statutory claims to honor the intent of the parties to an arbitration agreement. See Davis, supra, at 96 (citing Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1475 (D.C. Cir. 1997)). Other circuits, like the Fifth and Eleventh Circuits, have rejected the manifest disregard test. See id. at 97 (citing R.M. Perez & Ass'n v. Welch, 960 F.2d 534, 539 (5th Cir. 1992) (declining to adopt manifest disregard test); Robins v. Day, 954 F.2d 679, 684 (11th Cir. 1992) (openly rejecting manifest disregard test)); see also O.R. Sec., Inc. v. Professional Planning Ass'n, Inc., 857 F.2d 742, 746-47 (11th Cir. 1988) (refusing to adopt manifest disregard test)). The Eighth Circuit has also refrained from adopting the manifest disregard test. See Marshall v. Green Giant Co., 942 F.2d 539, 550 (8th Cir. 1991) (concluding that arbitrator may have erred, but deciding manifest disregard test was not met due to inadvertent, rather than intentional, error by arbitrator). Circuits opposed to the manifest disregard test find that the test fails to provide a measure of review of error in arbitration awards because it does not take into account the magnitude, quality or consequences of the error and, most significantly, the manifest disregard test contradicts the implicit intent of the parties to allow for review of the arbitrator's award. See Davis, supra, at 99-101 (showing that some courts still support deference to decision of arbitrator instead of applying manifest disregard test). Illustrating the reason many other circuits have refused to adopt the "manifest disregard" standard, the
the Fourth, Sixth, Ninth, Tenth and Eleventh Circuits have also traditionally applied the public policy exception narrowly.82 These circuits, 

Eleventh Circuit stated that: "[t]his court has never adopted the manifest-disregard-of-the-law standard; indeed, we have expressed some doubt as to whether it should be adopted since the standard would likely never be met when the arbitrator provides no reasons for its award (which is typically the case).” Galbraith, supra note 2, at 254 (quoting Raiford v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 903 F.2d 1410, 1412 (11th Cir. 1990)).

82. See SFIC Properties, Inc. v. International Ass’n of Machinists & Aerospace Workers, Local Lodge 311, 103 F.3d 923, 924 (9th Cir.) (finding scope of review of arbitral award in labor dispute extremely narrow); Mountaineer Gas Co. v. Oil, Chem. & Atomic Workers Int'l Union, 76 F.3d 606, 608 (4th Cir.) ("[A]bsent any fraud by the parties or dishonesty by the arbitrator, an arbitrator's findings should never be overruled." (citing Misco, 484 U.S. at 38)), cert. denied, 117 S. Ct. 80 (1996); United Food & Commercial Workers Int'l Union, Local 558 v. Foster Poultry Farms, 74 F.3d 169, 173 (9th Cir. 1995) ("The scope of review of an arbitrator's decision is extremely narrow." (quoting Federated Dep't Stores v. United Food & Commercial Workers Union, Local 1442, 901 F.2d 1494, 1496 (9th Cir. 1990))); Bowles Fin. Group, Inc. v. Stifel, Nicolaus & Co., Inc., 22 F.3d 1010, 1012 (10th Cir. 1994) ("To stress the narrowness of our review, however, we look solely to statutory and other legal requirements imposed upon arbitration contracts, proceedings and awards."); Brown v. Rauscher Pierce Refns, Inc., 994 F.2d 775, 782 (11th Cir. 1993) (ruling that public policy exception allows for courts to vacate arbitral awards if contrary to well-defined and dominant public policy ascertained by laws and legal precedents); Seymour v. Blue Cross/Blue Shield, 988 F.2d 1020, 1023 (10th Cir. 1993) ("If a court is to disturb an award, it can only do so under strict statutory or judicially-created standards."); Monroe Auto Equip. Co. v. UAW, Local 878, 981 F.2d 261, 269 (6th Cir. 1992) (ruling that award must violate some explicit public policy); Richmond, Fredericksburg & Potomac R.R. Co. v. Transportation Communications Int'l Union, 973 F.2d 276, 278 (4th Cir. 1992) ("The effectiveness of any pro-arbitration policy is dependent, in the first instance, on a limited scope of judicial review of the arbitrator's determination." (quoting United States Bulk Carriers, Inc. v. Arguelles, 400 U.S. 351, 360 (1971))); Shelby County Health Care Corp. v. American Fed'n of State, County & Mun. Employees, Local 1733, 967 F.2d 1091, 1095 (6th Cir. 1992) (holding that award must violate well-defined and dominant public policy, and that conflict between public policy, and arbitration award must be clearly shown); Interstate Brands Corp. v. Chauf feurs, Teamsters, Warehousemen & Helpers Local Union No. 135, 909 F.2d 885, 892 (6th Cir. 1990) (finding that court's refusal to enforce arbitrator's award is limited to situations when award would violate well-defined and dominant public policy); Federated Dep't Stores, 901 F.2d at 1496 (holding that scope of review of arbitrator's award is extremely narrow (citing Misco, 484 U.S. at 36-37)); Stead Motors v. Automotive Machinists Lodge No. 1173, 886 F.2d 1200, 1212 (9th Cir. 1989) (noting Ninth Circuit's narrow view of judicial power to vacate arbitral award on public policy grounds); Pack Concrete, Inc. v. Cunningham, 866 F.2d 283, 285 (9th Cir. 1989) (allowing for extremely narrow judicial review of arbitrator's award); Sheet Metal Workers Int'l Ass'n, Local No. 359 v. Arizona Mechanical & Stainless, Inc., 863 F.2d 647, 653 (9th Cir. 1988) (holding that judicial scrutiny of arbitrator's award is extremely limited and award is to receive deferential review if it finds support from collective bargaining agreement); Board of County Comm'rs v. L. Robert Kimball & Assoc., 860 F.2d 683, 686 (6th Cir. 1988) (finding that court's refusal to enforce arbitrator's award is limited to situations when award would violate well-defined and dominant public policy); Florida Power Corp. v. International Bhd. of Elec. Workers, Local Union 433, 847 F.2d 680, 681-82 (11th Cir. 1988) (noting that federal courts traditionally have given deference to arbitral awards); Butterkrust Bakeries v. Bakery Workers Int'l Union, Local No. 361, 726
although not insisting upon as stringent requirements as the District of Columbia and Second Circuits, follow the rule that for an arbitrator’s award to be vacated, it must violate a well-defined and dominant public policy.\textsuperscript{83} These circuits note that because parties have bargained for the arbitrator’s decision, under the historical construction of the public policy exception in labor cases, courts must defer to the award of the arbitrator unless the award fits within this extremely narrow application.\textsuperscript{84}

3. Middle Road: The Third Circuit Stands All Alone on the Road Least Traveled

Although W.R. Grace defined what most commentators had interpreted to be two lines of authority in response to the issue of when a court may set aside arbitration awards that violate of public policy, the Third Circuit recently has developed a two-prong test, which places it in the middle of this public policy continuum.\textsuperscript{85} The first prong of the Third Circuit’s test requires a court to identify a well-defined and dominant public policy that is expressed or implied by a regulation or statute.\textsuperscript{86} The second prong of the test requires a court to consider whether the arbitration award violated the identified public policy and, also, whether the award would undermine the stated purpose behind the policy.\textsuperscript{87}

\textsuperscript{83} See Hayford & Sinicropi, supra note 44, at 261-66 (discussing circuits that apply narrow scope of review to vacate arbitration awards on public policy grounds); Mouser, supra note 9, at 108-16 (noting circuits that apply narrow approach to public policy exception).

\textsuperscript{84} See Brown, 994 F.2d at 782 (finding that courts should defer to arbitrator unless award violates well-defined and dominant public policy); United Food & Commercial Workers, Local Union No. 7R v. Safeway Stores, Inc., 889 F.2d 940, 948 (10th Cir. 1989) (noting that ability of courts to apply public policy exception to arbitrator’s award is permissible only when award violates explicit public policy that is well-defined and dominant).

\textsuperscript{85} See Exxon Shipping Co. v. Exxon Seamen’s Union, 993 F.2d 357, 362-64 (3d Cir. 1993) (illustrating Third Circuit’s new two-prong intermediate test); see also Thomas E. Claps, Labor Law—Arbitration Awards—An Arbitration Award Reinstating Helmsman Who Tested Positive for Marijuana Use May Be Vacated for Contravening Public Policy Against the Operation of Sea Vessels by Drug Users—Exxon Shipping Co. v. Exxon Seamen’s Union, 24 SETON HALL L. REV. 541, 542 (1993) (analyzing Third Circuit’s two-prong test for vacating arbitral awards for violation of public policy); Hayford & Sinicropi, supra note 44, at 271 (“The mid-point of the public policy trigger is defined by the opinions of the Third Circuit in Stroehmann Bakeries and Exxon Shipping.”).

