Journal of Dispute Resolution

Volume 1993 | Issue 2 Article 1

1993

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JOURNAL OF
DISPUTE RESOLUTION

VOLUME 1993, NUMBER 2

THE LABOR CONTRACT AND EXTERNAL LAW: REVISITING THE ARBITRATOR'S SCOPE OF AUTHORITY

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I. INTRODUCTION

For decades, labor relations practitioners, scholars, and commentators have debated under what circumstances, if any, labor arbitrators should apply external law in resolving contractual disputes. This debate has been re-energized by the 1987 decision of the United States Supreme Court in *United Paperworkers International Union v. Misco, Inc.*,[1] wherein the Court, *inter alia*, attempted to clarify the breadth and depth of the public policy basis for judicial vacation of labor arbitration awards first articulated in *W.R. Grace & Co. v. Local Union 759, International Union of United Rubber Workers*.[2]

This article examines the impact of *Misco* and the attendant body of case law emerging from the U.S. circuit courts of appeals on the labor arbitration process. The ultimate goal of this study is to ascertain whether the public policy exception warrants a rethinking of traditional views of the relationship between collective bargaining agreements and external law, and the manner in which labor arbitrators should juxtapose the two in resolving contractual disputes. The Authors assert that it does.

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1. 484 U.S. 29 (1987).

2. 461 U.S. 757 (1983).

II. THE MISCO-W.R. GRACE POLICY BASELINE

A. Overview

At the outset, it is important to remember that the unanimous *Misco* Court unequivocally reaffirmed the long-standing rule of the "Steelworkers Trilogy"[3] that in reviewing the awards of labor arbitrators, federal courts "are not authorized to reconsider the merits of an award even though the parties may allege that the award rests on errors of fact or on a misinterpretation of the contract."[4] In restating the rule of *Enterprise Wheel*[5] and *American Manufacturing*,[6] the Supreme Court left no doubt that the national labor policy still contemplates that arbitration awards which draw their essence from collective bargaining agreements cannot be reversed merely because a federal district court judge disagrees with the arbitrator's findings of fact, interpretation of the contract, or remedy formulation.[7] The Court also made clear its belief that arguable procedural errors (determinations concerning the admission of evidence, etc.), made by labor arbitrators during the course of adjudicating a contractual dispute, do not warrant vacation of the arbitrator's award, unless the errors are the result of bad faith conduct or mistakes so gross as to constitute affirmative arbitrator misconduct.[8]

The public policy portion of the Court's analysis in *Misco* arose in the context of its review of the district court's determination, affirmed by the circuit court of appeals, that an arbitrator's award reinstating an employee discharged for allegedly possessing marijuana on his employer's property violated the public policy "against the operation of dangerous machinery by persons under the influence of drugs."[9] The Court first traced the common law of contracts origin of the public policy exception articulated in *W.R. Grace*. Next, the Court reasserted that reversal of an arbitrator's interpretation of a collective bargaining agreement is warranted only when "the contract as interpreted would violate 'some explicit public policy' that is 'well-defined and dominant' and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'"[10]

As examples of the type of explicit, well-defined public policies contemplated by the *W.R. Grace* standard, the *Misco* Court cited obedience to judicial orders

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3. United Steelworkers of Am. v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

4. *Misco*, 484 U.S. at 36.

5. *Enterprise Wheel*, 363 U.S. 593 (1960).

6. *American Mfg.*, 363 U.S. 564 (1960).

7. *Misco*, 484 U.S. at 36-40.

8. *Id.* at 39-40.

9. *Id.* at 42 (quoting Misco, Inc. v. United Paperworkers Int'l Union, 768 F.2d 739, 743 (5th Cir. 1985)).

10. *Id.* at 43 (quoting *W.R. Grace*, 461 U.S. at 766 (quoting Muschany v. United States, 324 U.S. 49, 66 (1945))).

and voluntary compliance with Title VII.[11] The Court next noted two points which follow from the opinion in *W.R. Grace*. First, a court may refuse to enforce a collective bargaining agreement when the specific terms of that agreement violate a public policy of the nature defined in *W.R. Grace*.[12] Second, a court may properly set aside an arbitration award interpreting a collective bargaining agreement only if: (1) that award explicitly conflicts with the type of public policy identified in *W.R. Grace*; and (2) the violation of public policy worked by the award is clearly shown on the record.[13] The *Misco* Court went to substantial lengths to emphasize its view that the enunciation of the public policy exception in *W.R. Grace* was not intended "to otherwise sanction a broad judicial power to set aside arbitration awards as against public policy."[14]

This commentary will now turn to a brief examination of the more significant reported decisions of the circuit courts of appeals applying the public policy exception from 1987 to the present. The purpose of this effort is to clarify the lessons that *Misco* and its progeny provide for practicing labor arbitrators and the advocates who argue cases before them.

B. The Threshold Element in the Misco-W.R. Grace Analysis

In the last six years, ten U.S. circuit courts of appeals have directly addressed the *Misco/W.R. Grace* public policy exception.[15] Five circuits, the Second, Third, Fifth, Eighth, and Eleventh, have vacated arbitral awards on public policy grounds.[16] Six circuits, the Third, Sixth, Seventh, Ninth, Tenth, and the Court of Appeals for the D.C. Circuit, have refused to vacate arbitrators' awards on the basis of the *Misco/W.R. Grace* public policy standard.[17] Interestingly, all of the

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11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. Because of its significance, the authors have also addressed the immediate pre-*Misco* D.C. Circuit Court of Appeal's decision in Northwest Airlines, Inc. v. Air Line Pilots Ass'n, Int'l, 808 F.2d 76 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1014 (1988).
16. *See* Exxon Shipping Co. v. Exxon Seamen's Union, 993 F.2d 357 (3d Cir. 1993); Gulf Coast Indus. Workers Union v. Exxon Co., U.S.A., 991 F.2d 244 (5th Cir. 1993), *cert. denied*, No. 93-441, 1993 WL 376533 (U.S. Sup. Ct. Nov. 8, 1993); Stroehmann Bakeries, Inc. v. Local 776, Int'l Bhd. of Teamsters, 969 F.2d 1436 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 660 (1992); Newsday, Inc. v. Long Island Typographical Union, No. 915, 915 F.2d 840 (2d Cir. 1990), *cert. denied*, 499 U.S. 922 (1991); Delta Air Lines, Inc. v. Air Line Pilots Ass'n, Int'l, 861 F.2d 665 (11th Cir. 1988), *cert. denied*, 493 U.S. 871 (1989); Iowa Elec. Light and Power Co. v. Local Union 204, Int'l Bhd. of Elec. Workers, 834 F.2d 1424 (8th Cir. 1987) (courts vacated awards based on public policy).
17. *See* Chrysler Motor Corp. v. Int'l Union, Allied Indus. Workers of Am., 959 F.2d 685 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 304 (1992); Interstate Brands Corp., Butternut Bread Div. v. Chauffeurs Local Union No. 135, 909 F.2d 885 (6th Cir. 1990), *cert. denied*, 499 U.S. 905 (1991); Communication Workers of Am. v. Southeastern Elec. Coop. of Durant, Okla., 882 F.2d 467 (10th Cir. 1989); Stead Motors of Walnut Creek v. Automotive Machinists Lodge No. 1173, 886 F.2d 1200 (9th

reported circuit courts of appeals opinions have involved cases of employee misconduct.

An analysis of the developing body of case law under *Misco* reveals that the lower federal courts are encountering substantial difficulty in developing a consistent scheme for applying the public policy exception. This difficulty seems most acute with regard to the task of ascertaining when the public policy exception and the intensified judicial intrusion into the merits it connotes are triggered.

Identifying the public policy "trigger" is the critical step in the lower federal courts' application of the *Misco* doctrine. This "trigger" demarcates the stage of the arbitrator's analysis of the merits of a contractual dispute at which judicial intervention occurs. The case law reveals two polar views as to the appropriate scope of the judicial evaluation of an arbitrator's analysis and award.

At one extreme, representing the most intrusive level of judicial review of the merits of arbitration awards, some courts act on the premise that judicial scrutiny properly extends to an evaluation of whether the grievant's conduct violated relevant public policy. The opposite extreme is represented by the view that the public policy inquiry should be limited to a determination of whether the result produced by the award (*i.e.*, the arbitral remedy order) is explicitly barred by public policy.

Clearly, the earlier in the arbitrator's analysis of the merits that judicial intrusion is provoked (*i.e.*, the further the judicial inquiry moves away from weighing only the impact of the arbitral remedy order and toward a full re-evaluation of the grievant's misconduct), the greater the prospects for vacation of the award become. When presented with a dispute where the grievant has engaged in conduct barred by public policy, a reviewing court that commences its public policy analysis with an evaluation of the grievant's conduct is much more likely to find a violation of public policy than a court which limits its inquiry to the question of whether the remedy directed by the arbitrator is barred by public policy. Thus, the critical nature of the identification of the "trigger" to the public policy inquiry becomes apparent.

The circuit courts of appeals describe the nature and extent of their review of an arbitrator's award under the public policy exception in various ways. Regardless of the analytical model employed, once the public policy exception is deemed applicable (*i.e.*, is "triggered") in a particular dispute, the reviewing court effectively grants itself license to engage in a *de novo* evaluation of the arbitrator's interpretation of the relevant contract language and/or the arbitral formulation of an appropriate remedy.

Recognition of the public policy trigger is the critical threshold determination in the *Misco/W.R. Grace* analysis. The subsequent review of the significant circuit courts of appeals case law will attempt to identify and compare the various public

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Cir. 1989), *cert. denied*, 495 U.S. 946 (1990); United States Postal Serv. v. National Ass'n of Letter Carriers, 839 F.2d 146 (3d Cir. 1988); Northwest Airlines, Inc. v. Airline Pilots Ass'n, Int'l, 808 F.2d 76 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1014 (1988) (courts refused to vacate awards based on public policy).

policy "triggers" employed in the circuits as the jumping off point for heightened judicial intrusion into what formerly was considered the exclusive domain of labor arbitrators.[18]

III. THE PROGENY OF MISCO AND W.R. GRACE

A. Circuit Courts of Appeals Opinions Vacating Arbitration Awards on Public Policy Grounds

In *Iowa Electric Light and Power Co. v. Local Union 204 of the International Brotherhood of Electrical Workers*,[19] the Eighth Circuit Court of Appeals vacated the award of an arbitrator reinstating a machinist employed in a nuclear power plant. The grievant machinist, motivated by a desire to facilitate an early exit to the plant lunch room, and acting with the aid of a supervisor, overrode a safety interlock system designed to protect the integrity of a secondary containment area within the nuclear facility.[20]

The grievant's conduct was in direct violation of federally-mandated safety regulations for nuclear power plants.[21] His discharge and the discharge of the involved supervisor were subsequently approved by the Nuclear Regulatory Commission (NRC), presumably because of the aforementioned violation of federal regulations. The NRC also issued a reprimand to the employer for compromising secondary containment.[22]

The district court vacated the arbitrator's award on public policy grounds, and the Eighth Circuit affirmed. The circuit court identified the public policy at issue as the "well defined and dominant national policy requiring strict adherence to nuclear safety rules."[23] The circuit court then concluded that the identified "strong" public policy would be violated by judicial enforcement of an arbitration award requiring reinstatement of an employee who had knowingly violated a nuclear safety rule.[24]

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18. At this point it must be emphasized that the focus in the analysis below is on alerting arbitrators and advocates to the various "triggers" relied on by the several circuit courts of appeals that open the door to judicial evaluation of the merits of a contractual dispute. Although it is a short step from identifying these triggers to an evaluation and critique of the decision rules utilized by the federal courts in ordering the vacation of arbitration awards on public policy grounds, the latter topic is not within the purview of this piece. *See generally* Deanna J. Mouser, *Analysis of the Public Policy Exception after Paperworkers v. Misco: A Proposal to Limit the Public Policy Exception and to Allow the Parties to Submit the Public Policy Question to the Arbitrator*, 12 INDUS. REL. L.J. 89-152 (1990).

