The Critical Role of a Judicially Recognized Public Policy Against Illegal Drug Use in the Workplace*

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In direct opposition to Deanna Mouser’s article, Jesse Schaudies and Chris Miller argue that courts should actively use public policy as a basis for invalidating arbitration decisions which order employers to reinstate workers who have been found to have violated drug laws or an employer’s drug policies. Schaudies and Miller argue that public policy should be defined by reference to the employee’s actions in a broad sense, rather than narrowly focusing on whether the reinstatement itself would violate any laws. After reviewing the many laws prohibiting drug use both on or off the job, they conclude that courts have an adequate basis for refusing to allow employees who use drugs to be returned to work over an employer’s objection.

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I. INTRODUCTION

The pernicious nature of drugs in America’s workplace has been recognized by the courts, the Congress and the President. The Supreme Court called drug abuse “one of the most serious problems confronting our society today.” President Bush has announced what he calls an all-out war on the use of drugs in America, calling on all segments of society—including private employers—to help eliminate drug use in the workplace. Former President Reagan issued an executive order declaring people who use illegal drugs to be “not suitable for federal employment.” Congress has enacted legislation making it the “declared policy of the United States government to create a Drug-Free America by 1995.” Congress declared that “illegal drug use is prevalent in the workplace and endangers fellow workers, national security, public safety, company morale, and production.” The anomaly, however, is that while the other two branches of government have denounced illegal drug use as a major problem of disastrous scope, the judicial branch has failed

to adopt an appropriate unified means of combating a significant manifestation of the problem: drug use in the workplace.

There is a strong public policy in this country against the use of illegal drugs, especially in the workplace. In support of this public policy, both public and private sector employers have instituted employee drug testing and drug rehabilitation programs, and implemented policies of discharging those who have used drugs at work. In general, the federal courts, including the Supreme Court, have supported aggressive measures by employers to eliminate the effects of drug use in the workplace. However, in unionized work settings, arbitrators have been uneven in upholding discharges for proven violators of anti-drug policies.

As a primary example, in a 1987 case, United Paperworkers International Union v. Misco, Inc., the Supreme Court refused to vacate a labor arbitrator's award reinstating an employee alleged to have possessed illegal drugs while on duty on the employer's property. In Misco, the Court failed to find that the award or the employee's reinstatement was contrary to public policy. The Fifth Circuit Court of Appeals had vacated the award based on the public policy exception to the general rule of enforcing labor arbitration awards. Nonetheless, while stating in dictum that a policy against use of drugs in a dangerous work environment would be sound, the Supreme Court chose not to recognize a public policy against workplace drug use in general.

The different approaches taken by federal courts interpreting Misco's discussion of the scope of the public policy exception manifests a glaring conflict among several circuits. In addition, Judge Harry T.

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8. For example, see generally, Thornicroft, Arbitrators Social Values and the Burden of Proof in Substance Abuse Discharge Cases, 40 LAB. L.J. 582, 583 (1989).


10. Id. at 44. The Court noted that "a 'well defined and dominant' policy against the operation of dangerous machinery while under the influence of drugs . . . is firmly rooted in common sense." Id.

Edwards of the District of Columbia Circuit wrote a law review article stridently condemning the use of the public policy exception. Judge Edwards argued that the exception should be used only in limited cases where the award itself violates the law.

This restrictive view of the scope of the public policy exception is unfounded for two reasons. First, it misinterprets the limits of deference to labor arbitrators, and second, it fails to accommodate or even to acknowledge the superseding public policy of "zero tolerance" of employee drug use. Proponents of a narrow view of the public policy exception such as Judge Edwards argue that the public policy of supporting collective bargaining and industrial peace requires leaving arbitrators essentially unaccountable. They fail to show, however, why the goal of a drug-free workplace must be sacrificed as a result.

This article urges that federal courts should be more protective of workplace safety and not tolerate labor arbitration awards that return illegal drug users to the workplace. While the Misco Court acknowledged the "common sense" finding that drug use in the workplace is unacceptable, recognizing the problem is not enough. Rather, the federal judiciary must not only recognize the state and federal policy against employing drug users, but also refuse to enforce arbitration awards that violate that policy. As a tool for interpreting collective bargaining agreements, public policy empowers, and may indeed require, federal courts to confront this problem and to take steps to resolve it.

The first section of this article examines the historical use of public policy to void contracts. We argue that despite the traditional deference courts have shown to arbitration awards in collective bargaining settings, the Supreme Court has never retreated from the notion that labor contracts are subject to the same public policy limitations as commercial contracts. The second section addresses the "narrow view" of the public policy exception as championed by Judge Harry T. Edwards. This section disputes Judge Edwards' contentions that the Steelworkers Trilogy supports judicial deference in the public policy context and that to establish a public policy and subsequent violation, a court must find the award itself violates a statute. The final section reviews federal and state laws relating to the use of illegal drugs in the workplace and proposes that the Supreme Court's holding in Misco be used to support a well-defined and dominant public policy against such workplace drug use. The article

13. Misco, 484 U.S. at 44.
concludes that public policy justifies the federal courts' vacating arbitration awards that reinstate proven workplace drug users.

II

THE TRADITIONAL USE OF PUBLIC POLICY IN VOIDING CONTRACTS

The opportunity to bargain and to use an arbitration process is based on the public good that derives from parties settling their differences through collective bargaining and through non-judicial arbitration. Collective bargaining agreements are contracts between organizations concerning how the parties, and people under their control, are to conduct themselves. A cornerstone provision of most collective bargaining agreements is the arbitration and grievance machinery. In the Steelworkers Trilogy the Supreme Court recognized the importance of such provisions in collective bargaining agreements. However, while the Steelworkers Trilogy underscored the importance of the arbitration process, it certainly did not remove collective bargaining agreements from traditional contract analysis.

A. The Muschany Decision Supports a Meaningful Application of the Public Policy Exception to Labor Contracts

Contractual obligations that are inimical to the public interest can be set aside as contrary to public policy. The Supreme Court’s decision in Muschany v. United States is commonly cited for this proposition, but the concept has much older origins. Indeed, nearly a century ago, the Supreme Court recognized that a principal part of personal liberty in this country is the right to maintain and enforce contracts “unless it clearly appear that they contravene public right or the general welfare.” Virtually every state court has issued a similar pronouncement. In his treatise, Professor Corbin states: “[I]n thousands of cases, contracts have been declared to be illegal on the ground that they are contrary to public policy.” The First Restatement of Contracts defines

15. See cases cited supra note 14.
17. 324 U.S. 49 (1945).
20. 6A A. CORBIN, CORBIN ON CONTRACTS § 1375 (1962).
a contract as illegal "if either its formation or its performance is criminal, tortious, or otherwise opposed to public policy."21 In addition, the comment to Section 512 explains the impossibility of listing all of the kinds of illegal bargains because "the variety of agreements that can be made in violation of statute or of rules of the common law is almost infinite."22

_Muschany_ presented the Supreme Court with a novel wartime issue of whether certain contracts with the government could be contrary to public policy. The Court stated that "[p]ublic policy is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interest."23 The factors to be considered in determining the existence of a public policy include: longevity of relevant governmental practice, statutory enactments, and violations of obvious ethical or moral standards.24 This case provided the foundation on which _Misco_25 and _W.R. Grace & Co. v. Local Union 759_,26 held that public policy could require rejecting a labor arbitrator's award.

