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Is Arbitration Final & (and) Binding - Public Policy Says, Not Necessarily - Exxon Shipping Company v. Exxon Seamen's Union

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Is Arbitration Final & Binding?
Public Policy Says, "Not Necessarily!"

Exxon Shipping Company v. Exxon Seamen's Union

I. INTRODUCTION

In the realm of employment law, management and labor unions enter in collective bargaining agreements to establish employment terms including wages, hours, benefits and grievance procedures. A typical grievance procedure provides that labor disputes will be resolved through arbitration. Courts are encouraged to defer to collective bargaining agreements. When disputes arise, employees and employers attempt to resolve matters themselves, and if this fails, labor unions intervene and submit grievances to arbitration. Generally, an arbitrator's decision is final and binding, but in limited circumstances the matter is ultimately litigated. One such limited circumstance arose when the courts developed a public policy exception to arbitration awards. Over the past decade, the circuits have disagreed about the proper application of the public policy exception. Exxon Shipping II is a prime example of one of the two competing views on when to apply this exception.

II. FACTS AND HOLDING

Exxon Shipping Company ("Exxon Shipping") brought this action seeking to have an arbitration award vacated. A majority of a three-member arbitration panel ruled against Exxon Shipping in favor of Exxon Seamen's Union ("Union").

1. Id. at 1189 (3d Cir. 1993). This case will be referred to as Exxon Shipping II because of a prior, unrelated case between the same parties. See infra note 118.
3. Id.
4. Id.
5. Id.
6. Id.
7. Id. at 1059.
9. Exxon Shipping II, 11 F.3d at 1194.
10. Id. at 1191. This action originated in the United States District Court for the District of New Jersey. Id.
11. Id.; see infra note 23.
The dispute stemmed from an incident that occurred on September 13, 1989. In 1985, Exxon Shipping and the Union entered into a collective bargaining agreement requiring all grievances to be submitted to arbitration. Additionally, disputes were to be resolved by an arbitration panel, with the panel’s decision being final and binding. In April 1988, the agreement was modified by adding a new employee alcohol and drug use policy which provided that employees under the influence of alcohol or drugs during working hours would be subjected to discipline, and such conduct would be grounds for termination. On September 5, 1989, the alcohol and drug use policy was modified by a new provision which gave Exxon Shipping the right to administer a breathalyzer test to any employee suspected of being intoxicated. Furthermore, it provided that a Blood Alcohol Content ("BAC") of 0.04 or greater was grounds for discipline and possibly termination.

In 1989, Randall Fris, an Exxon Shipping employee, was on assignment to the Exxon Long Beach, an Exxon ship used for the transportation of crude oil. Upon reporting to the Exxon Long Beach on September 13, 1989, several officers observed that Fris appeared intoxicated. Fris was tested pursuant to the new policy, and the results revealed he had a BAC of 0.15. Exxon Shipping terminated Fris the next day.

The Union filed a grievance concerning Fris’ discharge, and the dispute was then submitted to arbitration pursuant the collective bargaining agreement. The three-member arbitration panel ordered Fris to be reinstated with Exxon Shipping because termination was not mandatory and Fris had a clean record during eight years of employment, causing the majority to believe that termination was an

12. Id. at 1190.
13. Id.
14. Id.
15. Id. The policy also provided that if an employee suffering from alcohol or drug dependency sought treatment, the employee would not be terminated or disciplined. Id. In September 1988, the company sent a letter to all affected employees explaining the policy. Id. at 1190. The letter also stated that these incidents would be handled on a case-by-case basis following thorough investigations. Id.
16. Id.
17. Id. Blood Alcohol Content is a measure of the intoxication level determined by the breathalyzer test. THE SLOANE-DORLAND ANNOTATED MEDICAL-LEGAL DICTIONARY 713-14 (1987). This regulation is consistent with standard Coast Guard Regulations. See 33 C.F.R. §§ 95.020(b), 95.050(b) (1993).
18. Exxon Shipping II, 11 F.3d at 1190. Fris’ assignment included significant duties in which he had to exercise judgment and discretion to ensure safe operation of the oil tanker. Id. at 1191. Fris, employed as an able bodied seaman, was partly responsible for steering the tanker. Exxon Shipping Co. v. Exxon Seaman’s Union, 801 F. Supp. 1379, 1381 (D. N.J. 1992) ("Exxon Shipping").
19. Exxon Shipping II, 11 F.3d at 1190.
20. Id. at 1191.
21. Id.
22. Id.
inappropriate remedy.23 The majority stated that Fris should have been permitted to prove that the incident was an aberration and would not be repeated.24 Rather than termination, the majority imposed a 90-day suspension as an adequate penalty.25

Exxon Shipping then filed this action in district court seeking to have the arbitration award vacated.26 The company argued that such reinstatement was contrary to public policy in that there is a significant interest in protecting the public and the environment from potential disaster resulting from a commercial vessel operator working while under the influence of drugs or alcohol.27 The Union’s position was that the arbitration result should be upheld pursuant to the collective bargaining agreement’s provision that arbitration shall be final and binding.28 The district court concurred with Exxon Shipping’s public policy argument and vacated the arbitration award.29

The Union then appealed to the Third Circuit Court of Appeals.30 The court affirmed the lower court’s decision by ruling in favor of Exxon Shipping.31 The court held that the arbitration award violated a well-defined and dominant public policy in that the public has a compelling interest in not being subjected to the potential danger presented from an intoxicated individual operating a commercial vessel.32 Therefore, the individual’s employer is free to discharge the employee due to such conduct despite the results of the arbitration.33

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23. *Id.* The arbitration panel was made up of a neutral arbitrator, an Exxon Shipping representative and a Union representative. *Id.* The majority, consisting of the neutral arbitrator and the Union representative, reasoned that Exxon Shipping did not terminate Fris for good cause (even though they agreed that Fris was intoxicated while on duty). *Id.*

24. *Id.*

25. *Id.* However, the panel did not require Fris to seek treatment or counseling. *Id.*


27. *Id.* at 1382, 1389.

