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Judicial Deference to Grievance Arbitration in the Private Sector: Saving *Grace* in the Search for a Well-Defined Public Policy Exception

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I. INTRODUCTION

Collective bargaining in the private sector enables employees, through their union, to participate in creating and administering the rules of the workplace.¹ Collective bargaining agreements between

1. See Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663, 721-24 (1973). The discussion in this Comment is confined to issues that arise in the judicial review of arbitrators' decisions to reinstate private sector employees who were discharged for violating laws and administrative regulations. This Comment does not address arbitration in the public sector, because the public interest in effective and efficient government that pervades public labor-management relations results in a different mix of policy considerations. See 5 U.S.C. § 7101 (1982) (Collective bargaining is tailored to meet the "special requirements and needs of the Government."); 5 U.S.C. § 7121(a)(1) (1982) (mandating the use of grievance arbitration in the federal government).

Three federal labor acts are applicable to the private sector employees who are the subject of this Comment. The Labor Management Relations Act (LMRA) applies to employees in private industries that affect interstate commerce. Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified at 29 U.S.C. §§ 141-187 (1982)) (amending the National Labor Relations Act, 49 Stat. 449 (1935)) (codified as amended at 29 U.S.C. §§ 151-166 (1982)). The Railway Labor Act covers both railway and air carrier employees. 45 U.S.C. §§ 151-188 (1982). Postal workers have a hybrid status in the area of labor relations under chapter 12 of the Postal Reorganization Act, 39 U.S.C. §§ 1201-1209 (1982). In enacting the Postal Reorganization Act, Congress sought to reform the labor-management structure of the newly organized Postal Service by bringing "postal labor relations within the same structure that exists for nationwide enterprises in the private sector." H.R. REP. NO. 1104, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 3649, 3662. With regard to strikes and interest arbitration, however, postal workers are treated as other federal employees. They may not

unions and employers typically limit an employer's right to discharge and discipline employees.² The employer normally gives up its otherwise broad discretion over disciplinary action³ through a provision in the agreement requiring "just cause" for such action.⁴ In exchange for this provision, a union typically will promise not to strike.⁵ As a result of this quid pro quo,⁶ unions and employers agree to resolve their disputes according to the terms of their collective agreement without the use of economic coercion by either party.⁷ The grievance

strike and must resort to binding arbitration should they or the Postal Service reach an impasse in the course of collective bargaining. H.R. REP. NO. 1104, 91st Cong., 2d Sess., reprinted in 1970 U.S. CODE CONG. & ADMIN. NEWS 3649, 3658, 3662-64. For examples of the judicial approach to labor disputes in the Postal Service, see *National Ass'n of Letter Carriers v. United States Postal Service*, 590 F.2d 1171, 1174-75 (D.C. Cir. 1978); *Melendy v. United States Postal Service*, 589 F.2d 256, 259-60 (7th Cir. 1978); *Winston v. United States Postal Service*, 585 F.2d 198, 207 (7th Cir. 1978); *Malone v. United States Postal Service*, 526 F.2d 1099, 1103-04 (6th Cir. 1975).

There is a divergence of opinion among the circuits as to how the hybrid nature of postal labor relations should affect the scope of judicial review of arbitral reinstatements. See *infra* note 129. An in-depth discussion of this issue, however, is beyond the scope of this Comment. The cases that the various courts of appeal have decided are nonetheless exemplary of judicial treatment of the public policy exception generally, and courts addressing the public policy exception in the context of the private sector cite them as persuasive.

2. Under common law doctrine, employers may discharge employees at will, without notice or cause. This right, however, is not necessarily absolute. Judicial decisions, employment discrimination laws, and collective bargaining agreements all limit management's freedom to discharge. For a general discussion of these limitations, see Krauskopf, *Employment Discharge: Survey and Critique of the Modern at Will Rule*, 51 UMKC L. REV. 189 (1983); Comment, *Employers Beware: The Implied Contract Exception to the Employment-at-Will Doctrine*, 28 B.C.L. REV. 327 (1987); Comment, *Erosion of the Employment-at-Will Doctrine: Choosing a Legal Theory for Wrongful Discharge*, 14 CAP. U.L. REV. 461 (1985); Note, *Protecting Employees at Will Against Wrongful Discharge: The Public Policy Exception*, 96 HARV. L. REV. 1931 (1983); Note, *Protecting at Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816 (1980).

3. Disciplinary actions usually take one of two forms: temporary suspension, during which an employee generally is not paid, or discharge. If the employer elects the latter, the employee's job, seniority, and benefits are revoked and his reputation is tarnished. See F. ELKOURI & E. ELKOURI, *HOW ARBITRATION WORKS* 660 (1985).

4. See Cox, *Rights Under a Labor Agreement*, 69 HARV. L. REV. 601, 613 (1956). Many arbitrators infer the "just cause" limitation, even if it is not expressly contained in the collective agreement. See F. ELKOURI & E. ELKOURI, *supra* note 3, at 651.

5. The Supreme Court of the United States has used injunctions to enforce a union's obligation not to strike, whether the obligation is expressed or implied. See *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970); *Teamsters Local 174 v. Lucas Flower Co.*, 369 U.S. 95 (1962).

6. *United Steelworkers of Am. v. American Mfg. Co.*, 363 U.S. 564, 567 (1960).

7. The use of economic coercion not only harms management through lost productivity and profits, but labor as well through lost workdays and wages. See D. BOK & J. DUNLOP, *LABOR AND THE AMERICAN COMMUNITY* 229 (1970); C. UPDEGRAFF, *ARBITRATION AND LABOR RELATIONS* 22 (1970). Unions and employers agree to refrain from using economic coercion to resolve their differences during the term of their agreement. This means, however, that the parties use economic pressure extensively during negotiations over the collective agreement itself. Courts acknowledge the use of economic pressure in collective bargaining as

procedures that are established in the agreement thus become a union's primary means of ensuring that the employer adheres to its promises.⁸ If an employer disciplines an employee, the union may submit a grievance on behalf of its member to the management hierarchy in an attempt to reverse the actions of managers or supervisors at lower levels.⁹ Through this review procedure, employers and unions settle most grievances arising out of disciplinary actions taken against employees.¹⁰ If the employer maintains its position, however, the union may submit its case to an arbitrator pursuant to the collective bargaining agreement.¹¹

As the preferred means of resolving disputes arising under a collective agreement, grievance arbitration has come to occupy a central

an integral part of the process. See *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 494 (1960); see also *Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608 (1986) (Resort to economic pressure is a legitimate part of the collective bargaining process.); *Belknap, Inc. v. Hale*, 463 U.S. 491, 500 (1983) (Federal law is intended to leave employers and unions free to use economic pressure against one another during collective bargaining.); *Lodge 76, Int'l Ass'n of Machinists and Aerospace Workers v. Wisconsin Employment Relations Comm'n*, 427 U.S. 132, 147 (1976) (Both employers and employees have the right to resort to economic tactics during collective bargaining if more amicable measures fail.). Thus judicial support for arbitration is necessary to prevent the economic pressure that may occur during bargaining from continuing into the ongoing relationship between the employer and the union. Brief for Petitioners at 18, *United Paperworkers Int'l Union v. Misco, Inc.*, 108 S. Ct. 364 (1987) (No. 86-651).

8. See Feller, *supra* note 1, at 741-42; Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999, 1007 (1955); see also Katz, *Minimizing Disputes Through the Adjustment of Grievances*, 12 LAW & CONTEMP. PROBS. 249, 252 (1947) (grievance procedures provide a "daily confirmation of the right of the workers to participate in directing the course of their lives"); Selekmán, *Handling Shop Grievances*, 23 HARV. BUS. REV. 469, 469 (1945) (arguing for a recognition of grievance procedures as "the very heart of shop relationships").

9. See Feller, *supra* note 1, at 742. The Supreme Court has recognized the integral role that grievance procedures play in enabling unions to enforce their collective bargaining agreements. *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965). The *Maddox* Court stated: "As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must attempt use of the contract grievance procedure agreed upon by employer and union as the mode of redress." *Maddox*, 379 U.S. at 652. Notwithstanding the merits of the underlying grievance, arbitrators will often deny or limit a grievant's request for relief if the grievant failed to utilize an available grievance procedure. See F. ELKOURI & E. ELKOURI, *supra* note 3, at 199.

10. See *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 438 (1965); F. ELKOURI & E. ELKOURI, *supra* note 3, at 153-54, 157-58. Successful arbitration relies upon the grievance procedure to sift out those claims that are less meritorious. Otherwise, the sheer number of claims would overburden arbitration's capacity to resolve them. See *id.*; see also *Maddox*, 379 U.S. at 653 (1965) (Rules permitting employees to sidestep the grievance procedure would disrupt both the negotiation and administration of collective agreements.).

11. See Shulman, *supra* note 8, at 1007-08; Feller, *supra* note 1, at 745. As of 1986, approximately ninety-five percent of the collective bargaining agreements negotiated in the United States contained an arbitration clause. GOULD, A PRIMER ON AMERICAN LABOR LAW 136 (2d ed. 1986).

role in American labor law.¹² Because the union arbitrates only those issues that the union and the employer have been unable to resolve, the way in which an arbitrator resolves them may be of great importance to their continuing relationship.¹³ Unlike a judge, who may consider the public interest involved in a particular case, the arbitrator has no authority to look beyond the collective agreement in a given workplace to resolve a grievance.¹⁴ The collective agreement, therefore, defines the arbitrator's role. Furthermore, the collective agreement typically details the means by which the parties select the arbitrator,¹⁵ establishes the scope of the arbitrator's authority, and forms the body of "law" from which the arbitrator's decision must

12. See Kaden, *Judges and Arbitrators: Observations on the Scope of Judicial Review*, 80 COLUM. L. REV. 267, 267 (1980); Congress expressed a policy preference for arbitration of workplace disputes and for the finality of arbitrators' decisions in section 203(d) of the Labor Management Relations Act, which provides: "Final adjustment by a method agreed upon by the parties [to a collective agreement] is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." 29 U.S.C. § 173(d) (1982). For a discussion of the Supreme Court doctrine securing arbitration's centrality in American labor law, see *infra* notes 35-53.

13. The closer a grievance comes to arbitration, the greater its potential for affecting the collective agreement. See generally Cox, *supra* note 4, at 606-16 (demonstrating the many ways in which the processing of an individual dispute through grievance procedures and arbitration can affect the union as an organization and other employees generally). In *Vaca v. Sipes*, the Court affirmed arbitration's unique role in maintaining a union's strength in its relationship with the employer:

Though we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion, we do not agree that the individual employee has an absolute right to have his grievance taken to arbitration [T]he settlement process furthers the interest of the union as statutory agent and as coauthor of the bargaining agreement in representing the employees in the enforcement of that agreement.

386 U.S. 171, 191 (1967).

14. See Shulman, *supra* note 8, at 1016. It is precisely this broader authority that characterizes the institutional setting of judicial decisions. Unlike the arbitrator, the judge must consider the public interest in resolving disputes. The judge's authority is not derived solely from an agreement between the litigants before him. See *id.* at 1008-09. Grievance arbitration in the labor relations context also differs from other forms of arbitration. Although commercial arbitration is an alternative to litigation, labor arbitration is an alternative to the use of economic pressure to resolve workplace disputes. See *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-79 (1960).

15. See Jones, "His Own Brand of Industrial Justice": *The Stalking Horse of Judicial Review of Labor Arbitration*, 30 UCLA L. REV. 881, 889-93 (1983). Employers and unions closely scrutinize potential arbitrators because each perceives the selection of an arbitrator as an important factor in the outcome of the dispute. As Professor Jones noted, the prior decisions of a potential arbitrator are a central consideration: "[E]lements commonly examined by the parties include at least the following: experience, education, *past decisions on point*, temperament, fairmindedness, *past decisions on point*, skepticism, insight, *past decisions on point*, intelligence, articulateness and, finally, *past decisions on point*." *Id.* at 889.

derive.¹⁶ At the same time, however, the arbitrator must interpret the often vague language that these agreements contain in a way that recognizes the fact that the parties before him are engaged in a continuing relationship.¹⁷ Although arbitration takes place in the context of individual disputes, it is an integral part of an ongoing collective bargaining system designed to enhance the union's effectiveness in the workplace, increase the employer's productivity, and secure just results for aggrieved employees.¹⁸ Consequently, the arbitrator must be sensitive to each of these concerns as he resolves workplace disputes.¹⁹

Arbitrators generally consider three factors in determining whether an employer's reasons for disciplining an employee constituted just cause.²⁰ The first factor is whether the employer has proven that the employee committed the acts that led to the disciplinary action.²¹ The second factor is whether the employer accorded proce-

16. See Shulman, *supra* note 8, at 1008-09. The arbitrator may draw reasonable inferences from the agreement if necessary. See *id.* at 1011-12.

