1994

Sexual Harassment, Labor Arbitration and National Labor Policy

Douglas E. Ray
University of Toledo College of Law, dray@stu.edu

Follow this and additional works at: https://digitalcommons.unl.edu/nlr

Recommended Citation
Available at: https://digitalcommons.unl.edu/nlr/vol73/iss4/3
I. INTRODUCTION

The institution of labor arbitration is tasked with resolving workplace disputes arising under a collective bargaining agreement. It is not surprising that many of these disputes involve the same problems that sometimes plague our larger society. In a sense, labor arbitration awards provide a window on the workplace and society, revealing problems of illegal drug use, alcohol abuse, race, sex and disability discrimination, spouse and child abuse and a host of other ills. It is not surprising, too, that Congress, state legislatures, and the courts have sought to resolve these problems as well.¹

¹ Given the fact that the percentage of the workforce represented by unions has declined in recent decades, statutes, regulations, and court decisions play an increasingly important role in the development and protection of workplace rights.
Where an issue dealt with by a labor arbitrator is also covered by public regulation, the arbitrator's award may be subject to challenge in court on grounds that it allegedly violates the public policy behind such regulation. Although such court review might seem like a good thing in the abstract, it threatens long-standing values of national labor policy protecting the finality of labor arbitration awards without necessarily doing anything to foster the public policy at issue.

One area where such challenges have been raised is that of sexual harassment in the workplace. The issue of determining when, if ever, a court may overturn the award of a labor arbitrator reinstating a person accused of sexually harassing a co-worker is an important one. Courts have taken opposite positions and the Supreme Court has denied certiorari. Commentators, too, have taken somewhat different positions.

The larger issue, of which the sexual harassment cases are but a part, involves the circumstances under which a court may overturn a labor arbitration award on public policy grounds. The issue is unresolved.

Also, it is not inconsistent with our national labor policy scheme that an individual be protected by law even if he or she is represented by a union. Collective bargaining representation, with its emphasis on majority rule, can only imperfectly protect rights such as freedom from discrimination. As Professor Clyde Summers has suggested, "if collective bargaining does not protect the individual employee, the law will find another way to protect the weaker party. The law, either through the courts or the legislatures, will become the guardian." Clyde W. Summers, Labor Law as the Century Turns, 67 Neb. L. Rev. 7, 10 (1988).


4. Commentators are split on this issue as well. Compare Harry T. Edwards, Judicial Review of Labor Arbitration Awards: The Clash Between the Public Policy
In *United Paperworkers International Union v. Misco, Inc.*, the Supreme Court's most recent case on the standards for judicial review of arbitration awards, the Court stated that it had granted certiorari "[b]ecause the Courts of Appeals are divided on the question of when courts may set aside arbitration awards as contravening public policy." Despite this intent to resolve the issue, however, the Court did not do so, indicating that:

[w]e need not address the Union's position that a court may refuse to enforce an award on public policy grounds only when the award itself violates a statute, regulation, or other manifestation of positive law, or compels conduct by the employer that would violate such a law.7 The issue remains open.

The author believes that this yet unanswered question should be answered in the affirmative. An award should only be set aside if it requires a party to commit an illegal act or violate positive law.

The reasons for adopting a narrow public policy review of labor arbitration awards are especially well demonstrated by the cases involving reinstatement of persons accused of sexual harassment.

This Article will first review the general standards for court review of labor arbitration awards including the current status of the law concerning review of awards on a public policy basis. The Article will then identify the cases in which courts have struggled to balance the importance of upholding labor arbitration awards against a perceived conflict with the strong and acknowledged public policy against sexual harassment. These cases will then be used to demonstrate how a narrow review standard is most consistent with national labor policy and how reviewing courts may not always understand the labor arbitration process or appreciate the interests it protects. The Article asserts that most perceptions of a "conflict" between the policies of arbitral finality and prevention of sexual harassment are flawed and that there is generally not a true conflict in policy even

---

*Exception and the Duty to Bargain, 64 CHI.-KENT L. REV. 3, 4, 33 (1988)(attacking broad public policy review cases as exercises in "unprincipled and unwarranted judicial activism" and advocating rule allowing vacation only if award construes agreement to compel violation of positive law) and Bernard F. Ashe, Arbitration Finality and the Public Policy Exception 49 DISP. RESOL. J. 22 (Sept. 1994) with Bernard Meltzer, After the Labor Arbitration Award: The Public Policy Defense, 10 INDUS. REL. L.J. 241 (1988)(criticizing "limitist view")*.  
6. *Id.* at 35.  
7. *Id.* at 45 n.12.  
8. See *infra* notes 108-117 and accompanying text.  
9. See *infra* notes 27-45 and accompanying text.  
10. See *infra* notes 46-84 and accompanying text.  
11. See *infra* notes 85-107 and accompanying text.  
12. See *infra* notes 108-117 and accompanying text.  
13. See *infra* notes 118-131 and accompanying text.
where the arbitrator directs reinstatement.\textsuperscript{14} The Article concludes with a recommendation for a narrow standard of review and with suggestions for advocates and arbitrators which should make it easier for a court to uphold an award.\textsuperscript{15}

II. BACKGROUND

A. Labor Arbitration and Policies of Finality

Labor arbitration as a means to resolve industrial disputes is of relatively recent origin with its real growth as a means to resolve labor-management contract grievances occurring only after World War II.\textsuperscript{16} For this reason, the law in the area is also of recent origin. In its 1957 decision in \textit{Textile Workers v. Lincoln Mills},\textsuperscript{17} and three 1960 decisions comprising the \textit{Steelworkers Trilogy},\textsuperscript{18} the Supreme Court first discussed the importance of labor arbitration to national labor policy. In \textit{Lincoln Mills}, the Court held that section 301(a) of the Labor Management Relations Act\textsuperscript{19} authorized federal courts to fashion federal law which would allow enforcement of agreements to arbitrate grievance disputes.\textsuperscript{20}

In 1960, the Court limited the power of courts to interpret collective bargaining agreements and explained the importance of the arbitrator's role in relation to the collective bargaining process. In the

\begin{footnotes}
14. See infra notes 132-164 and accompanying text. Because the focus of Title VII sexual harassment policy is on protecting the work environment of the plaintiff and not on punishing transgressors, courts have not required that employers always discharge employees guilty of sexual harassment. Thus, cases challenging arbitration awards which reinstate persons accused of harassment often present what could be termed a "false conflict." See \textsc{William M. Richman \& William L. Reynolds}, \textsc{Understanding Conflict of Laws} (2d ed. 1993).
15. See infra Parts VII-VIII.
\end{footnotes}
first Trilogy case, United Steelworkers v. American Manufacturing Co., the Court stated that courts "have no business weighing the merits of the grievance" before enforcing the parties' promise to submit a grievance to an arbitrator. In United Steelworkers v. Warrior & Gulf Navigation Co., the second case of the Trilogy, the Court framed a rule of presumption of arbitrability in a collective bargaining agreement containing an arbitration clause. The Court noted: "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." Writing for the Court, Justice Douglas recognized the significance of arbitration to a collective bargaining system:

Arbitration is the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and content are given to the collective bargaining agreement.