28. *Id.* at 1382. The Union argued that the arbitration award did not violate public policy. Hence, it should be enforced because Fris did not have a history of alcohol abuse, the 90-day suspension was a sufficient penalty and termination was not mandatory. *Id.*

29. *Id.* at 1392.

30. *Exxon Shipping II,* 11 F.3d at 1191.

31. *Id.* at 1194.

32. *Id.*

33. *Id.*
III. LEGAL BACKGROUND

A. Judiciary Deference to Arbitration

The development of modern day labor law, including the use of arbitration, has been in full force for approximately the last thirty-five years.34 During this time, the United States Supreme Court has expressed significant limitations on the judicial review of arbitration awards under collective bargaining agreements.35 There exists significant federal policy favoring settlement of labor disputes through arbitration, without resorting to the judiciary.36 The United States Supreme Court has recognized that a collective bargaining agreement is a distinct type of contract in that "it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate."37 The Court stated that an arbitration award must be enforced unless the decision does not "draw its essence from the collective bargaining agreement."38 Although the "essence" test is difficult to define, case law has interpreted it to mean that if the award is rationally related to the agreement, it shall be enforced.39

An important reason for this great judicial deference is that the arbitrator possesses specialized knowledge of industrial relations.40 Furthermore, the parties voluntarily entered into the collective bargaining agreement which expressly defers grievances to arbitration.41

36. Misco, 484 U.S. at 36-37; see Enterprise Wheel, 363 U.S. at 598. "The federal policy of settling labor disputes by arbitration would be undermined if the courts had the final say on the merits of the awards." Id.
37. Warrior & Gulf Navigation Co., 363 U.S. at 578. This statement indicates that the Court understood that collective bargaining agreements are drafted to cover all employment situations, including negligent and wrongful behavior of employees that may or may not have anything to do with employment responsibilities. Id.
38. Enterprise Wheel, 363 U.S. at 597. See, e.g., International Ass'n of Machinists v. Northwest Airlines, Inc., 858 F.2d 427, 429 (8th Cir. 1988); see also Union Pac. R.R. v. Sheehan, 439 U.S. 89, 91 (1978) (noting that labor arbitration awards shall be given the most narrow standard of judicial review).
39. Id.; Tribble, supra note 2, at 1058; see, e.g., Ethyl Corp. v. United Steelworkers of Am., 768 F.2d 180, 186 (7th Cir. 1985), cert. denied, 475 U.S. 1010 (1986); Drummond Coal Co. v. UMW Dist. 20, 748 F.2d 1498 (11th Cir. 1984); Board of R.R. Trainmen v. Central Ga. Ry., 415 F.2d 403, 412 (5th Cir. 1969), cert. denied, 396 U.S. 1008 (1978).
40. Mouser, supra note 8, at 93. The chosen arbitrator is an expert, whereas judges are not; therefore, the arbitrator is more competent to justly resolve labor disputes. Id.
41. Id. at 95.
B. The Public Policy Exception

Courts have acknowledged that in extraordinary situations judicial review of an arbitration award is imperative to further the aims of public policy. In 1945, the United States Supreme Court first applied a public policy exception to a commercial contract by holding that a contract will be invalidated if it violates a well-defined and dominant public policy. The Court went on to say that the public policy in question must be "ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests."

The United States Supreme Court first adopted the public policy exception in the labor arbitration area in W.R. Grace & Co. v. Local Union 759, International Union of the United Rubber Workers. In W.R. Grace, the employer was suspected of violating Title VII of the Civil Rights Act of 1964 by discriminating against African-Americans and women. As a result, the employer entered into a conciliation agreement with the Equal Employment Opportunity Commission ("EEOC"). The conciliation agreement resulted in male employees being treated contrary to the seniority provision in the collective bargaining agreement between W.R. Grace and the employees' union. The aggrieved male employees submitted grievances pursuant the collective bargaining agreement which required arbitration.

Refusing to arbitrate, the employer took the dispute to district court where it argued that the conciliation agreement controlled and should bind the parties. The District Court agreed, but the decision was reversed on appeal and compelled the employer to arbitrate. The arbitrator determined that the employer was

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42. Tribble, supra note 2, at 1059.
43. Muschany v. United States, 324 U.S. 49, 66 (1945). A contingent fee contract was in dispute where the contingency was securing a Government contract. Id. at 64. It was unsuccessfully argued that this type of contract violated public policy in that it would "induce improper solicitation of public officers and the exercise of political pressure." Id.
45. W.R. Grace, 461 U.S. at 757 (stating that "a court may not enforce a collective bargaining agreement that is contrary to public policy").
47. W.R. Grace, 461 U.S. at 759.
48. Id.
49. Id. at 760. W.R. Grace assigned women to positions ahead of male employees with greater seniority. Id. Due to pending litigation, W.R. Grace laid off certain male employees so as not to violate the conciliation agreement. Id. These employees added their claims to the grievances already being handled. Id. at 762.
50. Id. at 761.
51. Id.
52. Id. at 761-62. The court of appeals held that since the seniority system itself was not discriminatory, it could not be modified without the Union's approval. Id. at 762; see generally International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).
liable for violating the collective bargaining agreement’s provision regarding seniority. 53