\textsuperscript{86} See Mayes, supra note 62, at 494 (interpreting application of Third Circuit test for vacating arbitral awards on public policy grounds).

\textsuperscript{87} See Exxon Shipping, 993 F.2d at 364 (holding that reinstating Foster would “undermine the regulations’ stated purpose ‘to minimize the use of intoxicants by merchant marine personnel and to promote a drug-free and safe work environment’” (quoting 46 C.F.R. § 16.101(a) (1997))); see also Mayes, supra note 62, at 494 (describing Third Circuit’s two-prong test).
The first case to apply this middle road test was *Stroehmann Bakeries, Inc. v. Local 776, International Brotherhood of Teamsters.* In *Stroehmann Bakeries*, the Third Circuit faced an action challenging an arbitration award ordering the reinstatement of an employee charged with sexual harassment. In affirming the decision of the district court, the Third Circuit applied its two-prong test to determine its ability to vacate the decision of the arbitrator on public policy grounds. Under the first prong of the test, the court concluded that there was a well-defined and dominant public policy against sexual harassment in the workplace.

The Third Circuit, in applying the second prong of the test, found that the reinstatement of the employee, without an actual determination that the harassment did not occur, violated public policy. The Third Circuit found an award that reinstated an employee under these circumstances did not discourage sexual harassment and, in addition, undermined the employer's ability to fulfill its obligations to prevent and

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88. 969 F.2d 1436 (3d Cir. 1992).
89. See id. at 1437-38. The employee, a "store door" driver who was employed by Stroehmann for 17 years, was discharged for violating a company rule that prohibits immoral conduct while on duty. See id. at 1439. The employee, after unloading his delivery, picked up an orange and asked the night clerk of one of Stroehmann's customers if her breasts were as hard as the orange. See id. The employee then attempted to pull up the night clerk's shirt, and he accused the night clerk of following him so that she could "look at his ass." See id. The employee then grabbed the night clerk's breasts. See id. Next, he told her not to tell her father of the incident because he did not want to jeopardize his friendship with her father. See id. After the employee denied the incident to his supervisor, the sales activator and manager of Stroehmann still discharged the employee for violating the longstanding written Stroehmann policy prohibiting immoral conduct while on duty. See id. The employee filed a grievance over the discharge under the collective bargaining agreement between Stroehmann and the Teamsters Union. See id. The arbitrator found that the employee was not discharged for just cause and ordered his reinstatement with back pay less interim earnings. See id. at 1440. The district court vacated the award, concluding that there exists a well-established public policy against sexual harassment in the workplace and that the award violated this public policy. See id. The Teamsters Union appealed. See id.

90. See id. at 1441-43 (discussing rationale for vacating arbitrator's award based on two-prong test).
91. See id. at 1441 (relying on Title VII of Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (1994)). The court also concluded, in addition to the public policy against sexual harassment in the workplace, a well-defined and dominant public policy existed favoring voluntary employer prevention and imposition of sanctions against sexual harassment in the workplace. See id. at 1442.
92. See id. The investigation of the incident did not produce conclusive evidence that the incident occurred and the arbitrator held that Stroehmann had insufficiently investigated the incident before discharge. See id. at 1440. The Third Circuit did not agree, however, with the premise that due to the lack of clear determination that the incident actually occurred, they would have to rule in favor of the employee as the arbitrator did. See id. at 1442.
sanction sexual harassment in the workplace. 93 Accordingly, the Third Circuit vacated the arbitrator's award and concluded that reinstatement of an employee without a determination of the merits of an allegation of sexual harassment violates public policy. 94

The Third Circuit also applied this two-prong test in Exxon Shipping Co. v. Exxon Seamen's Union. 95 In Exxon Shipping, the employer challenged an arbitration award reinstating a helmsman whom the employer had terminated for testing positive for marijuana after his ship ran aground. 96 In affirming the district court's grant of summary judgment in favor of the employer and vacating the arbitrator's award, the Third Circuit applied the two-prong test to determine if the arbitrator's award violated a well-defined and dominant public policy. 97

The Third Circuit concluded that the Coast Guard regulations express a "well-defined and dominant" public policy against the operation of a vessel while under the influence of drugs. 98 In applying the second

93. See id. (concluding that award failed second prong of two-prong test by violating well-defined and dominant public policy and purpose behind public policy).

94. See id.

95. 993 F.2d 357 (3d Cir. 1993).

96. See id. at 358. Exxon tested an employee for drugs and alcohol under both the Coast Guard regulation and Exxon's Alcohol and Drug Use Policy after the employee ran a 635-foot oil tanker aground. See id. Because the Coast Guard and Exxon use two different screening levels, the employee took two sets of tests. See id. The employee tested negative at the Coast Guard screening level, but tested positive at the stricter Exxon level. See id.

Finding the employee's positive test results to violate its drug use policy, Exxon terminated his employment. See id. Exxon's drug policy was contained in its collective bargaining agreement, under which the Union filed a grievance protesting the employee's discharge. See id. at 359. Although the arbitrators found that the employee violated the drug use policy, they concluded that termination was an excessive penalty. See id. The arbitration board ordered Exxon to reinstate the employee without back pay and to test the employee for drugs once a year. See id. The drug use policy prohibited the use, possession, distribution or sale of non-prescription drugs while conducting business for Exxon or on Exxon premises and provided that testing positive is grounds for disciplinary action, including dismissal. See id. The arbitrators found no evidence that the employee possessed drugs while conducting Exxon business or on Exxon premises and, therefore, assessed the lesser penalty of suspension. See id. Upon appeal by Exxon to the United States District Court for the District of New Jersey, the court held that the arbitration board's reinstatement violated a strong public policy against having "drug users operate commercial vessels," condoned illegal activity and would insufficiently deter drug use by other employees with safety-sensitive jobs. See id. at 360. The Union appealed to the Third Circuit for reversal of the arbitration board's award. See id. at 358.

97. See id. at 360-64 (deciding first if well-defined and dominant public policy existed and second if arbitrator's award violated policy, rules or purposes behind policy).

98. See id. at 361-62 (relying on language of Coast Guard regulations and Congress' decision to authorize Coast Guard to oversee and ensure maritime safety). The court noted that the Coast Guard regulations are part of a broader public policy against the operation of common carriers while under the influence of
prong of the test, the court found that an award reinstating the helmsman would violate the public policy of protecting the public and environment against the operation of common carriers by drug users and would undermine the stated purpose of the regulation— to minimize the use of drugs and alcohol by merchant marine personnel and to promote a drug-free and safe work environment.\footnote{99} As a result of the award failing to satisfy the second prong of the test, the Third Circuit affirmed the vacatur of the arbitrator's award on public policy grounds.\footnote{100} Although the Third Circuit failed to accept either the narrow approach, that to vacate the arbitrator's award it must violate a "positive law," or the broad approach, that a court can set aside an arbitrator's award if it is "inconsistent with some significant public policy," the Third Circuit recognized a new test falling somewhere between the two boundaries.\footnote{101}  

4. First, Seventh and Eighth Circuits: Lost in the Shuffle

Several circuit courts are having difficulty finding concrete, limiting principles when applying the public policy exception.\footnote{102} This is particularly true in the First, Seventh and Eighth Circuits. These circuits previously interpreted the public policy exception broadly, but now, in light of the confusion following \textit{W.R. Grace}, they have adopted a more narrow approach.\footnote{103}

drugs or alcohol. \textit{See id.} at 361. The Third Circuit also enumerated a long list of cases that gave further evidence of this public policy. \textit{See id.} (providing additional support for conclusion that there existed "a well-defined and dominant public policy").

\footnote{99} \textit{See id.} at 364. The Third Circuit also found that reinstating the employee would "thwart the achievement of the overriding interest in public safety furthered by the regulations." \textit{Id.} These regulations were to discourage drug and alcohol use by commercial vessel operators, reduce the potential for marine casualties relating to drug and alcohol use and enhance the safety of the maritime transportation industry. \textit{See id.} The Third Circuit also held that reinstating the employee would be inconsistent with the public policy expressed in other cases that vacated awards reinstating operators of common carriers discharged for drug or alcohol use. \textit{See id.} (citing Delta Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l, 861 F.2d 665, 674 (11th Cir. 1988); Amalgamated Meat Cutters & Butcher Workmen, Local Union 540 v. Great W. Food Co., 712 F.2d 122, 124 (5th Cir. 1983)).

