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Hold All Arbitrations: Public Policy Invalidations Are on the Loose - Town of Groton v. United Steelworkers of America

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Hold All Arbitrations: Public Policy Invalidations are on the Loose!

Town of Groton v. United Steelworkers of America[1]

I. INTRODUCTION

The United States Supreme Court has held that arbitration awards derived from collective bargaining agreements may be invalidated based on public policy. However, an arbitration award should only be invalidated if the public policy is explicit, well-defined, and dominant.[2] This article will examine how the Connecticut Supreme Court applied the public policy test and whether the court adequately justified its decision.

II. FACTS & HOLDING

David Warren worked at the town of Groton landfill as a weighmaster.[3] His duties included taking money for the town and giving Groton residents permits to dump their waste.[4] The waste permit fees were to be turned over to the appropriate officials of Groton.[5] The Groton Police Department suspected Warren of keeping the permit money, and they charged him with two counts of larceny by embezzlement in the sixth degree and one count of violating a town ordinance.[6] The charges were filed on November 20, 1996, and Warren's supervisor was informed of his arrest on November 22, 1996.[7] Warren was temporarily transferred to the highway department and notified that possible disciplinary action, including termination, may be taken after the court action was finalized.[8]

On December 4, 1996, Warren plead *nolo contendere* on one count of larceny and the prosecutor dismissed the other charge of larceny and the town ordinance violation.[9] Warren asserted that his financial situation forced him to plead *nolo contendere*.[10]

After numerous meetings between Warren, his supervisor, and the union representative, Warren was terminated on April 14, 1997.[11] On Warren's behalf, United Steelworkers of America ("Steelworkers") filed a grievance which was denied.[12] Groton and Steelworkers disagreed about what standard to apply to

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1. 757 A.2d 501 (Conn. 2000). This is a rehearing of a case from a decision of less than a year ago, *Town of Groton v. United Steelworkers of America*, 747 A.2d 1045 (Conn. 2000).
2. *See W.R. Grace & Co. v. Local Union 759, Int'l. Union of United Rubber, Cork, Linoleum and Plastic Workers of America*, 461 U.S. 757 (1983).
3. *Town of Groton*, 757 A.2d at 504.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.* at 504-05.
10. *Id.* at 505.
11. *Id.*
12. *Id.*

Warren's termination.[13] Groton contended that Warren's plea of *nolo contendere* was equivalent to a conviction and grounds for termination under Groton's Personnel Rule 10, section 1(a) which states: "Conviction of a felony or misdemeanor arising out of the performance of duty or within the scope of employment which may affect the performance of duty."[14] Steelworkers, on the other hand, contended that Groton should have used subsection (h) of the same rule which implies that Groton needs to conduct its own investigation before terminating Warren.[15] A collective bargaining agreement between Groton and Steelworkers called for arbitration of grievances concerning unjustified termination.[16] Therefore, the matter went to arbitration.[17]

The arbitrator decided that Groton did not have just cause to terminate Warren.[18] The arbitrator asserted the termination would have been valid if Groton had done its own investigation.[19] The arbitrator ordered Groton to rehire Warren.[20] Groton asked the trial court to vacate the award, and Steelworkers asked the trial court to confirm the award.[21] The trial court vacated the award based on Groton's argument that the arbitration order violated public policy.[22] The appeal reached the Connecticut Supreme Court.[23]

The Connecticut Supreme Court held there is a clear public policy against embezzlement and an employer does not have to follow an arbitration order to reinstate an employee who has been found guilty or pleaded *nolo contendere* to embezzlement.[24]

III. LEGAL HISTORY

A. United States Supreme Court

The Connecticut Supreme Court looked at *W.R. Grace & Co. v. Rubber Workers*[25] and *United Paperworkers International Union v. Misco, Inc.*[26] for guidance. *W.R. Grace* provides the basic rule for vacating an arbitration award concerning collective bargaining agreements. *Misco* gives the minimum standard to vacate such an arbitration award.