Instead of following the arbitration award, W.R. Grace went back to district court in an attempt to have the arbitration award overturned under the theory that public policy should have prevented the court of appeals from reversing the prior judicial order. 54 The case was appealed to the United States Supreme Court where the public policy exception was applied to the labor dispute. 55 The Court applied the Muschany public policy exception to the collective bargaining agreement. 56 The Court acknowledged that there was an important public policy at issue, "obedience to judicial orders," which satisfied the well-defined and dominant public policy prong of the test. 57 However, the Court held that the arbitrator’s award did not violate the public policy because the award was based on the employer’s violation of the collective bargaining agreement. 58 In other words, the fact that a judicial order was disobeyed was collateral to the determination that the collective bargaining agreement was violated. 59 Since W.R. Grace, appellate courts have interpreted the public policy exception with two distinct approaches. 60 One interpretation, the broader application, considers whether or not the employee’s wrongful act violates a well-defined and dominant public policy. 61 The competing interpretation, a more narrow approach, focuses on whether the arbitrator’s award actually violates public policy. 62

The First Circuit adopted the broad interpretation of the public policy exception in 1984. 63 In United States Postal Service v. American Postal Workers, 64 a postal worker was discharged for embezzling postal funds. 65 The American Postal Workers Union disputed the discharge on the grounds that the

54. Id.
55. Id.
56. Id. at 766; see supra notes 43-44.
57. Id.
58. Id.
59. Id.
60. Mouser, supra note 8, at 99.
61. W.R. Grace, 461 U.S. at 766; see Union Pac. R.R. Co. v. United Transp. Union, 3 F.3d 255 (8th Cir. 1993) (affirming the Eighth Circuit’s broad interpretation in that the public policy exception applies if reinstating an employee poses a risk to the public because of the employee’s propensity to work while under the influence of drugs); E.I. DuPont de Nemours & Co. v. Grasselli Employees Indep. Ass’n of E. Chicago, Inc., 790 F.2d 611 (7th Cir. 1986) (the public policy exception does not require the arbitrator’s award to violate positive law).
62. W.R. Grace, 461 U.S. at 766. This interpretation includes the situation where the collective bargaining agreement itself violates public policy, and therefore, by enforcing the agreement, the arbitrator’s award would also violate public policy. See Westinghouse Hanford Corp. v. Hanford Atomic Metal Trades Council, 39 F.3d 1190 (9th Cir. 1994) (affirming the Ninth Circuit’s narrow interpretation in that the arbitrator’s award did not violate public policy because the federal act governing the parties was not violated).
63. United States Postal Serv. v. American Postal Workers Union, 736 F.2d 822 (1st Cir. 1984).
64. 736 F.2d 822 (1st Cir. 1984).
65. Id. at 823.
United States Postal Service did not have "just cause" to terminate the employee. The arbitrator agreed, and ordered that the worker be reinstated.

The Postal Service took the matter to the United States District Court of Maine. After the District Court ruled in favor of the Postal Service, the Union appealed to the First Circuit. The First Circuit ruled that the postal service did not have to reinstate the employee because of the public policy exception. The court based its rationale on the importance of a postal worker's honesty because of the faith the public has that the Postal Service will diligently care for its mail. The court stated that it was not holding that a convicted criminal could not be employed with the Postal Service, but that in this case public policy dictated that the employee should not be reinstated.

Contrary to the First Circuit, the Court of Appeals for the District of Columbia adopted the more narrow interpretation in a 1986 case with nearly identical facts to United States Postal Service. In the District of Columbia case, a postal worker was discharged for embezzling postal funds. However, the arbitrator ordered the employee to be reinstated because the Postal Service could show no "just cause" for discharging the employee absent the statements illegally obtained by violating the Fifth Amendment. The court focused on the fact that the parties bargained for the arbitration provision in the collective bargaining agreement, and therefore, the court did not have the authority to overturn the arbitrator's judgment.

The court interpreted the public policy exception to mean that an arbitrator's award can only be overturned "if the award itself violates established law or seeks to compel some unlawful action." The court read W.R. Grace as requiring the exception to be narrowly applied "so as to limit potentially intrusive judicial review of arbitration awards under the guise of public policy." The court held that the arbitrator's award should be enforced because "there is no legal proscription against the reinstatement" of an embezzler.

66. Id.
67. Id. The arbitrator focused on the employee's intent and determined that the employee did not intend to keep the money, but rather intended to repay it. Id. The arbitrator ruled that suspension would have been an appropriate discipline. Id.
68. Id. at 824.
69. Id.
70. Id. at 825.
71. Id.
72. Id.
74. Id. at 3.
75. Id. The Fifth Amendment was violated in that incriminating statements were obtained from the employee before the employee was given Miranda warnings. Id.
76. Id. at 6.
77. Id. at 8.
78. Id.
79. Id.
The Court of Appeals for the District of Columbia applied a similar rationale to a case with facts analogous to Exxon Shipping II.\textsuperscript{80} In Northwest Airlines, Inc. v. Air Line Pilots Association, International, a pilot was discharged due to an alcohol-related incident.\textsuperscript{81} Upon receiving treatment for his drinking problem, the pilot was declared eligible to resume flying in 1984 by the Federal Aviation Administration ("FAA").\textsuperscript{82} The Union took the matter to arbitration in 1985 seeking an offer of reinstatement for the employee.\textsuperscript{83} During arbitration, the employer was ordered to offer the pilot a reinstatement because alcoholism did not constitute "just cause" in order to terminate the employee.\textsuperscript{84} The employer then filed a complaint in district court attempting to have the arbitration award overturned.\textsuperscript{85}