_Muschany_ merely extended the basic common law principle that a contract would be void and unenforceable if it was prohibited by statute or if it was against public policy as interpreted by the courts. Although this principal did not originally apply to employment contracts, but only to commercial transactions, the Supreme Court has frequently relied on _Muschany_ in the labor arbitration context. Therefore, it would be folly to suggest that the principles advanced in _Muschany_ should not now be applied to collectively bargained contracts.27

B. Deferece to Arbitration and Meaningful Review

_Can Peacefully Coexist_

As contracts between consenting parties, collective bargaining agreements are, and should be, subject to the _Muschany_ standard of contractual review. The _Steelworkers Trilogy_ is important for its clear state-

21. _Restatement (First) of Contracts_ § 512 (1932).
22. _Id._ comment b. Professor Meltzer has also argued that sections 178 and 179 of the Restatement (Second) of Contracts should be used to guide the application of the public policy exception in the labor arbitration context. Meltzer, _After the Labor Arbitration Award: The Public Policy Defense_, 10 INDUS. REL. L.J. 241, 255-56 (1988) (hereafter "Meltzer").
23. _Muschany_, 324 U.S. at 66.
24. _Id._ at 66-67.
25. 484 U.S. 29.
27. Indeed, in _W.R. Grace_ the Supreme Court placed the application of the public policy exception to labor arbitration awards within the framework of public policy review of other contracts, stating "[a]s with any contract, however, a court may not enforce a collective bargaining agreement that is contrary to public policy". 461 U.S. at 766 (emphasis added). Professor Bernard Meltzer, who has gingerly offered his support for a somewhat narrower view of the public policy exception, acknowledges that general principles of contract law should apply, notes that "[a]fter all, a pervasive and commonly accepted public policy defense has been part of the legal background for all contracts." _Meltzer, supra_ note 22, at 248, 256.
ment defining the role of arbitration in America's labor process. However, that relatively recent development does not supplant older and even more fundamental standards of public policy-based judicial review of contracts.

Public policy played a large part in creating the Steelworkers Trilogy. The Court readily recognized the Congressional intent of establishing a timely, efficient and cost-effective scheme for resolving disputes between employers and unions. Arbitration was designed to give life to collective bargaining agreements, to ensure procedural due process for individual employees, and to resolve conflicts peacefully through an independent third party rather than through strikes or work stoppages.

The Court has also noted the importance of finality in the arbitration process to minimize the possibility of extended industrial strife. The Court has enforced the principle of finality through its general rule of judicial deference to arbitrators' findings of fact and contract interpretation. However, as discussed below, the goal of finality and the rule of deference have never been extended beyond the terms of the labor agreement in question, and the Court has never signalled a retreat from traditional notions of contract analysis where a violation of public policy is at issue.

Finality is an important factor to parties to a collective bargaining agreement, but it is not enough by itself to induce parties to agree to a binding arbitration process. If employers and unions cannot expect arbitrators to be rational and to conform to societal norms, they will be unlikely to voluntarily submit disputes to them. This does not mean that every decision by an arbitrator should be closely scrutinized. However, when arbitration decisions are antithetical to fundamental social values (even though they may advance the interests of an individual), the parties to those decisions should have some avenue of relief. Indeed, relief on the basis of public policy, by definition, benefits more than just the parties; such relief provides a measure of security, comfort, and safety to other workers and to members of the community.

32. Professor Charles Morris has noted that due to the increasing effect of external law, the traditional deference to arbitrators "may no longer suffice, at least not in such simplistic form." Morris, NLRB Deferral to the Arbitration Process: The Arbitrator's Awesome Responsibility, 7 INDUS. REL. L.J. 290, 310 (1985).
III
A Response to Judge Edwards

Judge Harry T. Edwards of the United States Circuit Court of Appeals for the District of Columbia Circuit has argued forcefully in favor of narrowing the public policy exception. In American Postal Workers Union v. United States Postal Service, Judge Edwards enforced an arbitration award that reinstated a postal worker discharged for theft, reversing the district court's refusal to abide by the arbitrator's decision on the grounds of public policy. More recently, in a law review article, Judge Edwards bolstered his opinion in American Postal Workers Union with a wide-ranging assault on the notion of a public policy exception. He predicted dire consequences for American union-management relations if the public policy exception was allowed to exist in any meaningful form and criticized courts that have not adopted his constrained view. Judge Edwards set forth several arguments which are addressed below in supporting the narrowest interpretation of the public policy exception. Such an interpretation would place blinders upon a judiciary empowered by the Supreme Court to use public policy as a tool in the review of arbitration awards. Such an instance exists when the public policy exception is applied to employees who use drugs in a safety-sensitive workplace. Here, the public policy exception should be used as a sword against those who use illegal drugs at work, rather than as a shield which sanctions their life-threatening behavior.

A. The Steelworkers Trilogy Does Not Support an Abolition of the Public Policy Exception

Judge Edwards travels a familiar path, extensively citing the Supreme Court's Steelworkers Trilogy cases in an effort to render the public policy exception meaningless. The Steelworkers Trilogy is often used to reaffirm the critical role of arbitration in minimizing strife in American industrial relations. This article takes a different view and argues that apart from their historical significance, the Steelworkers Trilogy has no relevance either to the appropriate role of public policy exception in general, or to the exception's specific role in establishing a drug-free workplace.

Judge Edwards argues that judicial decisions supporting a meaningful public policy exception disregard the commands of the Steelworkers Trilogy.
However, it is difficult to disregard what is not there in the first place: at no point in any of the three decisions is the public policy exception addressed, much less criticized. Indeed, two of the decisions, *Warrior & Gulf Navigation Co.* and *American Manufacturing Co.* address solely the issue of arbitrability of grievances, a threshold question which has no application to the public policy exception, and which comes into play only after a grievance has been arbitrated.

The remaining case in the *Trilogy, Enterprise Wheel & Car Corp.*, provides no more guidance on the role and scope of the public policy exception. In *Enterprise Wheel*, the circuit court of appeals refused to enforce an arbitration award reinstating a discharged employee because the court found that the arbitrator did not have the authority to provide a backpay remedy beyond the termination date of the collective bargaining agreement. The Supreme Court reversed, holding that the court of appeals had impermissibly supplanted the arbitrator's role of interpreting the agreement. The Court limited review of an arbitration award to whether it "draws its essence from the collective bargaining agreement." The Court went on to state that courts "have no business overruling [the arbitrator] because their interpretation of the contract is different from his." The narrow viewpoint would champion this language as an implicit limiting of the public policy exception. However, since the Court focused solely on contract interpretation—and did not address public policy interpretation—this assertion is based on an unsupported leap of faith.

Indeed, throughout the *Steelworkers Trilogy*, the Supreme Court addressed only the issue of arbitration and the limitations on a federal court's power to substitute its interpretation of a collective bargaining agreement for that of the arbitrator. In sum, the *Steelworkers Trilogy* defines the right of review of the federal court over labor arbitration awards only in terms of the "four corners" of the collective bargaining agreement. None of these cases discuss the scope of federal courts' review of arbitration awards when that review is grounded in legal authority (i.e., public policy) that is independent of the terms of the collective bargaining agreement. The *Steelworkers Trilogy* has no relevance to that issue. Consequently, unless the Supreme Court extends to public policy determination the rule of deference applied to the review of how to inter-

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40. *Id.* at 597.
41. *Id.* at 599.
42. See Meltzer, *supra* note 22, at 248 ("But the Trilogy's primary focus is on the contract and its grant of jurisdiction to the arbitrator").
pret the contract, the *Steelworkers Trilogy* should not be invoked when considering whether public policy compels overturning an arbitrator's award.\textsuperscript{43}

Judge Edwards also relies on the notion that labor arbitration agreements are so different from traditional commercial arbitration provisions that the former should be almost completely immunized from judicial review.\textsuperscript{44} While the Supreme Court, in *Warrior & Gulf*, provided some support for such a protective view, the Court had been presented only with the issue of *de novo* contract interpretation by lower courts. By using the *Warrior & Gulf* language to restrict the public policy exception, Judge Edwards extends the limited immunity given to labor contracts well beyond the intended boundaries of that special status, a stretch that is not licensed by the *Steelworkers Trilogy*.\textsuperscript{45}

As the Supreme Court noted in the commercial arbitration context, the purpose of federal arbitration law is "to make arbitration agreements as enforceable as other contracts, but not more so."\textsuperscript{46} This principle was recognized by then-Judge Thurgood Marshall in the labor arbitration context in *Local 543 v. Otis Elevator Co.*\textsuperscript{47}:

It is no less true in suits brought . . . to enforce arbitration awards than in other lawsuits that the "power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States."\textsuperscript{48}

Thus, the notion of labor arbitration as a sacred cow survives only as long as the labor arbitration award confines itself to the collective bargaining agreement and the law of the shop.\textsuperscript{49} Once the award intrudes on public policy, it is deserving of the critical eye of the federal courts.\textsuperscript{50}

### B. The Public Policy Exception Does Not Require Illegality

In *W.R. Grace & Co. v. Local Union 759*,\textsuperscript{51} the Supreme Court held

\textsuperscript{43} Stead Motors, 886 F.2d at 1227.