In *W.R. Grace*, W.R. Grace & Co. ("Grace") and Local Union No. 759 ("Union") were engaged in a collective bargaining agreement that expired in March of 1974.[27] After a long investigation, the Equal Employment Opportunity

13. *Id.* at 506.
14. *Id.*
15. *Id.*
16. *Id.* at 505.
17. *Id.*
18. *Id.* at 506.
19. *Id.*
20. *Id.* at 507.
21. *Id.*
22. *Id.*
23. *Id.* at 501.
24. *Id.* at 509.
25. *W.R. Grace & Co.*, 461 U.S. 757 (1983).
26. 484 U.S. 29 (1987).
27. *W.R. Grace & Co.*, 461 U.S. at 759.

Commission ("EEOC") decided that Grace violated Title VII of the Civil Rights Act of 1964 by discriminating in the hiring of women and African-Americans.[28]

In May, Grace and Union worked out a new collective bargaining agreement.[29] Grace allegedly violated the new collective bargaining agreement, and Union sought to arbitrate.[30]

Grace and the EEOC reached a conciliation agreement on December 11, 1974.[31] Grace then attempted to use the conciliation agreement with the EEOC to get a summary judgement against the Union to negate the parts of the collective bargaining agreement that conflicted with the conciliation agreement.[32]

While the case was being considered, Grace terminated employees per the conciliation agreement.[33] The district court held for Grace and the EEOC, allowing for modification of the collective bargaining agreement.[34] The Union appealed.[35] During the appeal, Grace terminated more men with seniority per the conciliation agreement.[36]

In January 1978, the Fifth Circuit Court of Appeals reversed the district court's decision and ordered Grace to arbitrate with Union.[37] The first arbitrator, Sabella, declared that even though Union could get an award, it should not because Grace had been complying with an outstanding court order.[38] Union decided to contest Sabella's ruling through more arbitration.[39]

The second arbitrator, Barrett, decided that he did not have to conform to Sabella's arbitration award and that there was no good faith violation exception to the seniority provisions in the collective bargaining agreement.[40] Therefore, it was Grace's risk when it violated the collective bargaining agreement to follow the conflicting conciliation agreement.[41]

Grace appealed to the United States District Court for the Northern District of Mississippi.[42] The district court held that public policy should prevent the enforcement of the collective bargaining agreement during the appeal.[43] The Fifth Circuit Court of Appeals reversed and the United States Supreme Court granted certiorari.[44]

The Court ruled that in order to vacate an arbitration award on grounds of public policy, the policy must be explicit, well defined, dominant and found by looking at

28. *W.R. Grace & Co.*, 461 U.S. at 759. *See* 42 U.S.C. §§ 2000e (1994).
29. *Id.* at 760.
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.* at 761.
34. *Id.*
35. *Id.*
36. *Id.* at 761-62.
37. *Id.* at 762.
38. *Id.*
39. *Id.*
40. *Id.* at 763.
41. *Id.*
42. *Id.* at 764.
43. *Id.*
44. *Id.*

the laws and precedents, not generalities of alleged public interests.[45] The Court looked at several possible public policy reasons[46] to side with Grace, but found none.[47] The Court therefore affirmed the court of appeals.[48]

In *Misco*, the corporation had a collective bargaining agreement with the United Paperworkers International Union, AFL-CIO, and the local union ("Paperworkers").[49] This agreement held that grievances between Misco and Paperworkers as to the application or interpretation of the agreement would be arbitrated.[50]

Isiah Cooper, an employee of Misco and a union member, was discharged when Misco found out that Cooper had been arrested for marijuana possession.[51] Cooper filed a grievance against his discharge.[52] The arbitrator ordered Misco to reinstate Cooper because there was no just cause in terminating Cooper.[53] Misco filed in the district court to vacate the award.[54]

The United States District Court for the Western District of Louisiana agreed with Misco that to reinstate Cooper was against public policy of general safety concerns arising from operating dangerous machinery while under the influence of narcotics.[55] The Fifth Circuit Court of Appeals affirmed.[56] The United States Supreme Court granted Paperworker's writ of certiorari petition and reversed the court of appeals.[57]

The Court held that to uphold an award vacated based on public policy, at the very minimum, the supposed public policy must be properly framed to create an explicit conflict with laws and precedent and the violation of the policy must be clearly shown to vacate the award.[58] The court of appeals did not satisfy this minimum, therefore the arbitration award was reinstated.[59]

Therefore, the Court ruled that in order to vacate an arbitration award based on public policy, the public policy must be explicit, well defined, present in the law through precedent, and that the enforcement of the arbitration award would create an explicit conflict with laws and precedent.