The Court of Appeals for the District of Columbia stated that the public policy exception applied in limited circumstances.\textsuperscript{86} The court was adamant that the public policy must emanate from clear statutory or case law, and not from the judge's own perceptions of the public interests.\textsuperscript{87}

The court acknowledged the public policy of having commercial airlines flown by sober pilots; however, it went on to hold that to overturn the arbitration award would be to declare that the FAA erred in its recertification of the pilot.\textsuperscript{88} Since the collective bargaining agreement was silent on what the employer was to do in this situation, the court reasoned that it was not its place to step in and determine what the parties would have agreed to; therefore, the arbitration award was enforced.\textsuperscript{89}

Due to the contradicting interpretations among the circuits, the public policy exception made its way back to the United States Supreme Court in Misco.\textsuperscript{90} The Court did not expressly answer which interpretation was correct; however, Misco inferred that the exception should be applied narrowly and emphasized the great deference courts should give to labor arbitration.\textsuperscript{91}

A Misco employee, Cooper, who operated dangerous machinery was discharged after being caught with marijuana in the company parking lot.\textsuperscript{92} The

\textsuperscript{80} Northwest Airlines, Inc. v. Air Line Pilots Ass'n, Int'l, 808 F.2d 76 (D.C. Cir. 1987).
\textsuperscript{81} Id. at 78. The employee was discharged when he was discovered piloting a company flight within 24 hours after consuming alcohol. Id.
\textsuperscript{82} Id. at 79.
\textsuperscript{83} Id. at 78-79.
\textsuperscript{84} Id. at 78.
\textsuperscript{85} Id.
\textsuperscript{86} Id.; see American Postal Workers Union, 789 F.2d at 8.
\textsuperscript{87} Northwest Airlines, Inc., 808 F.2d at 83.
\textsuperscript{88} Id.
\textsuperscript{89} Id. at 83-84.
\textsuperscript{90} Misco, 484 U.S. 29 (1987).
\textsuperscript{91} Mouser, supra note 8, at 101; see infra note 152.
\textsuperscript{92} Misco, 484 U.S. at 32-33. Cooper was arrested when found in the back seat of his car which was parked in the company parking lot. Id. at 33. The police noted that marijuana smoke was in the air and a lit marijuana cigarette was found in the front seat ashtray. Id.
Union argued that Misco did not have just cause to terminate Cooper, and the
arbitrator agreed.\textsuperscript{93} Misco then sought to vacate the arbitration award in district
court.\textsuperscript{94} The district court and the court of appeals both agreed with Misco that
Cooper should not be reinstated because doing so would violate the public policy
against operating dangerous machinery while under the influence of drugs or
alcohol.\textsuperscript{95} The United States Supreme Court granted certiorari because of the
conflicting applications of this exception throughout the circuits.\textsuperscript{96}

In \textit{Misco}, the Court noted that two important points flowed from the \textit{W.R. Grace} decision which applied the public policy exception to the enforcement of
a collective bargaining agreement: 1) a court will not enforce a collective
bargaining agreement if its specific terms violate public policy; and 2) this
decision does not authorize "broad judicial power to set aside arbitration awards
as against public policy."\textsuperscript{97} The Court went on to say that its decision depended
on "whether the award created any explicit conflict with other 'laws and legal
precedents' rather than an assessment of 'general considerations of supposed public
interests.'"\textsuperscript{98}

The Court's decision was admittedly made easier by the fact that neither the
district court nor the court of appeals sufficiently showed that public policy had
been violated in this case because the use of marijuana outside the workplace does
not necessarily mean that the employee would operate the machine while under the
influence of drugs or alcohol.\textsuperscript{99} Additionally, the lower courts inadequately
demonstrated that this public policy existed outside general public considerations
and within existing laws or legal precedents.\textsuperscript{100} Therefore, the Court ordered
that the employee should be reinstated pursuant the arbitration award.\textsuperscript{101}

Since \textit{Misco} left open the question as to the exact interpretation of the public
policy exception, courts have continued to disagree about its application.\textsuperscript{102} In
1992, the Third Circuit Court of Appeals held that an arbitrator's award violated
a well-defined and dominant public policy against sexual harassment in the

