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Combating Employee Drug Use Under A Narrow Public Policy Exception

Deanna J. Mouser†

Ms. Mouser rebuts Schaudies' and Miller's response to her analysis and explains that methods more direct and effective than a broad public policy exception exist to address employee drug use.

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INTRODUCTION

There are many ways to win a war. The war on drugs is no different. The war on drugs will not be won easily or in the near future, but many avenues are available to reduce employee drug use. While Schaudies and Miller (authors of the preceding article) would like the reader to believe that a judicially recognized public policy against illegal drug use is the only method to combat employee drug use, other options are available to deal with employee drug use. The parties to the contract and state and federal legislatures have at their disposal different mechanisms to reduce employee drug use. The courts lack authority to rewrite the parties' contract to specify that termination for drug use constitutes

† Deanna Mouser is the author of Mouser, Analysis of the Public Policy Exception after Paperworkers v. Misco: A Proposal to Limit the Public Policy Exception and to Allow Parties to Submit the Public Policy Question to the Arbitrator, 12 Indus. Rel. L.J. —, ante.

just cause for the employee's discharge. Schaudies and Miller in effect are advocating that drug use is always sufficient cause for an employee's termination. Allowing courts to recognize such a public policy usurps the arbitrator's authority to interpret the contract and determine whether the employee's termination was for just cause.

While I recognize that society views illegal drugs as a substantial problem, society is not a party to the labor contracts between employers and employees. A collective bargaining agreement is intended to govern the relationship between an employer and that employer's employees. Since society is not a party to the collective bargaining agreement, society cannot place additional burdens on a labor relationship via the collective bargaining process which culminates in a contract. Society can place additional burdens on a labor relationship via the legislative process which culminates in statutes. Such statutes can prohibit the employment or re-employment of persons who use illegal drugs.

Societal views cannot be read into a collective bargaining agreement unless the collective bargaining agreement exceeds the boundaries of acceptable agreements by ordering illegal conduct. Since the arbitration award is viewed as part of the parties' contract, an award also cannot order illegal conduct. Where a statute prohibits employment of a drug user, courts can use the public policy exception to vacate arbitration awards ordering reinstatement since the award ordering reinstatement thereby orders an illegal act.

Where the award does not order an illegal act, the parties have bargained for the arbitrator's determination and they have to abide by the arbitrator's decision. The disgruntled losing party cannot be allowed to circumvent the agreement to abide by the arbitrator's decision except in extraordinary circumstances, such as where the arbitrator's award orders an illegal act. The narrow public policy exception would allow a court to vacate an arbitration award ordering reinstatement of the employee.

1. A court may vacate an arbitration award on very limited grounds since "the scope of review of an arbitrator's decision in a labor dispute is extremely narrow." Federated Dept. Stores v. United Food & Commercial Workers Union Local 1442, 901 F.2d 1494, 1496 (9th Cir. 1990). A court must defer to an arbitrator's determination of the dispute except under three narrow circumstances:

The Supreme Court and this court have been equally clear about when a court can vacate an arbitration award. There are three articulated exceptions to the general rule of deferring to the arbitrator's decision: (1) when the arbitrator's award does not "draw its essence from the collective bargaining agreement" and the arbitrator is dispensing "his own brand of industrial justice"; (2) when the arbitrator exceeds the boundaries of the issues submitted to him; and (3) when the award is contrary to public policy.

_id._ (citations omitted).

The limited review of arbitration awards is because of the policy favoring arbitration: "As for federal law, the Supreme Court and the circuit courts of appeals have traditionally limited attacks upon arbitrators' awards, thereby manifesting federal public policy in favor of arbitration." Cabrini Medical Center v. Local 1199, Drug, Hosp. & Health Care Employees Union, 731 F. Supp. 612, 616 (S.D.N.Y. 1990). The _Cabrini_ court found no public policy violation because the state law against
only where a well-defined and dominant public policy provided that a
drug-using individual could not be employed in the position to which the
employee was reinstated. The narrow view reinforces the parties' agree-
ment to have an arbitrator determine the employee discipline question by
allowing a court to use the public policy exception to redetermine the
discipline question only where the arbitrator's award orders an act con-
trary to a well-defined and dominant public policy.

