

1997

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The Public Policy Exception: A Narrow Exception to Judicial Review or an Independent Means of Avoiding Arbitration Agreements?

*Exxon Corp. v. Baton Rouge Oil and Chemical Workers Union*¹

I. INTRODUCTION

The Federal Arbitration Act advances a strong desire to encourage parties in labor management disputes to utilize arbitration in lieu of litigation.² For this reason, judicial review of an arbitrator's award is construed narrowly by three specific provisions.³ In recent years, a public policy exception to this strict standard of review has developed,⁴ and its use has exploded.

This Note discusses the impact of this public policy exception on both arbitration and judicial forums. In addition, this Note highlights the potential for abuse when the exception is not limited and applied with care.

II. FACTS AND HOLDING

Exxon Corporation [hereafter "Exxon"] maintains a chemical plant outside of Baton Rouge, Louisiana.⁵ In 1987, Exxon issued a new alcohol and drug use policy which authorized unannounced searches for alcohol and drugs on Exxon property.⁶ In addition, the policy required employees to submit to testing if there was a reason to suspect drug or alcohol use.⁷ Disciplinary action, including possible dismissal, followed a positive test result or refusal by an employee to submit to a test.⁸

1. 77 F.3d 850 (5th Cir. 1996).

2. 9 U.S.C. §§ 1-16 (1988).

3. *Butterkrust Bakeries v. BCTW Local 361*, 726 F.2d 698, 699 (11th Cir. 1984), limits review of a labor arbitration award to "whether an award is irrational, whether it fails to draw its essence from the collective bargaining agreement or whether it exceeds the scope of the arbitrator's authority."

4. See *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29 (1987).

5. *Exxon*, 77 F.3d at 851.

6. *Id.*

7. *Id.*

8. *Id.*

In 1988, the Drug-Free Workplace Act was enacted.⁹ Exxon responded to the Act by posting a list of offenses and giving notice that non-compliance with the offenses could result in termination.¹⁰ The applicable portions of the "Posted Offenses" prohibited bringing drugs on company property, possessing or using drugs on company time, or continually using a habit-forming drug.¹¹

Exxon again revised its drug and alcohol use policy in 1989 to include random drug testing for "'designated positions' with critical safety responsibilities."¹² The Baton Rouge Oil and Chemical Workers Union [hereafter "Union"] objected to the policy changes.¹³ Although no agreement was reached between the Union and Exxon, the Revised Alcohol and Drug Abuse Policy was issued in August 1989.¹⁴ The policy, however, did not become effective until September 1, 1989.¹⁵

On August 24, 1989, Donald Chube tested positive for cocaine use soon after he had been promoted into a "highly sensitive position" as operations controller.¹⁶ On September 13, Exxon terminated Chube for violating company policy on drug use.¹⁷ In a subsequent arbitration proceeding, the Union demanded that Chube be reinstated and be given backpay.¹⁸

The Union argued that Chube's test results could not be used to institute disciplinary action because Chube had violated no posted rule in effect at the time of his testing.¹⁹ Exxon countered that employees were well aware of the consequences of a positive drug test.²⁰ Furthermore, the policy was necessary to protect employees' lives and company property from possible accidents.²¹

The arbitrator found that Exxon did not have the right under the collective bargaining agreement to discharge Chube.²² Exxon was found in violation of § 1121(b) of the collective bargaining agreement, which required the Union's agreement prior to any changes in the posted offenses and which prohibited the dismissal of an employee without advance notice of such change.²³ Due to the lack

9. *Id.* Under the Drug-Free Workplace Act, an employer must publish a statement notifying employees that the use or possession of a controlled substance is strictly prohibited in the workplace. Disciplinary measures and a drug-free awareness program are to be implemented as well. Failure to comply with the Act prevents the employer from contracting for the acquisition of any property or services by any Federal Agency. 41 U.S.C. §§ 701-707 (1994).

10. Exxon, 77 F.3d at 851.

11. *Id.*

12. *Id.*

13. *Id.* at 852.

14. *Id.* The Union specifically objected to the absence of a provision for employee rehabilitation and notice of testing. *Id.*

15. *Id.*

16. *Id.* at 851-52.

17. *Id.* Chube was a temporary supervisor when he was tested. His permanent position would not have subjected him to random drug-testing. *Id.*

18. *Id.* at 852, 853.