\footnote{100} \textit{See id.} at 368.

\footnote{101} \textit{See United Transp. Union Local 1589 v. Suburban Transit Corp., 51 F.3d 376, 381 (3d Cir. 1995) (mandating that public policy must be well-defined and dominant and rejecting "violation of public law" standard (citing \textit{Exxon Shipping}, 993 F.2d at 363; Stroehmann Bakeries, Inc. v. Local 776, Int'l Bhd. of Teamsters, 969 F.2d 1436, 1441 (3d Cir. 1992)); \textit{see also} Service Employees Int'l Union Local Union 36 v. City Cleaning Co., 982 F.2d 89, 92 (3d Cir. 1992) (recognizing that arbitral award must violate "well-defined and dominant public policy"); United States Postal Serv. v. National Ass'n of Letter Carriers, 838 F.2d 146, 150 (3d Cir. 1988) (rejecting "positive law" threshold test for public policy exception)).

\footnote{102} \textit{See Edwards, supra} note 1, at 20 (illustrating difficulties that certain circuits encounter in applying public policy exception).

\footnote{103} \textit{See Schiltz v. Burlington N. R.R., 115 F.3d 1407, 1414 (8th Cir. 1997) (applying test that to vacate arbitrator's award on public policy grounds, it must violate well-defined and dominant policy); International Bhd. of Teamsters,
Local 878 v. Commercial Warehouse Co., 84 F.3d 299, 302 (8th Cir. 1996) (same); Prudential-Bache Sec., Inc. v. Tanner, 72 F.3d 234, 239, 241 (1st Cir. 1995) (ruling that judicial review of arbitration award is extremely narrow and is available only where arbitrators have imposed award in manifest disregard of law); Service Employees Int'l Union v. Local 1199 N.E., 70 F.3d 647, 651-52 (1st Cir. 1995) (stating that federal court review of arbitral decisions on matters of contract interpretation is extremely narrow and noting that courts can vacate award on public policy grounds only when it is contrary to well-defined and dominant public policy); Painewebber, Inc. v. Argon, 49 F.3d 347, 350 (8th Cir. 1995) (rejecting broad interpretation of public policy based on public safety adopted earlier in Iowa Electric Light & Power Co. v. Local Union 204 of International Brotherhood of Electrical Workers, 834 F.2d 1424 (8th Cir. 1987), and adopting well-defined and dominant public policy threshold for vacating arbitral awards on public policy grounds delineated in W.R. Grace); Baraviati v. Josephthal, Lyon & Ross, Inc., 28 F.3d 704, 706 (7th Cir. 1994) (“A number of courts, including our own, have said they can set aside arbitral awards if the arbitrators exhibited a ‘manifest disregard of the law.’” (citing Health Servs. Management Corp. v. Hughes, 975 F.2d 1253, 1267 (7th Cir. 1992))); United Pac. R.R. Co. v. United Transp. Union, 23 F.3d 1397, 1400 (8th Cir. 1994) (applying well-defined and dominant public policy test for vacatur of arbitral awards under public policy exception); National Wrecking Co. v. International Bhd. of Teamsters, Local 751, 990 F.2d 957, 961 (7th Cir. 1993) (“In order for a federal court to vacate an arbitration award for manifest disregard of the law, the party challenging the award must demonstrate that the arbitrator deliberately disregarded what the arbitrator knew to be the law to reach a particular result.”); Hughes, 975 F.2d at 1267 (applying “manifest disregard” of law standard and stating that to vacate award under this standard, court must find “something beyond and different from mere error in law or failure on the part of the arbitrators to understand or apply the law; it must be demonstrated that the majority of arbitrators deliberately disregarded what they knew to be the law to reach the result they did”); Chrysler Motors Corp. v. International Union, Allied Indus. Workers, 959 F.2d 685, 687 (7th Cir. 1992) (stating that to vacate arbitrator’s award, it must violate well-defined and dominant public policy); Todd Shipyards Corp. v. Cunard Line, Ltd., 943 F.2d 1056, 1060 (9th Cir. 1991) (finding that vacatur of arbitral awards is extremely narrow and limited to circumstances where arbitrator evidenced “manifest disregard for law”); Advest, Inc. v. McCarthy, 914 F.2d 6, 8-10 (1st Cir. 1990) (applying “manifest disregard test” of Second Circuit and stating that “to vacate an arbitration award, there must be some showing in the record, other than the result obtained, that the arbitrators knew the law and expressly disregarded it” (quoting O.R. Sec., Inc. v. Professional Planning Assoc., Inc., 857 F.2d 742, 747 (11th Cir. 1988))); Sheet Metal Workers Local Union No. 20 v. Baylor Heating & Air Conditioning, Inc., 877 F.2d 547, 551 (7th Cir. 1989) (holding that for courts to vacate arbitrator’s award under public policy exception, award must violate well-defined and dominant public policy); Daniel Constr. Co. v. Local 257, Int’l Bhd. of Elec. Workers, 856 F.2d 1174, 1181-82 (8th Cir. 1988) (same); Stroh Container Co. v. Delphi Indus., Inc., 783 F.2d 743, 749 (8th Cir. 1986) (“[A]n arbitrator’s conclusions on substantive matters may be vacated only when the award demonstrates a manifest disregard of the law where the arbitrators correctly state the law and then proceed to disregard it . . . .”); Local 1445, United Food & Commercial Workers Int’l Union v. Stop & Shop Co., Inc., 776 F.2d 19, 21 (1st Cir. 1985) (holding that courts may vacate arbitral award when decision was: “(1) unfounded in reason and fact; (2) based on reasoning so palpably faulty that no judge, or group of judges, ever could conceivably have made such a ruling; or (3) mistakenly based on a crucial assumption that is concededly a non-fact”).

These circuits have made it nearly impossible for their district courts to establish a “proper” test concerning the scope of the public policy ex-
ception. While it is hard enough to place the circuits' application of the public policy exception on a continuum, these courts have failed to establish a uniform test within their circuits. As a result of this confusion, arbitration, although intended to reduce federal court caseloads, is actually generating litigation.

These circuits' inconsistencies in applying the public policy exception, although somewhat troublesome for both the parties and the courts, demonstrate the impact that the public policy exception has on the arbitral process. A particular circuit's scope of the public policy exception

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104. See Edwards, supra note 1, at 20-23 (summarizing inconsistencies in application of public policy exception by Eighth Circuit (citing Iowa Econ. Light & Power, 834 F.2d at 1429 ("[O]ur holding today should not be read as a blanket justification for the discharge of every employee who breaches a public safety regulation in a nuclear power plant."))); see also Randall, supra note 3, at 759 ("The proper standard of review of arbitration awards continues to be a puzzle to litigants, and to some extent to the judiciary."); Tribble, supra note 9, at 1055-56 (acknowledging conflicts among circuits as to when arbitrator's award is contrary to public policy).

105. See Hayford & Sincropi, supra note 44, at 267-71 (recognizing unsettled state of public policy exception and attempting to define parameters for classifying circuits' position on continuum for application of public policy exception). The First Circuit has yet to define principles for applying the public policy exception. Compare Service Employees Int'l Union, 70 F.3d at 651-52 (stating that award can be vacated on public policy grounds only when award is contrary to well-defined and dominant public policy), with Prudential-Bache Sec., 72 F.3d at 239-41 (ruling that judicial review of arbitration award is available only when arbitrators have imposed award in manifest disregard of law), and Advest, 914 F.2d at 8-10 (applying "manifest disregard test" and stating that "to vacate an arbitration award, there must be some showing in the record, other than the result obtained, that the arbitrators knew the law and expressly disregarded it" (quoting O.R. Sec., 857 F.2d at 747)). The Seventh Circuit has had difficulty determining the proper scope of the public policy exception. Compare Sheet Metal Workers, 877 F.2d at 551 (holding that for courts to vacate arbitrator's award under public policy exception, award must violate well-defined and dominant public policy), with Chicago Newspaper Publishers' Ass'n v. Chicago Web Printing Pressmen's Union No. 7, 821 F.2d 390, 397 (7th Cir. 1987) (applying "manifest disregard of the agreement" threshold for vacating arbitrator's award on public policy grounds). The Eighth Circuit has also failed to find a uniform test for applying the public policy exception. Compare Union Pac. R.R., 29 F.3d at 1400 (applying well-defined and dominant public policy threshold for allowing vacatur of arbitrator's award under public policy exception), with Stroh Container, 785 F.2d at 749 (finding that arbitrator's award may be vacated only when award demonstrates manifest disregard of law).