Where the employer does not want to be forced to reemploy an em-
ployee, the parties can bargain to restrict the arbitrator's authority by
specifying limitations on the arbitrator in the collective bargaining agree-
ment. The parties can specify that drug use results in immediate termina-
tion and can specify that the arbitrator does not have authority to vary
the employer's determination of the appropriate punishment. Courts
may vacate an award exceeding these express contractual limits on the
ground that the arbitrator exceeded his authority.2

Despite the parties' ability to specify that drug use will result in im-
mediate discharge and despite the legislatures' ability to specify that a
drug-using employee cannot be employed in specified positions or in all
positions, Schaudies and Miller suggest that courts are the only mecha-
nism that can save society from drug-using employees. They argue that
courts must vacate arbitration awards reinstating alleged drug-using em-
ployees since such an award violates the well-defined and dominant pub-
lic policy against drug use.

patient abuse was stated in general terms, did not define abuse, and therefore was not a well-defined
public policy. Id. at 618.

In reviewing an arbitration award, courts recognize that the parties have bargained for the
arbitrator's construction of the contract. New American Publications, Inc. v. Newark Typographi-
cal Union Local 103, 918 F.2d 21, 24 (3d Cir. 1990). "[T]here must be absolutely no support at all
in the record justifying the arbitrator's determinations for a court to deny enforcement of an award." 2
Id.

2. A court may vacate an arbitrator's award where the arbitrator exceeds his contractual
authority. See supra note 1. An arbitrator exceeds his authority where he ignores clear language.
Northwest Airlines, Inc. v. International Ass'n of Machinists & Aerospace Workers, Air Transport
Dist. Lodge 143, 894 F.2d 998, 1000 (8th Cir. 1990) (arbitration board exceeded its authority when
it ignored the clear language). An arbitrator also exceeds his authority when he imposes a remedy
that contradicts the agreement's express language:
The extent of an arbitrator's authority lies within the language of the contract. An arbitra-
tor does not have unfettered discretion, and may not impose a remedy which directly con-
tradicts the express language of the agreement. Nor can he or she interpret a clause or
 provision when its language is clear, unequivocal and unambiguous.
Strathmore Paper Co. v. United Paperworkers Int'l Union, 900 F.2d 423, 426 (1st Cir. 1990) ( cita-
tion omitted).
I

NO WELL DEFINED & DOMINANT PUBLIC POLICY
REQUIRES THE TERMINATION OF ALL DRUG-
USING EMPLOYEES

A. Not All Employers Terminate Drug-Using Employees

The "well-defined and dominant public policy" supporting termination of drug users is not as clear as Schaudies and Miller lead the reader to believe. Although a large number of employers test employees for drug use, a very slight percentage of these employees testing positive for drug use are actually terminated on the first positive test result. Answers to a survey of manufacturing employers who employ over 1.5 million employees demonstrate that more than 80% of the manufacturing companies have company drug policies, 93% test applicants for drugs, and 75% test some present employees. Despite this widespread use of drug policies and testing, only 12% of employees testing positive for drug use and only 6% of employees testing positive for alcohol use were automatically terminated the first time they tested positive.