19. *Id.* at 853.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

of evidence that Chube had broken any 1987 drug policy rules, the arbitrator ordered Exxon to pay Chube one year's backpay.²⁴

Exxon filed suit in the United States District Court for the Middle District of Louisiana seeking to vacate the arbitration award.²⁵ Both parties filed motions for summary judgment.²⁶ The district court granted the Union's summary judgment motion and enforced the arbitrator's award of backpay plus costs.²⁷ Exxon timely appealed the district court's enforcement of the arbitrator's award.²⁸

The court of appeals relied primarily on three other Fifth Circuit cases,²⁹ *W.R. Grace and Co. v. International Union of Rubber Workers*,³⁰ *Misco Inc. v. United Paperworkers International Union*,³¹ and *Gulf Coast Industrial Workers Union v. Exxon Corp.*³² The Fifth Circuit reversed and rendered judgment in favor of Exxon.³³ The court held that there was a strong public policy against enforcing an arbitration award of reinstatement where an employee in a safety sensitive position is discharged for drug use.³⁴

III. LEGAL BACKGROUND

As a matter of federal labor policy, the use of arbitration is favored as the primary method to resolve disputes involving labor relations.³⁵ The Federal Arbitration Act presumes that resulting arbitration awards will be confirmed by federal courts whenever possible.³⁶ In general, a court will not disturb an arbitration award if it "draws its essence from the collective bargaining agreement" and if it is not solely based on the arbitrator's "own brand of industrial justice."³⁷ Therefore, a court could vacate the arbitrator's award only if the arbitrator exceeded its authority which is determined by the collective bargaining agreement.³⁸

Notwithstanding this narrow scope of judicial review, a federal court may also vacate an arbitration award if the award is "clearly shown" to violate a "well-defined and dominant" public policy that is drawn from "laws and legal precedents and not

24. *Id.* The arbitrator had originally ordered Exxon to reinstate Chube, but he was in prison at the time for selling drugs. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 853-57.

30. 461 U.S. 757 (1983).

31. 484 U.S. 29 (1987).

32. 991 F.2d 244 (5th Cir. 1993).

33. Exxon, 77 F.3d at 857.

34. *Id.*

35. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596 (1960).

36. 9 USC §§ 1-16 (1988).

37. *Enterprise Wheel*, 363 U.S. at 597.

38. *E.I. DuPont de Nemours and Co. v. Local 900 of Int'l Chemical Workers Union*, 968 F.2d 456, 458 (5th Cir. 1992).

from general considerations of supposed public interests."³⁹ The public policy exception has become an important litigation tool for parties wishing to convince a court to vacate an arbitration award.

In 1995, Peter Broida wrote a treatise discussing the use and scope of the public policy exception.⁴⁰ He noted that while courts will find an arbitration award unenforceable when the award is contrary to public policy, it is an extremely narrow exception which applies only when the public policy is drawn from "clear statutory or case law."⁴¹ Citing case law, Broida noted that the public policy exception was narrow to "limit potentially intrusive judicial review of arbitration awards under the guise of 'public policy'."⁴²

The boundaries of the public policy exception in an arbitration proceeding were first outlined in *W.R. Grace*.⁴³ The Fifth Circuit found that compliance with judicial orders and Title VII of the Civil Rights Act of 1964 was an important public policy.⁴⁴ The Supreme Court, in affirming the decision, found that "the question of public policy is ultimately one for resolution by the courts."⁴⁵ The Court noted that a collective bargaining agreement, like any contract, may not be enforced if it is contrary to public policy.⁴⁶ Since an arbitrator interprets the collective bargaining agreement to determine an appropriate resolution, an award that is contrary to public policy presumably justifies refusing to enforce a collective bargaining agreement.⁴⁷

In recent years, public safety has become the focus of litigation involving the public policy exception. A 1994 article on arbitration finality highlighted the "efforts to utilize public policy as the basis for setting aside arbitration awards. . . [to reflect]. . . issues prevalent in society today, i.e. AIDS, drug abuse, alcohol abuse, etc."⁴⁸ Most of the cases arise from disagreement between an employer and a union regarding the implementation of drug and alcohol regulations and testing. Both parties, labor and management, realize that "arbitration is the preferred method for resolving such matters rather than work stoppages or lengthy judicial proceedings."⁴⁹

The Drug Workplace Act of 1988 has caused employers to revise their drug policies whether or not the Union consents to the changes. In recent years, employers have attempted to utilize the public policy exception to challenge arbitration awards which would force them to reinstate or administer backpay to

39. *Misco*, 484 U.S. at 30 (quoting *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 766 (1983)).

40. PETER BROIDA, *A Guide to Federal Labor Relations Authority Law & Practice*, FED. LAB. REL. AUTH. L. & PRAC. Ch. 6, II, E (Grounds For Review.) (1995).

41. *Id.*

42. *Id.* (quoting *United States Postal Serv. v. Nat'l Assoc. of Letter Carriers*, 810 F.2d 1239, 1241).

43. 461 U.S. 757 (1983)

44. *Id.* at 766, 770.

45. *Id.* at 766.