106. See Edwards, supra note 1, at 3 (noting that long-standing policy of judicial deference to arbitration process has been undermined by unwarranted judicial activism under guise of public policy); LeRoy & Feuille, supra note 3, at 117-19 (documenting vast litigation following Trilogy and noting that toll over scope of public policy exception has seen that Trilogy deference remains alive and well, but finding some erosion due to application of public policy exception to promote public interests); Randall, supra note 3, at 759 (tracing problems with arbitral process to ongoing struggle between federal policy of recognizing finality of arbitral awards through absolute judicial deference and responsibility of courts to protect general public interest through support of public policies).

107. See Tremiti, supra note 7, at 279, 293 (recognizing split in authority concerning public policy exception and noting tremendous impact and ramifications of Misco on enforcement of arbitral awards).
can directly influence the enforcement of an arbitrator’s award. The Supreme Court’s decisions in *W.R. Grace* and *Misco*, in their attempt to provide a clear line on the applicability of the public policy exception, have confused the application of the exception and created a “Darwinist” struggle between the survival of the arbitrator’s award and the public policy exception that can vacate such an award.

III. *SAINT MARY HOME, INC. v. SERVICE EMPLOYEES INTERNATIONAL UNION, DISTRICT 1199*

Ted Barron was an employee of the Saint Mary Home, Inc. ("Home") for over eighteen years. As a nurse’s aide for the Home, Mr. Barron was represented by District 1199 ("Union") under the Home’s collective bargaining agreement. This case concerns the defendant’s discharge of Mr. Barron.

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108. See Davis, *supra* note 81, at 52 (discussing dichotomy of outcomes that may arise when courts attempt to vindicate public policy by correcting erroneous arbitral awards or when courts exercise judicial deference and preserve arbitral awards to recognize policy of finality of bargained-for arbitral awards).

109. See Mouser, *supra* note 9, at 103 (noting different applications of *Misco* in handling of public policy exception); Nowikowski, *supra* note 65, at 626 (concluding that *Misco* Court’s attempt to resolve split in authority that remained after *W.R. Grace* left issue of applying public policy exception to arbitral awards as amorphous as before).

110. See Brief for Appellant at 6 & app. 80, Saint Mary Home, Inc. v. Service Employees Int’l Union, Dist. 1199, 116 F.3d 41 (2d Cir. 1997) (No. 96-9353). Saint Mary Home ("Home") provides long-term care to approximately 300 residents, and as a skilled nursing facility, the Home is regulated by both the State of Connecticut and the federal government. See *id.* at 3. The Home relies on its certified nurses aides to provide feeding, bathing and other direct care to its residents. See *id.*

111. See *id.* The relevant provisions under the collective bargaining agreement provide:

1. A grievance . . . which has not been resolved . . . may, within ten (10) working days after the completion of . . . the grievance procedure, may be referred for arbitration by the Home or the Union to an arbitrator selected in accordance with the American Arbitration Association . . .

2. The request for arbitration shall set forth the nature of the grievance and shall state what provisions of this Agreement are claimed to be involved.

. . . .

4. The opinion and award of an arbitrator hereunder shall be in writing and the award shall be final, conclusive and binding upon the Home, the Union and the Employees.

5. The arbitrators shall have jurisdiction only over disputes concerning grievances as defined in Section 1 of Article XXVI [that is, a dispute concerning interpretation, application, performance, termination or breach of the agreement] and he shall have no power or authority to add to, subtract from, or modify in any way the terms of the Agreement.

Saint Mary Home, Inc. v. Service Employees Int’l Union, Dist. 1199, 116 F.3d 41, 43 (2d Cir. 1997).

112. See *Saint Mary Home*, 116 F.3d at 43.
On March 18, 1994, Mr. Barron had an argument during work hours with one of his coworkers, Ms. Green, over the care of one of the residents.113 The argument became physical, which resulted in Ms. Green suffering a sprained wrist.114 Shortly after the scuffle, the Home called the police, who later arrested Mr. Barron on assault charges.115 During a search incident to arrest at the station, the police found that Mr. Barron possessed a four and one-half inch bag containing approximately three-quarters of an ounce of marijuana, several empty plastic bags, plastic tweezers and a small gram-type scale.116 After the search, local prosecutors charged Mr. Barron with assault in the third degree and possession of marijuana with the intent to distribute.117 Following the investigation of the incident, the Home discharged Mr. Barron.118

Following Mr. Barron’s discharge, the Union invoked the arbitration procedure of the collective bargaining agreement between the Union and the Home, contending that the Home did not discharge Mr. Barron for

113. See id. at 42. On March 18, 1994, Mr. Barron was working the 7:00 a.m. shift at the Home on the West wing. See Brief for Appellant at app. 66, Saint Mary Home (No. 96-9353). Mr. Barron was working with another Certified Nurses Assistant, Lucille Green, and a dispute broke out over who would serve breakfast to a particular resident, Grace Collins, who was assigned to Ms. Green. See id. The resident often preferred Mr. Barron to serve her even though there was no clear practice of assigning a nursing assistant to residents for meal purposes. See id. On the morning of the incident, Ms. Green told Mr. Barron that she wished to serve all of his residents, including Ms. Collins. See id. at 66-67.

114. See Saint Mary Home, 116 F.3d at 42. Each party asserted that they had possession of the meal tray, which the other party attempted to remove. See Brief for Appellant at app. 67, Saint Mary Home (No. 96-9353). The parties did not dispute, however, that Mr. Barron then grabbed the wrist of Ms. Green, causing Ms. Green to suffer a sprained wrist that required a splint for approximately six weeks. See id.

115. See Saint Mary Home, 116 F.3d at 42. The police interviewed both Mr. Barron and Ms. Green, subsequently charged Mr. Barron with assault and removed him to the West Hartford Police Station. See Brief for Appellant at app. 67, Saint Mary Home (No. 96-9353).

116. See Saint Mary Home, 116 F.3d at 42. Based on the inventory found during the search incident to arrest, the officer conducted a strip search of Mr. Barron, which revealed a smaller bag of marijuana in his socks and some empty plastic bags. See Brief for Appellant at app. 67, Saint Mary Home (No. 96-9353). The police officer, based on his experience and training, concluded that Mr. Barron was dealing marijuana. See id.

117. See Brief for Appellant at app. 67, Saint Mary Home (No. 96-9353). Following the arrest, the prosecutor reduced the drug possession charge to only possession of marijuana. See Saint Mary Home, 116 F.3d at 43. Mr. Barron entered an accelerated rehabilitation program pursuant to Connecticut state law, which, upon completion of the probationary term, results in the dismissal of all charges and the expungement of the charges from the participant’s record. See id.

118. See Saint Mary Home, 116 F.3d at 43. The Home informed Mr. Barron of his discharge in a letter dated April 17, 1994, stating that “[t]ermination, effective April 27, 1994, is due to your involvement in an incident with another employee of the Home and due to your being found to be in possession of marijuana. Each of these incidents independently would have warranted your termination.” Brief for Appellant at app. 68, Saint Mary Home (No. 96-9353).
cause. On November 23, 1994, after a hearing, the arbitrator found that the Home did not discharge Mr. Barron for cause and ordered his reinstatement, but without back pay or lost benefits. Thus, the arbitrator effectively found just cause to suspend Mr. Barron for seven months without pay or benefits.

On December 12, 1994, instead of reinstating Mr. Barron within the ten day mandate of the arbitrator’s award, the Home moved the United States District Court for the District of Connecticut to vacate the arbitrator’s award on two grounds: first, that the award was beyond the authority of the arbitrator under the collective bargaining agreement; and second, that the award was contrary to public policy. On September 24, 1996, the district court granted the Union’s motion to confirm the award.

Nevertheless, the Home did not reinstate Mr. Barron and, subsequently, the Union moved to hold the Home in contempt of court. The district court denied the motion and ordered Mr. Barron’s immediate reinstatement. The Home appealed to the United States Court of Appeals.

119. See Saint Mary Home, 116 F.3d at 43 ("[A]fter the grievance procedure failed to resolve the dispute, the Union invoked the [collective bargaining agreement’s] binding arbitration provision . . . ."). In accordance with the terms of the collective bargaining agreement, the American Arbitration Association appointed an arbitrator to hear this grievance. See Brief for Appellant at 4, Saint Mary Home (No. 96-9353). At the arbitration proceedings, Mr. Barron did not testify about the marijuana or drug dealing paraphernalia in response to the police officer’s testimony and showed no remorse about having either the drugs or the paraphernalia at work. See id. at 5. Furthermore, Mr. Barron did not even claim to have been rehabilitated. See id. The Home did not attempt to explain, however, why possession of drugs was injurious to its business or patients. See id. at app. 70.