\textsuperscript{44} Edwards, *supra* note 12, at 6.

\textsuperscript{45} See *supra* note 42.


\textsuperscript{47} 314 F.2d 25 (2d Cir.), *cert. denied*, 373 U.S. 949 (1963).

\textsuperscript{48} Id. at 29. Accord, American Postal Workers Union v. United States Postal Serv., 682 F.2d 1280, 1286 (9th Cir. 1982), *cert. denied*, 459 U.S. 1200 (1983).

\textsuperscript{49} While the narrow view urges support for deference to arbitrators based on public policy grounds, Professor Meltzer has noted that the Supreme Court in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52-54 (1974), "emphasized that arbitration is primarily an instrument of the parties' private purposes rather than a means for achieving public purposes in the law of the land." Meltzer, *supra* note 22, at 250. Thus, the Court's own rulings raise doubt concerning the viability of the narrow view's principal assumptions.

\textsuperscript{50} Indeed, the National Labor Relations Board has long made exception to its general rule of deferral to arbitration awards. When the Board has found an award to be clearly repugnant to the policies of the National Labor Relations Act, the Board has refused deferral and ignored the award. See generally, *The Developing Labor Law*, 920-24 (Morris 2d ed. 1983) (hereafter "Morris").

\textsuperscript{51} 461 U.S. 757 (1983).
that a court can refuse to enforce a labor arbitration award when the award violates an explicit public policy. The Court then stated that an explicit public policy must be "well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general consideration of supposed public interests.'" However, the Court in *W.R. Grace* never addressed whether the award must either be illegal or order the parties to engage in illegal conduct for the public policy exception to apply. More specifically, the Court did not limit the use of the public policy exception to instances where the award would require the violation of a particular statute. Nonetheless, Judge Edwards takes the view that where an award does not "violate any statute, regulation, or other manifestation of positive law, or compel conduct by an employer, union or employee that would violate such a law," courts cannot rely on public policy to refuse enforcement of the award.

Judge Edwards acknowledged that his view has yet to be adopted by the Supreme Court. Indeed, the Court was presented with the argument that only illegal awards or awards compelling illegal conduct warrant use of the public policy exception, but instead explicitly chose not to address this position. Rather, the court relied on the lower court's failure to identify an explicit public policy as the basis for reversing the court of appeals' refusal to enforce an award.

The contention that the public policy exception is limited to instances where the award either directly violates a law or compels illegal conduct is a strained view of the "well defined and dominant" standard established in *W.R. Grace*. The Court in *W.R. Grace* rested its decision on *Muschany v. United States*, where the Court specifically identified the sources from which a public policy could emanate. *Muschany* provided examples of how a public policy sufficient to void a contract could be identified, noting that public policy could be established through "long governmental practice or statutory enactments, or ... violations of obvious ethical or moral standards." To argue that only direct illegality can justify the public policy exception is to ignore the existing Supreme Court position and to impute a contrary position to the Court—a posi-

52. 461 U.S. at 766.
54. Edwards, supra note 12, at 81.
55. *Misco*, 484 U.S. at 45 n.12.
56. 324 U.S. at 66.
57. 324 U.S. at 66-67. Moreover, at least one commentator who joins Judge Edwards in the narrow view has acknowledged that Judge Edwards' reading of *W.R. Grace* as requiring an outright violation of law is strained. Dunsford, *The Judicial Doctrine of Public Policy: Misco Reviewed*, 4 LAB. LAW. 669, 676 (1988). As Professor Dunsford notes, "it is apparent [in *W. R. Grace* that] the Court was thinking of public policy in a broader sense than solely of violations of law or directions to a party to perform an action that would violate the law." *Id.*
tion they have explicitly opted not to take.58

C. Misco Did Not Promote Judge Edwards’ Narrow View of the Public Policy Exception

Judge Edwards has interpreted the Misco decision as narrowing the public policy exception. In particular, Judge Edwards argues first that Misco held that unless public policy is well established in positive law, (i.e., a statute, a regulation, or case law), “the inquiry is over”.59 This position is in apparent conflict with the broader identification of public policy undertaken in Muschany. Since Misco did not announce a retreat from Muschany, the narrow reading of Misco is more speculative than interpretative. Judge Edwards then notes that Misco requires that, even if a sufficient public policy can be identified, the award must be in “explicit conflict” with that policy.60 This simply tracks the prior holdings in W.R. Grace and Muschany, and therefore does not narrow the effect of these earlier decisions.

In Misco, the Court found that the Fifth Circuit failed to satisfy the first part of the two-step process because it made no attempt to review existing law to support its refusal to enforce the arbitration award.61 Indeed, by relying on generalized considerations of public policy the Fifth Circuit had done precisely what Muschany and W.R. Grace proscribed.

The Misco Court also emphasized the tenuous connection between any public policy against operating dangerous machinery while under the influence of illegal drugs and the conduct of the grievant, Isaiah Cooper. Since the employer had not proved that the employee had ever possessed or used illegal drugs while at work, the employer had not shown just cause for discharging him in the first place. The Court correctly found

58. It is interesting to note that in wrongful discharge cases, the states appear to have adopted the Muschany view of what defines public policy. In Cordle v. General Hugh Mercer Corp., 325 S.E.2d 111 (W. Va. 1984), the West Virginia Supreme Court stated as follows:

   The rule of law, most generally stated, is that “public policy” is that principle of law which holds that “no person can lawfully do that which has a tendency to be injurious to the public or against public good . . .” even though “no actual injury” may have resulted in a particular case “to the public”. . . [t]he sources determinative of public policy are, among others, our federal and state constitutions, our public statutes, our judicial decisions, the applicable principle of common law, and the acknowledged prevailing concepts of the federal and state governments relating to and affecting the safety, health, morals, and general welfare of the people.

   Id. at 114 (quoting Allen v. Commercial Casualty Co., 131 N.J.L. 475, 477-78, 37 A.2d 37, 38-39 (1944)).

   The above language and definition of public policy is particularly appropriate in light of the inherent and unpredictable dangers of returning a known drug abuser to the workplace. But see, Zaccardi v. Zale Corp., 856 F.2d 1473 (10th Cir. 1988) (suggesting that public policy is found only in “clear mandate” of statutes).

59. Edwards, supra note 12, at 17.

60. Id.

61. 484 U.S. at 44.
that the Fifth Circuit had engaged in impermissible fact finding.\textsuperscript{62}

Judge Edwards views the \textit{Misco} Court's criticism of the Fifth Circuit's fact-finding as misleading. By casting the basis for the decision as impermissible appellate fact finding, Judge Edwards suggests there is an incorrect ambiguity, implying that the Court would have ruled differently if the employer had proved that Cooper operated dangerous machinery while under the influence of drugs and if the policy had been well defined and dominant.\textsuperscript{63} The problem with Judge Edwards' criticism, however, is that the Court in \textit{Misco} does allow for such an outcome. The Court's allowance for a different result in a subsequent case with modified facts is a rebuke to Judge Edwards' contention that only a legal proscription against Cooper's reinstatement could have created a public policy violation. Judge Edwards also labels as a "false lead" the Court's observation that Cooper would not necessarily operate dangerous machinery in the future, since the award allowed a different job placement of Cooper.\textsuperscript{64} This is another example of the Court going out of its way not to follow the narrow view of the public policy exception, and to allow use of the exception where the facts are appropriate.