\textsuperscript{93} Id. at 33-34. The arbitrator based his determination on the fact that Misco did not prove
Cooper possessed or used marijuana on company property. Id.
\textsuperscript{94} Id. at 34.
\textsuperscript{95} Id. at 34-35.
\textsuperscript{96} Id. at 35.
\textsuperscript{97} Id. at 43.
\textsuperscript{98} Id. (quoting \textit{W.R. Grace}, 461 U.S. at 766).
\textsuperscript{99} Id. at 44.
\textsuperscript{100} Id.
\textsuperscript{101} Id. at 45.
\textsuperscript{102} Mouser, supra note 8, at 103. \textit{Misco} is the most recent United States Supreme Court
decision to significantly discuss the issue. In the years after \textit{Misco}, circuit courts have continued to
disagree on the exception's proper interpretation. See Westinghouse Hanford Corp. v. Hanford Atomic
Metal Trades Council, 39 F.3d 1190 (9th Cir. 1994); Union Pac. R.R. Co. v. United Transp. Union,
3 F.3d 255 (8th Cir. 1993); Interstate Brands Corp. v. Chauffers, Local 135, 909 F.2d 885 (6th Cir.
1990) (interpreting the exception narrowly).
workplace. In Stroehmann Bakeries, Inc. v. Local 776, International Brotherhood of Teamsters, a Stroehmann employee, Leonard, violated a Stroehmann rule against immoral conduct while on duty when he allegedly sexually harassed an employee of one of Stroehmann’s business clients. Wiegand, the harassed employee, informed Leonard’s superiors of the incident, and as a result, Leonard was discharged. Leonard and the Union filed a grievance, and the matter went to arbitration pursuant the collective bargaining agreement.

The arbitrator did not determine whether the sexual harassment actually occurred because Stroehmann’s investigation was insufficient prior to the decision to terminate Leonard. Hence, the arbitrator ordered Stroehmann to reinstate Leonard. Stroehmann challenged the action in district court where the arbitration award was vacated because reinstating Leonard without a factual finding on the allegations violates the public policy against sexual harassment in the workplace.

On appeal, the Union argued that the district court erred in its application of the public policy exception. The district court set aside the award because the arbitrator’s means for arriving at the award violated public policy. The Union’s position was that the award itself had to violate public policy before the award could be vacated. The court of appeals disagreed with the Union’s argument and agreed with the result in the district court. The court of appeals reasoned that a full reinstatement without regard to the merits of the allegations would violate public policy against sexual harassment in the workplace. This interpretation is distinguishable from the district court’s holding in that it did not depend on the means used to arrive at the award as being what violated public policy. However, the court of appeals did agree that the arbitrator’s award

104. 969 F.2d 1436 (3d Cir. 1992).
105. Id.
106. Id. at 1438-39.
107. Id. at 1439-40.
108. Id. at 1440.
109. Id.
110. Id.
111. Id. at 1441.
112. Id.
113. Id.
114. Id. at 1444.
115. Id. The court believed that unless it was determined that no sexual harassment ever occurred, reinstating Leonard would not discourage sexual harassment in the workplace. This is because a person who may have committed sexual harassment would be permitted to return to his position. Such a result would tend to undermine Stroehmann’s ability to prevent immoral conduct in the workplace. Id. at 1442.
116. Id. at 1444.
should be overturned because it found that the arbitrator himself "was unacceptably predisposed towards Leonard and against Stroehmann." 117

In 1993, the Third Circuit decided an analogous case to Exxon Shipping II involving the identical parties. 118 The incident arose when an Exxon oil tanker ran aground and the helmsman, Foster, tested positive for marijuana. 119 Exxon proceeded to discharge Foster under its alcohol and drug policy, and the Union proceeded to take its grievance to arbitration pursuant the collective bargaining agreement. 120

The arbitration board determined that Foster did violate Exxon's drug policy. However, it concluded that termination was an inappropriate sanction because there was no evidence that Foster was impaired while on duty and the drug policy did not mandate termination. 121 Exxon then moved the district court to set aside the reinstatement award. 122

The district court vacated the award because reinstatement would undermine the public policy of prohibiting drug users from operating commercial vessels. 123 The court of appeals was again faced with applying the public policy exception:

[A court] must enforce an arbitration award if it was based on an "arguable" interpretation and/or application of the collective bargaining agreement, and may only vacate it if there is no support in the record for its determination or if it reflects a "manifest disregard of the agreement, totally unsupported by principles of contract construction. . ." 124

In applying the exception, the court focused on the Misco standard which provides that " . . . a court may refuse to enforce an award only when the award itself violates a statute, regulation, or other manifestation of positive law, or compels conduct by the employer that would violate such a law." 125 Reasoning through positive law, the court held that reinstating Foster would violate the public

117. Id. at 1446. The court made this conclusion about the arbitrator because of certain comments the arbitrator made on record. Id. The arbitrator commented that Wiegand was overweight, unattractive and that he doubted any average man would make a pass at such a woman. Id.

118. Exxon Shipping Co. v. Exxon Seamen's Union, 993 F.2d 357 (3d Cir. 1993). This case will be referred to as Exxon Shipping I.

119. Id. at 358-59.

120. Id. at 359. This is the same alcohol and drug policy at issue in Exxon Shipping II. See supra note 10.

121. Id.

122. Id. at 360.

123. Id.

124. Id.

125. Id. at 363 (quoting Misco. 484 U.S. at 45 n.12). Although this standard appears to be adopting the narrow interpretation, the court in Exxon Shipping I recognized the broad interpretation as the better approach even though it did not acknowledge a bright-line separating the two. Id.
policy against drug users operating commercial vessels.\textsuperscript{126} The Union interpreted \textit{Misco} to mean that such an award should be vacated only if the arbitrator determined that the employee was likely to use drugs in the future.\textsuperscript{127} The court disagreed with this argument because it interpreted the \textit{Misco} test to depend on the specific public policy in question and not on a distinction between the employee's past and future conduct.\textsuperscript{128}

The court justified its ruling by emphasizing the importance of safety in the operation of commercial vessels for the protection of the environment and general public from a major oil spill.\textsuperscript{129} The court distinguished the public policy involved in \textit{Exxon Shipping I} from the one in \textit{Misco} by concluding that the magnitude of potential harm is much greater in the operation of commercial vessels than in the operation of a machine in which only the employee in the drug-impaired or alcohol-impaired condition is in danger.\textsuperscript{130}