120. See Saint Mary Home, 116 F.3d at 43. The arbitrator rejected the Union’s characterization of Mr. Barron’s incident as “mere possession” of marijuana and found that the evidence clearly showed that Mr. Barron was dealing drugs. See Brief for Appellant at 5, Saint Mary Home (No. 96-9353). The arbitrator even concluded that Mr. Barron was in possession of marijuana with intent to distribute, which is a serious violation warranting discharge. See id. The arbitrator still found, however, that the Home did not have just cause to terminate Mr. Barron. See id. The arbitrator essentially looked to two factors to determine that Mr. Barron should be reinstated: (1) the fact that the State of Connecticut elected not to place Mr. Barron in jail, but rather in an accelerated rehabilitation program; and (2) Mr. Barron’s record at the Home of over 18 years of employment without any prior disciplinary problems of this nature. See id. at 6 & app. 80.

121. See Saint Mary Home, 116 F.3d at 43.

122. See id. The Union then proceeded to make an alternative motion to confirm the award. See id.

123. See id. The district court denied the Home’s motion to vacate the arbitral award because it found that “[t]here is no public policy against reinstating an employee who has been convicted of a crime.” Brief for Appellant at 6, Saint Mary Home (No. 96-9353). The district court rejected the Home’s argument that the arbitrator failed to conform to the submission of the parties and that his award failed to “draw its essence from the labor agreement.” See id.

124. See Saint Mary Home, 116 F.3d at 43.

125. See id. The district court denied the Home’s motion for stay pending appeal and as of oral argument, the Home still had not reinstated Mr. Barron. See id. at 43-44.
IV. Analysis

A. Saint Mary Home, Inc. v. Service Employees International Union, District 1199: Narrative Analysis

In Saint Mary Home, the Second Circuit faced two important issues regarding the public policy exception to the enforcement of an arbitral award. The first issue that the court addressed was whether an arbitrator's award ordering the reinstatement of an employee of a skilled nursing facility, whom the facility had discharged for possession of marijuana with intent to distribute, was beyond the arbitrator's authority under the collective bargaining agreement. Second, the court had to decide whether

126. See id. at 44.
127. For a discussion of the Second Circuit's analysis of the issue of whether the arbitrator's award violated public policy, see infra notes 128-44 and accompanying text. For a critical analysis of the Second Circuit's application of the public policy exception and its enforcement of the arbitrator's award, see infra notes 145-70 and accompanying text.
128. See Saint Mary Home, 116 F.3d at 44.
129. See id. The United States District Court for the District of Connecticut found that the arbitrator did not exceed his authority under the collective bargaining agreement in ordering the reinstatement of Mr. Barron after he was charged with possession of marijuana with intent to distribute. See id. at 47. On appeal, the Second Circuit confirmed the arbitrator's reinstatement. See id. The Second Circuit disposed of the Home's argument challenging the authority of the arbitrator by stating that "[t]he decision of an [arbitrator] hearing . . . a dispute receives limited review: 'as long as the arbitrator is even arguably construing or applying the contract and acting within his scope of authority, that a court is convinced that he committed error does not suffice to overturn his decision.'" Id. at 44 (quoting United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 38 (1987)). The court primarily focused its analysis on whether the arbitrator's award "draws its essence from the collective bargaining agreement." See id. (applying test formulated in United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960)). The court instituted a narrow scope of review concerning the arbitrator's award because the parties bargained for the arbitrator's decision. See id. Furthermore, the court stated that when an arbitrator "explains his [or her] conclusions in terms that offer even a barely colorable justification for the outcome reached, confirmation of the award cannot be prevented by litigants who merely argue, however persuasively, for a different result." Id. (quoting Andros Compania Maritima v. Marc Rich & Co., 579 F.2d 691, 704 (2d Cir. 1978)). The Home, in acknowledging the narrow scope of review of the arbitrator's award, argued that the arbitrator exceeded his authority by ordering the reinstatement of an employee charged with a type of marijuana offense that is "so serious that any employee may be properly expected to know without notice that such conduct is offensive and clearly punishable by discharge." Id. (citing Brief for Appellant at app. 78, 80, Saint Mary Home (No. 96-9353)). The court found that the Home had just cause to discipline Mr. Barron, but not to discharge him, for the following reasons: (1) Mr. Barron's 18
the arbitrator’s award ordering the reinstatement of the discharged employee violated public policy.130

1. The Scope of the Public Policy Exception

The Home’s second challenge to the arbitrator’s reinstatement order was that the award “violate[s] the well-defined and dominant public policy against possession, sale and distribution of illegal drugs, a public policy that is exceedingly important in the workplace.”131 The Second Circuit acknowledged that under a general doctrine rooted in common law principles, a court may refuse to enforce a contract that violates a law or public policy.132 The court noted that its authority to refuse to enforce an arbitral award on public policy grounds is limited due to a “firmly-established, legislative-entrenched policy favoring the resolution of labor[-management] disputes through arbitration.”133 Although the Second Circuit recog-

130. See id. at 45.

131. Brief for Appellant at 18-19, Saint Mary Home (No. 96-9353). “There are countless statutes, regulations, company guidelines, and judicial decisions that pronounce the emphatic national desire to eradicate illicit drugs from the workplace.” Id. (quoting Gulf Coast Indus. Workers Union v. Exxon Co., 991 F.2d 244, 250 (5th Cir. 1993)).

132. See Saint Mary Home, 116 F.3d at 45 (relying on Newsday, Inc. v. Long Island Typographical Union, No. 915, 915 F.2d 840, 844 (2d Cir. 1990)).

133. Id. (citing Enterprise Wheel, 363 U.S. at 596). The Second Circuit stated that its authority to refuse to enforce an arbitral award is limited “to situations where the contract as interpreted would violate some explicit public policy that is well-defined and dominant . . . ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests.” Id. (quoting Misco, 484 U.S. at 43).
recognized the strong public policy of eradicating the use, possession and sale of illegal drugs, the court held that the existence of the policy did not extend to prohibit an arbitrator’s award that reinstated an employee who was arrested for an on-the-job drug-related offense and who had already undergone rehabilitation and suspension without pay.\textsuperscript{134}

2. \textit{Applicability of the Public Policy Exception}

The Second Circuit noted that, although the material presented by the Home evinces a strong public policy against the possession, sale and distribution of illegal drugs, it does not support the narrower public policy that is at issue here—a policy against reinstatement of a long-term employee who has already completed a rehabilitation program and suffered a seven-month suspension without back pay and benefits.\textsuperscript{135} Although the Home offered many cases supporting public policies against drug and alcohol use in safety-sensitive positions in their argument against the reinstatement of Mr. Barron, the court found these cases unpersuasive because in these cases, the violated public policy was much clearer than the public policy currently at issue.\textsuperscript{136}


\textsuperscript{135} See \textit{Saint Mary Home}, 116 F.3d at 46 (“Nowhere does the Home point to an established policy that calls for a fixed disciplinary action of permanent dismissal in all cases where drug related conduct occurs in the workplace.”). The court noted that it does not need to look further than Connecticut’s resolution of Mr. Barron’s case with a period of probation followed by eradication of the record of arrest, which would allow Mr. Barron to seek future employment without disclosing the incident. See id. (noting that public policy for drug-related conduct in workplace is “flexible and remedial”).

\textsuperscript{136} See id. at 46-47 (referring to \textit{Union Pacific Railroad v. United Transportation Union}, 3 F.3d 255 (8th Cir. 1993), for finding of specific federal regulations prescribing use or possession of drugs by employees and requiring employers to take action upon discovery of violations); Exxon Shipping Co. v. Exxon Seamen’s Union, 995 F.2d 357, 360-62 (3d Cir. 1993) (requiring employers to take action against employees found in possession of drugs); Delta Airlines, Inc. v. Air Line Pilots Ass’n, Int’l, 861 F.2d 665, 668, 671-73 (11th Cir. 1988) (noting specific federal regulations and state laws that prohibit operation of any aircraft while still under influence of alcohol).
The Second Circuit also found the Home's reliance on *Newsday, Inc. v. Long Island Typographical Union, No. 915* to be "misplaced." In distinguishing *Newsday*, the Second Circuit noted that the repeat sexual offender in that case had already been reinstated once following a previous sexual harassment incident. Furthermore, following the first offense, the arbitrator warned the employee that any further sexual harassment episodes would result in grounds for immediate discharge. Therefore, the Second Circuit concluded that the circumstances of the two cases were distinguishable.