In the final Trilogy case, United Steelworkers v. Enterprise Wheel & Car Corp., the Court set out its standard for review of an arbitration award:

When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. . . . Nevertheless, an arbitrator is confined to interpretation and application of the collective bargain agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the awards.

The Court went on to note that "[a] mere ambiguity in the [arbitrator's] opinion accompanying the award . . . is not a reason" to refuse enforcement. Rather, concluded the Court, parties bargain for the arbitrator's construction of the contract; therefore, a court cannot overrule an arbitrator's decision merely because its interpretation of the contract differs from that of the arbitrator.

22. Id. at 567-68.
24. Id. at 582-83.
25. Id.
26. Id. at 581.
28. Id. at 597.
29. Id. at 598.
30. Id.
In its 1983 *W.R. Grace & Co. v. Local Union 759, International Union of Rubber Workers* decision, the Court emphasized the highly deferential standard of review contemplated by *Enterprise Wheel*:

When the parties include an arbitration clause in their collective-bargaining agreement, they choose to have disputes concerning constructions of the contract resolved by an arbitrator. Unless the arbitral decision does not "draw[w] its essence from the collective bargaining agreement," a court is bound to enforce the award and is not entitled to review the merits of the contract dispute. This remains so even when the basis for the arbitrator's decision may be ambiguous.\(^{32}\)

The issue of whether an award "draws its essence" from the contract, however, continued to be a substantial source of litigation. All seemed to agree that courts are to exercise discretion and show deference to the awards of labor arbitrators but there was confusion over the limits of such deference. Again, in 1987, the Court sought to outline approved standards for court review in *United Paperworkers International Union v. Misco, Inc.*\(^{33}\) *Misco* involved the discharge of an

---

32. *Id.* at 764 (quoting United Steelworkers v. Enterprise Wheel & Cart Corp., 363 U.S. 593, 597 (1960))(citations omitted). A number of distinguished commentators have argued for a narrow scope of judicial review of labor arbitration awards. See David E. Feller, *The Coming End of Arbitration's Golden Age*, 29 Proc. Nat’l Acad. Arts. 97, 107 (1976)(deference to arbitral awards is result of “recognition that arbitration is not a substitute for judicial adjudication, but a part of a system of industrial self-governance”); Timothy J. Heinsz, *Judicial Review of Labor Arbitration Awards: The Enterprise Wheel Goes Around and Around*, 52 Mo. L. Rev. 243 (1987); Edgar A. Jones, Jr., *“His Own Brand of Industrial Justice”*: *The Stalking Horse of Judicial Review of Labor Arbitration*, 30 UCLA L. Rev. 881 (1983); Lewis B. Kaden, *Judges and Arbitrators: Observations on the Scope of Judicial Review*, 80 Colum. L. Rev. 287, 297-98 (1980)("It is to be hoped that judges will learn to temper their activist instincts with an appreciation that the agreement before them is a unique type of contract, and that an apparently erroneous award may in fact just reflect the creative search for special rules that the parties need from their private judge, and for which they have negotiated."); Theodore J. St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny*, 75 Mich. L. Rev. 1137, 1160-61 (1977)(arbitrator is “reader” of parties’ contract, his award becomes part of their contract, and therefore courts defer to arbitrator whose award should stand, absent procedural violations or illegality of resulting contracts); Clyde W. Summers, *Judicial Review of Labor Arbitration or Alice Through the Looking Glass*, 2 Buff. L. Rev. 1, 27 (1953)(considering role of courts in reviewing merits of grievance, author finds that “courts have a function, but it is the limited one of exercising only enough supervision to protect labor arbitration from destroying itself”)
employee, Cooper, allegedly for marijuana use. The employee had been found in the back seat of an otherwise unoccupied automobile, belonging to another person, with a lighted marijuana cigarette in the front-seat ashtray. Two other employees had left the car. The employer investigated and discharged Cooper on the basis that his presence in the car violated its rule against marijuana use on plant premises.\(^3\) Cooper's grievance was processed to arbitration. Shortly before the arbitration hearing, the employer became aware that the police searched Cooper's car on the same day Cooper had been found in the car with the marijuana cigarette and found gleanings of marijuana in his car.\(^4\)

After a hearing, the arbitrator upheld the grievance and directed the employer to reinstate Cooper with backpay and full seniority. The arbitrator found that the employer had failed to prove that Cooper had used or possessed marijuana on company property and that finding Cooper in the back seat of a car with a burning cigarette in the front-seat ashtray was insufficient proof.\(^5\) The arbitrator refused to accept as evidence the fact that marijuana had been found in Cooper's car on company property because the employer did not base its decision to discharge on this fact, not knowing it at the time.\(^6\)

In the employer's suit to vacate the award, the district court set aside the award as contrary to a public policy against operation of dangerous machinery while under the influence of drugs as well as state criminal laws.\(^7\) The Court of Appeals for the Fifth Circuit affirmed,\(^8\) Judge Tate dissenting.\(^9\) The majority determined that reinstatement would violate the public policy "against the operation of dangerous machinery by persons under the influence of drugs or alcohol."\(^10\)

The Supreme Court granted certiorari on the question of whether a court may refuse to enforce an arbitration award rendered under a collective bargaining agreement on public policy grounds only when the award itself violates positive law or requires unlawful conduct by the employer.\(^11\) In its opinion, however, the Court took no position on