19. 834 F.2d 1424 (8th Cir. 1987).

20. *Id.* at 1426.

21. *Id.*

22. *Id.* at 1428.

23. *Id.* at 1427.

24. *Id.*

The trigger to the public policy exception relied upon by the Eighth Circuit in *Iowa Electric* is apparent. The circuit court believed that since the grievant's employment-related, on-the-job conduct jeopardized the public health and safety, the arbitrator's award was properly subject to broadened judicial inquiry on the merits.[25] The court noted that although it was obliged to "[take] the facts as found by the arbitrator," it was empowered to "[review] his conclusions *de novo*."[26] The circuit court based the decision to vacate the award on its disagreement with the arbitrator's assessment of the seriousness of the grievant's offense, a clear reversal on the merits of the contractual just cause issue.

In *Delta Air Lines v. Air Line Pilots Ass'n, International*,[27] the Eleventh Circuit also relied on an employment-related conduct "trigger" to the public policy exception. The circuit court vacated the award of a System Board of Adjustment that reinstated a pilot who had flown a commercial airliner with a .13% blood alcohol level.[28] It framed the issue on appeal as follows: "Does an established public policy condemn the performance of employment activities in the manner engaged in by the employee?"[29]

After carefully reviewing the statutory, regulatory, and case law bases for the public policy "denouncing the operation of any aircraft while intoxicated," the circuit court moved directly to a full review of the merits of the subject arbitration award.[30] The circuit court vacated the System Board's award on the grounds that the reinstatement that the Board ordered was tantamount to a requirement that the employer tolerate job performance in violation of the identified public policy.[31]

The circuit court observed that the airline employer was under both a statutory and regulatory duty to prevent its pilots from flying while intoxicated, the very type of wrongdoing the grievant committed.[32] The court concluded further that the arbitrator effectively "construed the collective bargaining agreement in such a manner that it appears that Delta has agreed to submit to arbitration the question as to whether it should authorize operation of aircraft by pilots while they are drunk."[33] Thus, the circuit court rejected the arbitrator's interpretation of the collective bargaining agreement as contrary to the identified, overriding public policy.

The Eleventh Circuit clearly believed that an airline employer is barred from agreeing contractually, either explicitly or as divined by an arbitrator, to reinstate a pilot who flies while intoxicated. Because the arbitration award produced that result, the circuit court concluded it could not stand.

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25. *Id.*
26. *Id.*
27. 861 F.2d 665 (11th Cir. 1988), *cert. denied*, 493 U.S. 871 (1989).
28. *Id.* at 667.
29. *Id.* at 671.
30. *Id.* at 674.
31. *Id.*
32. *Id.*
33. *Id.* at 671.

Two circuit appeals court opinions vacating arbitrators' awards on public policy grounds involved grievant employees discharged for purported acts of workplace sexual harassment who were subsequently reinstated in arbitration. In *Newsday, Inc. v. Long Island Typographical Union, No. 915*,[34] the Second Circuit was presented with an arbitrator's award directing the reinstatement of a male employee who had engaged in repeated acts of unwanted touching and physical contact with female employees. If tolerated by an employer, this type of conduct almost certainly would have constituted sexual harassment in violation of Title VII as interpreted by the Supreme Court in *Meritor Savings Bank, FSB v. Vinson*.[35]

The legal analysis in *Newsday* is concise and straightforward. After reviewing the key dimensions of the relevant statutory, regulatory (EEOC regulations), and case law milieu, the circuit court concluded that "there is an explicit, well-defined and dominant public policy against sexual harassment in the workplace" and noted the employer's affirmative duty to maintain a workplace environment free of sexual harassment.[36] The circuit court believed that the arbitrator's reinstatement of the grievant would perpetuate a hostile, intimidating, and offensive work environment for women employees and prevent the employer from satisfying its legal duty to prevent sexual harassment.[37] Therefore, the circuit court affirmed the decision of the district court vacating the award on public policy grounds.

It is apparent from the opinion in *Newsday* that the Second Circuit's decision to invoke the public policy exception was based largely on the grievant's long-run pattern of engaging in what appeared to be illegal sexual harassment of female co-workers. In the view of the Second Circuit, it was the grievant's repeated, illegal conduct that warranted judicial intrusion into the merits of the arbitrator's award.[38] Like the Eleventh Circuit in *Delta Air Lines*, the Second Circuit in *Newsday* also placed strong emphasis on its perception that the challenged arbitration award would effectively preclude the employer from satisfying a duty imposed on it by the subject public policy.[39]

In *Stroehmann Bakeries, Inc. v. Local 776, International Brotherhood of Teamsters*,[40] the grievant employee had been discharged for sexually harassing the employee of a customer, on a single occasion, by acts of unwanted touching and repeated offensive, sexually explicit remarks. The arbitrator reversed the discharge, ordering reinstatement with back pay, solely on the basis of what he deemed to be an inadequate predischarge investigation by the employer.[41] Regardless, the arbitrator went on to observe that although the state of the

34. 915 F.2d 840 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1314 (1991).
35. 477 U.S. 57 (1986).
36. *Newsday*, 915 F.2d at 845.
37. *Id.* at 843-44.
38. *Id.* at 845.
39. *Id.*
40. 969 F.2d 1436 (3d Cir. 1992), *cert. denied*, 113 S. Ct. 660 (1992).
41. *Id.* at 1440.

evidence precluded him from being able to determine whether the grievant or his accuser was more credible, had he proceeded to the merits, he would have found in favor of the grievant.[42]

The district court vacated the award based on the finding that it violated the public policy barring sexual harassment in the workplace by ordering reinstatement of the grievant without making a determination as to the allegations against him.[43] The Third Circuit affirmed the district court's vacation of the arbitrator's award and its remand of the dispute to arbitration before another neutral. In doing so, the circuit court articulated a clear decision rule: "[u]nder the circumstances present here, an award which fully reinstates an employee accused of sexual harassment without a determination that the harassment did not occur violates public policy."[44]

The circuit court juxtaposed the award before it with the award before the Tenth Circuit in *Communication Workers of America v. Southeastern Electric Cooperative of Durant, Oklahoma*,[45] wherein the arbitrator had directed the reinstatement of a discharged employee found to have committed a single act of sexual harassment on a customer. The Third Circuit noted that in the earlier case, the arbitrator had concluded that the grievant was penitent and apologetic; determined that the grievant had an otherwise clear work record; and "incorporated the public policy against sexual harassment into his reasoning in reaching his decision."[46]

In light of these characteristics of the arbitrator's analysis and findings, the *Stroehmann Bakeries* court characterized the Tenth Circuit's refusal to vacate the award in *Communication Workers* as mere deference to the arbitrator's choice of remedy.[47] The court then noted that the arbitrator in the case before it "studiously avoided the charges against [the grievant] and did none of the things the arbitrator did in *Communication Workers*."[48] Finally, the court concluded that the arbitrator's due process-based holding (founded on the contractual just cause provision) "neither considered nor respected public policy. Instead, his interpretation [of the collective bargaining agreement] violated it."[49] Because it remained unconvinced that the arbitrator had adequately demonstrated that the employer failed to respect the grievant's right to industrial due process, the Third Circuit deemed the neutral's conclusion to that effect unfounded.[50]

In both *Newsday* and *Stroehmann Bakeries*, the public policy inquiry was triggered by concerns resulting from the grievant's employment-related conduct

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42. *Id.*
43. *Id.*
44. *Id.* at 1442.
45. 882 F.2d 467 (10th Cir. 1989).
46. *Stroehmann Bakeries*, 969 F.2d at 1443 (citing *Communication Workers*, 882 F.2d at 468-69).
47. *Id.*
48. *Id.*
49. *Id.* at 1444.
50. *Id.*

allegedly violating public policy and the impact of an arbitral reinstatement order on the employer's legal duty to prevent that type of conduct by the grievant employee. The vacation of the awards in those cases resulted from judicial determinations that the arbitrators' analyses of the contractual issues before them failed to address and/or respect the subject public policy and the employer's duty to ensure that its employees comport their behavior with that external law. The importance of proper arbitral consideration of pertinent public policy, within the context of the contractual just cause issue, is further demonstrated by the recent opinion of the Third Circuit in *Exxon Shipping Co. v. Exxon Seamen's Union.*[51]

In that case, the Third Circuit affirmed the decision of the district court vacating the award of an arbitration panel which reinstated, without back pay, an oil tanker helmsman who had tested positive for the metabolite of marijuana after the tanker on which he served ran aground in the Mississippi River. The drug test was administered pursuant to a U.S. Coast Guard Regulation requiring the same following an accident.[52] The discharged helmsman had tested negative for marijuana metabolite at the threshold testing level set by the Coast Guard, but showed a positive result under Exxon's more stringent threshold testing level, which was set at twenty percent of the Coast Guard positive test threshold.[53]

The arbitration panel based its decision to reinstate the grievant on the Company's failure to prove that he was impaired on the job or had used drugs at work, and further, because it was not persuaded that termination of the grievant would serve the preventive and rehabilitative goals of Exxon's drug policy.[54] The Third Circuit found the distinction between off-work and on-the-job drug use and/or impairment and the goals of prevention of drug and rehabilitation of drug users to be of limited significance. It focused instead on the goal of the public policy that it deemed embodied in the subject Coast Guard regulation — safe operation of vessels. The court stated: "Whether an employee uses drugs on- or off-duty is relevant only to the extent it bears on [the safe operation of vessels]. Where, as here, there are test results, they serve as a more accurate indicator of safe operation than the location of [the grievant's] drug use."[55]

The court went on to note that the Coast Guard regulation does not distinguish between on- and off-duty use. In that regard it observed:

> Instead, [the regulation] provides that an individual who tests positive for drugs 'shall be denied employment as a crewmember or removed from duties which directly affect the safety of the vessel's navigation or operations as soon as practicable and shall be subject to suspension and revocation proceedings against his or her license, certificate of registry, or merchant mariner's document.'[citation omitted] The

51. 993 F.2d 357 (3rd Cir. 1993).
52. *Id.* at 358.
53. *Id.* at 358-59.
54. *Id.* at 359-60.
55. *Id.* at 361.

> individual may not then return to work aboard a vessel unless the medical review officer determines that 'the individual is drug-free and the risk of subsequent use of dangerous drugs by that person is sufficiently low to justify his or her return to work.'[56]

The court noted further that the statute authorizing the above-quoted Coast Guard regulation states: "[I]f it is shown that a holder [of a license, certificate, or a merchant mariner's document] has been a user of . . . a dangerous drug, [the license, certificate or document] shall be revoked unless the holder provides satisfactory proof that the holder is cured."[57] The court next cited various federal government regulations "against the operation of common carriers under the influence of drugs or alcohol" which sanction drug testing programs similar to the one at issue in the case before it.[58] Finally, in support of the importance of the public policy it had identified, the Third Circuit cited, *inter alia*, *Delta Air Lines* and *Iowa Electric*, which it characterized as prior circuit appeals court decisions "considering arbitration awards on similar facts."[59]

After acknowledging the disagreement among the circuit courts of appeals as to the proper test for determining whether an arbitrator's award reinstating a discharged employee is inconsistent with public policy, the court rejected the view whereby the finding of a violation of a "specific rule or prohibition" is required.[60] Instead, it opted for the "broader test," whereby an arbitration award can be deemed in violation of public policy if it conflicts with "the stated purposes behind those [specific] rules or prohibitions," stating further its conclusion that "[w]here the 'positive law' is a stated purpose behind a statute or regulation, to thwart the purpose is to 'violate positive law.'"[61] Relying on this new conceptualization of positive law, the court proceeded to hold that in the case before it, "the award reinstating [the grievant] violates the public policy protecting the public and the environment against the operation of vessels by drug users."[62]

Thoughtful analysis of the Third Circuit's opinion reveals that by failing to adequately reconcile its award and remedy order with the relevant Coast Guard regulation, the arbitration panel opened the door to a judicial re-evaluation of the merits regarding the employer's discharge decision. Because the regulation unequivocally provides that individuals who test positive for drugs "shall be denied employment . . . or removed from duties which directly affect the safety of the vessel's navigation or operations," that act of arbitral omission placed the award in sharp contravention with the regulation.