17. See Feller, *supra* note 1, at 750; Kaden, *supra* note 12, at 274 (citing Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1490-93 (1959); Shulman, *supra* note 8, at 1024)); see also Fischer, *Updating Arbitration*, 26 NAT'L ARB. A. PROC. 65 (1973) ("When a judge settles a case, it is over; but an arbitrator makes a decision which both parties must live with . . .").

18. See Shulman, *supra* note 8, at 1024.

19. The arbitrator must take care to adhere to the collective agreement to avoid any appearance that he exceeded his authority. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

20. These three factors are a condensed version of the seven-question test established in *Grief Bros. Co. v. United Mine Workers of Am., District 50, Local No. 15277*, 42 Lab. Arb. (BNA) 555, 557-59 (Daugherty, Arb.). These seven questions include: (1) Whether the employer forewarned the employee of the possible consequences of his conduct; (2) Whether the rule violated was reasonably related to the efficient and safe operation of the employer's enterprise; (3) Whether the employer, before disciplining the employee, attempted to discover whether the employee actually committed the acts in question; (4) Whether the employer's investigation was fair and objective; (5) Whether the evidence against the employee was substantial; (6) Whether the employer applied its rule evenhandedly; and (7) Whether the degree of discipline was reasonably related to the seriousness of the employee's proven offense and the employee's prior employment record. *Id.* at 558-59. The American Arbitration Association has accepted this test as a guideline for arbitrators resolving discipline grievances. See *Indianapolis Rubber Co. v. United Rubber Local 110*, 79 Lab. Arb. (BNA) 529, 534 (Gibson, Arb.).

21. See F. ELKOURI & E. ELKOURI, *supra* note 3, at 661-63. As one arbitrator has stated:

[I]t seems reasonable and proper to hold that alleged misconduct of a kind which carries the stigma of general social disapproval as well as disapproval under accepted canons of plant discipline should be clearly and convincingly established by the evidence. Reasonable doubts raised by the proofs should be resolved in favor of the accused. This may mean that the employer will at times be required, for want of sufficient proof, to withhold or rescind disciplinary action which in fact is fully deserved, but this kind of result is inherent in any civilized system of justice.

dural due process to the employee in the events leading up to and following discipline.²² Finally, the arbitrator considers any mitigating circumstances and determines whether some lesser penalty would be more appropriate.²³ Thus over time, arbitrators' decisions establish an understanding of the meaning of just cause under the particular collective agreement.²⁴

Once an arbitrator has resolved a grievance, either the union or the employer may attempt to overturn the arbitrator's award on the ground that it violated the collective agreement.²⁵ The possibility that a judge may review and ultimately reverse an arbitrator's decision presents a tension that exists, at least theoretically, between arbitrators and judges. Both arbitrators and judges are primarily concerned with resolving disputes. They are fundamentally different, however, because the proceedings through which they operate vary in both structure and purpose.²⁶ The benefits arising from peaceful and efficient resolution of disputes between unions and employers motivated

Kroger Co. v. International Bhd. of Teamsters, Local 406, 25 Lab. Arb. (BNA) 906, 908 (1955) (Smith, Arb.).

22. See F. ELKOURI & E. ELKOURI, *supra* note 3, at 673. The basic notions of fairness implicit in the concept of due process include failure to make a reasonable investigation before assessing an employee's punishment and attempting to cite additional reasons for disciplinary action after it has already occurred. See *id.* at 675-76.

23. The arbitrator's authority to modify the penalties that the employer initially imposes varies with the collective bargaining agreement. Many agreements expressly or impliedly give the arbitrator authority to modify penalties that he finds to be improper. See *id.* at 667, 670-71.

24. Although arbitrators' decisions interpreting provisions of a collective agreement may have authoritative force, the majority of decisions are regarded as persuasive. *Id.* at 430. An arbitrator's decision interpreting a provision of a particular collective agreement usually becomes a binding part of that agreement and is applied by subsequent arbitrators. *Id.* at 425. These three just cause inquiries may be theoretically distinct, but they often blend together in fact. For example, an arbitrator may ignore evidence that the employer offers on the ground that the employer was unaware of it prior to the disciplinary action. This combined inquiry of proof and procedure may lead an arbitrator to reinstate an employee who, in light of the evidence, was in fact impaired. See *infra* notes 176-79 and accompanying text.

25. Unions or employers may bring suit in any federal district court under section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a) (1982) or the Postal Reorganization Act, 39 U.S.C. § 1208(b) (1982). The federal courts have exclusive jurisdiction for disputes arising under the Railway Labor Act, 45 U.S.C. § 159 (1982). See *AFSCME v. State of Illinois*, 158 Ill. App. 3d 584, 511 N.E.2d 749 (Ill. App. Ct. 1987); *Amalgamated Transit Union, Division 1300 v. Mass Transit Admin.*, 305 Md. 380, 504 A.2d 1132 (1986); *Lansing Community College v. Lansing Community College Chapter of the Mich. Ass'n for Higher Educ.*, 161 Mich. App. 321, 409 N.W.2d 823 (1987).

26. Kaden, *supra* note 12, at 267. Thus it is not surprising that scholars such as the late Judge Paul R. Hays, who consider arbitration to be analogous to traditional adjudication, find arbitration threatening:

A system of adjudication in which the judge depends for his livelihood or even for a substantial part of his livelihood or even for substantial supplements to his regular income, on whether he pleases those who hire him to judge is per se a

Congress to adopt a federal labor policy that strongly favors arbitration and the finality of the arbitrator's decision.²⁷ Consistent with this federal policy preferring arbitral finality, the Supreme Court has developed a doctrine of judicial deference to arbitration decisions.²⁸ The Court subsequently stated in *W.R. Grace & Co. v. Local Union 759, International Union of the United Rubber, Cork, Linoleum & Plastic Workers of America*,²⁹ however, that judges need not defer to arbitrators' awards that violate public policy. In the wake of *Grace*, the federal circuits have expanded this "public policy exception" to limit the presumption of finality,³⁰ particularly when reviewing arbitrators' decisions to reinstate employees who have engaged in illegal or irresponsible behavior that threatened workplace safety or public welfare. The cases involving these "impaired workers"³¹ thus provide an appropriate vehicle for exploring the growth of the public policy exception and examining its ramifications for the relationship between arbitrators and the courts.

The continued expansion of the public policy exception has created incentives for parties who are discontent with arbitration decisions to abandon them and instead pursue litigation in the courts. This Comment questions whether arbitration can continue to perform its traditional role as a source of stability in labor-management relations in light of the expanded public policy exception. Section II examines the underpinnings of judicial deference to arbitration and the public policy exception to the presumption of arbitral finality. Sections III and IV of this Comment survey the subsequent development of the exception in the federal circuits and the impact of the Supreme Court's recent decision in *United Paperworkers International Union v. Misco, Inc.*³² In Section V, this Comment assesses the cur-

thoroughly undesirable system. In no proper system of justice should a judge be submitted to such pressures.

P. HAYS, LABOR ARBITRATION 112 (1966).

27. See *supra* note 12.

28. Beginning with *Textile Workers Union v. Lincoln Mills*, the Supreme Court developed a body of federal common law in labor relations. 353 U.S. 448 (1957). The preference for finality of arbitration has resulted in a common law doctrine restricting judicial review of grievance arbitration decisions. See *United Steelworkers of Am. v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). For a discussion of these cases, collectively referred to as the *Steelworkers Trilogy*, see *infra* notes 35-53 and accompanying text.

29. 461 U.S. 757 (1983); see *infra* notes 54-67 and accompanying text.

30. See *infra* notes 86-186 and accompanying text.

31. This Comment uses the term "impaired worker" to describe employees—alcohol or drug users and other illegal or reckless actors—whom employers have chosen to discharge as a result of their wrongful conduct.

32. 108 S. Ct. 364 (1987); see *infra* notes 76-193 and accompanying text.

rent state of the public policy exception. After concluding that *Misco* has clarified only the extreme ends of the range of possible approaches, this Comment concludes that, as long as the exception's scope remains unresolved, arbitration's efficacy as a source of stability in labor-management relations remains uncertain. On this basis, this Comment proposes a means of limiting the exception to incorporate the public interest in deterring actions that threaten workplace safety and public welfare, while respecting the integrity of arbitration.

II. FEDERAL LABOR POLICY AND THE PUBLIC POLICY EXCEPTION

In passing the National Labor Relations Act (NLRA),³³ Congress envisioned collective bargaining as a means of reducing industrial strife,³⁴ thereby promoting continuity of production. In three cases collectively known as the *Steelworkers Trilogy*,³⁵ the Supreme Court secured arbitration's position as the cornerstone of this system of "industrial self-government."³⁶ Building upon a body of federal common law of labor relations,³⁷ the Court sought in the *Trilogy* to encourage the final resolution of workplace disputes through grievance arbitration by imposing strict limitations on the ability of parties to a collective agreement to challenge arbitrators' decisions in the courts. In *United Steelworkers of America v. American Manufacturing Co.*,³⁸ the Court held that, as long as employers and unions provide for arbitration, judges must order them to arbitrate all

33. 29 U.S.C. §§ 151-160 (1982); see *supra* note 1.

34. 29 U.S.C. § 151 (1982); see *NLRB v. American Ins. Co.*, 343 U.S. 395, 401 (1952); see also *First Nat'l Maintenance Corp. v. NLRB*, 452 U.S. 666, 674 (1980) (The fundamental aim of the NLRA was to establish and maintain industrial peace to preserve the flow of interstate commerce.); *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962) (Ordering and adjusting of competing interests through collective bargaining is central to promoting industrial peace.); *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 488 (1960) (Imposing a mutual duty upon employers and unions to bargain in good faith will promote Congress' goal of securing industrial peace.); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937) (The theory underlying the NLRA is that free negotiation with employees' representatives will promote industrial peace.).

35. *United Steelworkers of Am. v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). The Court acknowledged that collective bargaining creates "a new common law—the common law of a particular industry or a particular plant." *Warrior & Gulf*, 363 U.S. at 579. For further discussion of the *Steelworkers Trilogy* in the context of judicial review, see Kaden, *supra* note 12 and St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and its Progeny*, 75 MICH. L. REV. 1137 (1977).

36. *Warrior & Gulf*, 363 U.S. at 580.

37. See *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957).

38. 363 U.S. 564 (1960).

unresolved disputes, including those the judge believes to be frivolous.³⁹ In *United Steelworkers of America v. Warrior & Gulf Navigation Co.*,⁴⁰ the Court established a presumption of arbitrability if coverage of a particular dispute under an arbitration clause is in doubt.⁴¹ Collective bargaining, the Court observed, enables unions and employers to govern their relationship according to an "agreed-upon rule of law"⁴² rather than by ad hoc resolutions that depend upon their relative strength.⁴³ The Court concluded that the arbitration process replaces a "regime of industrial conflict"⁴⁴ with a "regime of peaceful settlement,"⁴⁵ and that courts, therefore, should promote its operation.⁴⁶

The importance of promoting the finality of arbitration led to a corresponding doctrine that restricted judicial review of the merits of arbitrators' decisions. The Supreme Court developed this doctrine in the third *Trilogy* case, *United Steelworkers of America v. Enterprise Wheel & Car Corp.*⁴⁷ In *Enterprise*, an employer fired a group of employees who had left their jobs to protest the firing of another employee. Their union presented their grievances to the proper management channels and ultimately, after their grievances were not satisfactorily resolved, they submitted the dispute to arbitration. The arbitrator awarded the employees reinstatement with backpay, but the employer refused to comply.⁴⁸ Subsequently, the union sought enforcement of the arbitrator's order in federal district court, and although the district court enforced the arbitrator's award, the United States Court of Appeals for the Fourth Circuit reversed the district

39. The Court reasoned that "[t]he processing of even frivolous claims may have therapeutic values of which those who are not a part of the [workplace] may be quite unaware." *Id.* at 568 (citing Cox, *Current Problems in the Law of Grievance Arbitration*, 30 ROCKY MTN. L. REV. 526 (1958)).

40. 363 U.S. 574 (1960).

41. *Id.* at 582-83. The Court emphasized the unique role of arbitration in labor relations by distinguishing the different purposes it serves in resolving disputes over commercial contracts and collective agreements. Parties to commercial contracts resort to arbitration and the courts only when their working relationship has broken down. In contrast, the Court emphasized that the relationship between the parties to a collective agreement is a continuing one, and they therefore have no choice but to deal with one another. Thus the grievance procedures in the labor context are "actually a vehicle by which meaning and content are given to the collective bargaining agreement." *Warrior & Gulf*, 363 U.S. at 581.