In sum, Judge Edwards uses the poor facts of \textit{Misco} to create a narrow view of the public policy exception despite \textit{Misco}'s recognition that the employer's inability to prove just cause for discharge left it unable to refuse enforcement of the award. The Court repeatedly limited its ruling to those facts and explicitly chose not to narrow the public policy exception because it may apply to more certain violations of public policy.\textsuperscript{65} Judge Edwards has tried unsuccessfully to argue away the most meaningful result of \textit{Misco}: the establishment of a blueprint for what courts must do to justify not enforcing a labor arbitrator's award on the grounds of public policy. While the facts and the development of the record in \textit{Misco} were insufficient to warrant action by the Supreme Court, the guidelines for such review by trial courts were clearly laid down.

\textbf{D. Post-Misco and the Treatment of the Narrow View}

The decisions after \textit{Misco} have failed to establish any trend toward a consensus supporting the narrow view of the public policy exception. Indeed, the courts of appeals and district courts that have addressed the public policy issue have often followed \textit{Misco}, focusing on the facts in an

\textsuperscript{62} Id.
\textsuperscript{63} Edwards, supra note 12, at 18.
\textsuperscript{64} Id. at 19.
\textsuperscript{65} 484 U.S. at 45 & n.12. The Court stated: "We need not address the Union's position that a court may refuse to enforce an award on public policy grounds only when the award itself violates a statute, regulation, or other manifestation of positive law, or compels conduct by the employer that would violate such a law."
effort to avoid the question of how narrow or expansive the exception should be.

The split in the circuits appears to be a result of differences in the circuits’ willingness (1) to collect enough sources of law to establish a public policy, and (2) to identify the employee’s behavior as sufficiently egregious as to violate the public policy. As discussed below, the Eighth and Eleventh Circuits, and at least some members of the Ninth Circuit, have used *Misco* to enhance workplace and public safety.

Courts affirming arbitral awards have emphasized the employer’s failure to prove facts sufficient to establish just cause for discharge. In *United States Postal Service v. National Association of Letter Carriers*, the Third Circuit upheld the reinstatement of a black postal worker who had been fired for shooting out the windows of his white supervisor’s unattended car while off-duty. The arbitrator had reinstated the employee and found no just cause for discharge due to the “supercharged” atmosphere of racial discrimination involving the supervisor and the employee, the employee’s having filed a racial discrimination complaint, the absence of other violent acts by the employee, and the off-duty nature of the conduct.

After devoting most of its opinion to criticizing the district court for engaging in impermissible *de novo* fact-finding and reversing the district court’s refusal to enforce on that basis, without further explanation, the appeals court added that the discharge was not required by law or public policy. However, the court apparently based that conclusion on the arbitrator’s finding that the employee was amenable to other discipline and that any public policy cited by the district court could be supported by the employee’s rehabilitation through lesser discipline. In sum, it appears that the Third Circuit relied on the absence of a pattern of violence by the employee in agreeing to enforce the award.

In *Stead Motors of Walnut Creek v. Automotive Machinists Lodge 1173*, the Ninth Circuit had originally refused to enforce the reinstatement of an auto mechanic who had persistently performed negligently. The court found the reinstatement violated a state public policy against the operation of improperly maintained vehicles and cited a state statu-

66. 839 F.2d 146 (3d Cir. 1988).
67. *Id.* at 147.
68. *Id.* at 149-50.
69. *Id.* This decision should not be read as allowing arbitrators to avoid the public policy issue simply by requiring drug rehabilitation. The employer in *National Association of Letter Carriers* apparently contributed significantly to the employee’s misconduct. We are unaware of any research showing employers at fault for the typical abuser of illegal drugs.
71. *Id.*
tory scheme in support of this public policy. On rehearing en banc, the Ninth Circuit vacated the panel’s decision and enforced the reinstatement award. However, the plurality nature of the reversal revealed a circuit at odds with itself over the proper application of the public policy exception.

The Stead Motors mechanic had been discharged after repeated negligence in repairing cars, where the last incident nearly resulted in the loss of a car’s wheel. On rehearing, the five judge plurality found that since there was no public policy barring reinstatement, the arbitration award reinstating the mechanic could not be vacated. In a concurring opinion, four judges agreed in the result and the conclusion that the necessary public policy had not been sufficiently supported by state laws, but criticized the plurality opinion for wrongly urging deference to arbitral fact-finding in the public policy context. The two dissenting judges severely criticized the plurality opinion for its cavalier attitude toward public safety and the real impact of returning an incompetent auto mechanic to work.

The Eighth and Eleventh Circuits have opted to follow the Misco blueprint and use the public policy exception to refuse enforcement of safety-related awards. In Iowa Electric Light and Power Co. v. Local 204, IBEW, an arbitrator reinstated a nuclear power plant employee discharged for the deliberate violation of federally-mandated safety regulations. The court had little trouble identifying a “well defined and dominant national policy requiring strict adherence to nuclear safety rules.” The court cited the Nuclear Regulatory Commission’s regulations and Supreme Court rulings emphasizing the pervasive and safety-oriented regulatory scheme of commercial nuclear power. The Eighth Circuit then held that an employee who willfully violated the NRC safety rules and created the danger of a nuclear disaster could not be trusted in the nuclear environment and any reinstatement would violate the strong public policy.

Judge Edwards attacked the Iowa Electric decision primarily relying on his view that since discharge was not mandated by any law, the reinstatement could not violate public policy. The Eighth Circuit correctly

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72. Id. at 359.
73. 886 F.2d at 1217.
74. Id. at 1202-03.
75. Id. at 1224-28.
76. Id. at 1217-24 (Trott, J., dissenting).
77. 834 F.2d 1424 (8th Cir. 1987).
78. Id. at 1426.
79. Id. at 1427.
80. Id. at 1427-28.
81. Id. at 1429.
82. Edwards, supra note 12, at 22.
noted, however, that *Misco* did “not require[] [the court] to find that the award itself is illegal before . . . overrul[ing] the arbitrator on public policy grounds.” 83 Significantly, the Eighth Circuit cited *Muschany* for the proposition that “the Supreme Court based the public policy exception on ‘definite indications in the law of the sovereignty . . . not just on “‘definite laws’”’.” 84 Thus, the *Iowa Electric* court did not require the award itself to be illegal—whether by statute or otherwise—in order to refuse to enforce it. Since Judge Edwards has not acknowledged this reading of *Muschany*, it is unclear how he harmonizes his position with this language.

Judge Edwards offers an ominous prediction. He argues that under the rubric of refusing to enforce an award based on the employee’s illegal conduct, courts will be allowed to uphold discharges for non-job-related illegal conduct. 85 Judge Edwards contends that most illegal employee conduct is non-job-related, a conclusion he bases primarily on his listing of examples of non-job-related illegal conduct. However, the “absurd possibilities” over which Judge Edwards expresses concern are of his own making. Beyond his mere speculation, he offers no basis for concluding that it is somehow unduly expansive to overrule awards where the employee’s illegal conduct is established to be job-related. 86 Indeed, it is significant that Judge Edwards does not suggest that cases of job-related illegal conduct—such as hospital nurses who physically abuse or batter patients or production line workers who tamper with or poison consumer goods—are outside the reach of the public policy exception. It cannot reasonably be argued that judges who vacate arbitration awards that reinstate such employees are expanding the public policy exception beyond its intended purposes.