---


35. Id.
36. Id. at 34.
37. Id.
38. Id. at 34-35.
40. Id. at 743-46.
41. Id. at 743.
this exact issue but, rather, reversed the judgment of the court of appeals on other grounds. The Court ruled that the court of appeals erred and exceeded its limited authority to review arbitration awards. The court of appeals and the district court were not free to disregard and overrule the arbitrator's factfinding and find for themselves that the cigarette incident violated the employer's rule, nor could those courts overrule the arbitrator on the evidentiary matter of whether to consider the evidence of marijuana found in the grievant's car which evidence was not available to the company at the time of discharge. Further, the courts lacked the power to set aside the arbitrator's remedy.4

The Court stated that, with regard to the arbitrator's interpretation or application of the contract, "as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision."45

B. Issues of Public Policy

The issue left unresolved in Misco of when, if ever, an arbitration award should be overturned on public policy grounds is, as the Supreme Court recognized in W.R. Grace, "ultimately one of resolution by the courts."46 Two limits on a court's power in this area are now well established. First, a court may not use public policy as a subterfuge to second-guess either the arbitrator's factual findings or his or her reading of the contract. Second, courts must be careful to base public policy arguments on "real" public policy rather than vague and unsubstantiated notions of policy applied because they think an arbitrator erred. On the third limit, defining what it means for an award to "violate" a public policy, the courts are in hopeless disarray.

In W.R. Grace the Court stated that

[as with any contract, however, a court may not enforce a collective-bargaining agreement that is contrary to public policy. . . . If the contract as interpreted by [the arbitrator] violates some explicit public policy, we are obliged to refrain from enforcing it. Such a public policy, however, must be well defined and dominant, and is to be ascertained "by reference to the laws and legal precedents and not from general considerations of supposed public interests."47

The Supreme Court reaffirmed these limits in its United Paperworkers International Union v. Misco, Inc.48 decision which

43. Id. at 39.
44. Id. at 41.
45. Id. at 38.
47. Id. at 768 (quoting Muschany v. United States, 324 U.S. 49, 66 (1945)).
overturned a ruling by the Court of Appeals for the Fifth Circuit that the reinstatement of a person accused of drug use violated public policy. The Court stated, "we explicitly held in W.R. Grace that a formulation of public policy based only on 'general considerations of supposed public interests' is not the sort that permits a court to set aside an arbitration award."\textsuperscript{49}

Despite the narrowness of the \textit{W.R. Grace} definition, lower courts have overturned arbitration awards on public policy grounds in ways which second-guess arbitrator's factual findings and apply "general considerations of supposed public interests."\textsuperscript{50} A number of cases arising before and after \textit{W.R. Grace} and before \textit{Misco} demonstrate the intensity of the debate. Relying on a broad interpretation of public policy, a number of courts have overturned awards on this basis. In \textit{Amalgamated Meat Cutters & Butchers Workmen, Local 450 v. Great Western Food Co.},\textsuperscript{51} the Court of Appeals for the Fifth Circuit refused to enforce an award which ordered reinstatement of a tractor-trailer driver who had been drinking on duty. The court asserted that "no citation of authority" was needed to establish that enforcement of such an award was against public policy, but went on to discuss court decisions and federal regulations which evidenced a public policy against drinking on the job by professional drivers.\textsuperscript{52}

Similarly in \textit{United States Postal Service v. American Postal Workers Union},\textsuperscript{53} the First Circuit denied enforcement of an arbitrator's award directing reinstatement of a postal employee who admitted embezzling money orders. The court relied on several federal statutes regulating the conduct of postal employees and protecting the public in its use of the postal service.\textsuperscript{54}

In \textit{Misco}, the Fifth Circuit had refused to enforce an award which required reinstatement of an employee who had been discharged for drug use. The Fifth Circuit noted that the employee operated a "slitter-rewinder" which the arbitrator had found to be "an unusually dangerous machine."\textsuperscript{55} It found that there was a public policy "against the operation of dangerous machinery by persons under the influence of drugs or alcohol" and that there were Louisiana statutes against drug use.\textsuperscript{56} The arbitrator had ruled that the company did not prove the employee to have violated its rule against possession or use of drugs on company premises and that the discovery of a trace of mari-
juana residue in the employee's own car did not change the result because that discovery came after the discharge.

Rejecting the Fifth Circuit's view, the Supreme Court first noted that the lower court's definition of public policy did not seem to comport with the requirement in W.R. Grace that a policy must be "ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'" The court of appeals had not reviewed laws and legal precedents but rather drew upon "general considerations of supposed public interests" in concluding that there was a policy against operating dangerous machinery while under the influence of drugs.

Second, the Court found that the Fifth Circuit erred in finding that the discovery of marijuana gleanings in the grievant's car established a violation of the policy against operating machinery while under the influence of drugs or alcohol. The Court felt this connection was "tenuous at best" and, in any event, the drawing of inferences from the evidence was for the arbitrator and not for the court of appeals. In effect, the lower court had exceeded its authority by second-guessing the factual determinations of the arbitrator. As the Court in Misco stated: "The parties did not bargain for the facts to be found by a court, but by an arbitrator chosen by them."

A delegation of power to exercise "public policy" review of arbitrators' awards requires safeguards and limits to prevent judges from exercising their own senses of justice, thus substituting their views for those of the parties expressed in their contract. The term "public policy" will have different meanings to different persons. The possible extent of a public policy theory left unchecked is demonstrated by another Fifth Circuit case decided before Misco reached the Supreme Court, Oil Workers, International Union, Local No. 4-228 v. Union Oil Co. In that case, an employee was discharged after receiving a ten-year unadjudicated probation for possession of prohibited drugs. The arbitrator directed her reinstatement with back pay, noting that the terms of her probation forbade drug use and that she had a strong incentive to comply, and crediting her statements that she would remain drug-free. Shortly after the arbitration award, she tested positive for marijuana use in a company physical. Relying on the test, the employer refused to reinstate her. She later tested positive in probation service tests. The district court refused to enforce the reinstatement.

58. Id.
59. Id.
60. Id. at 44-45.
61. Id. at 45.
62. 818 F.2d 437 (5th Cir. 1987).
63. Id. at 439.
ment award, noting that while the arbitrator had assumed the probation system would protect employer’s interest, it did not. The employee used drugs and her probation was not revoked and, in the view of the court, the arbitrator’s reliance on her promise was unjustified.64 The district court then found that enforcement of the reinstatement award would violate public policy in light of the employee’s recent drug use and the probability of a safety hazard.65

Before the Fifth Circuit, the employer echoed this public policy argument. The union, on the other hand, responded by arguing a public policy in favor of rehabilitation, a policy evidenced by the grant of unadjudicated probation rather than confinement.