Finally, the court found it significant that the Home failed to cite a single case or regulation that specifically prohibited the reinstatement of health care employees who were suspended and convicted of drug offenses. Also, the court found it equally surprising that the Home did not attempt to equate the employee's responsibilities to those of a physician, medical technician or any other person in a safety-sensitive position. Accordingly, the Second Circuit affirmed the arbitrator's award reinstating Mr. Barron after suspension without pay and benefits and held that the arbitrator's award did not violate a "well-defined and dominant' public policy."

B. Critical Analysis

The primary issue discussed by the Second Circuit in *Saint Mary Home* was whether an arbitral award calling for the reinstatement of an employee charged with possession of marijuana with intent to distribute while

137. 915 F.2d 840 (2d Cir. 1990).
138. *See Saint Mary Home*, 116 F.3d at 47 (distinguishing case at hand from Home's reliance on *Newsday*). The court in *Newsday* affirmed the district court's vacatur of an arbitrator's reinstatement award on public policy grounds in favor of an employee with a history of sexual harassment. *See Newsday, Inc. v. Long Island Typographical Union, No. 915, 915 F.2d 840, 845 (2d Cir. 1990) (affirming district court's grant of Newsday's motion for summary judgment to vacate arbitrator's award).*

139. *See Saint Mary Home*, 116 F.3d at 47 (commenting on Second Circuit's analysis in *Newsday*). The court noted that the Second Circuit's vacatur of the first arbitrator's award in *Newsday* ultimately had the effect of affirming the first arbitral award. *See id.*

140. *See Newsday*, 915 F.2d at 843 (finding that offenses did not constitute grounds for immediate discharge).
141. *See Saint Mary Home*, 116 F.3d at 47.
142. *See id.* (noting its surprise because health care industry is one of most heavily regulated industries in country).
143. *See id.* (commenting on shortcomings in Home's argument).
144. *See id.* The court stated that in light of the facts of the case at hand, "were we to vacate the arbitral award we would be doing so in contravention of the well-established and dominant public policy supporting the validity of arbitral awards based on our view of 'general considerations of supposed public interest.'" *Id.* (quoting United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 43 (1987)).
on duty violates public policy.\textsuperscript{145} The court correctly applied the public policy test formulated in \textit{Misco}, limiting the court’s authority to refuse to enforce an arbitral award on public policy grounds to circumstances where the collective bargaining agreement would violate a “well-defined and dominant public policy.”\textsuperscript{146} The Second Circuit, however, in finding that there was no public policy against the \textit{reinstatement} of an employee found in possession of marijuana with intent to distribute while on duty, took a far too narrow approach to the public policy exception.\textsuperscript{147}

1. \textit{Violation of Public Policy: Determination on How Clear the Policy Is Depends on Who Is Reading the Chart}

The Second Circuit incorrectly applied the public policy determination in \textit{Misco} by concluding that for the arbitrator’s award to violate public policy, there must be a well-defined and dominant public policy against the \textit{reinstatement} of an employee found in possession of drugs with intent to distribute.\textsuperscript{148} In \textit{Misco}, the Supreme Court found that the award reinstating an employee operating “dangerous machinery” while under the influence of drugs did not violate public policy because the Fifth Circuit made no attempt to review existing laws and legal precedent in formulat-

\textsuperscript{145} See id. at 45-47; see also \textit{Misco}, 484 U.S. at 42 (recognizing that it is court’s job to determine if arbitrator’s award violates public policy); W.R. Grace & Co. v. Local Union 759, Int’l Union of United Rubber, 461 U.S. 757, 766 (1983) (finding that question of whether award violates public policy is one for courts to decide because courts may not enforce collective bargaining agreements that are contrary to public policy); \textit{Newday}, 915 F.2d at 844 (“The question of whether an award violates public policy is a specific application of the more general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy.”).

\textsuperscript{146} See \textit{Misco}, 484 U.S. at 45 (noting that public policy must be ascertained by reference to laws and legal precedents and not from general considerations of court-determined public interests).

\textsuperscript{147} See \textit{Saint Mary Home}, 116 F.3d at 47 (affirming judgment of district court reinstating employee found in possession of marijuana with intent to distribute); see also Exxon Shipping Co. v. Exxon Seamen’s Union, 993 F.2d 357, 367 (3d Cir. 1993) (holding that reinstating employee to safety-sensitive position who had been terminated after testing positive for marijuana after running oil tanker aground violated strong public policy against having drug users operate commercial vessels); Gulf Coast Indus. Workers Union v. Exxon Co., 991 F.2d 244, 257 (5th Cir. 1993) (finding that arbitrator’s award mandating reinstatement in safety-sensitive position of employee who tested positive for cocaine violated “well-defined and dominant public policy” when United States promotes drug-free and alcohol-free workplace); Monroe Auto Equip. Co. v. UAW, Local 878, 981 F.2d 261, 269 (6th Cir. 1992) (ruling that arbitration award ordering reinstatement of employee, who was discharged by employer for violating employer’s drug use policy through off-duty marijuana use, did not violate public policy because arbitrator did not find employee to be impaired or intoxicated while performing his duties).

\textsuperscript{148} See \textit{Saint Mary Home}, 116 F.3d at 46 (“While this material evinces a strong public policy against the use, possession and sale of drugs, it does not support the narrower public policy the Home seeks to invoke: a policy against the reinstatement of a long term employee . . . [arrested] for possession with intent to sell marijuana.”).
ing a well-defined and dominant public policy. Misco provided no basis for the overly narrow interpretation of the public policy exception, that the Second Circuit applied in this case.

The Third Circuit in Exxon Shipping, the Fifth Circuit in Gulf Coast Industrial Workers Union v. Exxon Co. and the Sixth Circuit in Monroe Auto Equipment Co. v. UAW, Local 876 correctly interpreted the Misco Court’s reasoning behind the application of the public policy exception by applying the public policy exception to the employee’s conduct and not the actual act of reinstatement of the employee. Misco’s analysis focused on whether reinstating an operator of dangerous machinery found under the influence of drugs violated public policy, not if there was a public policy against reinstating the employee. The fact that the Home attempted to extend the public policy exception to the reinstatement of Mr. Barron

149. See Misco, 484 U.S. at 44 (stating that Fifth Circuit’s judgment is firmly rooted in common sense and based on public policy considerations, but does not allow for vacatur under public policy exception).

150. See id. (noting that Fifth Circuit failed to justify its public policy adequately). In Misco, the Supreme Court ruled that the arbitrator’s award failed to fall within the scope of the public policy exception for two reasons. See id. First, the Supreme Court found that the award was based solely on “general considerations of supposed public interests” and was not based on a well-defined and dominant public policy derived from existing laws or precedent. See id. Second, the award was deemed not to violate public policy because the Fifth Circuit assumed the connection between the marijuana found in the employee’s car and the actual use of drugs in the workplace. See id. The Court held that “a refusal to enforce an award must rest on more than speculation or assumption.” Id.

151. 991 F.2d 244 (5th Cir. 1993).

152. 981 F.2d 261 (6th Cir. 1992).

153. See Exxon Shipping Co. v. Exxon Seamen’s Union, 993 F.2d 357, 360-64 (3d Cir. 1993) (finding that reinstatement of particular employee would violate public policy, condone illegal activity and insufficiently deter drug use by other employees in safety-sensitive jobs, and mentioning that there is no existence of policy against reinstatement of employee who tested positive for drugs in safety-sensitive position); Gulf Coast, 991 F.2d at 250-55 (establishing through federal statutes, state statutes, various regulations and judicial precedent that “well-defined and dominant” public policy exists against drug use by employees in safety-sensitive positions and violation of this policy enables courts to vacate arbitrator’s award under public policy exception); Monroe Auto Equip., 981 F.2d at 271 (Nelson, J., dissenting) (focusing on employee’s conduct and finding that his marijuana use while off duty did not violate policy where “[e]mployees will be subject to discharge [for] . . . [b]eing under the influence of alcohol or drugs on Company property or on Company time”).

154. See Misco, 484 U.S. at 44 (stating that formulation of public policy by Fifth Circuit did not follow test that policy must evolve from reference to laws and legal precedents rather than general considerations of public interests). The Supreme Court in Misco stated that even if it accepted the formulation of public policy against the operation of dangerous machinery while under the influence of drugs, there was no connection between the drug-related incident and the use of drugs in the workplace. See id. The Supreme Court’s analysis dealt with the public policy “against the operation of dangerous machinery by persons under the influence of alcohol,” without making reference to the public policy against the reinstatement of one found operating dangerous machinery while under the influence of drugs or alcohol. Id.
should not change the scope of the analysis under *Misco*. Therefore, the Second Circuit, by finding the public policy exception inapplicable to the enforcement of an arbitral award reinstating an employee found in possession of marijuana with intent to distribute while on duty, incorrectly interpreted the *Misco* Court's application of the public policy exception.