Employers have realized the seriousness of the drug problem, but more importantly, most employers realize that termination is not necessarily the best solution. Employers are increasingly adopting employee assistance programs (EAPs) or rehabilitation programs to assist employees in confronting the problem of drug use. A survey of corporate exec-

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3. 5 Indiv. Empl. Rights (BNA) (Issue No. 4, March 27, 1990) at 3.
4. Id.
5. Employee Assistance Programs (EAPs) are systems to help employees solve personal problems:
   EAPs are basically systems for motivating and helping employees who have personal problems to seek and accept appropriate help in solving them. Originally established as a source to help alcoholic employees overcome their dependencies, the EAP has grown in its 40 years of existence. Although these programs are primarily designed to treat substance abuse, many EAPs will handle other problems. . . .
   G. TULACZ, What You Need To Know About Workplace Drug Testing 12 (1989). “EAPs have been shown to be an effective tool in addressing drug & alcohol abuse in the workplace.” Id. at 14.
6. The growth in EAPs is due to the program's cost-effectiveness:
   EAPs have enjoyed spectacular growth and acceptance in recent years. The reason for such growth in an employee benefit, at a time when many employee benefits are being scaled back, is that this employee benefit is financially beneficial to the employer. If employees are treated and rehabilitated, the cost in dollars (as well as human lives) is usually far less than tolerating poor performance, absenteeism, industrial accidents, worker's compensation cases, turnover and retraining, increased medical costs and any other expenses attributable to impaired employees.
   EAPs recapture their own cost by decreasing the cost of employee accidents: “An EAP isn't just a humanitarian venture by employers; it saves employers money. Of the estimated $32 billion cost of work-related accidents in 1982, about three-fourths were believed to have been caused by emotional distress.” G. TULACZ, supra note 5, at 12-13.
utives revealed that the number of companies providing drug-education programs and employee assistance programs is rapidly increasing.

Similarly, the number of companies that provide drug-education programs for their employees increased 38% between 1989 and 1990, to 35% of firms surveyed. In addition, the number of companies that offer employee assistance programs for employees identified as drug users increased to 51% in 1990, compared with 42% in 1989. For the first time, according to the survey, more companies offer treatment and counseling for drug abuse than have testing programs in place. Companies increasingly are referring employees testing positive for drug use to counseling and treatment, rather than dismissing the employee. Since arbitrators often reinstate employees who complete the EAP treatment successfully, an employer may want to specify that successful completion of the EAP treatment is the “last chance” that will be given an employee. This will prevent the reinstatement of recurrent drug abusers who attempt to avoid termination by seeking treatment whenever a supervisor becomes aware of the drug use.

Terminating employees who use drugs does not help fight the war on drugs—termination merely shifts the problem of a drug-using employee to another employer. Termination of a substance abuser may exacerbate the abuse problem. Society gains nothing from a public policy requiring that employees be terminated.

7. 5 Indiv. Empl. Rights (BNA) (Issue No. 9, June 5, 1990) at 3. The survey was of American Management Association members. Over one thousand corporate executives responded to the survey.

8. The survey of corporate executives revealed fewer terminations and greater use of drug treatment programs:

Possibly reflecting a change in corporate attitudes toward drug abuse, fewer companies reported that they automatically dismiss employees who test positive for drug use (26 percent in 1989; 22 percent in 1990), while more firms said they refer those employees for counseling and treatment (57 percent in 1989; 70 percent in 1990).

Id.

9. Arbitrators appear to favor EAPs and will often order reinstatement where the employee has sought post-discharge treatment and testifies at the arbitration to an awareness and control over the problem. Similarly, arbitrators are less sympathetic to employees who suffer relapses after treatment. It is to the advantage of the astute employer to define the EAP treatment as a “last chance” and to have the employee sign a “last chance agreement.” Otherwise, the EAP may be used by substance abusers as a ritual whereby they atone for the past as a prelude to resumption of abuse. An effective EAP should never be a revolving door.

ALCOHOL & DRUGS IN THE WORKPLACE, supra note 6, at 72.