46. *Id.*

47. *Id.*

48. *Arbitration Finality and the Public Policy Exception*, 49-SEP DISP. RESOL. J. 22, 22 (1994).

49. *Id.*

employees discharged for drug use. In examining the enforceability of an arbitration award, courts have asked: (1) what qualifies as a "dominant public policy drawn from existing laws" and (2) when such a policy justifies vacating an arbitration award.⁵⁰ A concern arises in that "public safety is undeniably an important public interest."⁵¹ [However], whether or not it falls within an explicit public policy exception may depend upon the court."⁵²

In *Mountaineer Gas Co. v. Oil Workers International Union*, a court in the Fourth Circuit vacated an arbitrator's award to reinstate an employee for failing a company drug test.⁵³ Although the holding focused on the normal method of review by finding that the award exceeded the arbitrator's powers and failed to draw its essence from the collective bargaining agreement, the court noted that refusing to enforce the award would assure the safe operation of the pipeline and company equipment.⁵⁴

In two related cases, the Third Circuit refused to uphold arbitration awards of reinstatement.⁵⁵ In the earlier case, when an oil tanker ran aground, the captain, pilot and helmsman were drug tested.⁵⁶ The helmsman tested positive for marijuana use.⁵⁷ Exxon's drug policy provided for termination of an employee if he or she used unprescribed drugs on company property.⁵⁸

An arbitration proceeding followed the employee's termination.⁵⁹ The arbitration proceeding resulted in an award of reinstatement.⁶⁰ Exxon went to court to vacate the arbitrator's award.⁶¹ The court vacated the award despite the lack of evidence that the employee used drugs while on the ship.⁶² The court based its reasoning on an express public policy not to condone illegal activity and to deter drug use by others in "safety sensitive positions" whether on or off duty.⁶³ More importantly, the court based their public policy finding on Coast Guard Regulations and Exxon's strict drug and alcohol policy.⁶⁴

The second case involved an Exxon oil tanker employee who was found to be intoxicated while on-duty.⁶⁵ Based on reasoning that was similar to the earlier *Exxon*

50. *Misco*, 484 U.S. at 42-43.

51. *Id.* at 28.

52. *Id.*

53. 76 F.3d 606 (4th Cir. 1996).

54. *Id.*

55. *Exxon Shipping Co. v. Exxon Seamen's Union*, 993 F.2d 357 (3rd Cir. 1993); *Exxon Shipping Co. v. Exxon Seamen's Union*, 11 F.3d 1189 (3rd Cir. 1993).

56. 993 F.2d at 358.

57. *Id.*

58. *Id.* at 359.

59. *Id.*

60. *Id.*

61. *Id.* at 360.

62. *Id.* at 364.

63. *Id.* at 360, 361.

64. *Id.*

65. *Exxon Shipping*, 11 F.3d 1189, 1190.

case, the court vacated the arbitration award of reinstatement.⁶⁶ The court found that it was contrary to public policy to have an intoxicated person participate in the operation of a commercial vessel due to the potential for loss of life or for economic and environmental repercussions that could be caused by an oil spill.⁶⁷

In another Exxon case, the court also found a clear public policy barring reinstatement to safety sensitive positions where substance abuse could jeopardize the safety of the public and other employees.⁶⁸ In *McGee v. Exxon*, a gas plant employee was discharged after he was found on the company parking lot with drug paraphernalia, including a marijuana joint and a can of beer.⁶⁹ McGee claimed he had not received a proper hearing prior to his dismissal from Exxon.⁷⁰ The case did not go to arbitration because the plaintiff-employee McGee failed to utilize the collective bargaining agreement's grievance procedure within the prescribed period of time.⁷¹ As a result, the court granted defendant Exxon's motion for summary judgment finding that "McGee's release from employment was clearly within the realm of the collective bargaining agreement and public policy."⁷² Citing *Misco*, the court found a strong public policy prohibiting the operation of dangerous machinery by employees who were under the influence of illegal drugs or alcohol.⁷³ Public policy was again based on Exxon's strict drug policy and prior case law shaped by similar facts.⁷⁴

The prohibition of drug and alcohol use has affected all areas of labor, including transportation. In *Union Pacific R.R. Co. v. United Transportation Union*,⁷⁵ an employee tested positive for alcohol, cocaine, and marijuana use.⁷⁶ His substance abuse during work hours resulted in a railway accident.⁷⁷ Upon the employee's dismissal, Union Pacific appealed on its behalf to the arbitration panel, a Public Law Board.⁷⁸ The district court found a clear public policy barring reinstatement to a safety sensitive position where substance abuse endangered the public and fellow employees.⁷⁹ This "well-defined public policy" is based on the Federal Railroad Safety Act of 1970 and drug testing implemented by Federal Railroad Administration.⁸⁰ On appeal, the Eighth Circuit affirmed the decision to

66. *Id.*

67. *Id.* at 1196.