In *Delta Air Lines v. Air Lines Pilots Association*, 87 the Eleventh Circuit relied on the public policy exception as defined in *Misco* to refuse to enforce an award which had reinstated an airline pilot who had been drunk while on duty. In *Delta*, the court phrased the issue as follows: “Does an established *public policy* condemn the performance of employment activities in the manner engaged in by the employee?” 88 Notably, the issue was not “Does a specific *statute* prevent the re-employment of a formerly drunken pilot?” There was no statute prohibiting re-employment of the pilot—as the narrow view would demand—but based upon numerous state and federal laws which prohibit the operation of aircraft

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83. *Iowa Elec.*, 834 F.2d at 1427 n.3.
84. *Id.* at 1427-28 n.3.
86. *Id.*
88. *Id.* at 671 (emphasis added).
while intoxicated, the court identified a well-defined and dominant public policy.

The Eleventh Circuit found that by flying a plane while drunk, the pilot's behavior violated public policy as well as the law, and as a result his reinstatement was in violation of the public policy. The court found the arbitrator was not authorized to consider the prospect of rehabilitation in modifying the remedy. Once the arbitrator found facts establishing the basis of discharge, the public policy violation was established.

As a result, the Eleventh Circuit implicitly rejected Judge Edwards' approach in *American Postal Workers* that the award itself must violate public policy. Rather, the court found that once it established that an employee's underlying misconduct during the performance of his job violates an established public policy, an award reinstating him is unenforceable.

The only reported post-*Misco* decision dealing with the effect of the public policy exception in the context of drug use in the workplace is the Eleventh Circuit's decision in *Georgia Power Co. v. IBEW, Local 84*. In *Georgia Power Co.*, the district court vacated an award reinstating a power plant employee discharged for testing significantly positive for marijuana while on duty and for possessing marijuana on plant property. Although reinstating the employee, the arbitrator found that the employee—who was responsible for monitoring gauges and meters on high pressure equipment—was a "heavy chronic drug user" and had violated the employer's drug policy.

Relying on *Delta*, the district court reviewed the numerous federal and state statutes and regulations prohibiting illegal drug use and dangerous behavior in the workplace. The court determined that the statutes explicitly stated a public policy against allowing employees to operate potentially-hazardous machinery while under the influence of drugs. Again, no statute specifically proscribed re-employing the drug user. However, in vacating the award, the court found that enforcing the award would not only be contrary to public policy, but would also place the employer in violation of state law and expose it to potential liability under Federal OSHA.

89. Id. at 672-73.
90. Id. at 674.
91. American Postal Workers Union v. United States Postal Serv., 789 F.2d 1, 8 & n.23 (D.C. Cir. 1986) ("The arbitrator's award was not itself unlawful ... and did not otherwise have the effect of mandating any illegal conduct").
92. *Delta Air Lines*, 861 F.2d at 674.
94. Id. at 533-34.
95. Id. at 534.
96. Id. at 535-38.
97. Id. at 539.
Thus, the district court rejected the narrow view of the public policy exception and chose instead to find that the public interest in employee and public safety outweighed the values of deferring to private arbitration rulings. In a published per curiam opinion, the Eleventh Circuit affirmed on the basis of the district court's opinion.98

While Judge Edwards argues that Misco establishes the requirement that the award itself be illegal for the public policy exception to apply, the Supreme Court has chosen not to resolve that issue on several occasions subsequent to Misco.99 It is interesting to note that the Court denied a writ of certiorari filed in Delta.100 Although conventional wisdom counsels against interpreting such denials, it remains noteworthy that although the court in Delta did precisely what Judge Edwards claims Misco prohibits, the Supreme Court was content to let the ruling stand. Even if certiorari was denied merely to allow the issue to further percolate at the court of appeals level, the denial seems to indicate a level of uncertainty about narrowing the public policy exception. The denial is particularly significant in light of Judge Edwards' assertion that there are at least four votes on the Court in favor of the narrow interpretation.101

E. The Public Policy Exception Does Not Threaten the Duty to Bargain

One of the great ironies of Judge Edwards' defense of the narrow view of the public policy exception is his contention that public policy supports labor dispute resolution through arbitration and that the duty to bargain would be threatened by use of the public policy exception. In essence, Judge Edwards argues that if courts were allowed to uphold discharges based on public policy grounds, employers would no longer need to bargain in good faith over mandatory subjects of bargaining such as safety issues.102 In referring to the Iowa Electric decision, Judge Edwards states:

In practical terms, the court's decision licenses the employer to take unilateral action with respect to this safety issue. Henceforth, the employer is virtually free to fire any employee who threatens the integrity of the secondary containment system, confident of the fact that it will likely prevail in court if an arbitrator rules that it did not have "just cause." . . . In short, the employer is no longer strictly bound by the duty to bargain.

98. Georgia Power Co. v. IBEW, 896 F.2d 507 (11th Cir. 1990) (per curiam).
100. 110 S. Ct. 201 (1989).
101. Edwards, supra note 12, at 31. This discussion on the admittedly obscure process of granting certiorari is not intended to attach significance to the otherwise unexplainable; we only offer our own speculation in response to the inferences drawn by Judge Edwards.
over grievances and arbitration procedures as they relate to this safety issue. The relevant language in the collective bargaining agreement is thus rendered meaningless. 103

While the above language strikes an ominous tone, it is without foundation. First, the Iowa Electric decision specifically anticipated that employees who violated some safety rules could be reinstated without breaching public policy. 104 This ruling discounts the claim of the employer's unfettered right to discharge.

Second, Judge Edwards appears to overlook a critical part of the arbitration process. First, the employer must prove, and then the arbitrator must find, facts establishing just cause for the discharge. 105 In Iowa Electric and Delta, and most recently in Georgia Power Co., the courts did not engage in de novo fact-finding, but rather relied on the facts as found by the arbitrator. Indeed, these courts exhibited precisely the deference to arbitral fact-finding that the narrow view promotes. The courts then applied the facts to the identified public policy and found a violation. Since the determination of whether the facts of the award violate public policy is a judicial question, 106 there is no undermining of the arbitration process. More importantly, the burden of proof requirements of the bargained-for arbitration process prohibit the development of any unfettered employer right to discharge. The employer must still prove, usually by a preponderance of the evidence or a higher degree of proof, that the employee did engage in dischargeable conduct. 107

Third, whatever may be the state of an employer's right to discharge, the rules of discipline are subject to the bargaining process. Thus, if a union feels strongly enough, it can always pressure the employer to modify the nature or degree of discipline. An employer's failure to bargain remains an unfair labor practice that can be remedied in action by the National Labor Relations Board. 108

Finally, Judge Edwards finds it disturbing and paradoxical that a union and employer could reach an agreement on discipline that ostensibly violates public policy, but if the parties complied with the agreement, neither party would have a cause of action and a federal court would not have an opportunity to find the public policy violation. 109

103. Id. at 26, 27.
104. Iowa Elec., 834 F.2d at 1429.
106. W.R. Grace, 461 U.S. at 766 ("The question of public policy is ultimately one for resolution by the court.").
This argument is curious, because it appears to support a strengthening of the scope of the public policy exception. In any event, the federal courts are not prosecutors, and the failure of two parties to bring their illegal dealings to the courts' attention is not unusual, in or out of the labor context. Judge Edwards' contention that the public policy exception is not justified because private parties can evade it by agreement appears somewhat cynical, and attempts to eliminate a mechanism for the federal courts' protection of workplace and public safety simply because the mechanism is not infallible.