B. Schaudies and Miller Do Not Clearly State Whether The Public Policy Against Employee Drug Use Precludes Reinstatement Of All Drug-Using Employees Or Only Those In Safety-Sensitive Positions

Schaudies and Miller do not clearly state when a court should rule that the public policy exception precludes reinstatement of a drug user. They make broad sweeping statements regarding the importance of precluding drug users from returning to work without limiting such a “public policy” to employees in safety-sensitive positions. If they are advocating that each and every one-time drug user is not ever fit for reinstatement, then that one-time drug user is also never fit for any other job. The law supporting their finding of a “public policy” precluding reinstatement of drug users does not distinguish between reinstatement and employment in a new job—these laws state a general concern against drug use by employees. Such laws would, therefore, also establish the same public policy against employing the offender in a new job. If this is their position, they are advocating a mandatory sentence of “unemployment for life” for a one-time drug user without any chance of parole based on mitigating factors.

The arbitrator’s job is to consider any mitigating factors and determine whether an employee should be reinstated after considering all the evidence. Schaudies’ and Miller’s position would preclude considering any evidence other than that of drug use—drug use would automatically constitute just cause for termination since reinstatement of a drug user would violate public policy. Such a position renders the arbitration process meaningless for any dispute involving drug use. The traditional factors arbitrators consider in determining just cause would be rendered meaningless. Such factors include the probability of rehabilitation and equal treatment concerns.

Where the parties desire this result of automatic termination of a drug user, the parties may specify this in the collective bargaining agreement. Where society believes drug use precludes employment, society may specify this in legislation. I in no way condone drug use but only

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11. Schaudies’ and Miller’s introduction section denounces all use of drugs by employees, and other sections contain similar broad statements.
12. Indeed, their article states that the decision to discharge an employee who has engaged in conduct proscribed by explicit public policy should be beyond challenge.

Some state statutes prohibit employment of persons convicted of a narcotic offense or another specified criminal offense. For example, the California Education Code prohibits a school district from employing individuals convicted of a controlled substance offense: “Governing boards of school districts also shall not employ or retain in employment persons in public school service who have been convicted of any controlled substance offense . . . .” CAL. EDUC. CODE § 44836 (West
note that several avenues are available to deal with drug users. The parties or the legislatures may specify the punishment for drug use, but courts are not authorized to rewrite the contract since the contract governs the relationship between the parties to the contract. Courts may only enjoin the enforcement of a contract that orders illegal conduct.

If Schaudies and Miller are suggesting that the public policy exception precludes the reinstatement of employees in safety-sensitive positions only, the supposed "well-defined and dominant" laws on which they rely do not draw a distinction between safety-sensitive positions and other positions. The Drug Free Workplace Act deals with all federal contractors or grantees, not merely those with substantial safety concerns. Federal and state cases that uphold drug testing merely support a public policy in favor of drug testing employees in safety-sensitive jobs and do not support a public policy in favor of terminating all drug-using employees. The statutes cited by Schaudies and Miller merely support a public policy in favor of drug-testing programs for employees, or perhaps a public policy in favor of rehabilitation programs. They do not support a public policy in favor of terminating all drug-using employees. One court has expressly noted that legislatures are the appropriate forums for balancing employees' privacy rights and employers' safety concerns regarding drug use:

The difficult and delicate task of balancing the privacy rights of job applicants and employees against the legitimate business and safety concerns of private employers involves policy determinations which are peculiarly within the purview of the Legislature, and we urge that body to recognize and act on its obligation to provide guidance in this much debated area.

Schaudies and Miller rely heavily on the Drug Free Workplace Act to support their proposition that drug users must be terminated. However, the Drug Free Workplace Act does not require that employers fire employees who use drugs—the Act requires only a good faith effort to maintain a drug free workplace. Indeed, the Drug Free Workplace Act

Supp. 1990). The statute expressly notes that if the controlled substance charges are dismissed, the statute does not preclude the individual's employment. Id. Therefore, the legislature of California has determined that mere drug use evidenced by a drug test is not sufficient to warrant immediate termination. Controlled substance offenses are defined to include possession of a myriad of substances including heroin and cocaine-based compounds. CAL. HEALTH & SAFETY CODE §§ 11054(c)(11) and (f)(1) and 11350(a) (West Supp. 1990).