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45. *Id.* at 766.
46. First, the public policy of obeying judicial orders was not harmed because Grace did not violate the court order and court contempt powers are sufficient for protection. *Id.* at 768. Second, the public policy of Title VII voluntary compliance is outweighed here by a third party's (Union is a third party to the conciliation agreement of Grace and EEOC) reliance that a company will honor the collective bargaining agreement between themselves and the company. *Id.* at 770-71.
47. *Id.* at 766-72.
48. *Id.* at 772.
49. *Misco*, 484 U.S. at 31.
50. *Id.* at 32.
51. *Id.* at 33.
52. *Id.*
53. *Id.* at 34.
54. *Id.*
55. *Id.* at 34-35.
56. *Id.* at 35.
57. *Id.*
58. *Id.* at 42-45.
59. *Id.* at 44.

B. Connecticut Law

The Connecticut Supreme Court then used its own jurisprudence to show that arbitration awards contrary to public policy are not upheld by the court. The court used *Board of Trustees for State Tech. Colleges v. Federation of Technical College Teachers*[60] and *City of Stamford v. Stamford Police Association*[61] to demonstrate this. The court further used *Board of Trustees* to state that the question is not whether the arbitrator was right, rather whether enforcement of the award is proper.

In *Board of Trustees*, the Federation of Technical College Teachers, Local 1942, American Federation of Teachers, AFL-CIO ("AFT") and the Board of Trustees for State Technical Colleges ("Board") entered into a collective bargaining agreement on April 15, 1977.[62] Union argued that the agreement contained a provision that gave full-time faculty fifteen days of sick leave a year.[63] However, this portion of the agreement was not properly submitted to the Connecticut General Assembly for its approval.[64] Therefore, Board contended that full-time faculty were only allowed twelve and one-half days of sick leave a year.[65] The parties agreed to arbitration of the disagreement under the collective bargaining agreement.[66] The arbitrator declared that under the collective bargaining agreement, full-time faculty was entitled to fifteen days of sick leave per year.[67]

The Board appealed to the court to vacate the award.[68] The trial court ruled that the award conflicted with state statutes and regulations that set the full-time faculty sick leave at twelve and one-half days per year.[69] AFT appealed.[70] The court held, "just as private parties cannot expect a court to enforce a contract between them to engage in conduct which is illegal or otherwise contrary to public policy, they cannot expect an intervening arbitral award approving (or ordering) that conduct to receive judicial endorsement."[71] The court further stated that in cases where the award conflicts with public policy, it is not concerned with whether the arbitrator's decision was correct; rather it is concerned about whether enforcing the award would be legal.[72] The court found that the arbitrator's award was in conflict with Connecticut state law.[73] Therefore, the court upheld the trial court's vacation of the award.[74]

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60. 425 A.2d 1247, 1251 (Conn. 1979).
61. 540 A.2d 400 (Conn. App. 1988). In dicta, this case supports the proposition that arbitration awards contrary to public policy are not upheld.
62. *Board of Trustees*, 425 A.2d at 1248.
63. *Id.* at 1248-49.
64. *Id.* at 1249.
65. *Id. See* Conn. Gen. Stat. §§ 10-329(a), 5-247(a) (1996); Conn. Regs. §§ 5-247-1, 5-247-2(a) (1996).
66. *Board of Trustees*, 425 A.2d at 1249.
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.* at 1252 (quoting Robert A. Gorman, *Basic Text on Labor Law, Unionization, and Collective Bargaining* 593 (West Publg. Co. 1976)).
72. *Id.* at 1253.
73. *Id.*
74. *Id.* at 1254.

In *Stamford*, Robert Esposito, a Stamford police officer, was terminated from his sick leave because there was little chance that he would recover from his illness (the officer was blind).[75] Esposito and the Stamford Police Association filed a grievance to the state board of mediation and arbitration ("state board") claiming that there was no provision for termination of an officer on extended sick leave within the collective bargaining agreement between the Stamford Police Association and Stamford.[76] The state board reinstated Esposito's sick leave status, and ruled the Stamford Police Association claim was valid.[77] Stamford brought an action in trial court to vacate the arbitration ruling, claiming that it violated public policy in that it prevented Stamford from hiring a new police officer in Esposito's place in order to foster public safety.[78] The trial court declared that giving Esposito back his status did not place enough burden on the public policy of providing public safety to vacate the arbitration award.[79] Stamford appealed.[80] The court of appeals agreed with the trial court that the reinstating of Esposito's sick leave status did not affect the public policy of public safety enough to invalidate the award.[81]