42. *Id.* at 580.

43. *Id.*

44. *Id.* at 585.

45. *Id.*

46. *Id.*

47. 363 U.S. 593 (1960).

48. *Id.* at 595.

court's decision.⁴⁹ On certiorari, the Supreme Court reversed the Court of Appeals,⁵⁰ holding that "[t]he federal labor policy of settling labor disputes by arbitration would be circumvented if courts had the final say on the merits of the awards."⁵¹ The Court reasoned that to hold otherwise would undermine the foundation of collective bargaining:

[T]he question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.⁵²

Despite the Court's strong support for deference to arbitration, its opinion contained a caveat: An arbitrator's award is "legitimate only so long as it draws its essence from the collective bargaining agreement."⁵³

The Supreme Court recognized the public policy exception to the *Steelworkers Trilogy* requirement of deference to arbitrators' decisions in *Grace*.⁵⁴ In *Grace*, the employer had entered into a voluntary conciliation agreement with the Equal Employment Opportunity Commission to correct prior Title VII violations.⁵⁵ This conciliation agreement required Grace to maintain the existing proportion of women in the plant in the event of a layoff.⁵⁶ The terms of the conciliation agreement, however, violated the seniority provisions of its collective agreement with the union.⁵⁷ During a subsequent layoff of several employees, Grace complied with the conciliation agreement.⁵⁸ The union presented a grievance on behalf of the discharged employees and subsequently submitted its grievance to arbitration. The arbitrator concluded that, although Grace had made the layoffs in good

49. *Id.* at 595-96.

50. *Id.* at 599.

51. *Id.* at 596. In the years since the *Steelworkers Trilogy*, the Supreme Court has carved out two express exceptions allowing courts to engage in de novo review of grievances after arbitration. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (Parties may litigate a discharge upheld in arbitration de novo under Title VII of the Civil Rights Act of 1964.); *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976) (Employees may sue their employer and union if the grievance procedure has failed due to the union's bad faith representation.).

52. *Enterprise*, 363 U.S. at 599.

53. *Id.* at 597. At least one critic has challenged this caveat for its vagueness. See Kaden, *supra* note 12, at 270-71.

54. 461 U.S. 757 (1983). Title VII protects employees against discriminatory attitudes and behavior in the workplace. 42 U.S.C. § 2000e to 2000e-17 (1982).

55. *Id.* at 759-60.

56. *Id.* at 760.

57. *Id.* at 760-61.

58. *Id.* at 761.

faith compliance with the conciliation agreement, the collective bargaining agreement contained no exception for good faith violations of its seniority provisions.⁵⁹ Thus the arbitrator ordered Grace to pay damages to the employees in the form of backpay but did not order reinstatement.⁶⁰ Grace instituted an action in federal district court to overturn the award, and the district court entered summary judgment for Grace. The union appealed the district court's order to the United States Court of Appeals for the Fifth Circuit, which reversed the district court's decision.⁶¹

The Supreme Court granted Grace's petition for a writ of certiorari.⁶² Grace contended that the Court should vacate the arbitrator's award because it violated the public policies of encouraging both obedience to court orders⁶³ and voluntary compliance with Title VII.⁶⁴ In determining that Grace's arguments were insufficient to justify overturning the arbitrator's award,⁶⁵ the Court enunciated the public policy exception:

As with any contract, . . . a court may not enforce a collective-bargaining agreement that is contrary to public policy. . . . [T]he question of public policy is ultimately one for resolution by the courts. . . . If the contract as interpreted [by the arbitrator] violates some explicit public policy, we are obliged to refrain from enforcing it. Such a public policy, however, 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 sup-

59. *Id.* at 769.

60. *Id.*

61. *Id.* at 764.

62. 458 U.S. 1105 (1982) (granting Grace's petition for a writ of certiorari).

63. Although later reversed, a federal district court had ordered the employer, the union, and the EEOC to abide by the conciliation agreement. *Grace*, 461 U.S. at 761. Grace argued that the arbitrator's decision to make Grace pay damages was a disincentive to obey the court order. *Id.* at 767.

64. Congress intended voluntary compliance to be the preferred means of enforcing Title VII. *Id.* at 770-71.

65. *Id.* The Court's decision to uphold the arbitrator's award seems to have been a relatively simple one considering the equities of the case. Grace had voluntarily entered both agreements, although they were inconsistent with each other, and then attempted to allocate the burdens of its actions to its employees, who shared no responsibility for the Title VII violations. The Court reasoned that "[n]o public policy is violated by holding the Company to [its] obligations, which bar the Company's attempted reallocation of the burden." *Id.* at 770. The underlying rationale for the Court's decision may actually have been the reaffirmation of the *Steelworkers Trilogy's* recognition of the uniqueness of collective relationships. The Court stated: "Although the ability to abrogate unilaterally the provisions of a collective-bargaining agreement might encourage an employer to conciliate with the [Equal Employment Opportunity] Commission, the employer's added incentive to conciliate would be paid for with the union's contractual rights." *Id.* at 771.

posed public interests."⁶⁶

The language the Court used to describe the public policy exception, however, was sufficiently vague to permit courts interpreting it to show less deference to arbitrators' decisions. First, the opinion's "[a]s with any contract" language could imply that employers need only allege a violation of public policy to cause courts to abandon their deferential standard of review and to treat collective agreements as ordinary contracts.⁶⁷ Second, the opinion's "well defined and dominant" language provides only a vague notion of what constitutes sufficiently clear public policy to justify courts in disturbing the finality of arbitration decisions.

III. JUDICIAL REVIEW OF ARBITRATION DECISIONS AFTER *Grace*

A. *The Entitlement to Rehabilitation*

Although employers may lawfully reinstate impaired workers voluntarily, an employer who elects to do so may encounter tort liability for any injuries that the impaired worker inflicts on another after reinstatement.⁶⁸ In contracting to be bound by an arbitrator's decision, however, an employer relinquishes control over the question of reinstatement and its accompanying financial risks to an impartial

66. *Id.* at 766 (quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945) and citing *Hurd v. Hodge*, 334 U.S. 24, 34-35 (1948)). The Court in *Muschany* continued, "It is a matter of public importance that good faith contracts . . . should not be lightly invalidated. Only dominant public policy would justify such an action." *Muschany*, 324 U.S. at 66.

67. Under general principles of contract law, courts will not enforce contracts if some public policy outweighs the public interest in freedom of contract. *See, e.g.*, *Anaconda Federal Credit Union #4401 v. West*, 157 Mont. 175, 178, 483 P.2d 909, 911 (1971); *Sternaman v. Metropolitan Life Ins. Co.*, 170 N.Y. 13, 19, 62 N.E. 763, 764 (N.Y. 1902); *J. CALAMARI & J. PERILLO*, *CONTRACTS* § 22-1 (3d ed. 1987); *E. FARNSWORTH*, *CONTRACTS* § 5.1 (1982). As the *Steelworkers Trilogy* indicates, however, collective bargaining agreements are not ordinary contracts. *See supra* notes 35-53 and accompanying text.

68. Under certain circumstances, an employer may be liable to third persons for injuries inflicted upon them by his employee. If the employee commits the tort within the scope of his employment, liability is often based on the theory of respondeat superior or vicarious liability. An alternative theory of liability most likely to be raised in the impairment context is the employer's primary negligence in hiring or retaining an incompetent or unfit employee. *See Cramer v. Housing Opportunities Comm'n*, 304 Md. 705, 713, 501 A.2d 35, 40 (1985); *Evans v. Morsell*, 284 Md. 160, 164-65, 395 A.2d 480, 483 (1978); *Bradley v. Stevens*, 329 Mich. 556, 562, 46 N.W.2d 382, 385 (1951); *Ponticas v. K.M.S. Investments*, 331 N.W.2d 907, 912-13 (Minn. 1983); *DiCosala v. Kay*, 91 N.J. 159, 170-71, 450 A.2d 508, 516 (1982); *F & T Co. v. Woods*, 92 N.M. 697, 699, 594 P.2d 745, 747 (1979); *RESTATEMENT (SECOND) OF AGENCY* § 213; Comment, *Negligent Hiring and Negligent Entrustment: The Case Against Exclusion*, 52 OR. L. REV. 296 (1973); Note, *Employer Liable for Negligent Hiring After Cursory Investigation of a Prospective Employee*, 19 SUFFOLK U.L. REV. 371 (1984).

third party.⁶⁹ When reviewing an arbitrator's decision to reinstate an impaired worker, courts applying public policy considerations can, in effect, reallocate those risks in the employer's favor by reversing the arbitrator. An employer thus will have a strong incentive to support an expansive interpretation of the public policy exception if an arbitrator orders the reinstatement of an impaired worker.

Arbitrators awarding reinstatement to impaired workers in effect grant them an "entitlement to rehabilitation"⁷⁰ by providing them a second chance to prove their worth to their employer. The employer must then absorb the costs of protecting both the workplace and the public from workers whose judgment the employer now questions. Assuming that the employer adheres to its agreement with the union and accepts the arbitrator's order, it faces two choices: First, the employer may place the employee in his original or a similar position,⁷¹ insure against potential tort liability,⁷² and insist that the worker abstain from the objectionable behavior. Second, the employer may invest in rehabilitating the worker through an employee assistance program.⁷³

69. See *Northwest Airlines, Inc. v. Air Line Pilots Ass'n*, 808 F.2d 76, 83 (D.C. Cir. 1987), petition for cert. filed, 56 U.S.L.W. 3045 (U.S. March 26, 1987) (No. 86-1548).

70. See Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). Calabresi and Melamed's article enunciates the concept of "entitlement":

The first issue which must be faced by any legal system is one we call the problem of "entitlement." Whenever a state is presented with the conflicting interests of two or more people, or two or more groups of people, it must decide which side to favor. Absent such a decision, access to goods, services, and life itself will be decided on the basis of "might makes right"—whoever is stronger or shrewder will win. Hence the fundamental thing that law does is to decide which of the conflicting parties will be entitled to prevail. The entitlement to make noise versus the entitlement to have silence, the entitlement to pollute versus the entitlement to breathe clean air, the entitlement to have children versus the entitlement to forbid them—these are the first order of legal decisions.

Id. at 1090 (footnote omitted). Similarly, an arbitrator must decide between the conflicting interests of the employer, who wants efficiency and productivity, and the impaired worker, who wants continued employment. In awarding reinstatement, the arbitrator gives the impaired worker, in essence, a revocable right to a second chance at proving his value to the employer.

71. *But cf.* *United States Postal Service v. American Postal Workers Union*, 736 F.2d 822, 825 (1st Cir. 1984) (holding reinstatement of a postal clerk convicted of embezzling inappropriate, even if to a different position).

72. For a discussion of employers' potential liability in the impaired worker context, see *supra* note 68.

73. Many employers have introduced employee assistance programs (EAP's) as a means of confronting substance abuse in the workplace. Approximately 5,000 American companies currently offer their employees some sort of assistance in fighting impairments such as alcohol and drug abuse. See Lyons, *EAPs: The Only Real Cure for Substance Abuse*, 76 MGMT. REV. 38, 38 (1987). These programs result in higher productivity, higher morale, lower absentee rates, and lower hiring and training costs. For further discussion of substance abuse in the

If the employer is dissatisfied with the arbitrator's order, it may seek to correct that decision in one of two ways. The employer may abide by the award and seek to prevent the recurrence of similar awards from within the collective bargaining system either by bargaining for more discretion over dismissal,⁷⁴ or by selecting arbitrators more cautiously in the future.⁷⁵ The employer may also choose to reject the award and look to the courts to correct the immediate situation on the ground that reinstating the employee would violate public policy. Such a contention presents the court with a dilemma: To what extent should the court impose its authority upon the situation from outside the collective bargaining context? The following section discusses this issue by tracing the approaches the federal courts have taken when considering whether to apply the public policy exception.

B. *Public Policy and Judicially Imposed Limitations on Reinstatement*

Federal courts agree that if it is unlawful for an employer to choose voluntarily to reinstate an impaired worker,⁷⁶ the courts should vacate any arbitrator's award that compels reinstatement. There is a split among the federal circuits, however, arising out of *Grace's* "well defined and dominant" language regarding whether courts should vacate an arbitrator's reinstatement order on public policy grounds if reinstatement by the employer would not be illegal.⁷⁷

workplace and strategies for controlling it, see generally, SCANLON, ALCOHOLISM AND DRUG ABUSE IN THE WORKPLACE (1986); CORPORATE STRATEGIES FOR CONTROLLING SUBSTANCE ABUSE (H. Axel ed. 1986); COUNSELING THE TROUBLED PERSON IN INDUSTRY (J. Dickman, W. Emener & W. Hutchinson eds. 1985).