68. *McGee v. Exxon Co., U.S.A.*, 669 F.Supp. 153 (S.D. Tex. 1986).

69. *Id.*

70. *Id.* at 155.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. 794 F.Supp. 891 (D.Neb. 1992).

76. *Id.* at 893.

77. *Id.* at 892.

78. *Id.*

79. *Id.* at 891.

80. *United Transportation Union*, 794 F.Supp. at 894, 895 (citing the *Federal Railway Safety Act of 1970*, 45 U.S.C. § 436 (1990); *Federal Railroad Administration Regulations*, 49 CFR § 214.1 (1992)).

vacate the arbitrator's award.⁸¹ The Eighth Circuit, quoting the Supreme Court, found that "where enforcement of private agreements would [violate public] policy, courts should refrain from [upholding the award]."⁸²

Although most courts have easily found a well-defined public policy as set out by *W.R. Grace*⁸³, other courts have found no grounds to vacate an arbitration award when an employer has unilaterally implemented a drug testing program or when a lower court has not based its refusal to enforce an arbitrator's award on specific and well-defined statutory and case law. In *Gulf Coast Indus. Workers Union v. Exxon Co., U.S.A.*⁸⁴, the court found that the district court had not based "its decision upon an articulated review of laws and legal precedents that frown upon the reinstatement of . . . employees" who are alcohol and drug abusers.⁸⁵ Instead, the district court relied on a "common sense" basis in refusing to reinstate the employee.⁸⁶ The Fifth Circuit still upheld the award based on numerous statutes, regulations, case law, and the company's guidelines which reflect an intolerance of illicit drugs in the workplace.⁸⁷

The Fifth Circuit was more cautious in *Gulf Coast* after it was reversed by the Supreme Court in *United Paperworkers v. Misco, Inc.*⁸⁸ In *Misco*, the Supreme Court reiterated *W.R. Grace*⁸⁹ and reprimanded the Fifth Circuit for not following the Court's guidelines for establishing a well-defined public policy.⁹⁰ Under these guidelines, the court was supposed to find an "explicit public policy . . . by reference to . . . legal precedents and not from general considerations of supposed public interests."⁹¹ Although the employee was found on company property in a co-worker's car with marijuana smoke in the air and a marijuana cigarette in the ashtray, a search of his own car found only marijuana "gleanings."⁹² The Supreme Court felt that there was insufficient proof that the employee had used drugs in the workplace.⁹³ Furthermore, the employee was fired before the employer knew of the second car search.⁹⁴ The Court went on to say that it was inappropriate for the Court of Appeals to substitute its judgment for the arbitrator's findings of fact.⁹⁵ The Fifth Circuit felt that reinstating an employee who violated company drug and alcohol policies and

81. *McGee v. Exxon Co., U.S.A.*, 3 F.3d 255, 264 (8th Cir. 1993).

82. *Id.* at 259 (citing *Hurd v. Hodge*, 334 U.S. 24, 34-35).

83. *See supra note 45.*

84. 991 F.2d 244 (5th Cir. 1993).

85. *Id.* at 250.

86. *Id.* at 249.

87. *Id.* at 250.

88. 484 U.S. 29 (1987).

89. *See supra note 45.*

90. 484 U.S. at 44.

91. *Id.* at 43 (quoting *W.R. Grace Co. v. Rubber Workers*, 461 U.S. 757, 766 (1983)).

92. *Id.* at 33.

93. *Id.* at 44-45.

94. *Id.* at 33.

95. *Id.*

who operated hazardous machinery would violate public policy.⁹⁶ The Supreme Court, however, re-emphasized that the court's power to refuse to enforce an arbitration award that is made pursuant to a collective bargaining agreement and that is contrary to public policy is "a *specific* application of the more general doctrine rooted in common law that a court may refuse to enforce contracts that violate law or public policy."⁹⁷

The question of unilateral implementation of drug testing arose in *United Food & Commercial Workers International Union v. Foster Poultry Farms*.⁹⁸ Foster Poultry claimed that a well-defined public policy was embodied in the regulations of the Federal Highway Administration of the Department of Transportation⁹⁹ (hereafter "DOT regulations").¹⁰⁰ The Ninth Circuit upheld the district court's ruling affirming an arbitration decision to reinstate two employees terminated in connection with the DOT regulations and to temporarily freeze the company's drug testing program until Foster agreed to bargain with the Union over discipline and rehabilitation under the policy.¹⁰¹ The appellate court found that the award was consistent with the public policy embodied in the DOT regulations and that the termination was not mandatory.¹⁰² The DOT Regulations granted the employer broad discretion in dealing with an employee who violated company drug policy and only prohibited such employee from driving a commercial motor vehicle.¹⁰³