Schaudies and Miller cite to regulations prohibiting employment of drug users in other positions also.

15. The language in the text under Section IV of Schaudies' and Miller's article suggests that drug using employees employed "in a job that presents significant safety risks should be discharged."


expressly recognizes that termination of an employee is not always ap-
propriate when an employee is convicted of a criminal drug offense:

A grantee or contractor shall, within 30 days after receiving notice from
an employee of a conviction [under any criminal drug statute]. . .

(1) take appropriate personnel action against such employee up to
and including termination; or

(2) require such employee to satisfactorily participate in a drug
abuse assistance or rehabilitation program approved for such purposes by
a Federal, State, or local health, law enforcement, or other appropriate
agency.\textsuperscript{19}

A good faith effort may consist of drug testing and a rehabilitation pro-
gram. None of the statutes cited by Schaudies and Miller require that
drug-using employees be terminated.

Congress has used language prohibiting the employment of specified
individuals where its intent was to preclude employment of such individ-
uals. For example, Congress precludes employment of specified catego-
ries of children.\textsuperscript{20} Where Congress intends to prohibit employment of
specified individuals, Congress is capable of wording the statutes so as to
convey that intent. State legislatures also are capable of drafting statutes
that prohibit employment of specified classes of individuals.\textsuperscript{21} None of
the statutes regarding drug use require that the employer terminate or
not employ drug users.

Moreover, it is interesting that the “well-defined and dominant pub-
lic policy” against drug use under the Drug Free Workplace Act extends
only to federal government contractors and grantees, not to all employ-
ers. Were the policy against drug use “well-defined and dominant,” Con-
gress would probably extend the policy to all employers under its
interstate commerce clause power.\textsuperscript{22} Congress chose to have this “well-
defined and dominant” policy apply only to contractors and grantees of
the federal government.

The most recent articulation of the federal legislature’s viewpoint on
drug-using employees is in the Americans With Disabilities Act of 1990,


\textsuperscript{20} “No employer shall employ any oppressive child labor in commerce or in the production of
goods for commerce or in any enterprise engaged in commerce or in the production of goods for
commerce.” 29 U.S.C. § 212(c) (1988). “Oppressive child labor” is defined by limiting the employ-
ment opportunities available to minors age 14 to 18 based on schooling and health and welfare

\textsuperscript{21} E.g. CAL. EDUC. CODE § 44836 (West Supp. 1990) (prohibiting a school district from
employing of a person convicted of any sex offense); CAL. EDUC. CODE § 44837 (West 1978)
(prohibiting a school district from employing a person determined to be a sexual psychopath).

\textsuperscript{22} For example, the Fair Labor Standards Act applies to all employers in interstate com-
Act which prohibits employers engaged in or affecting interstate commerce from requiring or sug-
enacted in July of 1990. Despite the opportunity to require that drug-using employees be terminated, the federal legislature instead chose to protect former drug users from discrimination. The Act protects former drug users from adverse employment actions if the employee is rehabilitated or participating in a rehabilitation program and no longer uses drugs.

More importantly, the Act protects from discrimination those individuals erroneously regarded as engaging in the illegal use of drugs. An employer who terminates an employee for refusing to take a drug test or without proof of a positive valid drug test may be liable for handicap discrimination should the employee argue that he was erroneously regarded as a drug user. To avoid liability, employers must be able to prove that the employee actually used drugs.

Nowhere in the Americans With Disabilities Act does Congress require the termination of all drug-using employees or even the termination of drug-using employees in safety-sensitive positions. The Act does not support the contention that a well-defined and dominant public policy precludes employment of drug users.

State laws also negate Schaudies' and Miller's insistence that a "well-defined and dominant" public policy requires the termination of drug users. State laws forbid discrimination against handicapped individuals, including drug users who are able to perform their job duties.