**IV. INSTANT DECISION**

**A. Majority Opinion**

The Third Circuit Court of Appeals began its analysis by acknowledging the fact that in \textit{Misco}, the United States Supreme Court did not have to adopt either the broad or narrow interpretation of the public policy exception because the lower court's decision did not attain the required threshold in \textit{W.R. Grace}.\textsuperscript{131} Although the public policy against drugs in the workplace was in issue, it was not determined to be well-defined and dominant based on existing laws and precedents.\textsuperscript{132} Furthermore, no violation of public policy was clearly shown in the lower court.\textsuperscript{133}

Since \textit{Misco} did not settle the discrepancy as to the proper interpretation of the public policy exception, the court in \textit{Exxon Shipping II} had to rely on other

\textsuperscript{126} \textit{Id.} at 364. The court did not decide whether the award had to violate positive law, or merely the wrongful act had to be against public policy. Nonetheless, the court pointed to Coast Guard regulations enacted to protect the public and the environment from negligent acts by drug or alcohol-impaired vessel operators. \textit{Id.}

\textsuperscript{127} \textit{Id.} at 365. This is because if the employee was found to have been rehabilitated, then there is no reason to refuse employment; whereas if the employee can be expected to use drugs again, then there would be a strong public interest in preventing a potential disaster if that employee operates a vessel while in an impaired condition. \textit{Id.}

\textsuperscript{128} \textit{Id.}

\textsuperscript{129} \textit{Id.} at 367.

\textsuperscript{130} \textit{Id.}

\textsuperscript{131} \textit{Exxon Shipping II}, 11 F.3d at 1192.

\textsuperscript{132} \textit{Id.}

\textsuperscript{133} \textit{Id.}
precedent and existing laws. The court noted that in *Stroehmann Bakeries* and *Exxon Shipping I*, the Third Circuit rejected the argument that the exception can only be applied if enforcing the arbitrator's award would violate a well-defined and dominant public policy imbedded in laws and legal precedents.

In *Exxon Shipping I*, the Third Circuit embraced a broad interpretation of the exception ruling that an arbitration award reinstating an employee may be vacated if the award is "inconsistent with some significant public policy." The public policy at issue in both *Exxon Shipping I* and *Exxon Shipping II* is the prevention of "the operation of a vessel under the influence of drugs or alcohol." In *Exxon Shipping I*, the court based its decision on the magnitude of potential harm caused by an oil tanker disaster, as distinguished from cases in which arbitration awards survived public policy challenges. In the present decision, the court also cited other circuits applying similar interpretations to the public policy exception.

In *Exxon Shipping II*, the court was extremely concerned with the potential danger that this public policy seeks to prevent, in particular, the effects on the environment of a major oil spill. The court pointed to the Clean Water Act and the Oil Pollution Act to establish that Congress has expressly promulgated restrictions and penalties for the wrongful discharge of oil. These acts provide for the liabilities and penalties imposed on the owner or

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134. *Id.* The court then tried to meet the *W.R. Grace* threshold by finding a violation of a well-defined and dominant public policy based on existing laws and precedents. *Id.* The court avoided the relevant dicta set out in *Misco* which provided that the arbitration award should be enforced if the arbitrator arguably applied the contract within the scope of authority. See *infra* note 155. The court also seemed to ignore the issue of undermining alternative dispute resolution by giving the courts final say on arbitration awards. See *supra* note 35.

135. *Id.* The court is implying that the Third Circuit has rejected the narrow, and thus, has adopted the broad interpretation. *Id.* This was accomplished in *Stroehmann Bakeries* by vacating an arbitration award contrary to the public policy of preventing sexual harassment in the workplace, without identifying any law making it illegal to reinstate an employee accused of such conduct. *Id.*

136. *Id.* (quoting *Exxon Shipping I*, 993 F.2d at 363).

137. *Id.* at 1193. (quoting *Exxon Shipping I*, 993 F.2d at 362).

138. *Id.* For example, the court noted that the potential danger in the oil tanker cases was much more severe than the possible harm to the employee in *Misco.* *Id.*

139. *Id.* at 1193-94; see Gulf Coast Indus. Workers Union v. Exxon Co., U.S.A., 991 F.2d 244, 257 (5th Cir.), cert. denied, 114 S.Ct. 441 (1993) (aff'g order vacating arbitration award that required reinstatement of refinery worker who tested positive for drugs); Delta Airlines, Inc. v. Air Line Pilots Ass'n Int'l, 861 F.2d 665, 674-75 (11th Cir. 1988), cert. denied, 493 U.S. 871 (1989) (vacating arbitration award that reinstated a pilot who flew while intoxicated); Iowa Elec. Light & Power v. Local Union 204, Int'l Bhd. of Elec. Workers, 834 F.2d 1424, 1430 (8th Cir. 1987) (refusing to reinstate nuclear power plant employee who committed serious violation).

140. *Id.* at 1193-94.


143. *Exxon Shipping II*, 11 F.3d at 1194. Under federal and state law, the owner or operator of an oil tanker that causes an oil spill may be civilly and criminally liable. *Id.*
operator of a tanker causing an oil spill. Additionally, the court noted the Senate Report on the Oil Pollution Act which discussed the public interest in individuals being responsible for the safe operation of vessels to avoid the influence of alcohol while on duty and the Senate conclusion that alcohol use among seamen is currently a serious problem. The court also recognized that Coast Guard regulations may use civil or criminal actions to punish crew members if intoxicated while on duty.