The Fifth Circuit found that the arbitrator was free “to credit the public policy favoring drug rehabilitation and find that [the employee] no longer used drugs and would not present a safety risk.”66 In light of the subsequent drug use, however, the court felt that public policy could bar enforcement and remanded the issue to the arbitrator for reconsideration in light of the employee’s post-award drug use “to the extent that this conduct proves his findings were based on an erroneous prediction.”67

The message of Union Oil is clear. Under the broadest view, public policy can mean whatever a judge wishes it to mean. If an arbitrator’s award were based not on the contract, but on his or her weighing of a general public policy against drug use compared to a general public policy in favor of rehabilitation, it would be vulnerable.68 A court should not have such power to ignore the contract.

Even where there is a clear public policy, courts are in disagreement as to what kind of arbitration award will violate such policy. A number of federal appellate courts have shown a willingness to overturn arbitration awards on broad public policy grounds, especially where allegations are made that public safety is involved.69 Other

64. Id. at 440.
65. Id.
66. Id. at 442.
67. Id. at 443.
68. "When an arbitrator bases his award on public policy considerations, he has overstepped his authority and the court may review the substantive merits of the award." Local N. P-1236, Amalgamated Meat Cutters & Butchers Workman v. Jones Dairy Farm, 680 F.2d 1142, 1144 (7th Cir. 1982) ("An arbitrator is not authorized to substitute his own view of wise policy for that of the parties."). E. I. DuPont de Nemours & Co. v. Grasselli Employees Indep. Ass’n, 790 F.2d 611, 618 (7th Cir. 1981) (Easterbrook J., concurring) (construing Ethyl Corp. v. United Steelworkers, 768 F.2d 180, 183-85 (7th Cir. 1985), cert. denied, 479 U.S. 853 (1986)).
69. See, e.g., Delta Air Lines, Inc. v. Air Line Pilots Ass’n, Int'l, 861 F.2d 665, 666-68 (11th Cir. 1988) (striking down award which reinstated pilot who flew while intoxicated), cert. denied, 493 U.S. 871 (1989); Iowa Elec. Light & Power Co. v. Local Union 204, Int'l Bhd. of Elec. Workers, 834 F.2d 1424, 1427-30 (8th Cir. 1987) (va-
courts have been less willing to find public danger and less willing to find violations of public policy in similar circumstances.\footnote{70}

A number of courts and judges have taken a far more limited view, believing that public policy review is "extremely narrow"\footnote{71} and that an arbitrator's decision should be overturned on public policy grounds only when the decision requires someone to act unlawfully.\footnote{72} Two Ninth Circuit decisions provide examples. In Amalgamated Transit Union, Local 1309 v. Aztec Bus Lines,\footnote{73} the arbitrator ordered the reinstatement of a bus driver who violated company policy by driving a bus despite knowing that its brakes were faulty. The court held that the arbitrator's order did not violate public policy. Taking a narrow view of the public policy exception, the court stated: "We agree that..."
forcing a party to a collective bargaining agreement to break the law is against public policy, but no California statute has been called to our attention which would make it illegal to employ bus drivers who have previously shown bad judgment.”74

In *Bevles Co. v. Teamsters Local 986*,75 an arbitrator ordered the reinstatement of two employees fired when their employer learned they were undocumented aliens. The court held that the award did not “violate [ ] a clearly defined public policy . . . [since] [n]either the company nor its employees are subject to any criminal or civil liability under federal law arising from their employment relationship.”76

Other courts have refused to overturn, on public policy grounds, awards directing reinstatement of drug users,77 letter carriers pleading guilty to unlawful delay of mail,78 persons assaulting supervisors,79 and gamblers.80 In another case, a court enforced an award directing reinstatement of a religious program radio announcer despite the argument that enforcement of the award would infringe on the First Amendment rights of the employer radio station.81 As Judge Easterbrook noted, in disagreeing with the concept of a broad public policy inquiry:

I find the principle itself objectionable. A power to set aside awards on grounds of public policy, as distinct from rules of law, is too sweeping. A court lacks this power for the same reason the arbitrator does—the function of arbi-

74. *Id.* at 644.
76. *Id.* at 1392-93 (footnote omitted).
77. See *Big Three Indus. v. International Longshoremen’s Union, Local 142, 124 L.R.R.M. (BNA) 3173 (D. Haw. 1987)* (upholding award directing reinstatement of two employees discharged for engaging in drug-related offenses on property of employer, finding no statute making it unlawful for the employer to reinstate employees); *S.D. Warren Co. v. United Paperworkers Int’l Union, Local 1069, 632 F. Supp. 463 (D. Me. 1986)* (upholding arbitration award reinstating three employees discharged for drug possession, sale or use and holding that suspension substituted for discharge does not violate public policy), *rev’d*, 815 F.2d 178 (1st Cir.), *and cert. granted and judgment vacated*, 484 U.S. 983 (1987).
78. See *United States Postal Serv. v. National Ass’n of Letter Carriers, 810 F.2d 1239 (D.C. Cir. 1987)*.
79. See *E. I. DuPont de Nemours & Co. v. Grasselli Employees Indep. Ass’n, 790 F.2d 611 (7th Cir. 1986)*.
80. See *Local 453, Int’l Union of Elec. Workers v. Otis Elevator Co., 314 F.2d 25 (2d Cir.)* (enforcing contract interpreted by arbitrator to require reinstatement of company employee who violated company rule against gambling on premises and was convicted of a misdemeanor), *cert. denied*, 373 U.S. 949 (1963). In *Otis Elevator*, the court found that the public policy represented by the New York statutory prohibition was vindicated by criminal conviction and further vindicated by a seven-month uncompensated layoff upheld by the arbitrator. The court also found no “greater vindication of the public condemnation of gambling . . .” was required. *Id.* at 29.
trator and court is to carry out a contract, and contracts bind unless made unlawful by rules of positive law. While strict adherence to the W.R. Grace requirements of a “well defined and dominant” public policy “ascertained ‘by reference to the laws and legal precedents’” can limit some overreaching by courts, there is hopeless confusion over what kind of conflict is necessary to establish the next requirement, that the contract “violates some explicit public policy.” This issue is the focus of those cases reviewing arbitration awards which direct the reinstatement of persons discharged for sexual harassment.