In the aforementioned labor relations treatise, the author noted that a bright line was needed to preserve the scope of review of both the arbitration and judicial forums.¹⁰⁴ In addition, court decisions should be concerned with balancing the views of each judicial forum while balancing the interests of our national labor policy.¹⁰⁵ The author noted that the majority of court decisions which vacate arbitration awards are based on congressional acts, federal regulations, and state laws that expressly or implicitly prohibit certain conduct as a basis for denying enforcement.¹⁰⁶ Common sense dictates that operating trains, automobiles, and hazardous machinery requires drug-free employees.¹⁰⁷ Nevertheless, the author questioned whether such public safety concerns warranted recognition as a "well-defined" public policy.¹⁰⁸

96. *Id.* at 35.

97. *Id.* at 42 (citing *W.R. Grace*, 461 U.S. at 766; *Hurd v. Hodge*, 334 U.S. 24, 34-35 (1948)).

98. 74 F.3d 169 (9th Cir. 1995).

99. See 49 CFR §§ 391.81 - 391.123 (mandating drug testing for commercial motor vehicle operators).

100. *Id.* at 171.

101. *Id.* at 172-73, 175.

102. *Id.* at 175.

103. *Id.* at 174.

104. See *supra* note 50, at 90.

105. *Id.* at 28.

106. *Id.*

107. *Id.*

108. *Id.*

Arguing the other side, Bret F. Randall supported *Misco*¹⁰⁹ and similar case law that favored a public policy exception which condemned the performance of employment activities in the manner engaged in by the employee herself.¹¹⁰ In this scenario, the court would not review the specific conduct of the employee in the case at bar but, instead, would focus on the numerous regulations and statutes that prohibited such conduct in the workplace.¹¹¹ For example, rather than judging an employee for being inebriated while driving a truck, a court would look at all statutory and case law that prohibited drinking and driving. Randall felt that this method of judicial review would not undermine the policy of judicial deference although it is not as traditionally narrow as courts have required.¹¹²

IV. INSTANT DECISION

In the case at bar, the Fifth Circuit determined whether an "arbitrator's award . . . ordering . . . [a] monetary award to an employee who, while working in a safety-sensitive position, tested positive for the use of drugs violate[s] well-established public policy."¹¹³ The court began its analysis by discussing the traditionally narrow scope of review of an arbitration proceeding.¹¹⁴ First, a court will not vacate an award if it "draws its essence from the collective bargaining agreement."¹¹⁵ It will, however, vacate the award if it is based on the arbitrator's "own brand of industrial justice" or if the arbitrator exceeds the arbitral authority provided in the collective bargaining agreement.¹¹⁶

The Fifth Circuit noted that if the award is contrary to public policy, enforcement could still be denied even if the award is deemed valid under the normal method of review.¹¹⁷ The court reiterated the holding in *W.R. Grace and Co. v. International Union of Rubber Workers*¹¹⁸, "which provided that a federal court may vacate the award if it is 'clearly shown' that the award violates 'well-defined and dominant policy drawn from existing laws and legal precedent.'¹¹⁹ Using *W.R. Grace* as precedent for a public policy analysis, the circuit court proceeded to

109. 484 U.S. 29 (1987).

110. Bret F. Randall, Comment, The History Application, & Policy of the Judicially Created Standards of Review for Arbitration Awards, 1992 B.Y.U. L. REV. 759, 779 (1992).

111. *Id.*

112. *Id.*

113. *Exxon Corp. v. Baton Rouge Oil*, 77 F.3d 850, 857 (5th Cir. 1996).

114. *Id.* at 853.

115. *Id.* (citing *United Steelworkers of Am. v. Enter. and Car Corp.*, 363 U.S. 593, 597 (1960)).

116. *Id.* (citing *E.I. DuPont de Nemours and Co. v. Local 900 of Int'l Chemical Workers Union*, 968 F.2d 456 (5th Cir. 1992)).

117. *Id.*

118. 461 U.S. 757 (1983).

119. *Exxon Corp.*, 77 F.3d at 853 (citing *W.R. Grace*, 461 U.S. 757, 766 (1983)).

scrutinize the arbitration award by examining case law addressing employee drug use.¹²⁰

The Fifth Circuit first observed that it had previously been reversed by the Supreme Court for failing to precisely identify the legal precedent underlying its public policy ruling.¹²¹ In *Misco*¹²², the Fifth Circuit affirmed the vacating of an arbitration award which reinstated an employee based on a policy "against the operation of dangerous machinery by persons under the influence of drugs or alcohol."¹²³ The Supreme Court emphasized the narrow scope of the public policy exception.¹²⁴ In addition, the Court cited *W.R. Grace* as the standard for constructing a public policy argument.¹²⁵