However, the court conceded that there is no statute or regulation which prohibits the owner of an oil tanker from employing an individual who has previously been found intoxicated while operating an oil tanker. However, the court reasoned that continuing to employ such an individual may constitute gross negligence on the part of an employer.

Upon review of *Exxon Shipping I* and the aforementioned statutes, regulations and congressional manifestations, the court concluded that the public policy in question is well-defined and dominant, emanating directly from laws and legal precedents and not from general public considerations. While acknowledging that arbitration is the preferable method of settling labor disputes, the court held that the arbitration award should be vacated because of the proper application of the public policy exception.

**B. Dissenting Opinion**

Judge Seitz dissented relying on *Kane Gas Light & Heating Co. v. International Brotherhood of Firemen & Oilers, Local 112*. Judge Seitz noted that *Kane Gas* adopted the position that an arbitration award should be enforced unless the award requires illegal acts to be performed. The dissent believed that the rule in *Kane Gas* is equally applicable to *Exxon Shipping II* and if the rule was to be rejected, it could only be done so by an *en banc* court.

145. *Id.* (citing S. REP. NO. 99, 101st Cong., 2d Sess. 10 (1990)).
146. *Id.* at 1195.
147. *Id.*
148. *Id.* Furthermore, continued employment of a seaman with a history of drug and alcohol abuse could constitute criminal liability to Exxon Shipping for "the employment of crew members who were allegedly 'incompetent' or 'physically or mentally incapable' of performing their duties." *Id.* see 33 U.S.C. § 1232(b)(1) (1988) and 33 C.F.R. § 164.11(b) (1993).
149. *See supra* notes 137-38 and accompanying text.
150. *Exxon Shipping II*, 11 F.3d at 1196.
151. *Id.*
153. *Exxon Shipping II*, 11 F.3d at 1196; *see Kane Gas*, 687 F.2d at 682. This position parallels the narrow interpretation of the public policy exception, although it should be noted that *Kane Gas* was decided before *W.R. Grace* first adopted the exception into the arbitration realm. *Id.*
V. COMMENT

While it seems the decision in Exxon Shipping II is correct, the public policy exception has a profound effect on alternative dispute resolution. The goals of arbitration are undermined when a court steps in and determines that the arbitrator incorrectly resolved the dispute between an employer and employee.

There exists three distinct standards which promote the policy of the judiciary's deference to arbitration: 1) arbitration is final and binding; 2) if the collective bargaining agreement or the arbitration award violates public policy, a court may then vacate the award; and 3) if public policy is at issue, then a court may determine how the dispute shall be resolved. The United States Supreme Court has rejected the argument that absolute finality should be a characteristic of arbitration. However, although the Court's dicta implies the second standard, it has explicitly refused to adopt either the broad or narrow interpretations. This gives each individual circuit too much discretion in interpreting the public policy exception.

A. The Court's Analysis

The Third Circuit Court of Appeals properly complied with precedent established in Stroehmann Bakeries and Exxon Shipping I by adopting the broad

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155. The outcome seems correct because the court was consistent with prior Third Circuit decisions. See Exxon Shipping, 801 F. Supp. at 1444. Furthermore, there is no dispute that Fris was in an impaired condition while on duty which may have placed the environment and the public at a greater risk of disaster. Exxon Shipping II, 11 F.3d at 1191. Therefore, dismissing Fris from his duties would prevent Fris from putting the public at risk again and serve as a deterrent to other employees to keep them from becoming involved in a similar situation in the future.

156. See supra note 42.

157. This was the standard provided for in the collective bargaining agreement between Exxon Shipping and the Union, with no mention of the public policy exception or judicial intervention. See Exxon Shipping II, 11 F.3d at 1190.

158. This standard amounts to the narrow interpretation of the public policy exception because an arbitration award will not itself violate public policy unless: 1) the contract the arbitrator is interpreting is contrary to public policy; or 2) the arbitrator acts negligently by misinterpreting the contract resulting in a public policy violation. See supra note 68.

159. In essence, this is what results under the broad interpretation of the public policy exception because in cases applying the broad interpretation, the arbitration award is vacated if the court determines that a well-defined and dominant public policy has been violated. See supra note 61.


161. See Misco, 484 U.S. at 38. "[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of authority, that a court is convinced he committed serious error does not suffice to overturn his decision." Id. The contract in Exxon Shipping II allowed the arbitration panel discretion on whether or not Fris' conduct constituted grounds for dismissal. Exxon Shipping II, 11 F.3d at 1190. Therefore, under the language of Misco, the only way the arbitration award should have been set aside is if the arbitration panel exceeded the scope of its authority. Id.
interpretation of the public policy exception.\textsuperscript{162} However, the Third Circuit Court of Appeals has misapplied Misco.

The Misco Court determined that the arbitration award should be enforced because the lower courts did not prove that a well-defined and dominant public policy was violated.\textsuperscript{163} As a result, the Court did not have to adopt either the broad or narrow interpretation.\textsuperscript{164} Since the outcome of Exxon Shipping II rested on the proper interpretation, the court probably should have recognized the assertive dicta in Misco favoring the narrow interpretation.\textsuperscript{165} In Exxon Shipping II, the arbitration panel applied the collective bargaining agreement to Fris’ conduct and determined that reinstatement after a ninety-day suspension was the proper remedy.\textsuperscript{166} The alcohol and drug policy did not mandate termination; therefore, it appears as though the panel arguably construed the agreement while acting within the scope of its authority. Under this standard, the arbitration award should have been enforced.