III. COURT REVIEW OF SEXUAL HARASSMENT DISCHARGE CASES

The degree of confusion and uncertainty over what kind of “conflict” is necessary to cause an arbitration award to “violate” public policy is best demonstrated by cases involving accusations of sexual harassment. These cases focus explicitly on the conflict issue because the existence of a clear public policy is not questioned.

A. The Public Policy

Title VII of the Civil Rights Act of 1964 makes it “an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.” This proscription has been applied to bar workplace sexual harassment.

In its 1986 Meritor Savings Bank v. Vinson decision, the Supreme Court held that Title VII prohibits sexually offensive conduct in the workplace that is sufficiently severe and pervasive to create a hostile work environment based on sex.

In its 1993 decision in Harris v. Forklift Systems, Inc., the Court confirmed its Vinson holding and further ruled that proof of psychological harm is not essential to a harassment claim under Title VII. The standard set in Harris is whether conduct is “severe or pervasive enough to create an objectively hostile or abusive work environment—

82. E.I. DuPont de Nemours & Co. v. Grasselli Employees Indep. Ass’n, 790 F.2d 611, 618 (7th Cir. 1986).
84. Id. (emphasis added).
86. 477 U.S. 57 (1986).
87. Id. at 66 (“[A] plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment.”).
an environment that a reasonable person would find hostile or abusive."\textsuperscript{89} In terms of applying this test, the Court does not provide a precise test for determining whether harassment has occurred. Rather, the Court majority suggests that whether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.\textsuperscript{90}

These standards have been expanded and defined in various Equal Employment Opportunity Commission (EEOC) guidelines and regulations\textsuperscript{91} to which the Supreme Court has often referred.\textsuperscript{92}

\section*{B. The Cases}

Although not numerous, the cases reviewing sexual harassment reinstatement awards by arbitrators reveal a great disparity in how broadly courts perceive their power to find a violation of public policy on which to base a vacation. Some courts view their powers as very broad.

\begin{footnotes}{92}
\begin{footnotes}{89} Id. at 368. \end{footnotes}
\begin{footnotes}{90} Id. at 371. It is not entirely clear whether, by this statement, Justice O'Connor meant to reject the "reasonable woman" standard adopted by the Ninth Circuit in Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991). \end{footnotes}
\begin{footnotes}{91} The Equal Employment Opportunity Commission, which enforces Title VII, has established a guideline stating:

\textit{Harassment on the basis of sex is a violation of Sec. 703 of Title VII. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when ... (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.}

29 C.F.R. § 1604.11(a)(1994)(footnote omitted). In its Compliance Manual, the EEOC has stated that the Commission will presume that unwelcome, intentional touching of a charging party's intimate body areas is sufficiently offensive to alter the conditions of her working environment and constitute a violation of Title VII. More so than in the case of verbal advances or remarks, a single unwelcome physical advance can seriously poison the victim's working environment.

\textit{EEOC: Policy Guidance on Sexual Harassment, reprinted in Fair Empl. Prac. Man. (BNA), at 405:6681, 6691 (March 19, 1990). The EEOC Guidelines suggest that an employer is liable for sexual harassment between fellow employees of which it knew or should have known, "unless it can show that it took immediate and appropriate corrective action." 29 C.F.R. § 1604.11(d)(1994).}

\begin{footnotes}{92} In Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), the Supreme Court stated that the EEOC Guidelines, as an administrative interpretation of Title VII, "while not controlling ... constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." Id. at 65 (citations omitted). The Court also stated that EEOC Guidelines "drew upon a substantial body of judicial decisions and EEOC precedent holding that Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult." Id. at 65. \end{footnotes}

\end{footnotes}
In *Newsday, Inc. v. Long Island Typographical Union, No. 915*, for example, the Court of Appeals for the Second Circuit affirmed the vacation of an arbitration award which reinstated, without back pay, an employee discharged for sexually harassing female co-workers. The grievant was found by the arbitrator to have engaged in unwelcome touching of female co-workers but was reinstated due, in part, to the employer's failure to follow progressive discipline. The court felt that the arbitration award should be vacated because it "condoned" the employee's conduct, tended to "perpetuate a hostile, intimidating and offensive work environment," and prevented the employer "from carrying out its legal duty to eliminate sexual harassment in the workplace." 

Similarly, in *Stroehmann Bakeries v. Local 776, International Brotherhood of Teamsters*, the Court of Appeals for the Third Circuit overturned an arbitration award directing reinstatement, with back pay, of an employee discharged for violation of a work rule prohibiting immoral conduct. The employee had been accused of sexually harassing a customer while making a delivery. Following the discharge, the union brought a claim to arbitration under the grievance procedure set forth in the collective bargaining agreement. The arbitrator concluded that the employee was not given a full opportunity to refute the claim of sexual harassment and ordered the employee reinstated with back pay. Subsequently, the district court vacated the arbitration award as being contrary to public policy.

On appeal, the court of appeals affirmed the district court's ruling. The court in *Stroehmann* stated "[t]here is a well-defined and dominant public policy concerning sexual harassment in the workplace." The court further stated there is a "dominant public policy favoring employer prevention and application of sanctions against sexual harassment in the workplace." It stated that such policies are referred to in Title VII of the Civil Rights Act of 1964 and regulations promulgated thereunder by the Equal Employment Opportunity Commission.