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56. *Id.* (citing 46 C.F.R. §§ 16.201(c), 16.370(d) (1992)).
57. *Id.*
58. *Id.* at 361-62.
59. *Id.* at 362.
60. *Id.* at 363.
61. *Id.* at 364.
62. *Id.*

In the same manner, the arbitration panel's apparent failure to harmonize its remedy order of reinstatement with the regulatory requirement that an individual "may not return to work aboard a vessel unless the medical review officer determines that 'the individual is drug-free and the risk of subsequent use of dangerous drugs by that person is sufficiently low to justify his or her return to work'" provided reason for judicial concern.[63] Thus, the district court was especially disturbed by (1) the absence of an arbitral finding that the grievant would no longer use drugs or a conclusion that the possibility of future use was remote, and (2) the failure of the arbitration panel to require the grievant to enter a rehabilitation program as a condition of, or prerequisite to, reinstatement.[64]

There can be little doubt that a careful reading of the relevant Coast Guard regulation would have revealed to the arbitration panel the regulatory bar to the remedy it directed. Reinstatement of a confirmed drug user to a position as safety-sensitive as the helmsman of an oil tanker, without the medical clearance called for by that regulation, was an invitation to the district court to vacate the award. That the level of marijuana metabolite in the grievant's body was far below the regulatory definition of a positive drug test was a distinction lost on the federal judges who vacated the award. The arbitration panel's apparent act of omission in not discussing this dimension of the employer's decision to discharge enabled the district court and the Third Circuit to avoid addressing this potentially significant fact in reaching its decision to affirm the district court's granting of the employer's summary judgment motion.

In what is almost certainly the most expansive judicial use of the public policy exception to overturn a labor arbitration award, the Fifth Circuit, in *Gulf Coast Industrial Workers Union v. Exxon Co., U.S.A.*,[65] recently affirmed the refusal of the district court to enforce an arbitration award directing the reinstatement of an employee discharged for violating the terms of an aftercare (post-alcohol abuse rehabilitation) program. The employee had tested positive for cocaine use some two months into the aftercare program and had not reported his relapse as required by the program's terms. There was no evidence to indicate that the grievant had used cocaine on the job or that he had reported for work impaired.[66]

The discharge was appealed to arbitration under the standard just cause issue formulation. The arbitrator, noting that the terms of the aftercare program did not require termination for the grievant's actions, concluded that termination was too harsh a penalty and directed reinstatement without back pay, contingent on a negative drug and alcohol screen. The arbitrator observed that there was "no

63. *Id.* at 365.

64. The circuit court opinion indicates that the arbitration panel required only that the grievant submit to a year of random drug testing and failed to require him to be cleared by Exxon's medical officer before returning to work. *Id.*

65. 991 F.2d 244 (5th Cir. 1993), *cert. denied*, No. 93-441, 1993 WL 376533 (U.S. Sup. Ct. Nov. 8, 1993).

66. *Id.* at 247

question that the Company had just cause to discipline [the grievant]," but stated that the employee seemed "a good bet for successful rehabilitation."[67]

The Fifth Circuit commenced its public policy analysis by acknowledging that its decision could not properly turn on the question of whether the grievant employee's conduct violated public policy. Instead, the court tasked itself with "detail[ing] specifically the official measures establishing the policy" on which it would rely. Based on that inquiry, the court held that:

> . . . it offends public policy for [the grievant], an employee who holds a safety-sensitive position, to retain his job upon testing positive for cocaine while on the job and after having breached his company's drug abuse policy on two occasions — first when he broke his pledge of abstinence, and second when he failed to disclose his relapse.[68]

The court noted the "countless statutes, regulations, company guidelines, and judicial decisions that pronounce the emphatic national desire to eradicate illicit drugs from the workplace."[69] Primary among the various bases for the identified public policy cited by the Fifth Circuit were the 1988 Drug-Free Workplace Act;[70] a parallel Texas statute;[71] and Department of Transportation regulations mandating anti-drug programs for workers on petrochemical pipelines.[72] But for Exxon's status as a federal government contractor covered by the 1988 Drug-Free Workplace Act, the court did not elucidate as to how and why any of the cited public policy bases applied to it as the grievant employee's employer. Further, the court failed to explain how the identified public policy expressly or impliedly barred this type of arbitral reinstatement.[73]

After characterizing the grievant's workplace as dangerous and his job as safety sensitive, the court pointed out that "federal courts have with some frequency overturned [arbitral] awards of reinstatement on public policy grounds, where . . . public safety was implicated."[74] Like the Third Circuit in *Exxon Shipping*, the Fifth Circuit cited to *Iowa Electric* and *Delta Air Lines*. Unlike the

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67. *Id.* at 247-48.

68. *Id.* at 250.

69. *Id.*

70. Drug-Free Workplace Act, 41 U.S.C. §§ 701-707 (1988).

71. TEX. REV. CIV. STAT. ANN. art. 8308-7.10(a) (West Supp. 1993).

72. 49 C.F.R. § 199 (1991).

73. The court observed that the Drug-Free Workplace Act requires federal contractors to certify that they will provide a drug-free workplace. It noted further that the Act:

> [R]equires private employers with federal contracts to [1] publish a statement notifying their workers that the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance is prohibited in the workplace, [2] notify the employees that their continued employment hinges on compliance with the policies [of the Act], and [3] establish a drug-free awareness program to inform their employees of the dangers of drug abuse in the workplace.

Exxon Shipping, 991 F.2d at 250.

74. *Id.* at 253.

Third Circuit, the Fifth Circuit failed to identify how the statutes, regulations, and judicial decisions that it relied on constitute a well-defined public policy expressly barring the arbitral reinstatement of a petrochemical refinery employee who tests positive for illegal drugs, without proof of on-the-job drug use or impairment. This omission from the Fifth Circuit's analysis mirrors its opinion in *Misco*. This flaw likely renders the opinion a poor guide regarding the proper application of the public policy exception.

Exxon Shipping and *Exxon U.S.A.* stretch the public policy exception to its limits and demarcate its boundary. The employee workplace conduct they center on is the act of reporting for work with the metabolites of an illegal drug in one's body. Neither case involved overt acts of misconduct similar to those in the earlier cases (discussed above) in which arbitral awards were vacated. *Exxon Shipping* is defensible in that the Third Circuit identified and acted upon a clearly-stated public policy, directly applicable to the subject employer, barring reinstatement of an employee whose sole offense was being present in the workplace when he tested positive for illegal drugs. Because the Fifth Circuit failed to do so, its decision in *Exxon U.S.A.* amounted to little more than a re-adjudication of the merits of the arbitrator's award, and is thus indefensible.

B. Circuit Court of Appeals Opinions Refusing to Vacate Arbitration Awards on Public Policy Grounds

Our focus now shifts to the case law in which circuit courts of appeals have refused to invoke the public policy exception. In *Interstate Brands Corp. v. Chauffeurs Local Union No. 135*,[75] the Sixth Circuit reversed the district court's vacation of an arbitration award reducing the discharge of a delivery truck driver charged with off-duty possession of marijuana, cocaine, and drug paraphernalia, to a six-month suspension. The grievant had been arrested on his day off in a disoriented condition, with slurred speech, alcohol on his breath, and blood and needle marks on his arm, sitting in the passenger seat of a private vehicle stopped on a public thoroughfare.[76]

Interstate Brands is a particularly interesting opinion. The Sixth Circuit succinctly addressed both the *AT&T Technologies*[77] standard for arbitrability determinations and the *Misco* standards for (1) review of an arbitrator's procedural determinations and (2) application of the public policy exception. The district court had based its decision to vacate on arbitrability grounds and spoke to the public policy exception only in *obiter dicta*.[78] The comments below are confined to the Sixth Circuit's treatment of the latter topic.

In the key portion of its public policy analysis, the Sixth Circuit criticized the lower court for evaluating, in *dicta*, the grievant's conduct under the guise of the

75. 909 F.2d 885 (6th Cir. 1990), *cert. denied*, 449 U.S. 905 (1991).
76. *Id.* at 887.
77. AT&T Technologies, Inc. v. Communications Workers of Am., 475 U.S. 643 (1986).
78. *Interstate Brands*, 909 F.2d at 888.

public policy exception.[79] The circuit court stated: "[t]he issue is not whether the grievant's conduct for which he was disciplined violated some public policy or law, but rather whether the award requiring reinstatement of a grievan[t], *i.e.* 'the contract as interpreted' violated some explicit public policy."[80] The court then observed:

> [w]hile it is indisputable that allowing intoxicated persons to drive motor vehicles violates public policy, it does not follow, however, that any arbitration award reinstating an employee discharged for being intoxicated while off-duty, or arrested for off-duty possession of controlled substances may never be enforced without violating the public policy exception of arbitration awards.[81]

The *Interstate Brands* court distinguished the case from *Delta Air Lines* and *Iowa Electric* by noting that those earlier opinions involved on-the-job employee misconduct that violated "well-defined and dominant laws and legal precedents."[82]

The Sixth Circuit found no public policy in the two states involved which bars persons who have been convicted of drunk driving or impaired driving due to drug use from operating a motor vehicle.[83] Thus, the circuit court observed "[t]he states' well-defined policy is only to prohibit driving by those whose licenses have been revoked."[84] In *Interstate Brands*, the grievant's license had not been revoked. In fact, the charges against him had been dropped after he completed a court-directed drug rehabilitation program.[85] Because of the non-work related nature of the grievant's misconduct and the failure of the district court to identify a relevant public policy transgressed by the arbitral award of reinstatement, the Sixth Circuit deemed reversal of the award on public policy grounds not to be warranted.

In *Interstate Brands*, the Sixth Circuit reached a different result than the circuit courts in *Iowa Electric*, *Delta Air Lines*, *Newsday*, and *Stroehmann Bakeries*, and emphasized what appears to have been a different decision rule than that relied on by the Eighth, Eleventh, Second, and Third Circuits in those

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79. *Id.* at 893.

80. *Id.* (quoting *W.R. Grace*, 461 U.S. at 766). *See also* Shelby County Health Care Corp. v. American Fed. of State, County and Mun. Employees, 967 F.2d 1091 (6th Cir. 1992) (relying on the decision rule articulated in *Interstate Brands* as the basis for reversing a district court order vacating the award of an arbitrator reinstating an employee who had engaged in strike activity unprotected by the Labor Management Relations Act).

81. *Interstate Brands*, 909 F.2d at 893.

82. *Id.* at 893-94.

83. *Id.* at 894.

84. *Id.*

85. *Id.* at 887.

opinions. That decision rule centers on whether the arbitration award, and not the grievant's conduct, violated relevant public policy.[86]

Regardless, it becomes clear that all five circuit courts of appeals focused their evaluation on the following question: "Does the arbitration tribunal result in the reinstatement of a grievant employee who has engaged in a knowing or intentional violation of a public policy governing or regulating the employee's work conduct?" If the answer to this question is "Yes," the award is in peril. If the court is not satisfied that the arbitrator has sufficiently weighed the pertinent public policy and reconciled the contractual result with the dictates of that external law, reversal is certain.