74. See *Northwest Airlines*, 808 F.2d at 83-84. For a discussion of *Northwest Airlines*, see *infra* note 82.

75. Published copies of prior opinions which are accessible to both parties enable them to search for an arbitrator who has handled similar situations in the past. See F. ELKOURI & E. ELKOURI, *supra* note 3, at 414-15.

76. See *supra* notes 68-69 and accompanying text.

77. Before the Supreme Court articulated *Grace's* "well defined and dominant" requirement, courts applied general public policy principles in reviewing arbitrators' decisions. See, e.g. *Local No. P-1236, Amalgamated Meat Cutters v. Jones Dairy Farm*, 680 F.2d 1142 (7th Cir. 1982) (arbitrator's decision upholding a company rule that prohibited contacting United States Department of Agriculture inspectors vacated as against public policy); *Amalgamated Transit Union v. Aztec Bus Lines*, 654 F.2d 642 (9th Cir. 1981) (court refused to vacate an arbitrator's decision, concluding that two week suspension without pay of a bus driver who demonstrated bad judgment was appropriate rather than outright dismissal on public policy grounds); *Washington-Baltimore Newspaper Guild, Local 35 v. Washington Post Co.*, 442 F.2d 1234 (D.C. Cir. 1971) (arbitrators' awards will not be vacated, even for errors of fact and law, unless they compel violation of law or conduct contrary to public policy).

The federal courts of appeal have developed a variety of approaches to the public policy exception. Courts that interpret the exception narrowly will vacate only those arbitrators' awards ordering reinstatements that would be illegal.⁷⁸ Courts that interpret the exception more expansively look beyond mere illegality to overturn those reinstatements that violate more expansive notions of workplace safety and public welfare.⁷⁹ Although most courts use statutes, regulations, and precedent in their efforts to identify public policy, the divergence of approaches indicates that what qualifies as public policy may often depend upon the individual decisionmaker's point of view.⁸⁰ Under the narrow interpretation of the exception's scope,⁸¹ statutes and regulations must expressly address reinstatement before they are sufficiently "well defined and dominant" to justify overturning an arbitrator's decision. Under the more expansive interpretation, statutes and regulations need only address the workplace or criminal behavior generally to enable courts to craft a public policy that justifies reversal.⁸² This split among the circuits reflects the vague nature of the public policy exception established in *Grace*. The case analyses that follow demonstrate the extent to which this exception has permitted courts to play an expanding role in policing grievance arbitration.

1. THE NARROW INTERPRETATION OF *Grace*: ILLEGALITY

Courts adhering to a narrow approach to the public policy exception are reluctant to reverse an arbitrator's decision to reinstate an impaired worker.⁸³ The opinions of these courts generally have

78. See, e.g., *American Postal Workers Union v. United States Postal Service*, 789 F.2d 1 (D.C. Cir. 1986); see *infra* notes 83-104 and accompanying text.

79. See, e.g., *Amalgamated Meat Cutters, Local Union 540 v. Great Western Food Co.*, 712 F.2d 122 (5th Cir. 1983); see *infra* notes 105-86 and accompanying text.

80. The same difficulty exists in the realm of general contract law. In his treatise on contracts, Corbin wrote, "In thousands of cases contracts have been declared to be illegal on the ground that they are contrary to public policy; and those two alliterative words are often used as if they had a magic quality and were self-explanatory. What is 'public policy' and who knows what it requires? Does a judge know this, merely by virtue of becoming a judge?" A. CORBIN, *CONTRACTS* § 1375 (abr. ed. 1952).

81. See *infra* notes 83-104 and accompanying text.

82. See *infra* notes 105-44 and accompanying text.

83. See *Northwest Airlines, Inc. v. Air Line Pilots Ass'n, Int'l*, 808 F.2d 76 (D.C. Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3045 (U.S. Mar. 26, 1987) (No. 86-1548); *American Postal Workers Union v. United States Postal Service*, 789 F.2d 1 (D.C. Cir. 1986); see also *American Postal Workers Union v. United States Postal Service*, 682 F.2d 1280 (9th Cir. 1982) (vacating as illegal the reinstatement of postal worker discharged for striking), *cert. denied*, 459 U.S. 1200 (1983). From the post-*Grace* case of *Bevles Company, Inc. v. Teamsters Local 986*, it appears that the Ninth Circuit may be a narrow-*Grace* jurisdiction. 791 F.2d 1391 (9th Cir. 1986), *cert. denied*, 108 S. Ct. 500 (1987). In *Bevles*, the Ninth Circuit

emphasized the particular facts of each impaired worker's case and the ability of the union and employer to resolve their disputes in the manner best suited to the needs of their particular relationship.⁸⁴ This view recognizes the individual's entitlement to rehabilitation and encourages employers and unions to make adjustments for the future through collective bargaining rather than through the submission of their disputes to the judicial system. Courts that have adopted these principles will not reverse an arbitrator's order for reinstatement unless a statute or regulation expressly addressing the workplace makes reinstatement illegal.⁸⁵

The United States Court of Appeals for the District of Columbia Circuit has been the leading advocate of this limited approach to the public policy exception. In *American Postal Workers Union v. United States Postal Service*,⁸⁶ a postal clerk confessed to misappropriating postal funds after a postal inspector interrogated him without advising him of his constitutional rights.⁸⁷ Following the investigation, the Postal Inspection Service removed the clerk, who was subsequently indicted.⁸⁸ The trial judge excluded the confession because of the inspector's failure to administer the proper warnings during the investigation.⁸⁹ A jury subsequently acquitted the clerk.⁹⁰ The clerk's union filed a grievance on behalf of the clerk under its collective agreement with the Postal Service and ultimately invoked its right to submit the dispute to arbitration.⁹¹ The arbitrator also excluded the clerk's confession⁹² and ordered the Postal Service to reinstate

considered whether it should, in light of public policy, vacate an arbitrator's reinstatement of two known illegal aliens with backpay. Although not expressly articulating its view of the public policy exception's scope, the court restricted its search for public policy to statutes and cases addressing employer liability for hiring illegal aliens. *Bevles*, 791 F.2d at 1391. Thus the Ninth Circuit, implicitly at least, has accepted an approach to the public policy exception similar to that of the D.C. Circuit.

84. See, e.g., *Northwest Airlines, Inc. v. Air Line Pilots Ass'n, Int'l*, 808 F.2d 76 (D.C. Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3045 (U.S. Mar. 26, 1987) (No. 86-1548).

85. See, e.g., *American Postal Workers Union v. United States Postal Service*, 789 F.2d 1 (D.C. Cir. 1986).

86. 789 F.2d 1 (D.C. Cir. 1986).

87. *American Postal Workers Union v. United States Postal Service*, 118 L.R.R.M. (BNA) 2472, 2473 (D.D.C. 1985). The Inspection Service failed to inform the clerk of his constitutional rights as required under *Miranda v. Arizona*, 384 U.S. 436 (1966).

88. *Id.* The clerk was indicted under 18 U.S.C. § 500 (1982), which forbids conversion or misappropriation of postal funds. *Id.*

89. *American Postal Workers*, 789 F.2d at 3.

90. *American Postal Workers*, 118 L.R.R.M. at 2473.

91. *Id.*

92. *Id.* The collective bargaining agreement between the Postal Service and the union provided that the discharge of Postal Service employees had to be "consistent with applicable laws and regulations." *American Postal Workers*, 789 F.2d at 6. Thus the court of appeals held that the arbitrator clearly had jurisdiction to apply *Miranda* to the dispute. *Id.*

him.⁹³ The Postal Service refused to comply with the decision and the union sought enforcement of the award in federal district court.⁹⁴ The district court granted the Postal Service's motion for summary judgment and refused to enforce the arbitrator's reinstatement order.⁹⁵

On appeal, the D.C. Circuit addressed the issue of whether public policy justified the district court's refusal to enforce the arbitrator's award.⁹⁶ The court held that it did not, emphasizing that collective bargaining creates a "constitution of industrial self-government"⁹⁷ in which the arbitrator plays an integral role.⁹⁸ Disturbing the results of arbitration, the court reasoned, would undermine a substantial basis of the parties' bargain,⁹⁹ yet refusing to intervene would not leave the parties without a remedy. "The parties' remedy in such cases is the same remedy they possess whenever they are not satisfied with the arbitrator's performance of his or her job: negotiate a modification of the contract or hire a new arbitrator."¹⁰⁰

The court rejected the Postal Service's contention that the compulsory reinstatement of the clerk would violate public policy.¹⁰¹ In so holding, the court articulated what it perceived to be the proper scope of *Grace*: Courts must interpret *Grace*'s "well defined and dominant" language narrowly in order to prevent "potentially intrusive"¹⁰² judicial review of arbitrators' decisions in the name of public policy.¹⁰³ The court argued that "judges have no license to impose their own brand of justice in determining applicable public policy; thus, the exception applies only when the public policy emanates from clear statutory or case law, 'not from general considerations of supposed public interests.'"¹⁰⁴

93. *American Postal Workers*, 789 F.2d at 4.

94. *Id.*

95. *Id.*

96. *Id.* at 8.

97. *Id.* at 5.

98. *Id.*

99. *Id.* at 7 (citing *Feller*, *supra* at note 1).

100. *Id.*

101. *Id.* at 9.

102. *Id.* at 8.

103. *Id.*

104. *Id.* (quoting *Grace*, 461 U.S. at 766 (quoting *Muschany*, 324 U.S. at 66)) (emphasis omitted). In *Northwest Airlines, Inc. v. Air Line Pilots Association*, the D.C. Circuit reiterated the importance of interpreting *Grace* narrowly. 808 F.2d 76 (D.C. Cir. 1987), *petition for cert. filed*, 56 U.S.L.W. 3045 (U.S. Mar. 26, 1987) (No. 86-1548). In *Northwest Airlines*, the airline dismissed a pilot who flew while intoxicated in violation of an airline work rule that prohibited drinking within twenty-four hours of a scheduled flight. *Id.* at 78. Finding that the pilot could be rehabilitated, the arbitrator ordered Northwest to reinstate him without backpay or benefits if the Federal Aviation Administration's (FAA) air surgeon

2. EXPANDING *Grace*: JUDICIAL CONCERNS FOR WORKPLACE SAFETY AND PUBLIC WELFARE

In contrast to the D.C. Circuit, other courts have interpreted *Grace*'s "well defined and dominant" language more expansively and are therefore more inclined to reverse an arbitrator's decision to reinstate an impaired worker.¹⁰⁵ Their focus is not on rehabilitating the individual, but rather on a perceived need to deter irresponsible behavior.¹⁰⁶ As a result, these courts more readily extract public policies prohibiting reinstatement from laws and regulations that do not expressly address the issue.

A more expansive interpretation of *Grace* raises an additional concern: To what extent should courts be required to justify the public policy grounds on which they overturn arbitrators' reinstatement decisions? Courts that interpret *Grace* more expansively generally will present statutes or regulations that loosely support their understanding of public policy.¹⁰⁷ Furthermore, they often justify a decision

recertified him as fully rehabilitated and capable of flying. *Id.* at 79. The air surgeon recertified the pilot, and Northwest sought to overturn the arbitrator's decision. A federal district court set aside the award as a threat to the public policy of air safety. *Id.* at 80.

The Court of Appeals rejected Northwest's contention that reinstating the pilot violated public policy because Northwest could point to no statute or regulation prohibiting reinstatement under the circumstances. In one sense, the court faced a fairly easy case. The pilot's reinstatement was contingent upon the FAA recertifying him as capable of flying. Thus the court's decision had two grounds: deference to the arbitrator and deference to an administrative agency. *Id.* at 83. The court stated that granting Northwest's request would disrupt the existing relationship between it and the union:

[I]t is not the role of the courts to alter the labor-management balance struck in the collective bargaining agreement. Northwest is free to negotiate with [the Air Line Pilots Association] to remove the application of safety rules from the jurisdiction of the Board or to reduce the amount of discretion given to the Board on such matters.