2. Recognizing the Need for Deference

The Second Circuit correctly recognized that the "firmly-established, legislatively-entrenched policy favoring resolution of labor disputes through arbitration" limits the scope of the public policy exception. It is not the job of the courts to second-guess the choice of the arbitrator or to rewrite the collective bargaining agreement. Although the scope of


156. See *id.* (recognizing public policy against use, possession and sale of drugs, but not against *reinstatement* of employee arrested for offense on job). The Second Circuit openly acknowledged that the evidence offered by the Home "evinces a strong public policy against the use, possession and sale of drugs . . . ." *Id.* Furthermore, unlike the situation in *Misco*, the marijuana was found in the employee's possession while on duty, and therefore did not require the court to assume the connection between the possession charge and the use of drugs at the workplace. *See id.* at 42. "Typically, the public policy exception is implicated when enforcement of the award compels one of the parties to take action which directly conflicts with public policy." Brown v. Rauscher Pierce Refsnes, Inc., 994 F.2d 775, 782 (11th Cir. 1993) (citing Delta Air Lines, Inc. v. *Airline Pilots Ass'n*, Int'l, 861 F.2d 665, 671 (11th Cir. 1988) (finding that enforcement of award violated public policy because it required reinstatement of pilot who operated aircraft while drunk)); *Iowa Elec. Light & Power Co. v. Local Union 204 of the Int'l Bhd of Elec. Workers*, 834 F.2d 1424, 1428 (8th Cir. 1987) (holding that enforcement of award reinstating nuclear power plant machinist who deliberately violated NRC rules violated public policy). Instead of focusing on the strong public policy that the Home established against the use, possession and sale of drugs that applied to the arbitral award in Mr. Barron's current situation, the Second Circuit incorrectly formulated a much narrower interpretation of *Misco* and focused on whether the *reinstatement* of Mr. Barron violated public policy. *See Saint Mary Home*, 116 F.3d at 46 (finding that Home's public policy was too broad).

157. See *Saint Mary Home*, 116 F.3d at 45 (recognizing traditional policy of deference in favor of arbitrator's award because parties bargained for it); *see also Misco*, 484 U.S. at 36 ("The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards."); *Stead Motors v. Automotive Machinists Lodge No. 1173, 886 F.2d 1200, 1208 (9th Cir. 1989) (finding that federal policy favoring resolution of labor disputes through arbitration would be frustrated if courts had plenary authority over merits of awards); Local Joint Executive Bd. v. Riverboat Casino, Inc., 817 F.2d 524, 526-27 (9th Cir. 1987) (concluding that it is not role of courts to have final say regarding merits of arbitration case and that failure to limit judicial review to circumstances where awards would violate well-defined and dominant public policy would result in undermining of federal policy of settling labor disputes through arbitration).

158. See *Saint Mary Home*, 116 F.3d at 45 (noting that parties bargained for arbitrator's decision, whether they agree with it or not, and that is what they received); *see also Richmond, Fredericksburg & Potomac R.R. Co. v. Transportation
judicial review is designed to be narrow to limit intrusive review of arbitration awards, courts may and should refuse to enforce arbitral awards when the enforcement of the award would violate a well-defined and dominant public policy.159

In Saint Mary Home, the Home clearly recognized the narrow scope of judicial review under the public policy exception, but provided legislative, regulatory and judicial materials supporting a public policy against drug-related conduct in general.160 The Third and Fifth Circuits have also rec-

Communications Int'l Union, 973 F.2d 276, 278 (4th Cir. 1992) (“Arbitration . . . is ‘the substitute for industrial strife’ . . . [but] arbitration can succeed in achieving these goals only to the extent it is accorded finality by the judiciary.” (quoting United Steelworkers of America v. Warrior & Gulf Navigation Co., 365 U.S. 574, 578 (1960))); Shelby County Health Care Corp. v. American Fed. of State, County & Mun. Employees, Local 1733, 967 F.2d 1091, 1094 (6th Cir. 1992) (“If the courts were free to intervene on these grounds, the speedy resolution of grievances by private mechanisms would be greatly undermined . . . .” (quoting Misso, 484 U.S. at 37-38)); Board of County Comm’rs v. L. Robert Kimball & Assoc., 860 F.2d 683, 685 (6th Cir. 1989) (“Once it is determined that a dispute should be referred to arbitration . . . [t]he courts are not authorized to reconsider the merits of an award . . . .” (quoting Misso, 484 U.S. at 36)); Florida Power Corp. v. International Bhd. of Elec. Workers, Local Union 433, 847 F.2d 680, 683 (11th Cir. 1988) (“The court may not reevaluate supposed inconsistencies in the arbitrator’s logic or review the merits of the arbitrator’s decision.” (quoting Local 863 Int’l Bhd. of Teamsters v. Jersey Coast Egg Producers, Inc., 775 F.2d 530, 534 (3d Cir. 1985))); American Postal Workers Union v. United States Postal Serv., 789 F.2d 1, 2-3 (D.C. Cir. 1986) (“[I]t is the arbitrator’s construction of the contract that the parties bargained for and not that of the court, and it does not matter whether the disagreees with the arbitrator’s judgment on the merits.” (quoting United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599 (1960))).

159. See Saint Mary Home, 116 F.3d at 46 (recognizing limited scope to reviewing arbitral awards, but allowing for vacatur of arbitrator’s award when enforcement would be directly at odds with public policy); see also Newsday, Inc. v. Long Island Typographical Union, No. 915, 915 F.2d 840, 844 (2d Cir. 1990) (acknowledging that courts have limited capacity to review arbitral awards, but may refuse to enforce contracts that violate law or public policy); Amalgamated Meat Cutters & Butcher Workmen, Local Union 540 v. Great W. Food Co., 712 F.2d 122, 124 (5th Cir. 1983) (stating that courts should exercise extreme caution before declaring that arbitral award violates public policy, but that courts may apply public policy exception to enforcement of arbitral awards when awards violate well-defined and dominant public policy).

ognized that similar drug-related employee behavior in the workplace violates a well-defined and dominant public policy. In addition, the Supreme Court in *Misco* stated that "[a] court’s refusal to enforce an arbitrator’s interpretation of a collective bargaining agreement is limited to situations where the contract as interpreted would violate ‘some explicit public policy’ that is ‘well-defined and dominant’ . . . ." The Supreme Court concluded that this public policy may be "ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests." Although the Second Circuit found a strong public policy against the use, sale and possession of drugs, by not following *Misco* and thereby improperly narrowing the public policy exception, the court upheld the arbitral award because it did not find such a policy against reinstating an employee who was charged with marijuana possession and intent to distribute.

3. Safety-Sensitive Position: Nursing Fits the Bill

Under current law, a policy sufficient to vacate an arbitral award under the public policy exception must be ascertained "by reference to . . . laws and legal precedents and not from general considerations of supposed public interests."

The Second Circuit recognized a line of cases supporting a public policy against drug and alcohol use in safety-sensitive positions in which the arbitrator’s award ordering reinstatement of the employee violated public policy. Although the Second Circuit stated

161. See Exxon Shipping Co. v. Exxon Seamen’s Union, 993 F.2d 357, 364 (3d Cir. 1993) (holding that reinstating employee who tested positive for marijuana would violate well-defined and dominant public policy against operation of vessels by drug users); see also Gulf Coast Indus. Workers Union v. Exxon Co., 991 F.2d 244, 250-54 (5th Cir. 1993) (ruling that employee who violated company drug policy by testing positive for cocaine violated well-defined and dominant public policy established by multiple federal and state statutes on elimination of drugs in workplace, regulations on control of alcohol and drug use in workplace, executive order for random testing and judicial decisions).

162. *Misco*, 484 U.S. at 43.

163. *Id.* at 30 (quoting W.R. Grace & Co. v. Local Union 759, Int’l Union of United Rubber, 461 U.S. 757, 766 (1983)).

164. See *Saint Mary Home*, 116 F.3d at 46 (discussing materials presented by Home establishing well-defined and dominant public policy against use, possession and sale of drugs).

165. *Id.* (quoting *Misco*, 484 U.S. at 43).