The most poignant response to the purported sanctity of arbitration and collective bargaining was recently made by Judge Trott in his dissent in Stead Motors:

The bromidic observation of the court that all of us suffer when potentially productive workers are relegated to unemployment is scarcely a response to the threat to public safety embodied in the majority opinion. Accidents happen in the blink of an eye. Our best defense to these inescapable perils of life is . . . attentive, trustworthy human beings . . . I do not believe that deference to arbitration, a concept with which I wholeheartedly agree, suffers at all if this judiciary retains the right to keep arbitrators within the bounds of public policy; nor do I think Misco compels the excessively "hands-off" policy adopted today in this circuit.110

In the context of public and workplace safety, arguments that deference to arbitration requires a narrow view of the public policy exception violates a sacred trust in favor of a sacred cow. Although less than seventeen percent (17%) of the workforce is currently unionized, the entire labor force remains susceptible to the negligent injuries caused by incompetent mechanics, drunken pilots, or drug-abusing utility workers. If the proponents of the narrow view are to promote the public policy behind arbitration, they must be prepared to defend that position in the context of changing values and emphases among concurrent public policies against drug use.111 To argue for the narrow view without apologizing for impact, or at least acknowledging these equal and competing public policies, is simply to choose to maintain the status quo without concern for present realities.

110. Stead Motors, 886 F.2d at 1222 (Trott, J., dissenting).
111. In fact, the Supreme Court has continued to reevaluate the role of collective bargaining as it relates to other public policies. In Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399 (1988), the Court refused to allow a collective bargaining agreement or federal labor law to preempt a union employee's state law wrongful discharge action, when the employee's claim was based on a state workers' compensation law. Id. at 411. As the Court noted, "there is nothing novel about recognizing that substantive rights in the labor relations context can exist without interpreting collective-bargaining agreements." Id. at 411.
IV
THE USE OF MISCO BY THE JUDICIARY TO RECOGNIZE A PUBLIC POLICY AGAINST DRUGS IN THE WORKPLACE

If the *Misco* framework is followed, public policy can be used to vacate erroneous arbitration awards. A specific public policy against the use of drugs in the workplace can and should be judicially recognized for this purpose. Virtually any employee in a job that presents significant safety risks who uses or possesses illegal drugs should be discharged. When that discharge is subject to arbitration, it is appropriate for an arbitrator to be able to review the facts that support the discharge, but if the employee's conduct is proscribed by explicit public policy, the decision to discharge should be beyond challenge. An employee who uses illegal drugs while performing his employment duties, if those duties include operations critical to the safety of the plant and its employees, is violating restrictions established by all three branches of state and federal government. An arbitrator's order that the employer suffer the employee's improper performance and not be allowed to discharge the employee (indeed, re-employ the employee in the same critical position) would violate public policy well-established by numerous federal statutes, regulations, and executive orders prohibiting drug use, especially when such use is related to the employment position. These authorities are reviewed in some detail below in order to establish precisely what *Misco* requires: a "well-defined and dominant" public policy.

A. The Judicial Branch

The United States Supreme Court recently addressed the specific concern of drug abuse by employees in safety-sensitive positions. In *National Treasury Employees Union v. Von Raab*, the Court called drug abuse "one of the most serious problems confronting our society today," noting "there is little reason to believe that American workplaces are immune from this pervasive social problem." In upholding drug-testing of U.S. Custom Service Agents, the Court recognized that "the public should not bear the risk that employees who may suffer from impaired perception and judgment will be promoted to positions where they may need to employ deadly force." Neither should private employers who use individuals in similar safety-sensitive positions be made to bear the risks caused by illegal use of drugs.

112. McPherson, supra note 105, at 388.
114. Id. at 674.
115. Id.
116. Id. at 671.
In *Skinner v. Railway Labor Executives Association*, the Court recognized the criminal nature of drug possession, but stated "it is a separate and far more dangerous thing to perform certain sensitive tasks while under the influence of those substances." In approving the drug-testing of railroad employees, the Court lauded the inhibitory effect drug-testing would have on employees in safety-sensitive positions. The Court recognized the compelling need for urinalyses to determine drug usage since employees using illegal drugs could cause "great human loss before any signs of impairment became noticeable to supervisors or others."

Many other federal court decisions have reflected the judiciary's critical attitude toward drug-use by employees in America's workplaces. The Eleventh Circuit Court of Appeals recently recognized the "strong and legitimate interest" of the City of Atlanta Bureau of Fire Services in protecting public safety and welfare by ensuring that firefighters do not use drugs. The Third Circuit Court of Appeals has declared that "[t]he enormity of the problem facing this country because of drug use is sufficiently well established to justify judicial notice." In *Roane v. Conair, Inc.*, a district court in Kentucky held that the nation's drug problem required a "national policy" justifying retention of jurisdiction over state claims, and stated that "no greater issue of employer-employee relations exists in this nation than how to deal with drugs in the workplace."

Regardless of the context, federal courts have consistently recognized the need to eliminate drug use from the workplace. Additionally, appellate courts in several states have supported programs designed to curb employee drug use. The Texas Court of Appeals enthusiastically endorsed a company's policy of "eliminating drug abusers from the pri-

118. Id. at 633 (emphasis added).
119. Id. at 629-30.
120. Id. at 628.
121. Everett v. Napper, 833 F.2d 1507, 1513 (11th Cir. 1987).
124. Id. at 806.
125. For example, Copeland v. Philadelphia Police Dep't, 840 F.2d 1139, 1142-44 (3d Cir. 1988) (probable cause existed to uphold discharge of policeman for marijuana in urine sample, even though urinalysis was prompted by uncorroborated accusations by girlfriend), cert. denied, 490 U.S. 1004 (1989); Ensor v. Rust Eng'g Co., 704 F. Supp. 808, 814 (E.D. Tenn. 1989) (an employer would be "foolhardy... not to take every reasonable step it could to identify drug use among its employees," even by the plaintiff, a delivery person); National Air Traffic Controllers Ass'n v. Burnley, 700 F. Supp. 1043, 1046 n.3 (N.D. Cal. 1988) (judicial notice of America's serious drug problem provides sufficient reason to guard against drug use by air traffic controllers).
The Supreme Court of Alaska found that the public policy in protecting the health and safety of fellow oil rig workers outweighed employees' right to privacy in off-duty activities including the use of drugs. Similarly, the Supreme Court of Nevada found significant hazards presented by an employee who smoked marijuana while off-duty from the explosives plant at which she worked. The court found that "the very nature of [the manufacture of explosives] would require . . . employees to be free from controlled substances that may impair their work performance or judgment."

In Texas Employment Commission v. Hughes Drilling Fluids, the court ruled that an employee's refusal to submit to a urinalysis required by his employer constituted "misconduct" rendering him ineligible for unemployment benefits upon his subsequent dismissal. The Georgia Supreme Court's only decision on the issue of drug use by employees in a non-criminal case also addressed the public policy supporting urinalysis of police employees suspected of drug use. It expressed concern about employees' ability to carry out duties "honestly and vigorously." But, the most important concern of the court was that employees who used marijuana could "endanger their fellow employees and the public" while performing their duties. Whether the weapon of endangerment is a gun or the mishandled equipment and tools of a manufacturing plant, explosives, or even motor vehicles, state appellate courts have begun to clearly articulate a policy against the employment of individuals who use drugs and are in a position to endanger their fellow employees or the public.

It is important to note that both federal and state courts have exhibited a willingness to compromise constitutional privacy rights in order to uphold drug testing, including random testing, as a reasonable means removing illegal drug use from the workplace. If such constitutional rights can be subjugated to the public policy against workplace drug use, it is difficult to imagine why the policy of judicial deference to arbitration should be less yielding.