The benefit to be derived from thoughtful arbitral treatment of salient public policy issues that arise within the context of contractual disputes is demonstrated by the analysis and holding of the Seventh Circuit in *Chrysler Motors Corp. v. International Union, Allied Industrial Workers of America.*[87] In *Chrysler*, the arbitrator was presented with a challenge to the discharge of an employee for sexually assaulting a co-worker by fondling her breasts without her permission.[88] The discharged employee apparently had committed four prior acts of grabbing and/or pinching female co-workers.[89] However, because of his articulated determination that the employer had discovered this evidence of prior bad acts after the disputed discharge (and therefore, did not weigh that prior conduct in deciding to discharge the grievant), the arbitrator refused to consider it.[90]

Thus, like the arbitrator in *Newsday*, the neutral in *Chrysler* was confronted with an employer claim that reinstatement of a grievant who had engaged in repeated acts of illegal sexual harassment would violate the public policy embodied in Title VII. Unlike *Newsday* (and in contrast to the award in *Stroehmann Bakeries*), the arbitrator in *Chrysler* cogently demonstrated why considerations of substantive due process, pertaining to the post-discharge discovery of prior acts of sexual harassment by the grievant, obliged him to consider the case as a first offense of unwanted touching. The court characterized the question before it as "whether the arbitrator's reinstatement of [the grievant] violates public policy."[91] That analysis, along with the arbitrator's emphasis on the principle of progressive discipline and his determination that the grievant could be rehabilitated, prompted the Seventh Circuit in *Chrysler* to conclude: "[w]hile we do not condone [the grievant's] behavior, it was within the purview of the collective bargaining agreement for the arbitrator to order his reinstatement."[92]

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86. *Id.* at 893.
87. 959 F.2d 685 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 304 (1992).
88. *Id.* at 686.
89. *Id.*
90. *Id.*
91. *Id.* at 687.
92. *Id.* at 689.

Stead Motors of Walnut Creek v. Automotive Machinists Lodge No. 1173[93] is the well-known "loose lug nuts on the Mercedes" case. In *Stead Motors*, the Court of Appeals for the Ninth Circuit, sitting *en banc*, reversed a three-judge panel opinion vacating an arbitral award which had reinstated a grievant discharged for his persistent and repeated refusal to tighten wheel lug nuts in the instructed manner. The grievant's preference for his lug nut technique eventually resulted in a customer's Mercedes being put on the road in a very unsafe condition.[94]

In affirming the district court's vacation of the arbitrator's award, the original panel opinion had relied on what it identified as California's public policy "regarding automotive safety and maintenance."[95] The full Ninth Circuit rejected the panel's conclusion in this regard, and in so doing, stated:

> If a court relies on public policy to vacate an arbitral award reinstating an employee, it must be a policy that bars reinstatement. Courts cannot determine merely that there is a "public policy" against a particular sort of behavior in society generally and, irrespective of the findings of the arbitrator, conclude that reinstatement of an individual who engaged in that sort of conduct in the past would violate that policy.[96]

The Ninth Circuit held that a court vacating an arbitrator's award on public policy grounds must "demonstrate that the policy [relied upon] is one that specifically militates against the relief ordered by the arbitrator."[97]

The standard for identification of a *Misco*-level public policy fashioned by the Ninth Circuit sounds very much like the "positive law" standard urged by the Union in *Misco* and not addressed by the Supreme Court therein. The *Stead Motors* opinion tacitly acknowledges this fact in a footnote, but like the Supreme Court in *Misco*, the Ninth Circuit expressly reserved judgment on that question.[98]

In the absence of a public policy trigger to heightened judicial scrutiny, the Ninth Circuit looked to the arbitrator's award for "an expression of [the] arbitrator's reasons for his decision."[99] Finding in the award an arbitral determination that a 120 day suspension was a sufficient penalty and the conclusion that the grievant could be rehabilitated, the circuit court terminated its substantive inquiry.

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93. 886 F.2d 1200 (9th Cir. 1989), *cert. denied*, 495 U.S. 946 (1990).

94. *Id.* at 1202.

95. Stead Motors of Walnut Creek v. Automotive Machinists Lodge No. 1173, 843 F.2d 357, 359 (9th Cir. 1988).

96. *Stead Motors*, 886 F.2d at 1212 (citations omitted).

97. *Id.* at 1212-13.

98. *Id.* at 1212 n.12 (citing the positive law-like standard reflected in the D.C. Circuit's opinion in United States Postal Serv. v. National Ass'n of Letter Carriers, 810 F.2d 1239, 1241-42 (D.C. Cir. 1987)).

99. *Id.* at 1213.

In *Stead Motors*, the Ninth Circuit rejected the *Delta Air Lines/Iowa Electric* "employee work conduct violative of a public policy" trigger to intensified judicial scrutiny of arbitral awards. Nevertheless, it did point out that both of those earlier opinions dealt with "hard" cases and tacitly acknowledged the possible effect of: (1) the highly-regulated nature of the air line and nuclear power industries; (2) the very substantial public safety concerns involved in the two acts of employee misconduct in *Delta Air Lines* and *Iowa Electric*; and (3) the fact that the employers in both of those cases were subject to being called to task by the federal agencies charged with the regulation of their respective industries.[100]

The Court of Appeals for the D.C. Circuit has adopted what appears to be the most narrow view of the circumstances that may properly propel a court to engage in the *Misco/W.R. Grace* public policy analysis. In *Northwest Airlines v. Air Line Pilots Ass'n*,[101] the D.C. Circuit reversed a district court order which set aside, on public policy grounds, an arbitrator's award reinstating a pilot who had flown his aircraft with a .13% blood alcohol content.[102]

The circuit court reiterated the position it had taken a year earlier in *American Postal Workers Union v. United States Postal Service*[103] as to the "extremely narrow" scope of the public policy exception as originally articulated by the Supreme Court in *W.R. Grace*. In doing so, it stated as follows:

> Obviously, the exception is designed to be narrow so as to limit potentially intrusive judicial review of arbitration awards under the guise of 'public policy.' . . . [I]t is plain from the language in *W.R. Grace* itself that the Court meant to say only that an arbitration award may not be enforced if it transgresses 'well defined' and 'dominant' laws and legal precedents. . . . Thus, the exception applies only when the public policy emanates from clear statutory or case law. . . .[104]

Since it found no clear public policy barring the arbitrator's determination that the grievant's alcoholism was an illness that did not constitute just cause for termination, the circuit court concluded that vacation of the award was not warranted.[105]

The trigger to the *Misco/W.R. Grace* public policy exception recognized by the D.C. Circuit Court of Appeals closely approximates what has been characterized as the "positive law" view of the appropriate scope of the public policy exception. This view asserts that only arbitration awards which run afoul

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100. *Id.* at 1214-15.

101. 808 F.2d 76 (D.C. Cir. 1987), *cert. denied*, 486 U.S. 1014 (1988).

102. It is noteworthy that the relevant Federal Aviation Administration regulation prohibits service as a flight crew member by any person with a blood alcohol level in excess of .04%. *Id.* at 78 (citing 14 C.F.R. § 91.11(a)(4) (1986)).

103. 789 F.2d 1 (D.C. Cir. 1986).

104. *Northwest Airlines*, 808 F.2d at 83 (quoting *American Postal Workers Union*, 789 F.2d at 8).

105. *Id.*

of a clearly-stated statutory proscription or a similarly plain rule established by the controlling case law within a particular jurisdiction are subject to vacation.

The opinion in *Northwest Airlines* is not inconsistent with the views expressed by the Ninth Circuit in *Stead Motors* and the Sixth Circuit in *Interstate Brands*. Nevertheless, *Northwest Airlines* is more troublesome because it involved the work-related conduct of a grievant airline pilot who knowingly violated a key FAA safety-related rule, and thereby placed the lives and safety of a large number of persons in serious peril.

Northwest Airlines can be distinguished from *Stead Motors* and *Interstate Brands* in that the grievant's work conduct abridged a very significant public policy directed at his employment conduct. *Northwest Airlines*, at least at present, represents the most attractive potential candidate for vacation of an arbitral award directing reinstatement of a wrongdoing employee that did not result in a judicial determination at the circuit court of appeals level that the *Misco/W.R. Grace* public policy analysis was triggered.

Two remaining circuit court of appeals decisions merit only very brief mention. In the previously-cited Tenth Circuit opinion in *Communication Workers of America v. Southeastern Electric Cooperative of Durant, Oklahoma*,[106] the circuit court affirmed the district court's refusal to vacate an arbitrator's award reinstating an employee who had engaged in an apparently minor act of sexual assault (a single brushing touch on the buttocks) perpetrated against a customer in her home.[107]

Without deciding whether the grievant's conduct or the arbitral order directing his reinstatement touched upon a *bona fide* public policy, the court concluded that the arbitrator's "just cause determination fully incorporated this important concern [preventing the sexual assault and abuse of women] under all of the circumstances."[108] Consequently, the circuit court refused to examine the merits of the underlying dispute and declined to vacate the award.

The analysis and result reached by the Court of Appeals for the Third Circuit in *United States Postal Service v. National Association of Letter Carriers*[109] parallels the outcome in *Communication Workers* and is similar in rationale to the *Stead Motors* opinion of the Ninth Circuit. *Postal Service* did not involve an employment-focused public policy. In *Postal Service*, the circuit court found that no law or public policy required the discharge of a postal worker who, in a fit of anger over his failure to be promoted, shot up the local postmaster's empty parked automobile.[110] Consequently, the circuit court held that it was without authority under *Misco* to vacate an arbitral order directing the employee's reinstatement.[111]

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106. *See supra* note 45.
107. *Communication Workers*, 882 F.2d at 469.
108. *Id.*
109. 839 F.2d 146 (3d Cir. 1988).
110. *Id.* at 150.
111. *Id.*

IV. THE FIVE TRIGGERS TO THE PUBLIC POLICY INQUIRY - A CONTINUUM

The state of the public policy exception case law remains "somewhat unsettled."[112] The circuit courts' opinions reviewed above reveal five different "triggers" that have been deemed to demarcate circumstances where judicial intrusion into, and review *de novo* of, the merits underlying a challenged arbitration award are appropriate. All five "triggers" assume that the public policy relied upon by the party seeking vacation of an award will satisfy the *Misco* requirement that the policy be explicit, well-defined, dominant, and ascertained by reference to the laws and legal precedents.[113]

The five triggers to the public policy inquiry reflected in the case law just reviewed are as follows (***See* Figure 1**):

1. Circumstances where the grievant's work-related conduct clearly violates, or is inconsistent with, a relevant public policy governing or regulating that work conduct (*Delta Air Lines*, *Iowa Electric*, *Newsday*, *Stroehmann Bakeries*);

2. Circumstances where the grievant's conduct has prevented, or could prevent, the employer from fulfilling its duty under a relevant public policy (*Delta Air Lines*, *Iowa Electric*, *Newsday*, *Stroehmann Bakeries*);

3. Awards wherein the arbitrator has reinstated a grievant employee whose conduct is alleged to have violated public policy without addressing the salient public policy issue (*Stroehmann Bakeries*, *Exxon Shipping*);

4. Circumstances where a relevant public policy either expressly bars reinstatement of the grievant employee, by arbitral award or otherwise (*Interstate Brands*, *Stead Motors*, *Chrysler*), or requires that the offending employee be discharged (*Postal Service*, *Exxon Shipping*, *Exxon U.S.A.*);

5. Circumstances where positive law, *i.e.*, a clear, unequivocal statutory or case law directive, prohibits an arbitral order that the grievant employee be reinstated (*Northwest Airlines*).

It is useful to think of these various articulations of the triggers to the public policy inquiry as constituting points, though not necessarily discrete points, on a continuum. The primary dimension measured by that continuum is the stage in

112. United States Postal Serv. v. National Ass'n of Letter Carriers, 847 F.2d 775, 777 (11th Cir. 1988). *See also* David E. Feller, *Court Review of Arbitration*, 43 LAB. L.J. 539, 542 (1992).

113. *Misco*, 484 U.S. at 43.