The court stated that "an award which fully reinstates an employee accused of sexual harassment without a determination that the harassment did not occur violates public policy." The court found:

[The arbitrator's] award would allow a person who may have committed sexual harassment to continue in the workplace without a determination of whether sexual harassment occurred. Certainly, it does not discourage sexual

---

94. Id. at 846.
95. 969 F.2d 1436 (3d Cir. 1992).
96. Id. at 1437-38.
97. Id. at 1441.
98. Id. at 1442.
99. Id.
harassment. Instead, it undermines the employer’s ability to fulfill its obligation to prevent and sanction sexual harassment in the workplace.\(^{100}\)

The court directed that the case be remanded for a de novo hearing before another arbitrator.\(^{101}\)

In contrast, other courts have upheld the awards of arbitrators reinstating employees who had committed acts of sexual harassment. In *Chrysler Motors Corp. v. International Union, Allied Industrial Workers*,\(^{102}\) the Court of Appeals for the Seventh Circuit upheld the award of an arbitrator who reduced to a thirty day suspension the discharge of an employee who had intentionally grabbed the breasts of a co-worker. The employer had attacked the award on public policy grounds. The court upheld the arbitrator’s refusal to admit evidence of other incidents which the employer had discovered only after the discharge.\(^{103}\) The arbitrator found that the grievant had not received warnings or discipline for any prior misconduct before being discharged and that the evidence did not indicate he could not be rehabilitated by progressive discipline. The court of appeals held that, while it did not condone the grievant’s behavior, the arbitrator “was within the purview of the collective bargaining agreement and public policy in ordering reinstatement.”\(^{104}\)

Similarly, in *Communication Workers v. Southeastern Electrical Cooperative*,\(^{105}\) the Court of Appeals for the Tenth Circuit refused to vacate, on public policy grounds, the award of an arbitrator reinstating a nineteen-year lineman who had sexually assaulted a customer in her home.\(^{106}\) The arbitrator had substituted a one month suspension without pay for the discharge. While acknowledging that preventing the sexual assault and abuse of women was of “paramount impor-

\(^{100}\) *Id.* (emphasis added).

\(^{101}\) *Id.*. The court of appeals majority and the district court which originally overturned the award, *Stroehmann Bakeries, Inc. v. Local 776, Intl Bhd. of Teamsters*, 762 F. Supp. 1187, 1190 (M.D. Pa. 1991), apparently thought that the arbitrator did not consider whether or not the grievant had committed the acts with which he was charged. Judge Becker, dissenting to the decision of the Third Circuit majority, disagreed with both the result and this observation. He asserted that the majority “misapprehends” what the arbitrator decided and finds that the arbitrator did hold that there was insufficient evidence to find that sexual harassment had occurred. *Stroehmann Bakeries v. Local 776, Intl Bhd. of Teamsters*, 969 F.2d 1436, 1447 (3d Cir. 1992). For a complete analysis of this case, see Jay E. Grenig, *Due Process and Major Offenses: The Courts and Labor Arbitration*, 48 Nat’l Acad. Arb. (forthcoming 1995).

\(^{102}\) 959 F.2d 685 (7th Cir.), *cert. denied*, 113 S. Ct. 304 (1992).

\(^{103}\) *Id.* at 689 n.4. See United Paperworkers Intl Union v. Misco, Inc., 484 U.S. 29, 40 n.8. (1987)(involving a similar issue of after-discovered evidence).


\(^{105}\) 882 F.2d 467, 468 (10th Cir. 1989).

\(^{106}\) Like *Stroehmann Bakeries*, this case does not technically involve sexual harassment of a co-worker.
tance," the court believed that the arbitrator had incorporated this concern into his determination and that, under the circumstances, it was within the arbitrator's discretion to determine the remedy and whether to apply corrective discipline.107

These cases reveal most clearly the central issue of this Article. Should a court overturn an award because it thinks the decision "sends a message" inconsistent with some public policy, or would society be better served by a rule which limits court review to determining whether the arbitrator has ordered the employer to commit an illegal act?

IV. LABOR POLICY AND COURT REVIEW

Consistent with national labor policy, the Supreme Court recognized in United Steelworkers of America v. Warrior & Gulf Navigation108 that different policy considerations apply to labor arbitration cases than apply to commercial arbitration cases. As the Court stated:

In the commercial case, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife. Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place here. For arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself.109

As "part and parcel of the collective bargaining process," labor arbitration provides a means for the parties to receive a final and binding interpretation of unresolved differences concerning the meaning of the contract. One benefit of finality is that it may encourage settlement before the final step of arbitration. This promotes labor peace. An important part of the process is that a party losing in binding arbitration is yet free to attempt to secure negotiated language in the next agreement which will ensure that the disfavored result will not recur.110 A standard for public policy review that is unclear or that allows broad court intrusion risks these benefits of finality. There may be less desire to settle or negotiate if a party has hopes of court review as the final forum.

Less obvious is the inevitability of delay if a broad standard of review is adopted. Whether or not an award is ultimately enforced or vacated, any standard which invites a court to balance or weigh public

109. Id. at 578.
110. Thus, an employer, if it is concerned that arbitration would reinstate a person who has committed sexual harassment, is free to bargain for a clause providing that specified kinds of behavior shall be cause for immediate discharge rather than deputizing the arbitrator with the discretion that "just cause" provides.
policies also invites challenges by parties unhappy with a particular arbitration decision. Such challenges take time, and time is the enemy of the labor relations benefits gained by a final and binding alternative dispute resolution system. The longer a labor relations dispute is allowed to go on, the greater the risk of hostility, mistrust, and disaffection.\footnote{111}

As the Court in \textit{Misco} noted after discussing grounds on which courts should overturn awards, "[i]f the courts were free to intervene on these grounds, the speedy resolution of grievances by private mechanisms would be greatly undermined."\footnote{112} As Judge Posner of the Seventh Circuit has stated: "The most important reason for deference to labor arbitrators is that labor disputes ought to be resolved rapidly; and, to be fast, arbitration must be final."\footnote{113}

The Supreme Court has also recognized this need for finality in labor arbitration in the related area of fair representation suits. In \textit{United Parcel Service, Inc. v. Mitchell},\footnote{114} a suit against an employer and union by an employee claiming that the union had violated its duty of fair representation and that the employer had violated the collective bargaining agreement, the Court reversed a lower court ruling that a six year statute of limitations applied. As the Court stated:

\begin{quote}
This system, with its heavy emphasis on grievance, arbitration, and the "law of the shop," could easily become unworkable if a decision which has given "meaning and content" to the terms of an agreement, and even affected subsequent modifications of the agreement, could suddenly be called into question as much as six years later.\footnote{115}
\end{quote}

A study of reported 1984 and 1985 district court cases involving review of labor arbitration awards revealed that federal district court review consumed an average of over 400 days from the date of the arbitration award to the date the court decision issued.\footnote{116} When a party appeals to a higher court, the delays become much greater. The decision of the court of appeals in \textit{Chrysler Motors Corp. v. International Union, Allied Industrial Workers},\footnote{117} for example, was issued...
April 3, 1992. The arbitration award affirmed by the court was issued July 24, 1989. Thus, although the award was ultimately enforced, more than two and one-half years passed before the arbitrator's order of reinstatement and partial back pay was effected. Such delays are inevitable when the standard for review is unclear and can make the system "unworkable."