130. Id. at 803 (emphasis added).
132. Id. at 113, 365 S.E.2d at 434.
Tort law has also imposed upon employers the responsibility of eliminating unsafe practices from their workplaces. Many courts have held employers responsible for their employees' behavior—especially when the employer knew of the employee's potentially dangerous tendencies.134 Although tort law may not specifically make reinstatement illegal—as the narrow view would seem to require—court decisions in this area clearly require employers to be reasonable and prudent in critical employment decisions. This legal duty would be directly contravened by an arbitration award to re-employ a chronic user of illegal drugs in a position where mistakes could kill or maim other employees.

B. The Legislative Branch

The Supreme Court has declared that “congressional enactments... determine public policy.”135 Recent congressional statements in regard to safety and drug usage by employees in the work force leave no room for equivocation about public policy.

1. Safety Legislation

The Occupational Safety and Health Act of 1970 (OSHA),136 requires each employer to provide “employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.”137 The specific public policy advanced by OSHA is declared in Section 651. This section provides:

The Congress declares it to be its purpose and policy, ... to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources ... by encouraging employers and employees in their efforts to reduce the number of occupational safety and health hazards at their places of employment, and to stimulate employers and employees to institute new and to perfect existing programs for providing safe and healthful working

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135. Muschany, 324 U.S. at 68.
Most states have statutes that are equally direct in mandating the employer's obligation. Georgia, for example, requires that:

Every employer shall furnish employment which shall be reasonably safe for the employees therein, . . . shall adopt and use methods and processes reasonably adequate to render such an employment and place of employment safe, and shall do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employees.\(^{139}\)

On the subject of employment, the Georgia legislature has gone even further, imposing a specific duty on employers in their selection of safe employees:

The employer is bound to exercise ordinary care in the selection of employees and not to retain them after knowledge of incompetency . . . \(^{140}\)

The word "competent" in Georgia's statute has been interpreted to include everything that "is essential to make up a reasonably safe person, considering the nature of the work, and the general safety of those who are required to associate with such person in the common, general employment." \(^{141}\) Thus, statutes in Georgia\(^ {142}\)—and other states\(^ {143}\)—specifically require that employers not retain employees after knowledge of the employee's inability to work in a safe and competent manner.

2. Anti-Drug Abuse Act

On November 18, 1988, an omnibus anti-drug measure entitled the Anti-Drug Abuse Act of 1988 was signed into law.\(^ {144}\) In the introduction to the Act, Congress listed twenty-one (21) specific findings with regard to drug use. These include:

Illegal drug use is prevalent in the workplace and endangers fellow workers, national security, public safety, company morale and production;

It is estimated that drug users are three times as likely to be involved in on-the-job accidents, are absent from work twice as often, and incur three times the average level of sickness costs as non-users;

The total cost to the economy of drug use is estimated to be over

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\(^{142}\) GA. CODE ANN. § 34-7-20 (1982) (GA. CODE ANN. § 66-301 (Harrison Supp. 1988)).

\(^{143}\) See, e.g., CAL. LAB. CODE §§ 6400-6401 (West 1989); FLA. STAT. ANN. § 440.56(1) (West Supp. 1991); IOWA CODE § 88.4 (West 1984); MASS. GEN. LAWS ANN. ch. 153, § 1 (West 1958).

The specific declaration of Congress in enacting this statute was as follows: "It is the declared policy of the United States Government to create a drug free America by 1995."  

3. Drug-Free Workplace Act

One of the provisions of the Anti-Drug Abuse Act of 1988 is the "Drug-Free Workplace Act of 1988" (hereinafter "DFWA"). Under § 702(a) of the DFWA, private employers with federal contracts of $25,000 or more must, in pertinent part: (1) publish a statement informing employees that the possession or use of a controlled substance is prohibited in the workplace; (2) specify the penalties for violating such prohibition; (3) establish a drug-free awareness program; (4) impose the listed sanctions on employees for violation of the drug-free workplace policy; (5) notify the contracting agency of any employee convicted of violating a controlled substance law while at the workplace, and (6) make a "good faith effort" to continue to maintain a drug-free workplace. A contractor could have its contract terminated and could be subject to suspension and debarment if it either fails to fulfill the requirements of the DFWA or a significant number of employees are convicted of workplace offenses of criminal drug statutes so as to indicate that the contractor has failed to provide a drug-free workplace.


Congress enacted the Controlled Substances Act as part of the Comprehensive Drug Abuse Prevention and Control Act. By this Act, Congress recognized that "the illegal importation, manufacture, distribution and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people."

Similarly, virtually every state has enacted criminal codes making it a crime to possess, distribute or sell marijuana or other drugs. Indeed, in some jurisdictions the mere possession of tetrahydrocannabinol (the psychoactive ingredient in marijuana) is a felony.

5. Discrimination Statutes

Congress has also declared public policy with regard to illegal drugs

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146. Id. § 1502(b) (emphasis added).
by refusing to recognize drug abusers as "handicapped" within the meaning of the Rehabilitation Act. The rationale for the exclusion is that the employee's drug abuse "would constitute a direct threat to property or the safety of others." Thus, Congress has mandated that current drug-users are not required to be hired or advanced in employment by federal contractors and have no protection under the Rehabilitation Act of 1973. Moreover, Section 104(a) of the Americans With Disabilities Act of 1990, which was just enacted this past year, specifically excludes current users of illegal drugs from the protection of the Act. Further, Section 104(c) excludes drug tests from the Act's limitations upon medical examinations, expressly providing that the Act shall not be construed to prohibit or encourage either drug testing or the making of employment decisions based upon the results of such tests.

C. The Executive Branch

The Executive branch has clearly articulated its policy with regard to the employment of drug-users. President Bush has announced a multi-billion dollar broad-based plan to attack the nation's drug problem, encompassing strengthened law enforcement, education, drug treatment, community action, and workplace drug policies. In the employment context, President Bush has urged employers to implement policies which deny employment to individuals who are not drug-free.

On September 15, 1986, President Reagan signed Executive Order 12,564, requiring federal employees to refrain from the use of illegal drugs and declaring that persons who use illegal drugs are not suitable for federal employment. The Executive Order called for drug-testing employees in sensitive positions, and other employees when there is a reasonable suspicion that the employee uses illegal drugs. The Executive Order makes the following policy declarations:

The use of illegal drugs, on or off duty, by Federal employees impairs the efficiency of Federal departments and agencies, undermines public confidence in them, and makes it more difficult for other employees who do not use illegal drugs to perform their jobs effectively. The use of illegal drugs, on or off duty, by Federal employees also can pose a

156. NATIONAL DRUG CONTROL STRATEGY, supra note 2, at 57.
serious health and safety threat to members of the public and to other Federal employees . . . .

On September 28, 1988, the Department of Defense ("DOD") entered Interim Rules (by-passing Notice of Proposed Rulemaking) stating DOD's policy on a drug-free work force and providing for contract clauses in bid solicitations and contracts with certain criteria. The policy of the Defense Department very simply stated that "defense contractors shall maintain a program for achieving a drug-free work force." Among other comments, the DOD recognized that "Employees that [sic, who] use illegal drugs, on or off duty, tend to be less productive, less reliable, and prone to greater absenteeism resulting in the potential for increased costs, delay and risk to the government contract." The regulations also recognize that the "[u]se of illegal drugs also creates the possibility of coercion, influence and irresponsible action under pressure that may pose a serious risk to national security, and health and safety."

Other federal agencies have set forth rules and regulations requiring employers to establish anti-drug and drug testing programs in various safety-sensitive industries. These include the Urban Mass Transit Administration which, in order to "ensure the safety of the transit riding public," requires all federally assisted public transit operations to test for drugs prior to employment, when there is reasonable cause, after an accident, before returning to duty to perform sensitive safety functions after a positive drug test and randomly. Because of the need to reduce accidents in motor carrier operations and the desire to discourage the use of controlled substances among employees, the Federal Highway Administration requires carriers who operate commercial vehicles in interstate commerce to screen commercial motor vehicle drivers for drugs.