Figure 1

The Triggers to Judicial Review of the Merits
Under the W. R. Grace/Misco Public Policy Exception

Degree of Judicial Intrusion Into the Merits

HIGH

LOW

(1) The Grievant's Conduct Violates Public Policy

(2) The Grievant's Conduct Impairs the Employer's Compliance With Public Policy

(3) The Arbitrator Fails to Address a Salient Conduct-Related Public Policy Issue

(4) Reinstatement Barred by Public Policy

(5) Positive Law Bars Arbitral Reinstatement Order

the arbitrator's analysis of a contractual controversy at which *de novo* review of the merits is permitted. Concomitantly, the continuum also measures the probability that judicial re-decision of the merits of the contractual disputes submitted to arbitration by employers and unions will occur under each of the various triggers. In the schematic depiction of the continuum set forth below, these two dimensions are grouped under the phrase "Degree of Judicial Intrusion Into the Merits."[114]

When defining this continuum, it is important to realize that all of the significant case law has dealt exclusively with employee misconduct. Further, at both ends the continuum limits the *Misco/W.R. Grace* public policy inquiry only to employment or employment-related conduct. Off-duty conduct, unrelated to an employee's ability to perform the job, will almost never trigger the public policy exception, even if that conduct is violative of public policy. The developing case law prompts the inference that, at least in current application, the term "public policy" means public policy either directly or indirectly condemning the type of employment or employment-related conduct engaged in by a grievant employee in a discipline or discharge case.

At one pole of the continuum, the Courts of Appeals for the Second, Eighth, and Eleventh Circuits appear to be comfortable with judicial evaluation of the merits extending all the way back to an independent appraisal of the grievant's conduct. At the opposite extreme, the Courts of Appeals for the D.C. and Ninth Circuits believe that the reviewing court's inquiry must be limited to the effect of the arbitrator's remedial order of reinstatement.

The general view reflected in the cited opinions of the Second, Eighth, and Eleventh Circuit Courts of Appeals represents the broadest range of circumstances in which intrusive judicial inquiry is deemed warranted under the *Misco* standard. The condition precedent to judicial evaluation of the merits is a determination by the court that the wrongful conduct allegedly engaged in by the grievant, if proven, would abridge public policy.

Under the most extreme application of this view, when an employee engages in employment-related conduct violative of a workplace-focused, *bona fide* public policy intended to protect customers, fellow employees, or the public from death, injury or other serious calamity, a reviewing court will not hesitate to intrude into the merits of the dispute and vacate the arbitral award directing reinstatement of the offending employee, if the court believes discharge was warranted.

In cases involving this type of life or public safety-threatening work conduct, courts subscribing to the view reflected in *Iowa Electric* and *Delta Air Lines* will not be concerned with the rehabilitation potential of the grievant; the likelihood of a reoccurrence of similar conduct; the employer's treatment of (*i.e.*, failure to discharge) other employees who have committed the same or similar offenses in the past; or the other dimensions of the common law of the shop of labor

114. *See* Seymour v. Blue Cross/Blue Shield, 988 F.2d 1020, 1023-24 (10th Cir. 1993) (discussing the "broad" versus the "narrow" view of the public policy exception reflected in the post-*Misco* circuit courts of appeals case law).

arbitration that is the grist of most arbitral analysis of discharge and discipline cases. Instead, in this genre of public policy cases, any arbitration award which does not sustain the employee's discharge and fails to persuade the reviewing court that reinstatement was warranted is likely to be vacated, thus establishing a "one offense and you're out" rule of thumb for grievant employees.

The likely treatment of cases involving employee conduct violative of employment-focused public policies that do not touch upon matters of life or death, serious injury or public safety (*e.g.* the public policy barring employer tolerance of sexual harassment of employees of one gender by employees of the opposite gender) is less clear. In those cases, similar in fact situation to *Newsday*, *Stroehmann Bakeries*, and *Chrysler*, and lying at or on either side of the mid-point of the Figure 1 continuum, the case law indicates that a reviewing court, although recognizing a trigger to the public policy inquiry, might be more deferential to arbitral reinstatement of a wrongdoing employee when the arbitrator sets forth a careful explanation of how the relevant contract language and the common law of the shop justify that remedy. This may be especially true when the case before the arbitrator does not involve repeated improper conduct inconsistent with the identified public policy that could expose the employer to liability in a law suit brought by employees or other individuals whose legal rights have been negatively impacted by the grievant's actions.

At the other pole of the public policy trigger continuum is the view best represented by the D.C. Circuit Court of Appeals in *Northwest Airlines*, reasserting the view set forth in its 1986 opinion in *American Postal Workers Union.* Under this restrictive view, a reviewing court looks only to the remedy directed by the arbitrator. The public policy inquiry is deemed warranted only when the arbitrator has ignored a statute, government regulation, or case law rule that expressly prohibits an arbitral order of reinstatement, thereby compelling the employer to violate that positive law by directing reinstatement.[115]

Although it arguably was present in the recent Fifth Circuit opinion in *Exxon Shipping*, the type of specificity required by the positive law standard embraced by the D.C. Circuit is rare in the law. Thus, it is one thing for a statute or administrative regulation to be interpreted by a court to bar a particular course of workplace conduct, or even to make it illegal. It is much rarer, perhaps even impossible, to find a statute, government regulation, or case law rule that unequivocally bars the reinstatement of a grievant former employee whose actions abridged relevant law, rule, or regulation.[116] Under the D.C. Circuit standard,

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115. *See* Harry T. Edwards, *Judicial Review of Arbitration Awards: The Clash Between the Public Policy Exception and the Duty to Bargain*, 64 CHI.-KENT L. REV. 3, 33-34 (1988).

116. *Id.* at 33. In this regard, Judge Edwards observes that:

> [i]n *United States Postal Service* [789 F.2d 1 (D.C. Cir.1986)], Congress could have prohibited the Postal Service from employing a postal carrier who had been convicted of delaying the mails. However, Congress did not do this. Instead, it simply passed a law making it a crime to delay the mails. This suggests that Congress believed that criminal punishment would be sufficient, and that persons who violate the mail statutes should not also be deprived of future employment in order to send an even stronger message to other

the award of an arbitrator reinstating an employee who engaged in wrongful conduct inconsistent with public policy will seldom be subjected to review on the merits under the rule of *Misco*.

The two intermediate points of the continuum we envision are but refinements or restatements of the polar extremes they most closely reflect. Thus, it is a small step from concluding that heightened judicial scrutiny, under the public policy rubric, is warranted when the employment or employment-related conduct of a grievant violates public policy, to a decision rule stating that same inquiry is triggered when the grievant's conduct, if tolerated or condoned by an arbitral reinstatement order, will prevent the employer from satisfying its duty under the identified public policy to customers, the grievant's fellow employees, the public, or others. Similarly, only the degree of clarity of legislative or judicial statements of the identified public policy seems to differentiate the *Stead Motors/Interstate Brands/Postal Service/Exxon Shipping* standard of public policy as barring arbitral reinstatement or compelling discharge from the *Northwest Airlines* "positive law" trigger.

The mid-point of the public policy trigger is defined by the opinions of the Third Circuit in *Stroehmann Bakeries* and *Exxon Shipping*. In *Stroehmann Bakeries*, the Third Circuit vacated an arbitrator's award and remanded the contractual dispute to arbitration before another neutral because of the arbitrator's decision to fully reinstate the grievant without addressing the public policy arguably abridged by his conduct. The same dynamic was also a key factor in the Third Circuit's refusal to enforce the arbitration award in *Exxon Shipping*. The converse of the continuum mid-point is captured well by the Seventh Circuit's holding in *Chrysler* that, despite a likely violation of public policy caused by the grievant's conduct, the arbitrator's reasoned application of the contractual just cause standard was sufficient to preclude a judicial intrusion into the merits.

V. THE PLAYING FIELD OF EXTERNAL LAW, CIRCA 1993

The evolving public policy doctrine just described is but one part of the broader milieu of the external law affecting labor arbitration and labor arbitrators. The potential significance of the public policy exception becomes apparent only when one perceives the manner in which it alters the external law landscape. In order to illustrate that point, and to place the remainder of this analysis in its full and proper context, the commentary immediately below will first describe the pre-public policy external law framework and then speak to the unique and significant characteristics of the newly-added public policy element of that paradigm.

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employees.

Id.

A. The Three Pre-Misco/W.R. Grace Elements of the Arbitration External Law Interface

The first dimension of the external law paradigm (***See* Figure 2**) is that presented when a collective bargaining agreement provision conflicts with relevant state or federal law. This is the stuff of the traditional "Meltzer-Mittenthal-Howlett" external law debate.[117] With the exception of the possible impact of the public policy doctrine, discussed below, this component of the paradigm is primarily of historical interest.

Today, few collective bargaining agreements contain language which conflicts, expressly or even impliedly, with the law.[118] Many contemporary contracts include a "savings clause" or similar provision memorializing the parties' intent that the substantive terms of the agreement are meant to comport with relevant law and are to be effectively excised when they do not.[119] When confronted with a contract-external law conflict with no savings clause or other license to comport the two, arbitrators have a choice to make. They must either resolve the dispute before them based on the contract alone, or attempt to reconcile the apparent conflict between the rights granted the grievant under relevant law and the result indicated by the language of the collective bargaining agreement. If the arbitrator stays within the four corners of the contract and ensures that the award draws its essence therefrom, the award is immune to judicial vacation.

The second element of the external law paradigm centers on the *Spielberg/Collyer* deferral model.[120] When contractual issues overlap issues of unfair labor practice law, the *Spielberg* and *Collyer* deferral doctrines effectively authorize the arbitrator to address the statutory unfair labor practice issue. In this scenario, the neutral must identify the pertinent unfair labor practice law (typically with regard to Section 8(a)(3) or Section 8(a)(5) of the Labor Management

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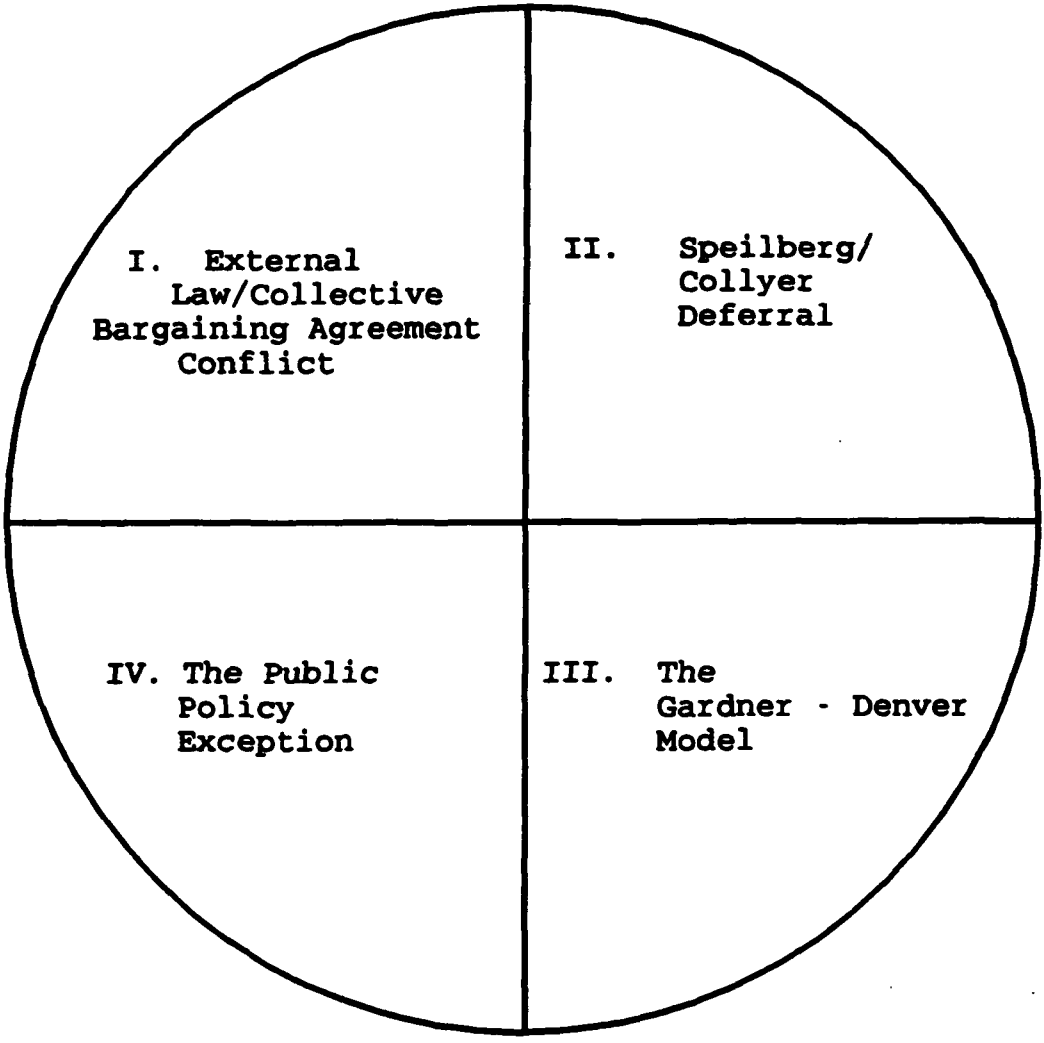
117. *See* Bernard D. Meltzer, *Ruminations About Ideology, Law, and Labor Arbitration, in* PROCEEDINGS OF THE TWENTIETH ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS 1 (Dallas L. Jones ed., 1967); Robert G. Howlett, *The Arbitrator, the NLRB, and the Courts, in* PROCEEDINGS OF THE TWENTIETH ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS 67 (Dallas L. Jones ed., 1967); Richard Mittenthal, *The Role of Law in Arbitration, in* PROCEEDINGS OF THE TWENTY-FIRST ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS 42 (Charles M. Rehmus ed., 1968); Bernard D. Meltzer and Robert G. Howlett, *The Role of Law in Arbitration, in* PROCEEDINGS OF THE TWENTY-FIRST ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS 58 (Charles M. Rehmus ed., 1968).