In *Exxon Corp.*, the Fifth Circuit next looked at *Gulf Coast Industrial Workers Union v. Exxon Corp.*¹²⁶ In *Gulf Coast*, the Fifth Circuit again used the public policy exception to vacate a reinstatement award that was considered valid under the normal method of review.¹²⁷ The Fifth Circuit was more cautious this time in affirming the district court. It noted that the lower court had not based its decision on "an articulated review of laws and legal precedents that frown upon the reinstatement of such employees."¹²⁸ The Fifth Circuit in *Gulf Coast* stressed that courts must not follow a "common sense public policy approach," but instead must look to law and legal precedent to find public policy.¹²⁹ This law-based policy determination will strengthen the presumption that an arbitration award will be enforced. Nevertheless, the court opined that an employee in a safety-sensitive position who has breached the company drug policy on two prior occasions could be denied reinstatement.¹³⁰ It supported its holding with the numerous statutes, regulations, company guidelines, and case law that promote this nation's goal of ridding the workplace of illegal drugs.¹³¹

Finally, the Fifth Circuit in *Exxon Corp.* noted that, post-*Misco*, the Supreme Court has acknowledged a public policy against drug use in the workplace.¹³² The Court determined that "the government had a strong interest in preventing employees

120. *Id.* at 854.

121. *Id.* at 855.

122. 768 F.2d 739 (5th Cir. 1985).

123. *Exxon Corp.*, 77 F.3d at 854.

124. *Id.* at 855.

125. *Id.*

126. 991 F.2d 244 (5th Cir. 1993).

127. *Exxon Corp.*, 77 F.3d at 855.

128. *Id.* The employee in *Gulf Coast* had been discharged for violating Exxon's Alcohol and Drug Use Policy after testing positive for cocaine. The arbitration award required Exxon to reinstate the employee without backpay. *Id.*

129. *Id.* Courts and commentators find a "common sense public policy approach" where an ordinary person would find a behavior undesirable simply by using his or her own common sense. No legal foundation is utilized.

130. *Id.*

131. *Id.*

132. *Id.*

'from using . . . drugs while on duty' to ensure the safety of the public and [fellow] employees."¹³³

Having reviewed the applicable case law, the Fifth Circuit turned to the issue at hand: whether it would deny enforcement of the arbitration award based on the facts of the case.¹³⁴ The Union argued that the case at bar should be distinguished from *Gulf Coast*.¹³⁵ It reasoned that reinstatement was not an issue in *Exxon Corp.*, which nullified any safety concern about reinstating an employee to a safety-sensitive position.¹³⁶

The Fifth Circuit found that the *Gulf Coast* public policy exception should not be interpreted so rigidly.¹³⁷ The court stated that Chube, the employee, had occupied a safety-sensitive position.¹³⁸ Moreover, Chube had tested positive for cocaine use, thereby, endangering the safety of his co-workers.¹³⁹ Therefore, a proper interpretation of the *Gulf Coast* holding would prohibit retrospective as well as prospective approval of the employee's drug use on the job.¹⁴⁰ Retrospective approval would include an order of backpay or reinstatement into the job Chube held at Exxon prior to his safety-sensitive position.¹⁴¹

The court stated that the public policy against drug use in safety-sensitive positions "looks to the future to ensure safety, but looks back to deny condonation of misconduct."¹⁴² This justified disallowing employees in such positions to be reinstated. The policy, however, should also look back to the conduct giving rise to the grievance in order to deny condonation of employee misconduct.¹⁴³ Otherwise, the public policy against the use or possession of drugs in the workplace, as articulated in *Gulf Coast*, would be undermined.¹⁴⁴

Referring to the federal and state statutes, regulations, and case law which "reflect our nation's 'well-defined and dominant' desire for a drug-free society" cited in *Gulf Coast*, the Fifth Circuit concluded that Chube's termination was justified.¹⁴⁵

133. *Id.* (citing *Skinner v. Ry Labor Executives Ass'n*, 489 U.S. 602, 621 (1989)).

134. *Id.* The Fifth Circuit noted that Exxon was clearly in violation of the collective bargaining agreement. Although the court recognized the limited circumstances where public policy could override the terms of a bargained-for agreement, it did not dwell on the issue, finding public policy mandated the final holding. *Id.* at 856-57.

135. *Id.* at 856.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 854, 856.

145. *Id.* at 856. The court referred to the Drug-Free Workplace Act, Defense Department Regulations, and a general adoption by the state of Louisiana of drug testing procedures for its businesses.