These laws do not require that drug users be terminated. Indeed, these laws prevent termination of an employee based on current drug use if that employee can perform the job's duties and is not a threat to others' safety or property. Since these laws exclude only current drug users who cannot perform their duties or are a safety threat from its protection, a

26. The Ohio Supreme Court explained that the rationale for extending the protection against discrimination to substance abusers who can perform their jobs is to provide help to the employees to overcome the substance abuse problem:
   One measure of a culture's viability and maturity is established by how well it addresses its problems. We gain nothing by pretending alcoholics and drug addicts can solve their problems without help or that substance abuse problems do not exist. By affirming that alcoholics and drug addicts are handicapped, to the extent that a dependency exists and has not yet compromised work skills, we seek to deal with a problem at a point where these individuals are still productive members of society, can still be helped, and still have the incentive to help themselves. Beyond this point the statute does not protect the chemically dependent individual.
court could not vacate an arbitration award reinstating an employee where that employee can perform his duties and is not a safety threat.

Since these laws prohibit discrimination against handicapped individuals, including drug users who can perform their jobs, an employer is prohibited from terminating such an employee because of his drug use. Therefore, a court could vacate an arbitration award upholding the termination of such an employee because the award would order an illegal act—discrimination against a handicapped individual. No public policy based on these laws requires termination of employees because of drug use indeed, these laws require that employees not be terminated because of drug use.

If Schaudies and Miller are extending this preclusion of employment for safety-sensitive positions only, they have made no attempt to determine in which positions employment is precluded. All employees drive, walk or ride public transportation to work and all employees come in contact with other individuals during work, so all employees on drugs could create a safety risk.

C. The Supreme Court Rejects Opportunity To Clarify Breadth Of Public Policy Exception

Schaudies and Miller argue that the Supreme Court’s denial of the Petition for Certiorari in cases adopting the broad view of the public policy exception indicates that the Supreme Court will endorse the expansionist interpretation of the public policy exception. The Supreme Court’s denial of the Petition for Certiorari in a case which endorsed the narrow view of the public policy exception completely invalidates any such theory. Courts do not credit the Supreme Court’s denial of certiorari in the expansionist cases as an endorsement of the broad view, since courts continue to apply the narrow public policy exception.


29. The federal district court in Massachusetts adopted the narrow public policy exception, noting that “not only must the conduct be against public policy, but the reinstatement itself must violate public policy.” Laidlaw Waste Sys. v. Teamsters Local 379, 134 L.R.R.M. (BNA) 2471, 2473 (D. Mass. 1990). Enforcement of an arbitration award reinstating a truck driver who was discharged for drinking beer while on a work break did not violate the public policy prohibiting alcohol consumption by transportation employees. The employer cited to a federal regulation that provided that drivers who have consumed alcohol must be taken out of service for 24 hours. Id. (citing 49 C.F.R. § 392.5(c)). This driver was out of service for five months before reinstatement. The court noted that the regulation did not require the permanent discharge of employees who drink on the job. Since the arbitrator did not find that the driver was intoxicated and since the employer had not permanently discharged other drivers guilty of the same misconduct, the court held that public policy was not violated by the driver’s reinstatement. Id.

The Sixth Circuit has also impliedly endorsed the narrow public policy exception by holding:
II
ARBITRATOR'S CONSIDERATION OF PUBLIC POLICY
ARGUMENTS MUST BE SUBJECT TO DE NOVO REVIEW

Addressing Schaudies' and Miller's footnote, 12 Indus. Rel. L.J. 153, 181 n.171, they totally misunderstand or mischaracterize my position. I never suggest that the arbitrator should determine whether his own award violates a public policy.30 Rather, I suggest that the arbitrator should attempt to construe the parties' contract consistent with exter-