118. The recent enactment of the Americans with Disabilities Act causes some reason for pause in this regard. *See* Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. §§ 12101-12213) (West Supp. 1992). Of particular concern is the possible conflict that may emerge between the Act's Section 12112 reasonable accommodation requirement and the various provisions of collective bargaining agreements pertaining to discipline, promotions, transfers, shift preference, and the like.

119. Jay E. Grenig, *When Can a Grievance Arbitrator Apply Outside Law?*, 18 J.L. AND EDUC. 515, 520 (1989).

120. *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080 (1955); *Collyer Insulated Wire*, 192 N.L.R.B. 837 (1971).

Figure 2
The External Law Paradigm



Relations Act),[121] integrate it into the analysis of the contractual issue, and proceed apace.

If the National Labor Relations Board (NLRB) is subsequently presented with the statutory issue and finds in the arbitrator's analysis and award a result consonant with the relevant national labor policy, it will defer to the arbitrator's award as dispositive of the statutory issue. Most important for the purposes of this analysis, whatever conclusion the Board ultimately reaches as to the viability of the arbitrator's treatment of the statutory issue, the neutral's award in resolution of the contractual dispute remains intact.

The third constituent of the external law paradigm arises in cases where the arbitrator is obliged to interpret and apply the growing body of external law defining the individual workplace-related rights of grievant employees. This is the familiar *Alexander v. Gardner-Denver*[122] scenario. Here, as always, the arbitrator's fundamental task is to resolve the contractual issue. In addition, the competent arbitrator will remain mindful of the possibility that the grievant employee will choose to pursue a separate legal action to enforce any statutory rights claimed to have been violated by the employer.

The thoughtful neutral will take care to ensure, to the extent possible, that a court, subsequently presented with the arbitral resolution of the contractual issue, will find therein an articulate and appropriate disposition of the statutory rights of the grievant sufficiently respectful of the relevant law that the court deems it worthy of concurrence. Like the contract-external law conflict and the *Spielberg/Collyer* deferral categories of the external law paradigm, the arbitrator in this scenario, who ensures that the award is based squarely on the collective bargaining agreement, effectively insulates it from judicial vacation on the merits of the contractual issue.

There is little fodder for meaningful new dialogue to be found in these first three categories of the external law paradigm. Nothing of substance remains to be added to the debate as to the proper mode of arbitral response when the neutral is presented with a clear conflict between the language of the collective bargaining agreement and external law; is asked to address matters of unfair labor practice law; or finds it necessary to integrate into the analysis of the contractual issue elements of external law pertaining to the individual statutory rights of a grievant employee. The action today is, and in the foreseeable future almost certainly will be, in the public policy external law venue.

121. Labor Management Relations Act, ch. 120, sec. 101, § 8(a)(3), (5), 61 Stat. 136, 140-41 (1947) (codified as amended at 29 U.S.C. § 158(a)(3), (5) (1988)).

122. Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

B. The Public Policy Component of the External Law Paradigm: Ramifications for Arbitrators and Labor Relations Advocates

The fourth component of the external law paradigm is found in the evolving body of public policy case law reviewed above. Given the subject matter of this discourse, the question for evaluation here must be whether, within the context of the emerging public policy doctrine, traditional notions as to the propriety of labor arbitrators considering and applying external law need to be re-examined. It is our firm belief that they do.

A key point must be emphasized at the outset. In this fourth dimension of the arbitration-external law interface, we are playing a different game than we play in the three components of the external law paradigm described above. In the three pre-*Misco*/*W.R. Grace* external law categories, the focus is on employer conduct that purportedly violates the rights afforded a grievant employee, both by the collective bargaining agreement and relevant law.

Arbitrators faced with a Category I conflict between external law and the collective bargaining agreement need only stick to the contract to avoid judicial vacation on the merits of their awards. Both the *Spielberg* and *Collyer* doctrines of the NLRB and the opinion of the U.S. Supreme Court in *Gardner-Denver* effectively establish the following general decision rule for Categories II and III of the Figure 2 paradigm: Because an arbitrator's determination of a grievant's contractual rights cannot be deemed dispositive of the grievant's statutory rights that are also allegedly abridged by the employer's challenged actions, the federal courts are authorized to review the statutory issues addressed by the arbitrator *de novo*.[123]

Application of this decision rule does not result in the judicial reversal on the merits of a challenged arbitration award when a reviewing court disagrees with the arbitrator's construction and application of relevant external law. Rather, it says only that the arbitrator's resolution of the contractual dispute cannot necessarily be deemed dispositive of the external law dimensions of the underlying controversy.[124]

Accordingly, in Category II and Category III, both the arbitrator's interpretation of the collective bargaining agreement and the arbitral disposition of the contractual dispute are permitted to stand, regardless of whether the reviewing court agrees with the neutral's interpretation of the contract or the remedy directed. The reviewing court formulates a judicial resolution of the external law issues attendant to the contractual dispute, reaching the same result as the arbitrator only if its interpretation of the controlling law so warrants. Accordingly, as noted previously, in the *Spielberg*/*Collyer* and *Gardner-Denver*

123. *Id.* at 48-49.
124. *Id.* at 60 n.21.

scenarios, the arbitrator's charge is relatively simple and essentially without risk to the integrity or the finality of the contractual result that the award produces.

In the fourth external law category, that demarcated by the *Misco/W.R. Grace* public policy exception, the decision rule for a reviewing court is as follows: A labor arbitrator's award resolving contractual issue(s) need not be deferred to if that interpretation of the collective bargaining agreement produces a result inconsistent with an identified public policy addressing the employment, or employment-related conduct, of the grievant. The impact of *W.R. Grace* and *Misco* is very different from, and far more significant than, the impact of *Spielberg/Collyer*, *Gardner-Denver*, and the external law cases falling within Category I of the Figure 2 paradigm.

In stark contrast to those first three types of disputes touched by external law, under the public policy exception, both the arbitrator's interpretation of the collective bargaining agreement and the award itself can be effectively overturned by a reviewing court if the court finds, in the disposition resulting from arbitration, an outcome that it deems inconsistent with the public policy touched by the controversy. The significance of the *Misco/W.R. Grace* doctrine is heightened by the very broad reach of the public policy exception.

The case law to date indicates that the scope of the public policy exception is defined, not *by the statutory rights of the grievant* (as in the three other external law modes), but rather *by the statutory and other well-defined legal rights of everyone but the grievant*, and it arguably extends to the legal duty of the employer to protect the rights of those impacted by the grievant's misconduct. This is new turf for labor arbitrators accustomed to focusing on the various workplace rights of grievant employees balanced only against the management rights of the employer. Undoubtedly, it is a perceived duty to protect and enforce the rights of these third parties that often leaves federal judges feeling compelled, especially in "hard" cases like *Iowa Electric* and *Delta Air Lines*, to intercede under the aegis of the public policy exception.

The developing case law indicates that proper analysis and treatment of the public policy dimensions of a discipline dispute obliges the arbitrator to balance the contractual and other rights of the grievant against the impact of the grievant's purported misconduct on the rights of fellow employees, customers, those who work for customers, suppliers of the employer, and even the general public. In addition, the arbitrator must also weigh the vicarious liability of the employer that may result from the grievant's transgression of public policy.

Under the broader views of the trigger to the public policy inquiry reflected in the recent decisions of the Eleventh, Eighth, and Second Circuit Courts of Appeals (and to a lesser extent, the opinions of the Third Circuit in *Stroehmann Bakeries* and *Exxon Shipping*, and the opinion of the Seventh Circuit in *Chrysler*), a federal court will review the merits *de novo* and can effectively substitute its judgment for that of the arbitrator when the arbitration award fails either to respect, or adequately address, the underlying workplace-related public policy that the reviewing court identifies. It seems clear that this judicial intrusion into the merits of the contractual dispute, which formerly was considered the labor

arbitrator's exclusive domain, can occur even though the external law dimension of the particular controversy was not directly at issue in arbitration and was not addressed by the parties in their cases-in-chief or in argument.

C. *The External Law Debate Brought Full Circle*

The public policy exception brings the external law debate full circle. The debate originated with the concerns raised when arbitrators were confronted with contract language which conflicts with external law touching on the same subject. In Category IV public policy cases, we are again faced with the question of how arbitrators should respond to a conflict, albeit often subtle, between the language of the collective bargaining agreement (the contractual just cause provision and the common law of the shop attendant thereto) and the external law touching on the same subject (a clear, unequivocal proscription of particular employee conduct found in relevant public policy). However, as the preceding analysis demonstrates, unlike Category I cases, arbitrators in Category IV public policy cases who choose not to address or somehow contemplate the impact of relevant external law place the contractual award in serious peril.

Thus, the external law debate is again joined, with an entirely new question to be decided, *to wit*: "[I]f a failure to address adequately, consider, or respect the public policy dimensions underlying a particular dispute can result in the vacation of an arbitration award, are not arbitrators and advocates obliged to confront those issues and deal with them the best they can?" This question provides the focal point for the final section of this analysis.

VI. AN APPROPRIATE RESPONSE

A. *The Imperative Presented by the Public Policy Exception*

Despite the narrowing language and reaffirmation of the general Steelworkers Trilogy principles announced by the Supreme Court in both *Misco* and *W.R. Grace*, it is undeniable that at the broader end of the public policy trigger continuum, federal courts can legitimate what amounts to a re-adjudication of the merits of contractual disputes which the parties have agreed will be decided by arbitrators. This is a new and very significant dimension of the external law paradigm that presents a serious challenge to labor arbitrators and the advocates who argue cases before them.

In light of the divergence between the several circuits as to the nature of the "trigger" to the public policy inquiry, it seems certain that the Supreme Court will be required to revisit the public policy exception and identify what it believes to be the proper stimulus to heightened judicial scrutiny under *Misco* and *W.R. Grace*. Until the Supreme Court articulates that bright-line standard, labor dispute resolution professionals must confront head-on the substantial threat to the finality

of the labor arbitration awards posed by the *Misco/W.R. Grace* public policy exception. Neutrals and advocates alike must formulate an appropriate response to the potential challenge to the integrity and finality of the contractual labor arbitration process presented by the current uncertain state of the law. It is that task to which we now turn.