IV. INSTANT DECISION

The Connecticut Supreme Court ruled that the arbitrator could not force Groton to reinstate Warren.[82] The court used *Stamford* and *Board of Trustees* for the proposition that an arbitration award that is illegal or contrary to public policy cannot be expected to be endorsed by the courts.[83] The court further uses *Board of Trustees* for the proposition that it is the legality of enforcing the award that is important and not whether the arbitrator was correct.[84] Therefore, the court follows *W.R. Grace* in ruling that the public policy used to vacate an arbitration award must be explicit, well defined, dominant, and found by referring to laws and precedent, not generalizations of alleged public interests.[85] The court then ruled that public policy against embezzlement fits the above test and that Groton did not have to reinstate Warren.[86]

V. COMMENT

The Connecticut Supreme Court should have deferred to the decision of the arbitrator. In *Misco*, a case the court cited, the United States Supreme Court said that the courts must defer to the arbitrator's interpretation of contract (collective

75. *Stamford*, 540 A.2d at 401.
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.* at 401-02.
82. *Town of Groton*, 757 A.2d at 510.
83. *Id.* at 508.
84. *Id.*
85. *Id.* at 509.
86. *Id.* at 510.

bargaining agreement) language.[87] The Court held that The Labor Management Relations Act of 1947 reflected the preference for labor-management relations to enter into private settlements rather than go to court.[88] Furthermore, the Court ruled that if "the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision."[89] In *Groton*, the arbitrator decided that a plea of *nolo contendere* for embezzlement from Warren without independent investigation was not sufficient to establish just cause for Warren's termination.[90] The arbitrator was interpreting the meaning of just cause within the collective bargaining agreement established between the Town of Groton and Warren's Union. Therefore, even if the Court believed that the arbitrator was wrong in his interpretation, the Court should have deferred to the arbitrator's judgement under *Misco*.

Whether embezzlement may or may not be contrary to public policy is not the question. The United States Supreme Court in *Eastern Associated Coal Corporation v. United Mine Workers of America, District 17* ("*UMWA*")[91] decided that the question is not whether the activity of the employee violated public policy, but whether the reinstatement of the employee does.[92] Furthermore, *UMWA* reaffirms the test set out in *W.R. Grace* and *Misco*.[93] In *UMWA*, the United States Supreme Court upheld an arbitration award to reinstate an employee that had twice failed drug tests and been punished by the arbitrator.[94] The Court found that, even though there could be differing opinions as to the correct remedy, there was no public policy interest that met the *W.R. Grace-Misco* test.[95] However, since both the company and union agreed to arbitration, they were compelled to follow the arbitrator's judgment.[96] Following this line of thought in *Groton*, Warren should be reinstated since Groton and Steelworkers agreed to arbitration within their collective bargaining agreement. Though there could be differing opinions as to whether Warren should be reinstated, Groton and Steelworkers should be bound by the arbitrator's decision. Although the policy against embezzlement may be strong enough to vacate an arbitration award, it does not matter because embezzlement was Warren's action. What is important is whether Warren's reinstatement was against public policy. Since Groton did not hold an independent investigation as to whether Warren embezzled, Groton could not claim there was a public policy interest to stop

87. *Misco*, 484 U.S. at 37-39.
88. *Misco*, 484 U.S. at 37. *See* 29 U.S.C. § 173(d) (1994).
89. *Id.* at 38.
90. *Town of Groton*, 757 A.2d 501, at 506.
91. 531 U.S. 57 (2000). Though this case was decided a few months after *Town of Groton*, the Court used the same major cases in its decision as the Connecticut Supreme Court. Therefore, there are no new cases cited that alter the test evaluations.
92. *Id.* at 62-65.
93. *Id.*
94. *Id.* at 66-67.
95. *Id.*
96. *Id.*

embezzlement. In order to make that claim, Groton should have conducted an independent investigation.[97]

Furthermore, Justice Scalia, in his *UMWA* concurring opinion, suggested that in order to vacate an arbitration award on public policy grounds, the award must conflict with positive law.[98] Therefore, we should look at Connecticut's positive law concerning the relevant issues. It may be important to protect a company from further embezzlement. However, an employer must prove embezzlement before an employee is terminated. The issue is whether a plea of *nolo contendere* constitutes sufficient evidence that Warren in fact embezzled from Groton.