\section*{B. Conflicting Policies}

In order to determine which standard is in society’s best interest, the competing policies must be balanced. One significant policy is the finality of arbitration.\textsuperscript{167} Although it is still a somewhat rare occurrence, an increasing number of arbitration awards are being vacated by the judiciary under the public policy exception.\textsuperscript{168} Interpreting the exception broadly and allowing judicial intervention could result in a limitless expansion of the exception in which the awards hold minimum weight with regard to public policy.\textsuperscript{169} Additionally, collective bargaining agreements would become more difficult to draft because of the possibility that parties would lose faith in the arbitration process.\textsuperscript{170} Further, such an interpretation detracts from parties’ rights to negotiate an agreement, while simultaneously being governed by a judge with less expertise in labor law than a specialized arbitrator.\textsuperscript{171} These issues are best served by the narrow interpretation because it provides a stricter threshold for courts to vacate an arbitration award. Thus, more disputes would be finalized at the arbitration phase, which was the process chosen by the parties.

Another important policy is the rights of the aggrieved employee. Applying the broad interpretation will result in an increasing number of discharged

\textsuperscript{162} See generally Exxon Shipping II, 993 F.2d 357; Stroehmann Bakeries Inc. v. Local 776, Int’l Bhd. of Teamsters, 969 F.2d 1436 (3d. Cir. 1992).
\textsuperscript{163} See supra notes 92-96 and accompanying text.
\textsuperscript{164} Mouser, supra note 8, at 102-103.
\textsuperscript{165} See supra note 161.
\textsuperscript{166} Exxon Shipping II, 11 F.3d at 1191.
\textsuperscript{167} Mouser, supra note 8, at 121.
\textsuperscript{168} Id.
\textsuperscript{169} Id. at 122-23.
\textsuperscript{170} Id. at 123.
\textsuperscript{171} Id. at 124-25.
employees from being reinstated if the employee’s conduct was contrary to public policy.\textsuperscript{172} The public may then perceive the employee as being incapable of doing adequate work, thus minimizing the likelihood of the employee finding other employment.\textsuperscript{173}

Another way a discharged employee might be aggrieved can be explained in the criminal context.\textsuperscript{174} If the public policy violated is punished by a criminal statute, then the employee will be punished twice—once for breaking the law and once by the employer.\textsuperscript{175} This violates the intent of the legislature because the legislature provides for maximum punishment in the statute, and if the employee is also punished by the employer, the employee is in effect given a greater punishment than the legislature intended.\textsuperscript{176}

The aforementioned policies are countered by the significant policy in promoting safety and protecting the environment from disaster caused by workers under the influence of drugs and alcohol.\textsuperscript{177} The cases have shown that a court will likely allow an employee to be reinstated if the wrongful act did not pose significant danger to the public, but a court will not enforce an award reinstating an employee who threatened public safety or the environment.\textsuperscript{178} Terminating dangerous workers will deter other employees from committing similar wrongful acts. This policy is more effectively advanced by the broad interpretation because it allows the courts to intervene into the labor arena and apply the concerns of society based on public policy.

However, arbitrators are similarly capable of weighing the public concern with the legal implications of enforcing the collective bargaining agreement. Furthermore, employers can achieve the same deterrence effect by mandating termination in the collective bargaining agreement for conduct which violates public policy and threatens public safety or the environment.\textsuperscript{179}

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\textsuperscript{172} Id. at 121.

\textsuperscript{173} Id. \textit{Exxon Shipping II} is an example of the dilemma persisting under the broad interpretation. The employee did not have an opportunity to prove that his conduct would not happen again, nor did the employer provide any rehabilitation or treatment. \textit{Exxon Shipping II}, 11 F.3d at 1191. As a result, it is doubtful that Fris will ever work as a seaman again.

\textsuperscript{174} Mouser, supra note 8, at 120.

\textsuperscript{175} Id.

\textsuperscript{176} Id.

\textsuperscript{177} \textit{Exxon Shipping II}, 11 F.3d at 1193.

\textsuperscript{178} To illustrate, the employee in \textit{Misco} did not risk harm to anyone except himself and the Court allowed him to be reinstated. See \textit{Misco}, supra notes 90-101 and accompanying text. In contrast, the threatened harm was much more severe in the \textit{Exxon Shipping} cases, and both employees’ reinstatements were disallowed. See supra notes 117-151 and accompanying text.

\textsuperscript{179} Mouser, supra note 8, at 126.
VI. CONCLUSION

Unfortunately, situations arise which make it impractical for an arbitrator to simply look at the collective bargaining agreement to resolve an employment dispute.\textsuperscript{180} Due to public policy concerns, it is necessary to consider public interests as well as private contractual ones.\textsuperscript{181} At a minimum, employer and employee representatives deserve uniformity in the application of the public policy exception. Furthermore, the courts should give deference to the arbitrator’s decision as indicated by the United States Supreme Court.\textsuperscript{182} Employers and labor unions contract for arbitration, and if they so decide, they can draft collective bargaining agreements which provide for public policy situations. If they do not, the arbitrator’s decision should stand as long as the agreement being enforced does not violate public policy.

TODD M. SIEGEL


\textsuperscript{181} Id.

\textsuperscript{182} See supra note 38 and accompanying text.