The arbitration award of reinstatement was reversed and judgment was rendered in favor of Exxon.¹⁴⁶

V. COMMENT

Traditionally, there has been a well-accepted method for reviewing the legitimacy of an labor arbitration award. The boundaries of this standard of review are limited to "whether an award is irrational, whether it fails to draw its essence from the collective bargaining agreement or whether it exceeds the scope of the arbitrator's authority."¹⁴⁷ This standard has been applied to numerous fact patterns so courts are familiar with its application. In recent times, however, the public policy exception has become the primary basis on which courts could set aside otherwise valid arbitration awards. The holding in *Exxon Corp.* further strengthened this trend, predominantly in the context of drugs in the workplace. Federal statutes support the use of the public policy exception.¹⁴⁸ The Americans with Disabilities Act specifically excludes current drug users from its protection.¹⁴⁹ State statutes and case law also support the use of an exception to the normal scope of review of an arbitrator's award. From *W.R. Grace*,¹⁵⁰ which set the "well-defined and dominant" public policy standard, to *Gulf Coast's* mandate of court decisions based on an articulated review of legal precedent¹⁵¹, the use of drug testing procedures in the workplace and the desire for a drug-free nation have justified overturning countless arbitration proceedings.

While it is commendable that the judicial forum is concerned with public safety and with the welfare of company employees, several questions arise with the use of the public policy exception. Although generally defined as narrow in scope, courts in recent cases have justified their holdings based on previous case law. As society evolves, should courts be allowed to rest their decisions on a general policy against drugs in the workplace without having to construct a detailed foundation for a public policy argument? How should a court deal with the competing policies of both the arbitration and judicial forums? In *Exxon Corp.*, has the court sufficiently presented legal sources to support their holding? Are decisions such as *Exxon Corp.* where the employer unilaterally implemented a drug testing procedure undermining the goals of labor relations and arbitration proceedings?

146. *Id.* at 857.

147. *See supra* note 3.

148. The Drug-Free Workplace Act, 41 U.S.C. §§ 701-707 (1994); Defense Department Regulations, 48 C.F.R. § 223.5 (1992) (both require employers to promote drug-free workplaces).

149. 42 U.S.C. §§ 12101-12213.

150. 461 U.S. 757 (1983).

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

*A. Dealing with Competing Policies in
the Judicial and Arbitration Forums*

The first two questions are closely related. According to the Supreme Court in *United Steelworkers of America v. Enterprise Wheel & Car Corporation*, the use of arbitration proceedings is a desirable way to handle disputes between labor and management.¹⁵² Both labor and management realize that arbitration is more desirable than "work stoppages or lengthy judicial proceedings."¹⁵³ Providing courts with the power to overturn awards allows the judicial system to impede and hinder the effectiveness of arbitration. If awards can be readily appealed, a Union would not subject itself to a proceeding knowing it will eventually expend additional time and money once the award is challenged in court. For this reason, the Federal Arbitration Act presumes that an arbitration award will be enforced in most situations.¹⁵⁴ To prevent potentially intrusive judicial review, the general method of review is limited.¹⁵⁵ This limitation on the general method of review is a narrow construction of the established general standard of review for arbitration agreements.

This is not meant to imply that judicial review of arbitration awards should be eliminated since an arbitrator's decision should be subject to scrutiny like any other judgment. The concern arises when an exception to a general standard of review begins to take on a dominant role in the appellate process. Under the current review system, an arbitrator's award is legitimate so long as it is based on the "essence of the collective bargaining agreement."¹⁵⁶ This valid decision, however, will still have to pass what has become an independent public policy test in order to be enforced.

The judicial system has legitimate concerns for implementing a public policy exception. The safety of our nation's citizens and of the co-workers of an employee engaging in illegal activities are vital considerations to the prosperity of our nation. Therefore, the use of the public policy exception is both commendable and desirable to promote these goals.

The same concern, however, arises as to whether public policy falls within an explicit policy as articulated in *W.R. Grace*.¹⁵⁷ Some commentators may argue that it is pointless to have a specific policy cited because public safety is such an overriding concern. For example, Bret F. Randall¹⁵⁸ supported case law that favored condemnation of employee misconduct in more general terms.¹⁵⁹ Randall said he would not focus on specific misconduct such as an inebriated employee driving a

152. 363 U.S. 593 (1960).

153. See *supra* note 50, at 22 (noting that federal court policy is to settle labor disputes by arbitration).

154. Federal Arbitration Act, 9 U.S.C.A. §§ 1-16.

155. A GUIDE TO FEDERAL LABOR RELATIONS AUTHORITY LAW & PRACTICE, FED. LAB. REL. AUTH. L. & PRAC. Ch. 6, II, E (1995) (citing 810 F.2d 1239, 1241).

156. *United Steelworkers of America v. Enterprise Wheel & Car Corporation*, 363 U.S. 593, 597 (1960).

157. 461 U.S. 757 (1983).