Id. at 83-84. The court offered Northwest an alternative: It could lobby the FAA or Congress for a change in the objectionable statutes and regulations. *Id.*

105. See *Stead Motor of Walnut Creek v. Automobile Machinists Lodge No. 1173*, No. 87-2053 (9th Cir. Mar. 30, 1988); *Iowa Elec. & Power Co. v. Local Union 204, Int'l Bhd. of Teamsters*, 834 F.2d 1424 (8th Cir. 1987); *Premium Building Products Co. v. United Steelworkers of Am.*, No. 85-3749, slip op. (6th Cir. July 15, 1986); *S.D. Warren Co. v. United Paperworkers Int'l Union, Local 1069*, 815 F.2d 178 (1st Cir. 1987), *vacated and remanded*, 108 S. Ct. 497 (1987); *Misco v. United Paperworkers Int'l Union*, 768 F.2d 739 (5th Cir. 1985), *rev'd*, 108 S. Ct. 364 (1987); *United States Postal Service v. American Postal Workers Union*, 736 F.2d 822 (1st Cir. 1984); *Amalgamated Meat Cutters, Local Union 540 v. Great Western Food Co.*, 712 F.2d 122 (5th Cir. 1983); *cf. United States Postal Service v. National Ass'n of Letter Carriers*, 810 F.2d 1239 (D.C. Cir. 1987), *cert. granted*, 108 S. Ct. 500 (1987) (arbitrator's reinstatement of compulsive gambler with mental problems who failed to deliver over 3,500 pieces of mail held to violate public policy); *E.I. DuPont de Nemours v. Grasselli Employees Ass'n*, 790 F.2d 611 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 186 (1986) (arbitrator's reinstatement of employee who suffered a mental breakdown held not to violate public policy).

106. See *supra* cases cited note 105.

107. See *infra* notes 117-27, 139-42 & 191 and accompanying text.

to overturn an arbitrator on "common sense."¹⁰⁸ Each of these decisions has precedential or persuasive value upon which the next court facing the issue can build.¹⁰⁹ As long as courts continue to build upon prior case law, the exception's scope may continue to expand. Too expansive an interpretation, however, may eventually reduce *Grace's* "well defined and dominant" language to a mere tautology.

The United States Court of Appeals for the Fifth Circuit was one of the first courts to interpret *Grace's* public policy exception more expansively. In *Amalgamated Meat Cutters, Local Union 540 v. Great Western Food Co.*,¹¹⁰ a professional driver was involved in an accident in which his truck overturned.¹¹¹ The highway patrolman who arrived on the scene noted a strong smell of liquor on the driver's breath, and the officer issued citations for both drinking while on duty and speeding.¹¹² The driver admitted to the officer that he had taken a drink at a rest stop before his accident.¹¹³ As a result of this incident, Great Western discharged the driver. Pursuant to its collective bargaining agreement with the employer, the driver's union filed a grievance and subsequently submitted its grievance to arbitration.¹¹⁴ The arbitrator ordered Great Western to reinstate the driver because it had failed to investigate the driver's claim that a mechanical failure, not his drinking, had caused the accident.¹¹⁵ Upon Great Western's refusal to reinstate the driver, the union sought and won enforcement of the order in federal district court.¹¹⁶

On appeal, the Court of Appeals for the Fifth Circuit held that public policy mandated that the court reverse the arbitrator's award.¹¹⁷ The court asserted that "[i]n a nation where motorists practically live on the highways, no citation of authority is required to establish that an arbitration award ordering a company to reinstate an over-the-road truck driver caught drinking liquor on duty violates public policy."¹¹⁸ Three separate factors convinced the court that vital public policy concerns were at issue:¹¹⁹ (1) the prevalence of laws

108. See *infra* notes 124, 128, 143-44 & 161 and accompanying text.

109. See *infra* notes 110-44 and accompanying text.

110. 712 F.2d 122 (5th Cir. 1983).

111. *Id.* at 123.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 123-24. The arbitrator refused to award the driver backpay, however, because he admitted to drinking shortly before his accident. *Id.*

116. *Id.* at 123.

117. *Id.*

118. *Id.* at 124.

119. Although the court based its construction of public policy upon these three general considerations, none of them directly addressed the immediate issue: whether the arbitrator

against drunk driving that, in the court's estimation, "become even more compelling" if the driver is a paid professional;¹²⁰ (2) case law supporting the discharge of employees who have failed to demonstrate the judgment skills required by their jobs;¹²¹ and (3) the Federal Motor Carrier Safety Regulations,¹²² which prohibit professional drivers from driving on duty within four hours of consuming alcohol.¹²³ In addition, the court claimed that "pure common sense" dictated against reinstatement.¹²⁴ The court concluded that the policy of preventing drinking and driving was "well defined and definite"¹²⁵ and precluded the arbitrator's decision to order reinstatement.¹²⁶

The Fifth Circuit thus established a more expansive interpretation of *Grace's* "well defined and dominant" language, and in turn, created a public policy exception less deferential to arbitration than that of the D.C. Circuit. Under the Fifth Circuit's analysis, courts can formulate public policy from laws or regulations that do not address reinstatement if the employee's wrongful act appears to the court to relate to his job duties in some manner.¹²⁷ The court also diminished judicial deference to arbitration by legitimating common sense as a valid justification for overturning an arbitrator's reinstatement order on public policy grounds.¹²⁸

Subsequent cases have both followed and expanded *Great West-*

could reinstate the driver. It is ironic to note that, though *Great Western* was free to reinstate the driver if it had wished, an arbitrator, to whom *Great Western* willingly gave up control over reinstatement in its collective agreement, could not make the same decision.

120. *Great Western*, 712 F.2d at 124.

121. *NLRB v. Dixie Motor Coach Corp.*, 128 F.2d 201 (5th Cir. 1942); *accord NLRB v. United States Trucking Co.*, 124 F.2d 887, 889-90 (6th Cir. 1942); *World Airways, Inc. v. International Bhd. of Teamsters, Local 2707*, 578 F.2d 800 (9th Cir. 1978); *Texas Co. v. NLRB*, 120 F.2d 186, 187-88 (9th Cir. 1941).

122. 49 C.F.R. §§ 350.1-99.211 (1987). These regulations also prohibit motor carriers from requiring or permitting drivers who have consumed or appear to have consumed alcohol to drive within four hours of drinking.

123. *Id.*

124. *Great Western*, 712 F.2d at 125.

125. *Id.*

126. Deterrence clearly motivated the court, which emphasized "the public policy of preventing people from drinking and driving." *Id.* Although it is less than clear that the interest in deterrence prohibits arbitrators from reinstating a driver already punished by suspension during the course of litigation, courts may decide differently under *Grace's* articulation of the public policy exception. *Cf. Super Tire Eng'g Co. v. Teamsters Local Union, No. 676*, 721 F.2d 121, 125 n.6 (3d Cir. 1983), *cert. denied*, 469 U.S. 817 (1984) (citing *Great Western* for the proposition that it is a violation of public policy to reinstate professional drivers whose intoxication causes an accident).

127. The court, for example, referred generally to laws against drunk driving, finding them to be "even more compelling" in light of the driver's job responsibilities. *See Great Western*, 712 F.2d at 124.

128. *Id.* at 125.

ern's approach. In *United States Postal Service v. American Postal Workers Union*,¹²⁹ the Postal Service discharged a clerk convicted of misappropriating postal funds.¹³⁰ The union sought the clerk's reinstatement, and ultimately submitted its grievance to arbitration. The arbitrator reinstated the clerk, focusing on the clerk's financial pressures, his evidenced intent to repay the money, and his good employment history.¹³¹ A district court vacated the award, and the United States Court of Appeals for the First Circuit affirmed the decision.¹³² The First Circuit all but ignored the mitigating circumstances surrounding the clerk's criminal activity, emphasizing instead the Postal Service's general statutory duty to be "prompt, reliable, and efficient" in its service to the public.¹³³ Public policy, the court held, could not condone reinstating a convicted felon, even to a position no longer involving the handling of money or stamps.¹³⁴

The union framed the issue according to the narrow interpretation of *Grace*, arguing that, although there may be a public policy against misappropriating postal funds, there is no public policy

129. 736 F.2d 822 (1st Cir. 1984). As previously discussed, the federal circuits appear divided on the impact postal employees' hybrid nature should have upon judicial scrutiny of arbitral reinstatement of impaired workers. See *supra* note 1. The D.C. Circuit case of *American Postal Workers Union v. United States Postal Service* reveals that circuit's tendency to maintain the same deference to the arbitrator in the postal context as it does in private sector cases. See *supra* notes 86-104 and accompanying text. In contrast, the case discussed in this section of the text reveals the First Circuit's tendency to engage in stricter scrutiny of arbitral reinstatement of impaired postal workers in light of their employment by a federal agency.

The Supreme Court of the United States has granted certiorari in a third postal workers case, *United States Postal Service v. National Association of Letter Carriers*, 810 F.2d 1239 (D.C. Cir. 1987), *cert. granted*, 108 S. Ct. 500 (1987). The Court will decide "[w]hether an arbitration award ordering the Postal Service to reinstate an employee who has been discharged for, and criminally convicted of, failing to deliver thousands of pieces of mail should be set aside as contrary to public policy." Petition for A Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit at I, *United States Postal Service v. National Association of Letter Carriers*, 810 F.2d 1239 (D.C. Cir. 1987), *cert. granted*, 108 S. Ct. 500 (1987) (No. 87-59). In its disposition of the case, the D.C. Circuit refused to overturn an arbitrator's reinstatement of an emotionally disturbed, compulsive gambler who failed to deliver over 3,500 pieces of mail over the course of eighteen months. The arbitrator reinstated him after a sixty day suspension conditioned upon his good faith participation in Gambler's Anonymous and abstention from gambling. *Letter Carriers*, 810 F.2d at 1240 n.3. In its petition for certiorari, the United States Postal Service argued that the scope of the public policy exception must be correspondingly greater in light of the Service's "public mission" to provide "prompt, reliable, and efficient" mail delivery. Petition for Writ of Certiorari at 10-11, *United States Postal Service v. National Association of Letter Carriers*, 810 F.2d 1239 (D.C. Cir. 1987), *cert. granted*, 108 S. Ct. 500 (1987) (No. 87-59).

130. *United States Postal Service*, 736 F.2d at 823.

131. *Id.*

132. *Id.* at 824.

133. *Id.* at 825-26.

134. *Id.* at 825.

against the Postal Service employing persons convicted of doing so.¹³⁵ The court, however, rejected this interpretation.¹³⁶ Citing *Great Western*, it stated that such a precise fit between the facts of the case and the public policy at issue was not necessary.¹³⁷ The court thus concluded that general public policy could be sufficient to vacate an arbitrator's award, regardless of the merits of the individual employee's case.¹³⁸

The court also rejected the proposition that criminal sanctions sufficiently vindicate the public interest in deterring criminal behavior.¹³⁹ First, applying the Fifth Circuit's analytical approach,¹⁴⁰ it asserted that misappropriation went to the heart of the employee's responsibilities as both a money handler and a public employee charged with the "public trust."¹⁴¹ The court based its decision on statutes relating to the conduct expected of postal employees: specifically, the Service's general duty of reliability and the postal workers' oath.¹⁴² Second, "the clear dictates of common sense"¹⁴³ provided an equally strong rationale against reinstatement:

[W]e cannot avoid the common sense implications that requiring the rehiring of [the discharged employee] would have on other postal employees and on the public in general. Other postal employees may feel there is less reason for them to be honest than they believed—the Union could always fix it if they were caught. Moreover, the public trust in the Postal Service, and in the entire federal government, could be diminished by the idea that graft is condoned.¹⁴⁴

135. *Id.* at 824.

136. *Id.*

137. *Id.*

138. *Id.*

139. *See Local 453, Int'l Union of Elec. Workers v. Otis Elevator Co.*, 314 F.2d 25 (2nd Cir.), *cert. denied*, 373 U.S. 949 (1963).

140. *See supra* note 127 and accompanying text.

141. *United States Postal Service*, 736 F.2d at 825.

142. *Id.* The court based its reasoning on several provisions of the Postal Reorganization Act relating to the conduct expected of postal employees and on a federal criminal statute prohibiting fraudulent use of money orders:

A postal employee is required to swear that he "will well and faithfully discharge the duties of the office on which [he is] about to enter." Numerous statutes relate to the conduct and honesty of postal employees—among them is 18 U.S.C. § 500, the statute under which [the employee] was convicted. Moreover, the Postal Service is required by law to be "prompt, reliable, and efficient . . ." Finally, as a government monopoly, the public has to use the Postal Service for the carriage of regular letter mail.

Id. (citations omitted) (quoting 39 U.S.C. §§ 101(a), 1011).

143. *Id.*; *see supra* note 124 and accompanying text.

144. *Id.*; *cf. E.I. DuPont de Nemours v. Grasselli Employees Ass'n*, 790 F.2d 611, 616-17 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 186 (1986). Similar to *National Association of Letter*

The court thus concluded that the arbitrator's award could not stand.