The previously-noted question all labor relations professionals face is a simple one: If a failure to address adequately, consider, or respect the public policy dimensions underlying a particular dispute can result in the vacation of an arbitration award, are not arbitrators and advocates obliged to confront those issues and deal with them the best they can? With but a few caveats detailed below, the Authors are convinced that the answer to this question is "Yes."

Labor arbitrators have a duty to those they serve, and to the arbitration process, to make every reasonable effort to provide definitive and final resolutions of the contractual disputes presented to them. Employer and union advocates have a parallel duty to their constituents, and to the process, to take every responsible step to maximize the likelihood that the grievance arbitration mechanism remains the final and binding dispute resolution device that the parties intend it to be. Labor dispute resolution professionals simply cannot continue to ply their trade in the old, tried and true fashion and hope the Supreme Court will eventually come to the rescue by adopting a view that falls on the restrictive, D.C. Circuit/Ninth Circuit end of the public policy trigger continuum.[125] Rather, we must acknowledge this new and very important aspect of the external law paradigm and develop a thoughtful response to it.

Matters of external law arising within the context of the traditional (collective bargaining agreement) labor arbitration model will likely always be subject to *de novo* review by the courts. If a given contractual dispute turns, or substantially touches, on issues of external law rising to the level of public policy, the award (as well as the arbitral resolution of the contractual issue) will always be subject to judicial vacation if it does not comport with, or at least contemplate, that public policy. Nevertheless, nothing in *Misco*, *W.R. Grace*, or the circuit courts of appeals case law reviewed above directs arbitrators to shy away from these issues.[126] Rather, the possibility that an arbitrator's award may be vacated on public policy grounds compels labor neutrals to weigh the external law factors pertinent to the contractual disputes before them in order to ensure, to the maximum extent possible, that the awards they issue do not lose the critical characteristic of finality. Otherwise, we run the risk of allowing contract arbitration to become only a preliminary step in the dispute resolution mechanism for labor-management controversies that directly or indirectly touch upon matters of public policy.

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125. *See Northwest Airlines*, 808 F.2d at 76; *Stead Motors*, 886 F.2d at 1200.

126. *Cf. Iowa Elec.*, 834 F.2d at 1427 (quoting *W.R. Grace*, 461 U.S. at 766) ("Because collective bargaining agreements do not formulate public policy, and arbitrators cannot consider matters not encompassed by the governing agreements, 'the question of public policy is ultimately one for resolution by the courts'").

Of course, arbitral forays into the external law domain raise the prospect of heightened judicial scrutiny and the attendant possibility that federal judges will feel less constrained to reverse awards on the merits. Regardless, it is clear that a decision by the parties and/or the arbitrator to ignore, or to defer on the public policy dimensions of a contractual dispute, will not insulate the award from judicial reversal. Thus, we believe advocates and arbitrators have no real alternative but to make reasonable efforts to ensure that the awards that result from the labor arbitration process somehow take into account, and produce results consistent with, any salient aspects of external law that constitute public policy.

B. Identification of Public Policy Issues

Once arbitrators and advocates decide that public policy issues cannot be ignored when they materialize, the process of determining the extent to which those matters will be brought within the scope of the arbitration proceeding is straightforward. The first step in that process, determining whether a dispute touches upon issues of public policy, is not a difficult task.

It is clear from the progeny of *Misco* that in employee misconduct cases, most public policy imperatives will be set out in statutes, administrative agency regulations, and/or definitive judicial interpretations of the same that expressly regulate, or have a direct impact on, the manner in which the grievant performs the job or behaves in the workplace. The most likely candidates for public policy status are promulgations intended to protect customers, fellow employees, or the public from death, injury, legal wrong, or other serious adversity.

The FAA regulations in *Delta Air Lines* and *Northwest Airlines*, the NRC regulation in *Iowa Electric*, the Coast Guard regulation in *Exxon Shipping*, and the Title VII bar on gender discrimination and the principle of sexual harassment law established by the opinion of the Supreme Court in *Meritor Savings Bank v. Vinson*, relied upon by the courts in *Newsday*, *Stroehmann Bakeries*, and *Chrysler*, all fall squarely within the public policy bailiwick. In contrast, no public policy was found to be at issue in *Stead Motors*, *Postal Service*, or *Interstate Brands*.

Among other factors, the presence of significant questions of public or workplace safety governed by law, or questions of employer liability for proscribed employment discrimination resulting from a grievant's workplace conduct, should serve as "red flags" indicating a strong likelihood of the presence of public policy concerns. All of these indicia of an operative public policy are familiar to advocates and arbitrators experienced in a particular industry. Their identification should not present great difficulty.

C. At the Arbitration Hearing

Once a dispute is determined to embrace matters of true public policy, advocates must decide whether to address those matters before the arbitrator by introducing pertinent evidence and argument. The Authors contend that there is no reason why advocates should not expect competent arbitrators to weigh these

matters in fashioning their awards and remedies and attempt to harmonize the contractual results they reach with applicable public policy.

To ensure proper and full arbitral treatment of conspicuous public policy issues, advocates, in presenting their cases, should: (1) exercise particular care to clearly identify to the arbitrator the components of the relevant external law that may constitute "public policy"; (2) put the question of the appropriate impact of that external law squarely before the neutral; and thereby (3) oblige the arbitrator to address these public policy considerations in some manner in the written award.

Identification of the relevant public policy issues and proper framing of the case-in-chief and argument effectively exhausts the responsibility of the advocates. Several vexing tasks remain for the arbitrator in such cases. Arbitrators face the first threshold dilemma when the parties have failed expressly to address a salient public policy issue in their cases-in-chief. The question is whether to inquire if the parties are willing to stipulate that the identified public policy issue is a proper subject for consideration by the arbitrator, and/or to request that they speak to those matters in the argument phase of their respective cases.

This is a step arbitrators cannot take lightly. If one or both parties have made reference to pertinent statutes, case law, or administrative agency promulgations, the arbitrator is effectively granted license to make the subject inquiry. However, if the parties have made no reference to these non-contractual promulgations during the hearing, the arbitrator's dilemma is exacerbated.

The act of requesting a stipulation and/or directing the parties to address a salient public policy issue in argument, when they have failed to do so in their cases-in-chief, would be most easily taken in cases where the parties are filing post-hearing briefs. This would avoid the possibility of prejudice to the case of a party who comes to the hearing unprepared to argue the public policy dimensions of the dispute. In cases where the parties choose to make oral closing argument, the arbitrator is left with a very difficult judgment call. That judgment call must be based on the neutral's assessment of the significance of the public policy issue and its potential impact, both on the merits of the contractual issue and the vulnerability of the award to judicial reversal.[127]

D. Drafting the Award

Regardless of whether the parties have addressed matters of relevant public policy, thoughtful arbitrators invariably will recognize the external law dimensions of a dispute and thus be confronted with several decisions in drafting the award. At the outset, the arbitrator must determine whether the analysis should be confined to the contractual issues or broadened to reach, either explicitly or impliedly, the public policy dimensions of the dispute.

The Authors have made clear their general belief that arbitrators should in some fashion deal with public policy issues when they recognize them. However,

127. Of course, even if the parties have not indicated a mutual intention to file post-hearing briefs, the arbitrator remains free to direct them to do so.

if the record (made at hearing and any post-hearing briefs) contains no reference to the identified public policy issue and the parties have not stipulated that the matter is properly before the arbitrator, the neutral almost certainly cannot speak to it explicitly in the award without stepping outside the scope of the contractually-specified arbitral authority.

It is indisputable that an arbitrator can properly interpret and apply external law only if it is in some fashion (by an express provision of the contract, stipulation of the parties, reference to relevant public policy in the case-in-chief and/or closing argument) brought within the scope of the contractual dispute.[128] Arbitrators whose offices are created by the collective bargaining agreement do not have authority, *sua sponte*, to step outside the four corners of the contract in search of a decision rule unless the parties have expressly or impliedly authorized that action.[129]

When the parties have not in some manner granted authority to the neutral, the arbitrator is obliged to take a less direct route in ensuring that the award will withstand judicial scrutiny under the public policy doctrine.[130] Neutrals pursuing this tack will cogently and methodically illustrate how their interpretation and application of the controlling contractual language, glossed by the common law of the shop of labor arbitration, produces a rational and defensible result. Particularly in discipline cases, the goal must be to demonstrate precisely how reliance on the arbitral and contractual principles of just cause and progressive discipline, as well as the traditional emphasis on the potential for rehabilitation of a wrongdoing employee, warrant the reinstatement of an individual who has engaged in conduct that, on its face, appears to be in violation of public policy.

In the alternate scenario, as is typically true today, the record will contain some form of reference to the statutory, case law, and/or administrative agency promulgation bases for relevant public policy. In this circumstance, we believe the arbitrator may properly address that external law in an explicit manner, as long as a contractual "hook" can be identified that legitimates such analysis. In discipline cases, the contractual just cause provision provides an appropriate contractual "hook."

Arbitral determination of a contractual just cause issue can properly extend to matters of external law which regulate or directly impact upon the disputed work behavior of a grievant employee. Moreover, in close-call, "hard" discipline cases, it can be argued that failure by the arbitrator to demonstrate that considerations of relevant public policy have been incorporated into the just cause

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128. *See* Grenig, *supra* note 119, at 518-19; George R. Fleischli, *When Can a Grievance Arbitrator Apply Outside Law?*, 18 J.L. AND EDUC. 505 (1989). *See also Iowa Elec.*, 834 F.2d at 1427.

129. *See* Roadmaster Corp. v. Production and Maintenance Employees' Local 504, 851 F.2d 886, 888-89 (7th Cir. 1988) (holding that, absent contractual authority to do so, a labor arbitrator is precluded from considering outside positive law when resolving a contractual grievance).

130. This approach might also provide a useful analytical model for arbitrators reluctant to expressly incorporate pertinent external law into their analysis under any circumstances.

analysis invites judicial intervention, in order to ensure that applicable public policy has not been ignored.[131]

The difficult task here is determining precisely how the dictates of the relevant public policy (typically a proscription of the type of conduct engaged in by the grievant) should be integrated into the just cause analysis. The paradigm for judicial analysis suggested by the opinion of the Sixth Circuit Court of Appeals in *Interstate Brands* is an appropriate model for arbitral evaluation of the public policy dimensions of contractual disputes.

The Sixth Circuit's application of the *Misco/W.R. Grace* standard requires a reviewing court to make three threshold findings before judicial intrusion into the merits, and vacation, of an arbitrator's award on public policy grounds is warranted. First, it calls for a clear articulation of the public policy allegedly affected. Second, it obliges the reviewing court to find that the grievant's conduct violated the subject public policy. Finally, the *Interstate Brands* analytical framework dictates identification of a nexus between the grievant's alleged misconduct in violation of public policy and the grievant's job performance. The Authors believe that these three elements are the key to proper arbitral evaluation of public policy matters in employee misconduct cases.

We suggest the following framework for explicit analysis of potential public policy issues in the arbitration award.

1. Identify the relevant external law and ascertain if it rises to the level of public policy. If it does,

2. Evaluate the grievant's conduct to determine if it abridged the relevant public policy. If it did,

3. Identify the nexus between the grievant's conduct and the work place. If there is a nexus,

4. Clearly demonstrate that the grievant's violation of public policy has been factored into the determination of the contractual just cause issue and the formulation of any remedy directed in the award.

The key to the analytic paradigm suggested above is a clear and persuasive explanation of how the arbitrator, in resolving the contractual just cause issue and applying the common law of the shop, has remained respectful of the public policy set forth in the statute, government regulation, and/or judicial doctrine touched by the dispute. By doing so, the neutral demonstrates how the collective bargaining agreement, as interpreted in the award, does not abridge public policy.