"[t]he issue is not whether grievant's conduct for which he was disciplined violated some public policy or law, but rather whether the award requiring the reinstatement... violated some explicit public policy." Interstate Brands Corp. v. Chauffeurs Local Union 135, 909 F.2d 885, 893 (6th Cir. 1990). Although public policy prohibits intoxicated individuals from driving, an arbitration award ordering reinstatement of an off-duty drug user does not violate public policy. Id. The court distinguished two other cases that endorsed the broad public policy exception by noting that those cases involved on-duty misconduct. Id. at 893-4 (distinguishing Iowa Electric Light & Power Co. v. IBEW Local 204, 834 F.2d 1424 (8th Cir. 1987) and Delta Air Lines v. Airline Pilots Ass'n Intl', 861 F.2d 665 (11th Cir. 1988), cert. denied, 110 S. Ct. 201 (1989). The Sixth Circuit noted in a footnote that it did not have to determine whether to follow the broad or narrow view because of this factual distinction. 909 F.2d at 894 n.11.

The United States District Court of the Eastern District of Wisconsin also endorsed the narrow view of the public policy exception. Chrysler Motor Corp. v. International Union, Allied Industrial Workers of Am., 748 F. Supp. 1352, 1363 (E.D. Wis. 1990). The court held that the arbitration award reinstating a sexual harasser could not be overturned on public policy grounds since "[n]o statute or judicial opinion has been cited which makes it illegal to employ a person who has sexually assaulted or harassed a co-worker on one occasion." Id. The court noted in a footnote that a Wisconsin statute prohibits discrimination against an individual arrested or convicted for sexual assault unless the offense was substantially related to the circumstances of the job. Id. at 1363 n.11 (citing Wis. Stat. Ann. § 111.335 (West 1990)). This statute would prohibit a court from overturning an arbitration award ordering reinstatement of a sexual assailant unless the sexual assault was substantially related to the employee's job.

30. Although I never advocate that an arbitrator determine whether his own award violates public policy, the Fifth Circuit has remanded a case to the arbitrator for the arbitrator to determine whether his award reinstating an employee violates public policy. Oil, Chemical & Atomic Workers Int'l Union Local 4-228 v. Union Oil Co., 818 F.2d 437, 442 (5th Cir. 1987). The arbitrator had reinstated an employee after the employer discharged her for off-duty and off-premises possession and/or sale of cocaine. Union Oil Co., 92 Lab. Arb. (BNA) 777, 777 (no date) (Nicholas, Arb.). The reinstatement was based on the arbitrator's conclusion that the employee was not apt to be involved with drugs in the future since the terms of her probation prohibited use and delivery of drugs.

The Fifth Circuit remanded the case to the arbitrator to determine whether the reinstatement violated public policy based on a subsequent drug test that revealed that the employee had used marijuana: "Whether... the employee's] post-award drug use renders enforcement of her reinstatement award against public policy presents an issue that should be resolved by the arbitrator, not the court." 818 F.2d at 442. This decision to remand the case to the arbitrator was before the Supreme Court decided United Paperworkers v. Misco, 484 U.S. 29 (1987). The arbitrator's award subsequent to the remand was decided after Misco was decided. The arbitrator refused to consider the subsequent evidence of marijuana use and determined that his prior decision to reinstate the employee was the proper decision based on the evidence presented at the arbitration hearing. 92 Lab. Arb. (BNA) at 778-79. The arbitrator noted that the evidence of subsequent drug use may be addressed by subsequent discipline and a subsequent arbitrator. Id. at 779-80.
nal law—the public policy—where such an interpretation is possible.\textsuperscript{31} Arbitrators will consider the safety risks from a drug-using employee when determining whether to uphold an employer’s decision to terminate an employee.\textsuperscript{32} One factor the parties can submit for the arbitrator’s determination is whether the employee’s underlying conduct violated a public policy since that determination is part of the determination of just cause.\textsuperscript{33} The parties to the collective bargaining agreement can also “contractualize” external laws by stating in the collective bargaining agreement that a violation of a specified law is grounds for immediate termination.\textsuperscript{34}