V. THE MEANING OF JUST CAUSE

The arbitration awards under attack for reinstating employees accused of sexual harassment are attempting to apply the parties' contractual commitment that "just cause" be required for discharge. Before jumping to its own judgment as to the awfulness of a particular employee's conduct, a court needs to understand that just cause means more in a labor contract than whether the employee has committed the act or acts of which he or she is accused. A broad range of concerns are implicated.

In an important and useful article,118 Professor Nolan and Dean Abrams have identified the concept of just cause for discipline as "the most important principle of labor relations in a unionized firm,"119 and a limit on management in virtually every collective bargaining agreement. They point out that it is a bargain which protects union interests in fair and consistent discipline, "industrial due process,"120 and "industrial equal protection,"121 while protecting management's interests in rehabilitation, deterrence, efficiency, and future profitability.122 As they point out, labor arbitrators regularly protect industrial due process concerns by overturning discharges where employees have not been put on notice of standards for conduct or penalties, where an investigation was not conducted before the discharge, or where, except in cases of extremely serious behavior, progressive discipline has not been followed. They also note that arbitrators will overturn discharges where industrial equal protection in the form of equal treatment of like cases has not been provided. Finally, arbitrators will find a promise of "individualized treatment" in the just cause language and will give weight to mitigating factors that they believe the employer should have considered.123

These promises are enforced as part of the collective agreement negotiated on behalf of all bargaining unit members. When a union as-

---

119. Id. at 594.
120. Id. at 607.
121. Id. at 608.
122. Id. at 603. For an examination of how courts have treated arbitrators' due process rulings, see Grenig, supra note 101.
123. Abrams & Nolan, supra note 118, at 609.
serts interests of industrial due process such as a failure to investigate or to provide progressive discipline, or industrial equal protection such as a failure to treat like cases in a like manner, it is asserting the contractual rights of the entire bargaining unit. The union and its members may not wish to condone or encourage the particular actions of the bargaining unit member that led to discipline. Rather, the group interest in preserving promises of notice, fair investigation, and progressive discipline is being protected through the vehicle of the individual employee's grievance.124

Nothing stated above means that the arbitration system down-plays the seriousness of sexual harassment in the workplace or the need to remedy it with prompt action. Applying this just cause standard, arbitrators generally will uphold the termination of employees discharged for violating employer sexual harassment policies which incorporate federal guidelines.125

As the Supreme Court noted in Misco, the arbitrator "is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies."126 The issue of whether to modify the discharge penalty assessed by the employer is one that applies this "informed judgment" to all of the above factors. It is not a scientifically predictable process but it is what arbitrators do.127 This is the process the parties contracted for in their collective bargaining agreement.128

124. The concept can be loosely analogized to the use of the exclusionary rule in criminal law. In theory, at least, it exists to protect the interests of lawful society by discouraging wrongful search and seizure.


127. See FRANK ELKOURI & EDNA A. ELKOURI, HOW ARBITRATION WORKS 628 (1973)("Where the agreement fails to deal with the matter [of modifying penalties] the right of the arbitrator to change or modify penalties found to be improper or too severe may be deemed to be inherent in his power to decide the sufficiency of cause."). Arbitrator Carroll R. Daugherty set out an extensive checklist of criteria for determining whether just cause standards are met in Grief Bros. Cooperage Corp., 42 Lab. Arb. (BNA) 555, 557-59 (1964)(Daugherty, Arb.). This set of criteria has been adopted or referenced by many arbitrators. See Abrams & Nolan, supra note 118, at 599 n.30.

128. See Summers, supra note 33. As noted by the Court of Appeals for the Fifth Circuit, "[a]rbitral determination not only of the existence of misconduct but of the fitness of punishment is routinely grist for the arbitral mill." Gulf States Tel. Co. v. Local 1692, Int'l Bhd. of Elec. Workers, 416 F.2d 198, 202 n.10 (5th Cir. 1969).
Where the arbitrator finds that charges have not been proven, however, or that other just cause protections have not been followed, discipline is sometimes overturned just as it can be in cases involving other serious behaviors such as theft.

VI. TITLE VII ENFORCEMENT AND LABOR ARBITRATION

Before considering vacation of an award, a court should also consider the relationship of the arbitration process to enforcement and preservation of the public policy asserted. In cases involving sexual harassment, two considerations are paramount. First, the protection of sexual harassment victims through Title VII enforcement is completely independent of, and not limited by, the arbitration award under attack. Second, because Title VII does not require discharge of an alleged offender, there is no direct conflict between Title VII enforcement and reinstatement of employees under a just cause standard.

In Alexander v. Gardner-Denver Co., the Supreme Court held that an employee claiming racial discrimination was free to proceed in a court with a suit claiming violation of Title VII despite the fact that his claim had already proceeded to arbitration, where the arbitrator had ruled that there had been no violation of the antidiscrimination provisions of the collective bargaining agreement. The court stated:

[W]e think it clear that there can be no prospective waiver of an employee’s rights under Title VII. It is true, of course, that a union may waive certain statutory rights related to collective activity, such as the right to strike... Title VII, on the other hand, stands on plainly different grounds; it concerns not majoritarian processes, but an individual’s right to equal employment opportunities... Of necessity, the rights conferred can form no part of the collective bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII. In these circumstances, an employee’s rights under Title VII are not susceptible of prospective waiver.

129. See, e.g., City of Hayward, 101 Lab. Arb. (BNA) 1080 (1993)(Riker, Arb.).
130. See, e.g., King Soopers, Inc., 101 Lab. Arb. (BNA) 107 (1993)(Snider, Arb.) (reducing discharge to 20 day suspension for bargaining unit employee who touched breasts of co-workers, where supervisor had been given only five day suspension for unwelcome touching and offering work benefits for sexual favors).
131. See, e.g., University of Wisconsin, 100 Lab. Arb. (BNA) 1067 (1993)(Imes, Arb.)(reducing discharge to 30 day suspension for employee who removed money from wallet and basing decision on inconsistent enforcement of rule and mitigating circumstances.) See also New Meiji Market v. United Food and Commercial Workers Union No. 905, 789 F.2d 1334 (9th Cir. 1986)(upholding arbitration award reinstating with back pay employee who had committed theft from cash register and holding that it was for arbitrator to determine what was good cause for discharge as long as the award “draws its essence from the collective bargaining agreement”).
133. Id. at 51-52.
Under this ruling, the union may not waive individual rights conferred by Title VII.