Similarly, the Coast Guard now requires drug-testing all commercial vessel personnel "to ensure that users of dangerous drugs are not issued licenses . . . or . . . accepted for employment on vessels engaged in commercial operations." The Federal Aviation Administration requires all commercial carriers to have an anti-drug program for employ-

159. Id. at 37,764 (emphasis added).
160. Id.
161. Id.
ees who perform safety-sensitive or security-related functions.\textsuperscript{165} Nor may crew members of any aircraft perform their duties "while using any drug that affects their faculties in any way contrary to safety."\textsuperscript{166} After concluding that despite the industry's use of "every major strategy conceivable to control drug use . . . the public and railroad employees remain at risk,"\textsuperscript{167} the Federal Railroad Administration prohibited non-medical drug use by safety-sensitive railroad employees and expanded the testing programs for such employees to include random testing.\textsuperscript{168}

In an effort to ensure safe and drug-free pipeline operations, the Research and Special Programs Administration has proposed requiring operators of liquified natural gas facilities or pipelines used to transport natural gas or hazardous liquids to have an anti-drug program, including drug testing, for persons who perform safety-related functions.\textsuperscript{169} Finally, the Department of Health and Human Services adopted "Mandatory Guidelines for Federal Workplace Drug Testing Programs."\textsuperscript{170} Reviewed collectively, these regulations reveal a distinct desire and goal, indeed a public policy, to eliminate drugs from every single workplace in which they present a risk to life and safety.

V

Conclusion

An employer cannot lawfully permit an employee to perform safety-critical duties who is intoxicated with, or who possesses illegal drugs. An employer who does so is an accessory to the wrongdoing. The critical point is that public policy condemns the performance of an employee's duties while using drugs, and positive law requires many employers to take all steps necessary to eliminate such conduct and to maintain a safe, drug-free work environment. Thus, whether using the narrow or expansive interpretation of \textit{Misco}, if drug use in the workplace is allowed by arbitrators, it should be soundly rejected by federal courts. An arbitrator's decision to reassign an employee who used drugs in the course of his or her previous duties, despite improper performance, violates public policy and contravenes employers' express duties.\textsuperscript{171}

\begin{itemize}
  \item \textsuperscript{166} 53 Fed. Reg. 47,024 (1988).
  \item \textsuperscript{168} \textit{Id.} at 47,102.
  \item \textsuperscript{169} 53 Fed. Reg. 25892 (1988).
  \item \textsuperscript{170} Mandatory Guidelines for Federal Workplace Drug Testing Programs, 53 Fed. Reg. 11,970 (1988) (Final Guidelines issued by National Institute on Drug Abuse/Alcohol, Drug Abuse, and Mental Health Administration).
  \item \textsuperscript{171} In Deanna Mouser's "Analysis Of The Public Policy Exception," 12 INDUS. REL. L.J. 89 (1990), the author proposes that the spirit of the \textit{Steelworker's Trilogy} can be preserved by allowing
The Eleventh Circuit’s application of this policy in *Delta Air Lines* and *Georgia Power Co.* provides a ready framework for application to instances where an employee has been discharged for drug use in the workplace. Just as Delta Air Lines was under a duty to prevent its intoxicated pilot from flying an airplane while drunk, so other employers must prevent their employees from operating dangerous equipment or performing other safety sensitive jobs while drug-impaired. The only difference between Delta’s drunken pilot and other employees is one of degree. We are all too familiar with the potential consequences to passengers on a plane flown by an intoxicated pilot. But other employees who use drugs present a similar prospect of tragedy by their operation of sophisticated and powerful equipment. The number of potential deaths should not be the marker by which improper conduct is measured. No employer, regardless of size, should be forced by an arbitrator to continue to subject employees and the public to the risk of harm or death by a drug-using employee. If an arbitrator refuses to uphold discharge of an employee who used dangerous drugs in a safety-sensitive workplace, then the arbitration award should be vacated.\(^2\)

Since trained clinicians cannot unerringly detect illegal drug use by their own patients, private employers’ programs of urinalysis have become the only objective and reliable method to confirm drug use. The Supreme Court recently recognized that “[d]etecting drug impairment on the part of employees can be a difficult task, especially where . . . it is not feasible to subject employees and their work product to the kind of day-

the arbitrator to determine whether public policy has been violated by the employer’s conduct, or would be violated by an order of reinstatement. Our first reaction is that the proposal is akin to allowing a baseball pitcher to call his own balls and strikes. Notwithstanding the author’s admirable faith in human nature, we believe her proposal is barred and unworkable for several reasons. First, the Supreme Court has already reserved the question of public policy exclusively for the courts. *W.R. Grace*, 461 U.S. at 766. Second, the reasons for such exclusive jurisdiction were well-stated in *Alexander*, 415 U.S. 36, where the court stated:

As the proctor of the bargain, the arbitrator’s task is to effectuate the intent of the parties. His source of authority is the collective bargaining agreement, and he must interpret and apply that agreement in accordance with the “industrial common law of the shop,” and the various needs of the parties. The arbitrator, however, has no general authority to invoke public laws that conflict with the bargain between the parties . . . .

*Id.* at 53. Indeed, Mouser’s proposal takes arbitrators well outside the role upon which the rule of reference is grounded, i.e., the arbitrator’s presumed specialized industrial knowledge. There can be no such presumption where public policy, either in the nature of federal or state law, is concerned. The effect of Mouser’s proposal is to remove public policy questions from federal judges who are best suited to decide them. Even if the parties agreed to submit public policy questions to an arbitrator, little or nothing would be gained in terms of efficiency. It is unlikely that arbitrators would use public policy to overrule a decision they would otherwise make based on their interpretation of the contract. In any event, whether the arbitrator reached the public policy question or not, the award could still be challenged in federal court. The real effect of Mouser’s proposal is to add another layer of decision-making, and to vest the decision-making power in someone generally untrained and unprepared to exercise it. The end result is less, not more, efficiency in the arbitration process.\(^2\)

\(^{172}\) See Stead Motors of Walnut Creek v. Automotive Machinists Lodge No. 1173, 886 F.2d 1200, 1217-24 (9th Cir. 1989) (Trott, J., dissenting), cert. denied, 110 S. Ct. 2205 (1990).
to-day scrutiny that is the norm in more traditional office environments." The Federal Railroad Administration's discussion of drug and alcohol use regulations acknowledges that impaired employees seldom display any outward "signs detectable by the lay person or, in many cases, the physician." The most commonly-used illegal drugs today present few external signs of use. Pills and smoked drugs can be ingested or inhaled quickly and completely. Even the scent of smoke soon disappears in larger work environments or on the highway where safety risks are often largest. Once drug use is shown, employers should not be required to wait for disaster before removing the employee from the workplace.

Employees who perform critical safety-related duties while using illegal drugs subject their employers to claims of having violated:

1) OSHA obligations to assure a safe workplace "so far as possible";

2) Various state laws to "do everything reasonably necessary to protect the life, health, safety, and welfare of . . . employees";

3) state laws "not to retain" employees who are not competent in safe performance of duties;

4) federal obligations to create and maintain a drug-free workforce; and

5) federal prohibition against retaining drug-using employees on duty pending a determination of improper performance.

Once an employer becomes aware of an employee's use of illegal drugs—which could affect the employee's work and safety as well as the safety of others—the employer has a legal duty under state and federal law, both statutory and common, to take appropriate steps to remove that danger. An arbitrator's order to re-employ that employee in the same potentially dangerous job ignores that legal duty. Like the employer in Delta Air Lines, other employers cannot permit drug-using employees to continue to perform their employment duties while their offensive conduct continues, "without being an accessory to the wrongdoing."

173. Von Raab, 489 U.S. at 674.


176. See supra note 138.

177. See supra note 139.


180. Delta Air Lines, 861 F.2d at 671.