Labor arbitrators do not have the luxury of adopting the simplistic view of discipline matters reflected in a number of the post-*Misco* public policy decisions

131. *See Stroehmann Bakeries*, 969 F.2d at 1436; *Exxon Shipping*, 993 F.2d at 365, 366 n.9, 367. *Cf. Chrysler*, 959 F.2d at 688.

of the federal judiciary. The charge placed on labor arbitrators by the just cause component of the common law of the shop obliges us to look, *inter alia*, to considerations of past practice, unequal treatment, and employer failures to promulgate clear rules and consistently enforce them, as well as concerns of procedural and substantive due process.

Rudimentary decision rules, like those embraced by some federal judges in evaluating discharge cases,[132] do not track well with the type of analysis typically engaged in by arbitrators (and bargained for by the parties) in discipline cases. This difference in perspective is the most likely source of the consternation and bewilderment that federal judges sometimes express with the results reached by labor arbitrators in "hard" discharge cases.[133]

The point here is that arbitrators who choose to expressly address public policy issues must in no uncertain terms inform a reviewing court as to how they have discerned the key material facts underlying the dispute before them. Further, they must assure the court that they have considered, weighed, and decided the impact of the relevant public policy in the course of adjudicating the contractual just cause issue.[134] By doing so arbitrators demonstrate how their interpretation of the collective bargaining agreement does not violate relevant public policy. At the same time, arbitrators make it more difficult for a reviewing court to ignore the common law of the shop of labor arbitration by substituting more uni-dimensional standards.

Thus, the Authors suggest that in discipline cases, arbitrators must weigh pertinent public policy both as an indicant of the gravity of a grievant's misconduct and/or as a contra-mitigating factor in remedy determinations. In this manner, arbitrators can force federal judges who vacate awards on public policy grounds to acknowledge, or at least impliedly reveal, that they are rejecting the arbitral resolution of the contractual just cause issue and substituting their own interpretation and application of the relevant external law for the contract interpretation and judgment of the neutral who was mutually selected by the parties to resolve the dispute.

This is a crucial step in ensuring, to the extent possible, that arbitration awards touching on matters of public policy do not lose their finality. The case law analyzed above shows that the several circuit courts of appeals that are more inclined to approve district court vacations of arbitration awards on public policy grounds focus their inquiry on the grievant's conduct, and not on the question of whether reinstatement of the wrongdoing grievant (*i.e.*, the contractual just cause provision, as interpreted by the arbitrator) violates public policy. Only by obliging

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132. *See, e.g., Exxon U.S.A.*, 991 F.2d 244; Misco, Inc, v. United Paperworkers Int'l Union, 768 F.2d at 741, 741 n.9, *rev'd* 484 U.S. 29 (1987).

133. *See* Frank H. Easterbrook, *Arbitration, Contract, and Public Policy, in* PROCEEDINGS OF THE FORTY-FOURTH ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS 65 (Gladys W. Gruenberg ed., 1991).

134. *See* William B. Gould IV, *Judicial Review of Labor Arbitration Awards - Thirty Years of the Steelworkers Trilogy: The Aftermath of AT&T and Misco*, 64 NOTRE DAME L. REV. 464, 493 (1989).

a reviewing court to confront the contractual just cause issue and explain how the just cause provision of the collective bargaining agreement, as interpreted by the arbitrator, violates public policy, can the arbitrator ensure that the court's inquiry is properly focused.[135]

If explicit incorporation of these public policy considerations into the just cause analysis makes it more difficult for arbitrators to conclude that mitigated penalty, middle-ground solutions like reinstatement without back pay are warranted in particular cases, so be it. In a similar manner, if deliberate and thoughtful analysis of public policy issues precludes labor arbitrators from playing a little fast and loose with that external law, so be it. A re-striking of the balance by focusing more on the gravity of the employee's misconduct, and less in the direction of the prospects or hopes for rehabilitation, may be a proper move in difficult cases involving employee misconduct that violates public policy.[136]

E. The Unknown: Non-Discipline Public Policy Cases

When the issue in arbitration moves outside of the discipline/employee misconduct area, implementation of the approach suggested here becomes more difficult. First, the necessary contractual justification for arbitral analysis of the public policy issue is likely to be more difficult to ascertain. A contract provision stating the parties' intent that the collective bargaining agreement comply with relevant law could serve such a purpose. That end could likely be served even more effectively by a stipulation from the parties that, in resolving the contractual dispute, the arbitrator is to address relevant external law constituting public policy.

Even if this "jurisdictional" concern is overcome, two more important considerations remain. The first concerns the fact that in non-discipline cases, it is almost certain that arbitrators will be obliged to engage in highly complex and sophisticated analysis, interpretation, and application of relevant external law. This is in contrast to the simple "glossing" of the just cause principle called for in the typical public policy-discipline case. The complex, sophisticated statutory/case law analysis required to resolve the public policy dimensions of non-discipline matters will provide reason for pause to even the most sophisticated labor arbitrator.

Related to this first concern, and even more important within the context of the larger external law debate, is the enhanced prospect of conflicts between the contractual obligations of the parties (most particularly, employers), and the rights, proscriptions, and duties set down in applicable law, rule, and regulation. For example, an arbitrator presented with what on its face looks like a simple

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135. *See* Seymour v. Blue Cross/Blue Shield, 988 F.2d 1020 (10th Cir. 1993): "[I]n determining whether an arbitration award violates public policy, a court must assess whether 'the specific terms contained in [the contract] violated public policy'. . . by creating an 'explicit conflict with other laws and legal precedents' . . . ." *Id.* at 1024.

136. *Id. See also* Joan Parker, *Judicial Review of Labor Arbitration Awards: Misco and Its Impact on the Public Policy Exception*, 4 LAB. LAW. 683, 742-43 (1988).

promotion/relative abilities grievance may be compelled to juxtapose and reconcile a conflict between a contractually-established promotion procedure and the employer's obligation, under the Americans with Disabilities Act,[137] to make reasonable accommodation to the physical or mental impairments of employees (both grievants and non-grievants) who are "qualified individuals with a disability" as per the Act.

Because all of the significant post-*Misco* public policy case law has arisen in the context of challenged disciplinary actions, it is difficult at this point in time to precisely divine the standards that federal courts will apply in reviewing public policy-based challenges to arbitration awards in non-discipline cases. Whatever the standards, the potential for conflict in a non-discipline, public policy case between collective bargaining agreement language and external law may well complete the external law paradigm by returning to its origins in Category I and reinvigorating the Meltzer-Mittenthal-Howlett debate.

VII. CONCLUSION

The above-discussed dimensions of the evolving body of public policy case law provide a strong impetus for re-examining the conventional wisdom regarding the advisability of arbitrators applying pertinent external law in resolving contractual disputes. The activist response advocated by the Authors to the challenges presented to the institution of labor arbitration by the public policy exception raises several significant questions as to the proper role and abilities of labor arbitrators. In addition, *Misco* and its progeny make clear that labor arbitrators presented with disputes embracing conspicuous public policy dimensions, who do not somehow harmonize their awards with those relevant dimensions of the external law, can no longer be confident that the shield of the Steelworkers Trilogy will hold.

Arbitrators must ensure that their awards in some fashion reveal to the parties (and to a reviewing court) how the arbitral resolution of the dispute remains viable, even when measured against the public policy touching upon it. By failing to do so, the arbitrator tacitly issues an invitation to the losing party to appeal and greatly enhances the likelihood of judicial vacation.

The Authors are convinced that arbitrators cannot back away from public policy cases as a result of this heightened possibility that their awards will be vacated if they misinterpret or misapply the law. An arbitrator's charge is to provide the parties being served with definitive, binding resolutions of the disputes they submit to arbitration. This duty to the parties and to the institution of labor arbitration must guide the response of labor arbitrators to the challenge of the *Misco*/*W.R. Grace* public policy exception. The seemingly pathological fear of

137. Americans with Disabilities Act, Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. §§ 12101-12213) (West Supp. 1992).

being reversed by a federal court, reflected in much of the traditional external law debate, should not be a deterrent.[138]

The numbers of arbitration cases touching upon matters of legitimate public policy may be relatively small.[139] Further, *W.R. Grace*, *Misco*, and the body of arbitration-related case law demarcated from the Steelworkers Trilogy provide strong basis for inferring that the Supreme Court will eventually resolve the current uncertainty as to the nature of the public policy exception in a manner that will perpetuate the traditionally severe restrictions on judicial intrusion into the merits of arbitration awards.

Nevertheless, if labor arbitration is to remain a viable institution and an effective dispute resolution mechanism, both labor arbitrators and labor relations advocates must decide and argue cases in a manner that minimizes the opportunities, and the necessity, for intrusion by the federal courts under the aegis of the public policy exception. The mainline labor arbitrators, who are otherwise qualified to interpret and apply external law, are well suited to assume this task.[140]

The Authors' purpose here is to stimulate a renewal of the debate as to the proper role of labor arbitrators in resolving contractual disputes that also present significant issues of external law. The new environmental dimension presented by the public policy exception raises the prospect of increasing intrusion of external law into the contractual arbitration process. The position advocated here is consistent with the apparently changing, and increasingly favorable, attitude of the Supreme Court regarding the appropriateness of arbitration as a vehicle for adjudicating employment-related statutory matters.[141]

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138. *Alexander v. Gardner* notwithstanding, there is some basis to believe that the federal courts will give arbitrators the benefit of the doubt in close call, "hard" cases involving the interpretation and application of external law. Thus, in Upshur Coals Corp. v. United Mineworkers of Am., District 31, 933 F.2d 225 (4th Cir. 1991), the U.S. Court of Appeals for the Fourth Circuit held that "[a] legal interpretation of an arbitrator may be overturned only where it is in manifest disregard of the law." *Id.* at 229 (citing American Postal Workers v. United States Postal Serv., 682 F.2d 1280, 1284 (9th Cir. 1982)).

139. Michael H. LeRoy and Peter Feuille, *The Steelworkers Trilogy and Grievance Arbitration Appeals: How the Federal Courts Respond*, 13 INDUS. REL. L.J. 78, 90 (1991).

140. Arbitrators so qualified are those capable of: (1) identifying relevant external law issues when they arise within the context of a contractual dispute; (2) analyzing the relevant law; and (3) integrating that analysis with the required (and primary) evaluation of the contractual questions in dispute. This does not require the arbitrator to be an attorney. It does require the neutral to be well-versed in substantive employment and labor relations law.

141. *See* Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647 (1991) (holding that claims brought pursuant to the Age Discrimination in Employment Act are subject to compulsory arbitration under the arbitration provision of a collateral, non-employment contract between a securities dealer and a securities brokerage firm). *See also* Saari v. Smith, Barney, Harris Upham & Co., 968 F.2d 877 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 494 (1992) (holding that the Employee Polygraph Protection Act does not prohibit contractually-required arbitration of claimed violations of the statue); Stephen L. Hayford, *The Changing Character of Labor Arbitration, in* PROCEEDINGS OF THE FORTY-FIFTH ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS 69 (Gladys W. Gruenberg ed., 1993); Stephen L. Hayford, *The Coming Third Era of Labor Arbitration*, ARB. J., Sept. 1993, at 8.

We cannot pretend to know the proper outcome of this debate. However, we can say with confidence that in contractual disputes touching upon matters of public policy, the traditional safe harbor of sticking strictly to the contract, without considering relevant public policy, no longer exists. At the same time, the approach indicated under the *Spielberg/Collyer* deferral and the *Gardner-Denver* components of the external law paradigm do not provide a fully satisfactory guide to arbitral conduct.

As observed earlier, the public policy case law reviewed above brings the external law debate full circle. Thus, we find ourselves again confronted with the troublesome question of whether labor arbitrators, whose function is to serve as the readers of the collective bargaining agreement that creates their office, have any business moving outside the contract. In cases touching on external law rising to the level of public policy, that question is redefined by the prospect of judicial vacation of the award when the arbitrator fails to do so. Therefore, at the very least, a thoughtful re-examination of the question of arbitral deportment, within the context of the recently-augmented external law paradigm, is warranted.