Like *Great Western*, the case of *Iowa Electric & Power Co. v. Local Union 204, International Brotherhood of Teamsters*¹⁴⁵ reflects judicial concern for the threat that impaired workers pose to public safety. The employee discharged in *Iowa Electric* worked in a machine shop in the secondary containment area of a nuclear power plant, a buffer area designed to prevent the spread of any radiation released from the core of the nuclear reactor.¹⁴⁶ Because the employee had a broken leg, he tried to exit through one of the containment system doors in order to avoid the lunch rush one afternoon.¹⁴⁷ After learning that the door was properly locked because another door was open,¹⁴⁸ the employee requested permission to unlock the door. The control room engineer denied the request. Nevertheless, the employee opened the door in violation of federally mandated safety regulations.¹⁴⁹ Iowa Electric subsequently discharged him and reported the incident to the Nuclear Regulatory Commission (NRC).¹⁵⁰ The NRC issued an inspection report approving the discharge and reprimanding Iowa Electric for the violation.¹⁵¹ The employee's union filed a grievance on his behalf and subsequently submitted the grievance to arbitration.¹⁵²

The arbitrator found that the employee's act was deliberate and thoughtless, but determined that his termination was an inappropriately severe form of discipline under the circumstances.¹⁵³ Although the employee was aware of the general purpose of the containment procedure and knew that he was not to disarm the system, the arbitrator reasoned that the employee, perhaps, was not aware of the gravity

Carriers, DuPont differs from other cases discussed in this Comment in that it involved an involuntarily impaired employee who suffered a mental breakdown at work. See *supra* note 129. An arbitrator ordered DuPont to reinstate the employee and the United States Court of Appeals for the Seventh Circuit ultimately upheld the arbitrator's award. *DuPont*, 790 F.2d at 617. Similar to *United States Postal Workers*, however, the *DuPont* court based its decision on the factual finding that reinstating the employee posed no threat to other workers. *Id.*

145. 834 F.2d 1424 (8th Cir. 1987).

146. *Id.* at 1425.

147. *Id.* at 1426.

148. *Id.* at 1425-26. The plant is equipped with a series of doors around the reactor area to maintain air pressure. This system is designed to prevent the spread of radiation into the atmosphere in the event of a leak. The doors are designed so that only one may be opened at a time. If one door is open, a red light flashes beside the others, which are automatically secured. The only way an employee can defeat the automatic lock system is to have someone outside the door pull a fuse. *Id.*

149. *Id.* at 1426.

150. *Id.*

151. *Id.* at 1428.

152. *Id.*

153. *Id.* at 1426.

of doing so.¹⁵⁴ The arbitrator therefore ordered Iowa Electric to reinstate the employee. Iowa Electric refused to obey the arbitrator's order and brought an action in federal district court to overturn the arbitrator's decision on the ground that it violated public policy. The district court vacated the arbitrator's reinstatement award, and the Eighth Circuit affirmed.¹⁵⁵

Emphasizing the public health and safety interests that the employee's actions conceivably could have harmed, the court rejected the narrow interpretation of the public policy exception.¹⁵⁶ The court held that enforcing the arbitrator's reinstatement order would violate the "strong public policy" of "strict adherence to nuclear safety rules."¹⁵⁷ In support of its holding, the court cited NRC regulations that require nuclear power plant licensees to draft technical specifications to protect national security and public health and safety.¹⁵⁸ "Nothing could be plainer," the court stated, "than the public interest in the safe operation of nuclear power plants that underlies this panoply of federal regulations."¹⁵⁹

In light of this public policy, the court concluded that reinstatement would discourage strict compliance with nuclear safety regulations.¹⁶⁰ Similar to other courts applying a more expansive interpretation of the public policy exception, the Eighth Circuit seems to have been concerned primarily with countering what it perceived to be the lenient disposition of the grievance by the arbitrator. That the employee's actions did not result in any actual harm to public health was of no consequence in light of the harm that could have arisen. Given the seriousness of the breach, the court could not avoid the "common sense implications" that reinstating this employee would have on other employees and the public.¹⁶¹

154. *Id.*

155. *Id.* at 1425.

156. *Id.* at 1427 n.3. For a discussion of the narrow interpretation of the public policy exception, see *supra* notes 84-105 and accompanying text.

157. *Id.* at 1427.

158. *Id.* at 1428. Specifically, the court cited 10 C.F.R. §§ 50.1-.110 (1987), which the NRC promulgated pursuant to 42 U.S.C. §§ 2131-2141 (1982). Each plant, in turn, must develop more detailed specifications and regulations in order to obtain and maintain its federal license. Licensees must report violations to the NRC, which may issue enforcement penalties. *Iowa Electric*, 834 F.2d at 1428.

159. *Iowa Electric*, 834 F.2d at 1428 (quoting *United States Postal Service v. American Postal Workers Union*, 736 F.2d at 825). In dicta, the court cautioned that its holding should not be read as a blanket justification for discharging every employee who violates a nuclear safety regulation. The violation in this case, the court stressed, was both serious and intentional. *Id.* at 1429.

160. *Id.* at 1430.

161. *Id.* (quoting *United States Postal Service*, 736 F.2d at 825). In the recent case of *Stead Motor of Walnut Creek v. Automobile Machinists Lodge No. 1173*, the United States Court of

IV. *United Paperworkers International Union v. Misco*: THE SUPREME COURT SETS THE EXCEPTION'S OUTER LIMIT

As interpreted by the federal courts, the "well defined and dominant" language of the public policy exception has justified varying degrees of judicial involvement in arbitration. Prompted by this division among the circuits, the Supreme Court recently revisited the public policy exception in *United Paperworkers International Union v. Misco*.¹⁶² In *Misco*, the Court explored the outer limit of the exception's scope, addressing whether a court's perception of public policy may justify the rejection of the arbitrator's findings of fact.¹⁶³

The employee in *Misco* worked the night shift in a paper mill, where he operated dangerous machinery.¹⁶⁴ While the employee was at work one evening, local police searched his home pursuant to a warrant, and found a substantial amount of marijuana.¹⁶⁵ An officer who had been sent to watch the employee's car in Misco's parking lot observed the employee and two coworkers leave the plant, enter the employee's car briefly, and then enter another car.¹⁶⁶ The two coworkers reentered the plant, and the police apprehended the employee, who had remained in the back seat of the car.¹⁶⁷ There were marijuana fumes in the car and a lit marijuana cigarette in a front seat ashtray.¹⁶⁸ A subsequent search of the employee's car revealed a box containing marijuana "gleanings."¹⁶⁹

The employee informed Misco that he had been arrested for pos-

Appeals for the Ninth Circuit followed the Eighth Circuit's analysis. No. 87-2053 (9th Cir. Mar. 30, 1988). In *Stead Motor*, an arbitrator reinstated an automobile mechanic who had been discharged for recklessly disregarding his foreman's instructions. The Ninth Circuit overturned the reinstatement on the grounds that it conflicted with "well defined and dominant" public policy. As grounds for its decision, the court cited California's broad regulation of the automotive repair industry, which includes sanctions for the gross negligence of automobile mechanics.

162. 108 S. Ct. 364 (1987).

163. In the cases discussed thus far, the courts, though ultimately vacating arbitrators' reinstatement orders on public policy grounds, generally have respected the arbitrators' findings of fact. For an express declaration of this standard of review in a somewhat different context, see *E.I. DuPont de Nemours & Co. v. Grasselli Employees Ass'n*, 790 F.2d 611 (7th Cir. 1987). The *DuPont* court stated: "Where an arbitration award has been overturned on public policy considerations, the court has not questioned the factual findings of the arbitrator. Rather, the court has found that, assuming all of the facts found below are true, the enforcement of the award will violate a public policy." *Id.* at 615.

164. *Misco*, 108 S. Ct. at 368.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* The employee ultimately pleaded guilty to possession of marijuana based on the police search of his home. He was not prosecuted for possession of the marijuana cigarette found in the car or for the marijuana gleanings found in his trunk. *Id.* n.3.

sessing marijuana in his home.¹⁷⁰ Misco did not learn of the marijuana cigarette in the car for another three days.¹⁷¹ Subsequently, Misco discharged the employee pursuant to a company rule that prohibited bringing controlled substances onto company premises and reporting for work under their influence.¹⁷² Misco had been concerned that there was a drug problem on its night shift, and had reprimanded the employee twice for errors in judgment in the performance of his duties.¹⁷³ At the time of discharge, however, Misco was not aware that the police had found marijuana gleanings in the employee's car.¹⁷⁴ The union filed a grievance and ultimately brought the case to arbitration, at which time Misco first raised the issue of the marijuana gleanings as support for its decision to discharge the employee.¹⁷⁵

The arbitrator's analysis of the dispute emphasized the absence of sufficient evidence against the employee to constitute just cause for the discharge.¹⁷⁶ First, the arbitrator determined that merely finding the employee in the back seat of a car with a burning cigarette in the ashtray was insufficient to prove that he had used or possessed marijuana on Misco's property.¹⁷⁷ Second, the arbitrator excluded from evidence the marijuana found in the employee's car in Misco's lot because Misco did not rely upon it when discharging the employee.¹⁷⁸ As a result, the arbitrator ordered Misco to reinstate the employee with backpay and full seniority.¹⁷⁹

Misco sought to vacate the arbitrator's award in federal district

170. *Id.* at 368.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* Indeed, Misco did not know of this until five days before the arbitration of the employee's grievance took place. *Id.*

175. *Id.*; see *infra* note 178.

176. *Misco*, 108 S. Ct. at 368-69.

177. *Id.* at 369 (citing Petition for A Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, app. D at 49a-50a, *United Paperworkers Int'l Union v. Misco, Inc.*, 108 S. Ct. 364 (1987) (No. 86-651) [hereinafter *Petition for Certiorari*]). The arbitrator also noted that, despite having a clear view of the car at all times, the surveilling police officer had not testified that he had seen the employee smoking marijuana. *Id.*

178. *Misco*, 108 S. Ct. at 369. It is a standard practice among arbitrators to limit the evidence to those facts known by the employer at the time of discipline. *Misco*, 108 S. Ct. at 371 n.8 (1987); see *West Virginia Pulp & Paper Co. v. International Bhd. of Pulp, Sulphite & Paper Mill Workers, Local 508*, 10 Lab. Arb. (BNA) 117, 118 (1947) (Guthrie, Arb.); F. ELKOURI & E. ELKOURI, *supra* note 3, at 675-77; O. FAIRWEATHER, *PRACTICE AND PROCEDURE IN LABOR ARBITRATION* 303-06 (1983).

179. *Misco*, 108 S. Ct. at 368. Acknowledging that the employee had operated "hazardous" machinery, the arbitrator gave Misco the option of reinstating him to the same position or a similar one not involving dangerous machinery. *Petition for Certiorari*, *supra* note 177, at 53a.

court. The district court set aside the reinstatement under the public policy exception.¹⁸⁰ The Fifth Circuit affirmed the district court's decision,¹⁸¹ ruling that the arbitrator's reinstatement order violated the public policy "against the operation of dangerous machinery by persons under the influence of drugs or alcohol."¹⁸² The Fifth Circuit reached its conclusion by considering the evidence that the arbitrator had excluded on due process grounds. The arbitrator's "narrow focus on [the employee's] procedural rights" had led him to ignore something he "knew was in fact true: that [the employee] *did* bring marijuana onto his employer's premises."¹⁸³ Furthermore, the court stated, even if the arbitrator had not known all of the facts when he rendered his decision, "it is doubtful that the award should be enforced today in light of what is now known."¹⁸⁴ The Fifth Circuit's approach represented the most expansive interpretation of the public policy exception, a complete rejection of the *Steelworkers Trilogy*¹⁸⁵ requirement of at least a modicum of judicial deference to arbitration.¹⁸⁶

The Supreme Court rejected this "superarbitrator" approach to

180. *United Paperworkers Int'l Union v. Misco, Inc.*, 768 F.2d 739, 741 (1985).

181. *Id.* at 743.

182. *Id.*

183. *Id.*

184. *Id.*

185. *United Steelworkers of Am. v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). See *supra* notes 35-53 and accompanying text.