Moreover, I explicitly state that courts will engage in de novo review in determining whether an award violates a well-defined and dominant public policy.\textsuperscript{35} Nowhere do I even suggest that the public policy question will be removed from judges. An arbitrator’s consideration of the public policy arguments might tilt his decision in an otherwise close case to a finding that the employee’s termination was for just cause, rendering an employer’s appeal unnecessary. This is more efficient than several years of appealing the award through the courts arguing that vague and obscure laws constitute a well-defined and dominant public policy.

\textsuperscript{31} See Mouser, \textit{supra} note 13, at 124-25 & nn.172-76.
\textsuperscript{32} One arbitrator upheld the employer’s dismissal of a bus driver responsible for driving elementary school children when the driver tested positive for marijuana:

[T]he grievant was employed as a bus driver charged with the responsibility of transporting school children. The Company bears a burden for the safety of its passengers as well as the safety of non-passengers on the streets traveled by those buses. It can hardly afford to take chances with a driver who may be driving under the influence of marijuana. Under the circumstances, the Company could do no less than remove the grievant from its employ. Mayflower Contract Services, 91 Lab. Arb. (BNA) 1353, 1357 (Oct. 24, 1988) (Petersen, Arb.).

Another arbitrator noted that the coal mining industry is the most dangerous occupation for American workers. He then noted that “intoxicated employees are too hazardous to be tolerated.” Pittsburg & Midway Coal Mining Co., 91 Lab. Arb. (BNA) 431, 434 (Aug. 26, 1988) (Cohen, Arb.). Since arbitrators do consider the safety risks from substance-abusing employees, public policy arguments against alcohol and drug use should be presented to arbitrators. Arbitrators can then consider the safety risks along with the other factors arbitrators consider in determining whether the employee’s termination was for just cause.

\textsuperscript{33} See Mouser, \textit{supra} note 13, at 122 & nn.166-71. An arbitrator may consider legal questions where the parties authorize such consideration in the submission agreement or collective bargaining agreement:

While it is true that an arbitrator “has no general authority to invoke public laws that conflict with the bargain between the parties,” the parties to a collective bargaining agreement may confer such authority upon an arbitrator, either through their submissions, or through the CBA.

Challenger Caribbean Corp. v. Union General de Trabajadores, 903 F.2d 857, 866 (1st Cir. 1990) (citations omitted).

\textsuperscript{34} See Mouser, \textit{supra} note 13, at 125-26 & nn.177-84.
III
Conclusion

Schaudies and Miller assume that a broad public policy exception is the only avenue to deal with the drug use problem. They ignore the possibility of using contractual language to restate the supposed “well-defined and dominant public policy” against drug use. That is, the parties can specify in their contract that drug use results in immediate termination and that the arbitrator cannot reinstate the drug user or otherwise modify the employer’s determination of punishment. An arbitration award that then attempts to reinstate such an employee can be overturned by a court on the ground that the arbitrator exceeded the scope of authority granted him in the contract. Since arbitrators do honor such a restriction on their authority,\(^\text{36}\) this route is much simpler and more efficient than appealing a case through several levels of courts while arguing that vague statutes constitute a “well-defined and dominant public policy” against the employee’s reinstatement.

\(^{36}\) See Mouser, supra note 13, at 125-26 nn.178, 181 & 185. The limit on the arbitrator’s authority to review and modify the employer’s determination of penalty must be expressly stated in the contract. See Dixie Warehouse & Cartage Co. v. General Drivers Local 89, 898 F.2d 507, 511 (6th Cir. 1990) (court held arbitrator did not exceed his authority by reinstating employee terminated for alcohol use while on duty even though contract stated employer could terminate employee without notice for alcohol use where the contract did not expressly limit arbitrator’s authority to modify penalty).