158. Randall, *supra* note 111, at 759.

159. *Id.* at 780.

truck. Rather, he would look at all the statutes and case law prohibiting drinking and driving. Although he said this would maintain an appropriate balance between deference to an arbitrator and the right to judicial review, Russell seemed to favor a broad public policy exception that would not require any specific foundation. A more compelling argument is provided by Peter Broida who advocates a narrow use for the public policy exception.¹⁶⁰ Limited use of the public policy exception is necessary to "limit potentially intrusive judicial review of arbitration awards under the guise of 'public policy'."¹⁶¹ A true balance must be struck in order to preserve the scope of review of both the judicial and arbitration forums. Otherwise, the use of arbitration in labor proceedings will be eclipsed by the appellate process, and judicial review and its utility will become a constant source of litigation.

B. Appropriateness of Legal Sources Established as a Foundation for the Public Policy Exception

In *Exxon Corp.*, the Fifth Circuit based its holding on the legal sources set forth in *Gulf Coast Industrial Workers*.¹⁶² Exxon was the defendant in both Louisiana cases. Therefore, the Fifth Circuit stated that the statutes and case law it applied to vacate the *Gulf Coast* arbitration award would also apply to the case at bar.¹⁶³ The court was correct in finding that backpay should be denied to a discharged employee who occupied a safety-sensitive position.¹⁶⁴ Not only did the employee test positive for cocaine use, he was also later arrested for selling drugs.¹⁶⁵ This individual was clearly a threat to the safety of his co-workers.

Although a desirable solution was reached, the court overlooked some significant facts in constructing a public policy argument. First, the employee had not broken any rules at the time he was tested.¹⁶⁶ The policy allowing random drug testing for employees in safety-sensitive situations did not become effective for another week.¹⁶⁷ Exxon did not prove that the employee had used drugs while on company property or brought drugs onto the property.¹⁶⁸ In short, the employee had not actually violated Exxon policy. Second, Exxon unilaterally implemented the new alcohol and drug policy.¹⁶⁹ Allowing this factor to go unchecked could encourage employers, particularly Exxon -- a company often involved in such litigation -- not to consult the union about changes in company policy. No specific statutes or case law were mentioned that addressed facts similar to this case. The

160. BROIDA, *supra* note 43.

161. *Id.* (citing 810 F.2d 1239, 1241).

162. *Exxon Corp.*, 991 F.2d 244 (5th Cir. 1993).

163. *Id.* at 249.

164. *Exxon Corp.*, 77 F.3d at 856.

165. *Id.* at 853.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

Fifth Circuit, even after providing an extensive history of the public policy exception prerequisites, never specified a detailed foundation. This holding allows an employer to simply raise public safety as a defense to any challenge regarding a violation of its collective bargaining agreement. As a result, states that have prior case law and statutes addressing such safety concern will allow a blanket approach to the public policy exception. No structured evidence of a public safety concern will need to be raised on a case-by-case basis.

C. Impact of Employer Unilaterally Implementing Drug Testing Procedures

In *Exxon Corp.*, the employer had not provided a rehabilitation provision for company employees.¹⁷⁰ Although the employee in the case at bar might seem unredeemable, that should not deter Exxon from aiding its other employees who could benefit from such a program. The Fifth Circuit did not raise these concerns that resulted from Exxon's unilateral implementation of its newest drug policy. It was satisfied that the public policy exception engulfed any such argument. This decision puts a heavy burden on labor representatives who initially formed unions to alleviate the influence employers had over them.

This decision seems to protect Exxon from future liability. It now has both statutory and case law to support any claim of public policy it might raise. It also finds itself in a position where it can unilaterally make changes to its policies without consulting the designated union. Although employee drug testing is desirable, the employer's specific behavior should have been a factor in deciding whether to implement a public policy exception. By encouraging a detailed foundation of statutes, case law, regulations, and similar company guidelines in the industry, both the arbitration and judicial forums can co-exist. Otherwise, the "common sense public policy approach" discussed in *Gulf Coast* will set the stage for the continuing expansion of the public policy exception with no boundaries in sight.

VI. CONCLUSION

The public policy exception has proven to be effective in promoting public safety concerns about employee misconduct in the workplace. As the usage of this exception continues to expand, however, the danger of abuse of discretion by the judicial system becomes a realistic possibility. The judicial and arbitration forums need to work together to preserve each side's respective scope of review. Otherwise, the use of arbitration proceedings will be reduced to simply another venue to fill the courts with litigation. Specific detailed case and statutory law should be used to establish a foundation and be reviewed on a case-by-case basis. By limiting the use of the public policy exception, parties to labor/management disputes will be

170. *Id.*

encouraged to resolve their differences in a less adverse environment and to provide employees with equal footing in such discussions.

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