Judge Katz, in his dissent in *Town of Groton*,[99] suggested that a plea of *nolo contendere* is significantly different than a plea of guilty or a trial conviction and that it was not sufficient evidence to allow Groton to terminate Warren.[100] Judge Katz examined how the Connecticut Supreme Court's positive law handled *nolo contendere* pleas in the past and found that they were different from pleas or trial convictions of guilt.[101] He quoted *Casalo v. Claro*,[102] which stated, "a plea of *nolo contendere* is merely a declaration by the accused that he will not contest the charge, and even though followed by a finding of guilty and the imposition of a fine or other penalty, is not admissible, either as a verbal admission or an admission by conduct."[103] Judge Katz also looked to *Lawrence v. Kozlowski*[104] to establish that pleas of *nolo contendere* should be limited to the cases where they were entered.[105] Groton's procedure in determining termination was separate from the criminal case in which Warren pled *nolo contendere* to embezzlement. Since pleas of *nolo contendere* are not used for proof of illegal actions within Connecticut positive law, Warren's plea was not sufficient to establish that he embezzled. Instead, Groton should have conducted its own investigation as to whether Warren embezzled.

The majority claimed that the dissent's argument was insufficient because "[c]ivil actions and administrative proceedings . . . ordinarily do not involve the kind of legitimate expectations of the employer that are inherent in the employment context and that would be severely undermined by requiring the reinstatement of an employee convicted of embezzling his employer's funds."[106] If Groton was so concerned about the embezzlement, Groton should have investigated the allegations against Warren. Groton did not know how much Warren supposedly stole from the town. An employer should want to know how much was taken from the company, possibly for civil action or insurance reasons. There were good reasons for Groton to investigate the allegations against Warren, but Groton did not. Instead, Groton

97. Another alternative would be to transfer Warren to a position where he would not handle money. Groton set precedent in doing this by transferring Warren to the highway division during the police investigation. *Town of Groton*, 757 A.2d at 504.

98. 531 U.S. at 67-69 (Scalia & Thomas, JJ., concurring).

99. Judge Katz made a similar assertion in his majority opinion in the original hearing of this case. *See Town of Groton*, 747 A.2d at 1054 (Katz, Norcott & Palmer, JJ., dissenting).

100. *Town of Groton*, 757 A.2d 501, 512-15.

101. *Id.*

102. 165 A.2d 153 (Conn. 1960).

103. *Town of Groton*, 757 A.2d at 513.

104. 372 A.2d 110 (Conn. 1976).

105. *Town of Groton*, 757 A.2d at 514.

106. *Id.* at 511.

relied on a plea of *nolo contendere* that does not *prove* guilt and cannot be used in subsequent proceedings. Judge Katz observed: "[b]y relying on the private nature of arbitration as a basis upon which to create an exception to our jurisprudence regarding the limited use of the nolo plea, the majority, in essence, takes the first step toward the elimination of the nolo plea."[107] Criminal defendants plead *nolo contendere* because the plea cannot be used against them in a subsequent proceeding, either as evidence of the crime or for impeachment purposes. By rendering its decision, the majority begins to take away the incentives for defendants to plead *nolo contendere* and instead go to trial.

VI. CONCLUSION

The Connecticut Supreme Court evaluated the public policy exception to the general rule of confirming arbitration awards. The point is to look at the award, not at the employee's actions, to determine if the award was contrary to public policy. The public policy must be well-defined, explicit, and dominant. Requiring Groton to rehire Warren after a plea of *nolo contendere* in the criminal court system is not sufficient. Pleas of *nolo contendere* should not be used as evidence against a person in subsequent proceedings. Instead, if Groton had established by an independent investigation that Warren had in fact embezzled, then matters would have been different. The arbitrator said that he would not have ordered the rehiring of Warren if Groton had investigated the allegations.[108] Groton should not be rewarded for inaction, but should be made to prove just cause for Warren's dismissal.

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107. *Town of Groton*, 757 A.2d at 515.
108. *Id.* at 504.