166. See *id.* at 46-47 (supporting premise that awards mandating reinstatement of employees charged with drug and alcohol use in safety-sensitive positions violates public policy). The Home cited numerous cases supporting this policy. See *id.* (citing Union Pac. R.R. v. United Transp. Union, 3 F.3d 255, 261-62 (8th Cir. 1993) (finding that reinstatement of railroad brakeman who tested positive for drug use violated public policy against on-duty drug use as well as purpose of regulation, which is to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs); *Exxon Shipping*, 993 F.2d at 360-62 (holding that arbitral award mandating reinstatement of helmsman, who was terminated for testing positive for marijuana in violation of Coast Guard regulations, would undermine public policy efforts to keep individuals who test positive
that the cases cited by the Home did not support their claim that the reinstatement of an employee in a sensitive nursing home context violates a well-defined and dominant public policy, this conclusion is incorrectly reasoned.\footnote{167} The Second Circuit, similar to the circuits cited by the Home, found that there was clearly a strong public policy against the use, possession and sale of drugs, as well as the reinstatement of an employee in a safety-sensitive position, which violated this policy.\footnote{168} Although the Home did not cite cases or regulations prohibiting reinstatement after suspension of those convicted of drug offenses in the health care industry, Mr. Barron clearly was in a safety-sensitive position.\footnote{169} Although the Home may not have been able to argue that Mr. Barron’s responsibilities were comparable to those of a physician or emergency technician, Mr. Barron, similar to members of those medical fields, was directly responsible for the livelihood and well-being of his patients.\footnote{170} Like any ship’s helmsperson, commercial air-

\footnote{167. See id. at 46 (rejecting Home’s claim that reinstatement of Mr. Barron, Certified Nursing Assistant, found in possession of marijuana with intent to distribute, violated well-defined and dominant public policy).}

\footnote{168. See id. at 46-47 (recognizing public policy against reinstatement of employee in safety-sensitive position who violated policy against drug and alcohol use).}

\footnote{169. See id. at 47 (noting that health care profession is one of most heavily regulated industries in country, but “[H]ome has cited neither case law nor regulations prohibiting reinstatement”). In response to a similar argument, the arbitrator in Saint Mary Home noted that the lack of an explicit policy does not preclude the Home from disciplining an employee for just cause:}

The Arbitrator therefore rules that, notwithstanding the sale or consumption of illegal drugs is not expressly prohibited by the plant rules, such conduct constitutes criminal behavior, and is at variance with the proper deportment of an employee in the context of the employment relationship. The Arbitrator concurs in the principal that “no specific rule is necessary” to warrant a finding that discipline is warranted for illegal, criminal activity on Company premises. Management is entitled to anticipate that its employees will be honest, punctual, sober, and refrain from physical violence or destruction of company property. An employee who violates his other obligations may be subject to discipline even though such conduct is not expressly prohibited by plant rules.

\footnote{170. See Saint Mary Home, 116 F.3d at 47 (commenting on Home’s failure to make analogy between Mr. Barron’s responsibilities at Home and those of other employees within medical field); see also Brief for Appellant at 3, Saint Mary Home (No. 96-9353) (discussing responsibilities of Mr. Barron as Certified Nursing Assistant at defendant’s facility).}
line pilot or train brakeperson, Mr. Barron was directly responsible for the lives of others. Because of his safety-sensitive position, an arbitral award mandating the Home’s reinstatement of Mr. Barron after he was found in violation of a well-defined and dominant public policy against the use, possession and sale of drugs violates public policy.

V. IMPACT

Under an analysis of the public policy exception to the enforcement of arbitral awards, the Second Circuit should have held that an arbitral award ordering the reinstatement of a health care employee found in possession of marijuana with intent to distribute violated public policy.\textsuperscript{171} The court should have recognized that the Supreme Court in \textit{Misco} failed to find the public policy exception applicable because of the employer’s inability to establish a well-defined and dominant public policy against the employee’s conduct, not due to the absence of a public policy against the reinstatement of an employee whose conduct violated a well-defined and dominant public policy.\textsuperscript{172} Moreover, after concluding that there was a strong public policy against the use, possession and sale of drugs, the Second Circuit should have recognized that vacating the arbitral award on public policy grounds would not be “in contravention of the well-established and dominant public policy supporting the validity of arbitral awards based on . . . ‘general considerations of public interest.’”\textsuperscript{173}

The Second Circuit’s decision will influence courts to continue to apply an overly narrow approach to the public policy exception. In an era of increased litigation, this narrow interpretation will undoubtedly increase challenges under the public policy exception.\textsuperscript{174} The Second

\textsuperscript{171} For a discussion and analysis of the application of the public policy exception under \textit{Misco}, see \textit{supra} notes 148-56 and accompanying text.

\textsuperscript{172} For a discussion of the Second Circuit’s application of the public policy exception to the enforcement of arbitral awards formulated in \textit{Misco}, see \textit{supra} notes 131-34 and accompanying text.

\textsuperscript{173} \textit{See} \textit{Saint Mary Home}, 116 F.3d at 47 (quoting \textit{Misco}, 484 U.S. at 43). The Second Circuit found that the material cited by the Home “evinces a strong public policy against the use, possession and sale of drugs.” \textit{Id.} The Home tried to establish a much narrower policy, “a policy against the reinstatement of a long-term employee after a seven-month suspension without pay or benefits following an arrest for possession with intent to sell marijuana,” but the court found it was unsuccessful. \textit{See id.} Accordingly, the court held that Mr. Barron’s behavior does violate the broader public policy acknowledged by it. \textit{See id.}

\textsuperscript{174} \textit{See} Galbraith, \textit{supra} note 2, at 241-42 (stating that not all who participated in arbitration process would view arbitration as panacea to immense over-crowding of federal courts because of challenges to arbitral awards in federal courts stemming from one party’s dissatisfaction with arbitrator’s interpretation of collective bargaining agreement). Since the Supreme Court decided the Steel-workers Trilogy, there have been at least 1602 federal district and circuit court appeals from the arbitral process. \textit{See} LeRoy & Feuille, \textit{supra} note 3, at 78 (noting impact of arbitral proceedings on litigation levels in federal district and circuit courts).
Circuit's decision in *Saint Mary Home* does nothing to alleviate these challenges.\(^{175}\)

Recognizing that the health care industry is one of the most regulated industries, this narrow application of the public policy exception not only violates the strong public policy aimed at eradicating the use, possession and sale of illegal drugs, but also results in a seemingly impenetrable barrier for employers who want to comply with drug and drug-related legislation.\(^{176}\) Realizing that in choosing to submit disputes to arbitration parties bargain for an arbitrator's decision, courts should protect the public interest and vacate arbitral awards that contravene a well-defined and dominant public policy.\(^{177}\) Ultimately, a case like *Saint Mary Home* will arise again for review in front of the federal district courts, circuit courts or even the Supreme Court.\(^{178}\) In view of the overly narrow application of the public policy exception by the Second Circuit in *Saint Mary Home*, courts should realize that while there are times for deference to the arbitrator's award, sometimes, in an effort to protect that principle, they have failed to recognize the proper scope of the public policy exception.

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175. For a discussion of the Second Circuit's decision in *Saint Mary Home* and the interpretation and application of the public policy exception, see *supra* notes 145-70 and accompanying text.

176. *See Saint Mary Home*, 116 F.3d at 45 (refusing to extend public policy exception where employer establishes strong public policy against "on-the-job drug-related offenses"). This type of extremely narrow application of the public policy exception illustrates the same reason that the Eleventh Circuit refused to adopt the “manifest disregard” threshold for the application of the public policy exception. *See* Galbraith, *supra* note 2, at 254 (noting that Eleventh Circuit refused to take such narrow interpretation of public policy exception because it would likely never be met).

177. For a discussion of the grounds for vacatur of an arbitral award under the public policy exception, see *supra* notes 22-35 and accompanying text.

178. *See* First Nat'l Supermarkets, Inc. v. Retail, Wholesale & Chain Store Food Employees Union Local 398, 118 F.3d 892, 896-98 (2d Cir. 1997) (debating proper scope of public policy exception). In *First National Supermarkets*, an employer brought an action to vacate an arbitral award requiring reinstatement of an employee who came to work under the influence of alcohol and drugs and was unable to perform his duties. *See id.* at 893-94. Although the employee was not employed in a safety-sensitive field, the Second Circuit nevertheless held that there was no established policy requiring the permanent discharge of an employee who was found in possession of marijuana with the intent to sell on his or her employer’s premises. *See id.* at 897-98 (citing *Saint Mary Home*, 116 F.3d at 46). This overly narrow approach once again disregarded the court’s acknowledgment of a strong public policy embedded in state and federal laws favoring workplace safety and against the use, possession and sale of controlled substances. *See id.* at 897 (noting employer's argument regarding state and federal concerns over drug use in workplace).