186. Increased judicial involvement in arbitration on public policy grounds may take forms other than overturning an arbitrator's decision. In *Oil, Chemical & Atomic Workers, Int'l Union, Local No. 4-228 v. Union Oil Co. of California*, the Fifth Circuit chose to remand a grievance dispute to the arbitrator for a determination of whether to uphold the discharge of a drug user on public policy grounds in light of positive drug tests administered after her reinstatement. 818 F.2d 437 (5th Cir. 1987). The court remanded the case because the arbitrator was in the best position to resolve the issue. *Id.* at 442. The court had authority to remand the case under federal common law that has developed under section 301 of the Labor Management Relations Act. See 29 U.S.C. § 185(a) (1982); cf. *Grand Rapids Die Casting Corp. v. Local Union No. 159*, 684 F.2d 413, 416 (6th Cir. 1982) (Remanding disputes for clarification enables the court to avoid the "draconian choice" of upholding or reversing the award.); *Local 2222, 2320-27, Int'l Bhd. of Elec. Workers v. New Eng. Tel. & Tel. Co.*, 628 F.2d 644, 647 (1st Cir. 1980) (Remanding disputes to arbitrators developed as a corollary to courts' reluctance to interpret collective agreements.). In each of these cases, courts remanded cases to arbitrators for clarification of an ambiguity in an award. In contrast, *Oil, Chemical & Atomic Workers* remanded to the arbitrator for a de novo review of the merits of the discharge of an impaired worker in light of public policy. 818 F.2d at 443.

Although remand may not have the same immediate impact on an arbitrator as would vacating an award on public policy grounds, it may pose an equally serious threat to an arbitrator's independent decisionmaking. Liberal use of the remand power would enable courts to exercise more control over arbitral decisionmaking on a regular basis. Cf. *United Steelworkers of Am. v. Aurora Equip.*, 830 F.2d 753 (7th Cir. 1987) (A federal district court

the public policy exception.¹⁸⁷ Under the *Steelworkers Trilogy*, the Court reasoned that if parties bargain for an arbitrator to resolve their disputes, they agree to accept the arbitrator's view of the facts as part of their bargain. This private agreement severely limits the role of the courts in reviewing arbitration decisions. In reviewing an arbitrator's decision, unlike reviewing lower court decisions, courts may not consider claims that an arbitrator committed factual or legal errors.¹⁸⁸ The Court also reaffirmed the need for courts to defer to an arbitrator's interpretation of the collective agreement, assessment of appropriate remedies, and consideration of the appropriate norms of due process.¹⁸⁹ Finally, the Court reiterated that courts need not defer to an arbitrator's opinion if it fails to draw its essence from the collective agreement.¹⁹⁰

The Court firmly rejected the Fifth Circuit's sweeping approach to defining public policy:

The Court of Appeals made no attempt to review existing laws and legal precedents in order to demonstrate that they establish a "well defined and dominant" policy against the operation of dangerous machinery while under the influence of drugs. Although certainly such a judgment is firmly rooted in common sense, we explicitly held in [*Grace*] that a formulation of public policy based only on "general considerations of supposed public interests" is not the sort that permits a court to set aside an arbitration award that was entered in accordance with a valid collective-bargaining agreement.¹⁹¹

order remanding a case to an arbitrator is not appealable because it is not a final order under 28 U.S.C. § 1291 (1982)).

187. *Misco*, 108 S. Ct. at 369.

188. The Court stated: "To resolve disputes about the application of a collective-bargaining agreement, an arbitrator must find facts and a court may not reject those findings simply because it disagrees with them." *Id.* at 370-71. The Court also stated in dicta that courts may refuse to enforce decisions procured through a party's misrepresentations or an arbitrator's dishonesty. In this case, however, the Court observed, "No dishonesty is alleged; only improvident, even silly, factfinding is claimed. This is hardly sufficient basis for disregarding what the agent appointed by the parties determined to be the historical facts." *Id.* at 371.

189. *Id.*

190. *Id.* at 372-73. The high degree of judicial deference to the arbitrator that the Court envisioned is evident from its observation: "[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision." *Id.* at 371. The Court's statement is an express affirmation of the high degree of judicial deference to arbitration contained in the doctrine of the *Steelworkers Trilogy*. See *supra* notes 35-53 and accompanying text.

191. *Misco*, 108 S. Ct. at 374 (quoting *Grace*, 461 U.S. at 766). The Court apparently did not find it significant that the *Misco* panel referred in passing to the fact that bringing drugs onto company premises was "in violation of Louisiana law." *Misco*, 768 F.2d at 743. The court of appeals made no attempt, however, to integrate this passing reference into its asserted

In its opinion, however, the Court expressly refused to address whether courts may overturn an arbitrator's reinstatement order on public policy grounds that fall short of illegality.¹⁹² Justice Blackmun, in a concurrence in which Justice Brennan joined, wrote separately to emphasize that the Court had not addressed the issue of the exception's scope.¹⁹³

public policy against the operation of dangerous machinery by one under the influence of drugs or alcohol.

In a decision recently vacated by the Supreme Court and remanded for reconsideration in light of *Misco*, the United States Court of Appeals for the First Circuit expanded the broad public policy exception the court had previously announced in *United States Postal Service, S.D. Warren Co. v. United Paperworkers Int'l Union, Local 1069*, 815 F.2d 178, 180 (1st Cir. 1987), vacated and remanded, 108 S. Ct. 497 (1987). For a discussion of *United States Postal Service*, see *supra* notes 129-44 and accompanying text. As in *Misco*, S.D. Warren discharged employees for violating a company rule that cited possession, use, or sale of drugs as cause for discharge. *Warren*, 815 F.2d at 180. Although discharge was mandatory under the agreement, the arbitrator reduced the discharge to suspension and reinstated the employees. *Id.* at 181. The First Circuit refused to enforce the award because it failed to draw its essence from the collective bargaining agreement. *Id.* at 186.

In dicta, the court also addressed the public policy issue of drugs in the workplace. *Id.* at 186-87. Although the court stated that it would assess public policy "by examining the laws and legal precedent pertaining to illegal drug sale and use," the court limited this examination to the observation that all states and the federal government outlaw the sale and use of drugs. *Id.* at 186. The court's assessment of public policy focused on public opinion against "the corrosive consequences" of illegal drug use and the "abominable" threat it poses to workplace safety and productivity. *Id.* On that basis, citing no "dominant laws and legal precedent," the court concluded that "there is a well-defined public policy against the use of drugs in the workplace." *Id.* Applying an analysis similar to that of the Fifth Circuit in *Great Western*, the court held that criminal laws against drug use, if viewed in relation to the industrial setting, invalidated the reinstatement as a matter of public policy. *Id.* at 186-87; see *supra* note 127 and accompanying text. Because the court's public policy discussion was contained in dicta, it is difficult to determine the impact that *Misco* will have on remand.

In an unreported decision, the Sixth Circuit, also applying state drug laws, came to a conclusion contrary to *Warren* and upheld an arbitrator's reinstatement of an employee discharged for drug use on the job. *Premium Bldg. Prods. Co. v. United Steelworkers of Am.*, No. 85-3749 slip op. (6th Cir. July 15, 1986). The *Premium Building Products* court enunciated three grounds that may explain the different outcomes of the two cases: (1) The collective bargaining agreement in *Premium Building Products* contained no rules addressing drug use; (2) The court sensed that the mere illegality of possession was insufficient to indicate a well-defined and dominant public policy requiring it to overturn the arbitrator; and (3) The company had offered no evidence that the employee had ever operated "dangerous" machinery. *Id.* at 8-12.

On the first two grounds alone, *Premium Building Products* indicates that the Sixth Circuit is a jurisdiction that refuses to interfere in collective bargaining relationships on the basis of penal statutes alone. The court's third ground for its holding, however, leaves the Sixth Circuit's position on the public policy exception somewhat ambiguous.

192. *Misco*, 108 S. Ct. at 374-75 n.12.

193. *Id.* at 375. Nor, Justice Blackmun observed, had the Court addressed the more general issue of whether a court's authority to set aside labor arbitration awards on public policy grounds differs from its authority to refuse to enforce contracts on public policy grounds. *Id.*

V. RECONCILING PUBLIC POLICY AND PRIVATE BARGAINING

A. *The Public Policy Exception After Misco*

In considering the most expansive approach to the public policy exception, the *Misco* Court expressly clarified one extreme of the range of interpretations of *Grace*'s "well defined and dominant" language and implicitly clarified the other. After *Misco*, it is clear that the superarbitration approach does not fall within *Grace*'s "well defined and dominant" public policy exception. Courts, therefore, may not review an arbitrator's findings of fact, and they may not invoke the public policy exception based on common sense alone. At the other extreme, *Misco* also implies that courts may assume that laws making it illegal to reinstate an impaired worker do express a "well defined and dominant" public policy.¹⁹⁴ The proper scope of the exception, which the Court has yet to address, lies somewhere between these two extremes.¹⁹⁵ Any court inclined to vacate an arbi-

194. An analysis of the First Circuit's opinion in *United States Postal Service v. American Postal Workers Union* illustrates *Misco*'s limited usefulness in guiding the lower courts in their application of the public policy exception. 736 F.2d 822 (1st Cir. 1984); see *supra* notes 129-44 and accompanying text. The *United States Postal Service* court based its public policy against reinstating an employee convicted of misappropriating postal funds largely upon "the clear dictates of common sense." *Id.* at 825. Standing alone, this basis would fail to pass scrutiny under *Misco*. The First Circuit, however, bolstered its common sense basis with criminal laws against misappropriation and laws expressing the importance of an "efficient" postal service and a postal worker's "loyalty" to his position. *Id.* Although *Misco* has reaffirmed the *Grace* requirement of reference to "well defined and dominant" laws, it provides no guidance as to how much of a legal basis is sufficient to construct a public policy against reinstatement. Nor does it indicate whether the legal basis must directly address behavior in the workplace, or whether courts should be permitted to construct a public policy against reinstatement from general criminal laws and laws regulating the workplace in a general fashion. Finally, the *United States Postal Service* court relied upon *Great Western* for the general proposition that a precise fit between public policy and the facts of a given case is not necessary to justify a refusal to enforce a reinstatement order. *Id.* at 826. The Supreme Court's opinion in *Misco* does not specify the role that "legal precedents" are to play as part of the exception. See *Misco*, 108 S. Ct. 364 (1987); see also *Warren*, 815 F.2d at 186 (citing state and federal criminal laws against the sale and use of drugs to conclude that there is a "well-defined public policy against the use of drugs in the workplace"); *Great Western*, 712 F.2d at 124-25 (citing laws against drunk driving, cases upholding discharge of employees with histories of poor judgment, the Federal Motor Carrier Safety Regulations, and "common sense" to shape a public policy against reinstating a truck driver cited for drunk driving while on duty). *Warren* and *Great Western*, like *United States Postal Service*, formulated public policy that fell short of illegality to justify overturning an arbitrator's reinstatement order.

195. This proposition is implicit in the *Misco* Court's statement that a court must clearly demonstrate that an arbitrator's award violates public policy before it may refuse to enforce it. *Misco*, 108 S. Ct. at 373-74. Laws that expressly make it illegal to reinstate certain impaired workers are the clearest expressions of public policy against reinstatement. Restricting the public policy exception to instances of illegality rarely would serve to vindicate a public interest, however, because there are few laws and regulations that make reinstatement illegal. Such positive law, however, does exist—at least in the public sector. In the pre-*Grace* case of *American Postal Workers Union v. United States Postal Service*, 682 F.2d 1280 (9th Cir.

trator's reinstatement order on public policy grounds that fall short of illegality can find at least some legal basis on which to justify its action.¹⁹⁶ Thus, at some point arbitration becomes nothing more than a factfinding mechanism for the courts. The tendency of courts that espouse an expansive interpretation of *Grace* to rely upon each other's methods of extracting public policy from laws and regulations has proven to be equally questionable. The veil of stare decisis has led to an inbred expansion of the public policy exception.¹⁹⁷

Perhaps the expanding interpretation of *Grace* is a judicial reaction to arbitrators who seem to focus solely on individual disputes rather than on broader social concerns. In turn, however, courts that vacate awards on public policy grounds short of illegality may very well encourage a reaction among arbitrators. The reaction may come in the form of summary justice for the discharged worker; that is, arbitrators wary of judicial reversal could be more likely to uphold management's decision to discharge on that ground alone.¹⁹⁸ Arbitrators also may begin to consider questions of public policy expressly in their decisionmaking. Ironically, doing so may expose them to even greater judicial scrutiny as they increasingly address issues of public rights in the course of resolving private disputes under collective bargaining agreements.¹⁹⁹ Even if a more expansive approach to the pub-

1982), for example, the court confronted the issue of whether to enforce an arbitrator's decision reinstating a postal worker who illegally participated in a strike. The court concluded that reinstatement required the Postal Service to violate the no strike law for federal employees, which provides in part: "An individual may not accept or hold a position in the Government of the United States . . . if he . . . participates in a strike . . . against the Government of the United States." 5 U.S.C. § 7311 (1982).

196. In its brief to the Supreme Court in *Misco*, counsel for Misco cited nine sources for the public policy against drug use in the workplace; some law and some clearly not: (1) an August 4, 1986 speech against drug use by President Ronald Reagan; (2) Executive Order 12,456 requiring federal employees to refrain from use of illegal drugs; (3) the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796i (1982); (4) the Comprehensive Drug Abuse Prevention and Control Act, 21 U.S.C. §§ 801-966; 42 U.S.C. §§ 257-261(a) (1982); (5) state laws against possession and use of controlled substances; (6) the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 (1982); (7) a provision of the Louisiana Worker's Compensation Law relating to employers' liability, LA. REV. STAT. ANN. § 23:1031 (West 1985); (8) the traditional tort theory of respondeat superior as well as negligent retention of incompetent employees; and (9) common sense. Brief for the Respondents at 10-15, *United Paperworkers International Union v. Misco, Inc.*, 108 S. Ct. 364 (1987) (No. 86-651).

197. The courts that apply a more expansive approach to the exception justify their constructions of public policy at least as much upon citation to one another as they do upon positive law. See *Warren*, 815 F.2d 178 (1st Cir. 1987), *vacated and remanded*, 108 S. Ct. 497 (1987); *Misco*, 768 F.2d 739 (5th Cir. 1985), *rev'd*, 108 S. Ct. 364 (1987); *United States Postal Service*, 736 F.2d 822 (1st Cir. 1984); *Great Western*, 712 F.2d 122 (5th Cir. 1983). See *supra* notes 105-86 and accompanying text.

198. Admittedly, this would be the worst-case scenario. There is no indication that such a trend has yet developed.

199. The issue is not whether arbitrators are capable of deciding issues of public law.

lic policy exception does not induce arbitrators to react in this manner, it nevertheless is likely to diminish the value of collective bargaining by imposing further limitations on the finality of arbitration.

In their attempts to define public policy, courts reading *Grace* expansively reinterpret laws that do not expressly address impairment in the workplace. Yet by emphasizing the public interest in health and safety, they threaten to undermine the competing, but established, public interest in the finality of arbitration as a means of ameliorating tensions in the workplace.²⁰⁰ Because of its malleable nature, the public policy exception enables employers to obtain a union's promise not to strike in exchange for a meaningless promise to adhere to arbitration decisions. Employers who are discontent with the results of arbitration may abandon it confidently for litigation. This, in effect, revokes labor's sole means of enforcing the collective bargaining agreement, short of a strike.²⁰¹

B. *Determining the Proper Scope of the Exception*

Despite the theoretical tensions between courts and arbitration, the courts still must account for public policy insofar as arbitrators' decisions do not.²⁰² Currently, however, no clear guidelines exist to enable courts to fulfill their responsibilities while allowing arbitrators to freely fulfill theirs. A workable distinction is necessary to determine which laws and regulations express "well defined and dominant" public policy that would justify a court's decision to disturb the results of arbitration. This distinction should prevent judicial intervention from undermining the public interest in the finality of arbitration awards,²⁰³ while vindicating clear expressions of public policy regarding acceptable workplace behavior. In short, this Comment suggests that courts should restrict the application of the public policy exception to those instances that require them to vindicate the public interest expressed in statutes and regulations clearly directed at deterring specific forms of behavior in the workplace.

Rather, the issue is the desirability of allowing them to do so. Judge Harry T. Edwards has written: "[W]e must determine whether [alternative dispute resolution] will result in an abandonment of our constitutional system in which the 'rule of law' is created and principally enforced by legitimate branches of government and whether rights and duties will be delimited by those the law seeks to regulate." Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 671 (1986); see also F. ELKOURI & E. ELKOURI, *supra* note 3, at 376-77.

200. See Petition for Writ of Certiorari, *supra* note 177, at 7-8, *Misco*.

201. See *supra* notes 1-11 and accompanying text.

202. *Grace*, 461 U.S. at 766.

203. See *supra* notes 35-53 and accompanying text.

Statutes and regulations that expressly regulate clearly defined behavior in the workplace are the only forms of positive law that embody a "well defined and dominant" expression of public interest with regard to reinstatement disputes. The postal workers' loyalty oath,²⁰⁴ the Federal Motor Carrier Regulations,²⁰⁵ and the nuclear safety regulations²⁰⁶ all fall within this category. Limiting the scope of the public policy exception to laws and regulations such as these would limit judicial intervention to those instances in which reinstatement violates a clear expression of the public interest in deterring the behavior in question.²⁰⁷

Although general criminal laws express the public interest in deterring specific forms of behavior, they lack a clear connection to the workplace. Perhaps it is not surprising in a time of heightened

204. See *supra* note 142 and accompanying text.

205. See *supra* note 122 and accompanying text.

206. See *supra* note 158 and accompanying text. For a more recent example of a public policy exception based upon regulations that fall within this category, see *supra* note 161.

207. Although not in the context of discharge grievances, federal courts have accepted the ideas underlying this approach in their review of arbitrators' decisions that address issues arising under the provisions of Title VII, 42 U.S.C. §§ 2000e to 2000e-17 (1982). See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 58 n.19 (1974) (citing *Vaca v. Sipes*, 386 U.S. 171 (1967); *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965); *Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192 (1944); *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944)). The federal courts play a special role in vindicating the public interest embodied in Title VII, which attempts to protect minority rights that the "majoritarian" process of collective bargaining and arbitration may overlook. See *Alexander*, 415 U.S. at 51. Title VII embodies a clear public interest in discouraging discriminatory behavior and attitudes in the workplace. Arbitrators may render decisions consistent with the collective agreement yet inconsistent with the broader goals of Title VII. Consequently, judicially imposed corrective action is the only means by which values that collective bargaining and arbitration do not consider may be instilled in the workplace. The Supreme Court thus declared in *Alexander* that Title VII issues that have been arbitrated may be relitigated de novo in federal court. *Id.* at 44-45; see Meltzer, *Arbitration and Employment Discrimination*, 39 U. CHI. L. REV. 30, 43-46 (1971); see also *Hutchings v. United States Industries, Inc.*, 428 F.2d 303, 313-14 (5th Cir. 1970) (Congress made the federal judiciary the final arbiter of Title VII rights). For further discussion of the principles underlying the role of the courts in enforcing Title VII, see generally, Isaacson & Zifchak, *Fair Employment Forums After Alexander v. Gardner-Denver Co.*, 16 WM. & MARY L. REV. 439 (1975); Comment, *Federal Courts as Primary Protectors of Title VII Rights*, 28 RUTGERS L. REV. 162 (1974).

The public policy exception that this Comment proposes would create a relationship between courts and arbitrators that also closely resembles the relationship between the National Labor Relations Board (NLRB) and the arbitrators who interpret the Labor-Management Relations Act. Like federal courts in Title VII cases, the NLRB is the entity charged with enforcement of the nation's labor laws. The NLRB stated its "deferral doctrine" in *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955). In *Spielberg*, the NLRB held that if (1) the arbitration proceedings appear to have been "fair and regular"; (2) the parties have agreed to be bound by the decision of the arbitrator; and (3) the arbitrator's decision is not "repugnant to the purposes and policies of the Act," deference to the arbitrator best serves the "desirable objective" of voluntary settlement of labor disputes through arbitration. *Id.* at 1082.

public concern about drug abuse and its economic costs²⁰⁸ to find that courts have interpreted *Grace*'s "well defined and dominant" language most expansively in these cases.²⁰⁹ Courts applying the public policy exception in this context seem to sense²¹⁰ an epidemic of drug use in the workplace and seek to eradicate it by permanently removing the offending employee from the workforce.²¹¹ In their efforts to rebut what they perceive as lenience on the part of arbitrators, however, courts justify removal of the drug user on untenable doctrinal grounds.²¹² Although possession and use of marijuana is illegal, it is questionable whether courts properly serve the public policy underlying those laws by reversing an arbitrator who reinstates workers who are caught violating them. The same criticism is true of the Fifth Circuit's use of laws against drunk driving in *Great Western*²¹³ to establish a public policy against reinstating a driver known to have taken a drink on the job. Criminal sanctions exist to vindicate the public interest embodied in criminal laws.²¹⁴ Courts therefore should not extend the sanctions for criminal violations beyond those that

208. See Brief for the Respondents, *supra* note 196, at 9-10 (identifying the "dangers to health and safety faced by the citizens of this nation and by employees of American industry because of the use of illegal drugs"). In the brief, attorneys for the respondent argued:

The cost to the American economy [of drug use in the workplace] is enormous: nearly \$26 billion—including \$16.6 billion in lost productivity alone—according to one authoritative study. . . . But others put the figure much higher. Employees who use drugs on the job are one-third less productive than straight workers, three times as likely to be injured and absent far more often. The indirect cost to the economy is impossible to measure.

Id. (quoting Brecher, *Taking Drugs on the Job*, Newsweek, Aug. 22, 1983, at 52).

209. *Warren*, 815 F.2d 178 (1st Cir. 1987), *vacated and remanded*, 108 S. Ct. 497 (1987); *Misco*, 768 F.2d 739 (5th Cir. 1985), *rev'd*, 108 S. Ct. 364 (1987).

210. Although "sense" connotes subjective, rather than objective meaning, the use of the word in this context best describes the actions taken by courts that adhere to a more expansive interpretation of *Grace* for precisely this reason.

211. See *supra* note 191.

212. See, e.g., *Misco*, 768 F.2d 739 (5th Cir. 1985); see *supra* notes 181-86 and accompanying text.

213. See *supra* notes 119-20 and accompanying text.

214. See *Local 453, Int'l Union of Elec., Radio & Machine Workers v. Otis Elevator Co.*, 314 F.2d 25 (2d Cir. 1963). The Second Circuit stated:

[I]n light of the important role which employment plays in implementing the public policy of rehabilitating those convicted of 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 Indeed, the arbitrator in effect took into account the importance of rehabilitation when he concluded that the criminal conviction, the sentence imposed as a result of that conviction, and the seven-month layoff without pay or unemployment compensation were appropriate punishment under the circumstances.

Id. at 29; accord *International Ass'n of Machinists, District No. 8 v. Campbell Soup Co.*, 406 F.2d 1223, 1227 (7th Cir. 1969). But see *United States Postal Workers*, 736 F.2d at 825.

already exist, unless a criminal law clearly requires removal of the offender from the workplace.

Although laws and regulations exist that address the workplace generally, most of them do not contain the requisite connection to the public interest in regulating workplace behavior. These laws thus provide equally insufficient justification for using the public policy exception to overturn an arbitrator's reinstatement order. Typical of such a law is the Postal Reorganization Act²¹⁵ provision that requires the Postal Service to be reliable and efficient.²¹⁶ Although it declares the responsibility of the Postal Service as a whole, the law is not one that expressly regulates the behavior of individual employees. As such, it does not provide sufficient grounds to justify a court's decision to reverse an arbitrator's order to reinstate an impaired worker. A court's reliance on such a law essentially enables it to retry a dispute that an arbitrator has already resolved. Similar to a court's reliance on criminal laws that do not address the workplace, this approach unnecessarily compromises the finality of arbitration.

VI. CONCLUSION

Given the nature of both arbitration and the courts as dispute resolution institutions, it is perhaps inevitable that the two will conflict. Although both arbitration and the courts perform the same dispute resolution function at one level, they differ fundamentally in their structure and purpose. Use of the public policy exception highlights these differences. The arbitrator's responsibility is to resolve disputes between unions and employers within the confines of a particular collective agreement, within a particular workplace. The judiciary's responsibility, under the dictates of *Grace*, is to effectuate public policy insofar as it conflicts with the arbitrator's decision. *Grace*'s open-ended language, however, has permitted courts to gradually abandon the doctrine of judicial deference to arbitration decisions. Although the Supreme Court in *Misco* addressed the outer limits of judicial intervention, it has yet to confront the public policy exception directly.

Recognizing the potential for tension between arbitrators and the courts, this Comment has attempted to fashion a viable compromise governing a small subset of those instances in which the two interact. The public interest in discouraging certain illegal or reckless activities may be a worthy one. Nonetheless, whether engaging in that behavior sufficiently harms the public interest as to demand denial of

215. 39 U.S.C. §§ 101-5605 (1982).

216. 39 U.S.C. § 101(a) (1982); see *supra* note 142 and accompanying text.

employment is a separate issue that legislative bodies and administrative agencies—not the courts—should address. Continued judicial review and reversal of arbitration decisions on judicially created public policy grounds will further undermine the stability of collective bargaining relationships. Restricting the public policy exception to express statements of public interest in reinstatement would enable both unions and employers to engage in collective bargaining with a more accurate understanding of their relative bargaining positions. Furthermore, the parties would have the security of knowing that an agreement, once struck, would be truly binding and conducive to a harmonious workplace relationship. As long as the exception's proper scope remains uncertain, however, arbitration's efficacy as a final means of dispute resolution, and thus a source of stability in labor-management relations, remains uncertain as well.

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