Because an arbitration award under a collective bargaining agreement would not limit the Title VII rights of even the person whose grievance was arbitrated, by no means can it affect the Title VII rights of the harassment victim to sue for an adequate remedy. The collective bargaining agreement's arbitration provisions and Title VII's enforcement mechanisms are designed to answer different questions and are independent of each other. This is particularly true where the arbitration is invoked to resolve only the contract-related rights.

134. In its famous footnote 21 to the Gardner-Denver opinion, the Supreme Court indicated that a court applying Title VII could give weight to the decision of an arbitrator, the amount of weight given to depend on whether the contract contained provisions which conformed substantially to Title VII, the degree of procedural fairness, the adequacy of the record on the issue of discrimination, and the special competence of the arbitrator. Id. at 60 n.21. This analysis, of course, applies only to the rights of the employees whose interests were directly resolved in the arbitration proceeding. It should not be seen to determine whether the employer has violated its Title VII duties to the alleged victim of sexual harassment. The victim's interests were not the focus of the arbitration proceeding.

135. In Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991), the Supreme Court held that an employee alleging age discrimination was bound to honor the written agreement he made in advance to arbitrate all disputes with his employer. Following Gilmer, courts have required employees to use arbitration rather than a jury trial to resolve employment discrimination claims if they had entered into pre-dispute arbitration agreements promising to do so. See, e.g., Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229 (5th Cir. 1991). It must be stressed, however, that this line of cases involves individual arbitration agreements entered into by unrepresented employees. These decisions do not involve the Alexander v. Gardner-Denver model of a collectively bargained arbitration clause governing the grievances of union-represented employees.

Although some have predicted the extension of Gilmer and the erosion of Gardner-Denver, see, e.g., B. Glenn George, Americans with Disabilities Act and Civil Rights: Effects of Arbitration, in Arbitration 1993, ARB. & THE WORLD OF WORK, PROC. OF THE FORTY-SIXTH ANN. MEETING, NAT'L ACAD. OF ARB. 130, 144 (Gladys W. Gruenberg, ed. 1993) ("Gilmer may be the first step in the erosion and ultimate reversal of Gardner-Denver."). A development with which this author would disagree, the outcome of the grievance arbitration hearing should not in any event affect the rights of the victim of sexual harassment. The arbitration cases under attack resolve only the contractual rights of the alleged harasser and do not litigate the claims of the victim.

Finally, it has been recently suggested that, after Gilmer, a union-represented employee's Title VII claim can be dismissed for failure to exhaust arbitral remedies, at least if the contract contains a non-discrimination clause that is subject to arbitration. David A. Kadue & Hope Jacobson, Trend Requiring Union-Represented Employees to Arbitrate Employment Discrimination Claims, Employment Discrimination Report (BNA), May 11, 1994, at 594, 595 ("If the language of the CBA arguably makes the discrimination claim subject to arbitration, then the claim may be subject to dismissal for failure to exhaust arbitral remedies, notwithstanding the impression left by a casual reading of Alexander v. Gardner-Denver."). This argument seems wrong and, in this author's view, would require a far more explicit overruling of Alexander v. Gardner-Denver than even a broad
affecting an alleged harasser. Title VII provides the alleged victim of co-worker harassment with an independent means to ensure that the employer provides a lawful working environment.136

This independent Title VII remedy is broader and potentially far more powerful than any labor arbitration award. Unlike arbitrators who are limited to enforcing the narrow terms of the collective bargaining agreement, court enforcement offers damages and other relief not available through labor arbitration.137 Such remedies can provide a substantial incentive to employers to protect employees' rights to a workplace free of sexual harassment.

A second matter a court should consider when it is tempted to review a sexual harassment reinstatement case is that a reinstatement order will not generally violate Title VII. Courts have recognized, in Title VII cases involving co-worker harassment, that employer remedies should be sufficient to persuade harassers to discontinue unlawful conduct, but that not all cases of harassment call for discharge.138 Indeed, courts reviewing instances of serious harassment have often

---

136. The proving and perception of sexual harassment can be a difficult matter, with a broad range of views possible as to what is serious and what should be actionable. See Nancy S. Ehrenreich, Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law, 99 YALE L.J. 1177, 1207-08 (1990). See also Kathryn Abrams, Gender Discrimination and the Transformation of Workplace Norms, 42 VAND. L. REV. 1183, 1203 (1989).

137. The original provisions of Title VII limited a successful plaintiff's recovery to equitable relief such as reinstatement, back pay, and injunctive relief as well as attorney's fees. The scope of recovery available to victims of sexual harassment was substantially enhanced by provisions of the 1991 Civil Rights Act expanding remedies to include compensatory and punitive damages. The amendments allow compensatory and punitive damages ranging from $50,000 to $300,000 depending on the size of the employer. 42 U.S.C. § 1981a(b)(3)(Supp. V 1993). In addition, when such damages are sought, a jury trial may be demanded. 42 U.S.C. § 1981a(c)(Supp. V 1993).

According to a study conducted by the Center for Women in Government, State University of New York at Albany, the total monetary benefits awarded in sexual harassment cases handled by the EEOC increased 98% from 1992 to 1993. Sexual Harassment Awards Studied, Fair Employment Practices Summary of Latest Developments (BNA), June 6, 1994, at 61. The study reports that, in 1993, 1546 employees won 25.2 million dollars. Id. Thus, Title VII now provides a substantially greater inducement to employers to maintain a work environment free of discriminatory influences.

138. See Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991)("We do not think that all harassment warrants dismissal.")(citing Barrett v. Omaha Nat'l Bank, 726 F.2d 424 (8th Cir. 1984)).
held that the employer can properly remedy sexual harassment with steps short of discharge.

In *Swentek v. USAIR, Inc.*,\(^{139}\) for example, the Court of Appeals for the Fourth Circuit held that the employer complied with Title VII by fully investigating allegations of sexual harassment, issuing written warnings, and warning the offender that a subsequent infraction would result in suspension.

Similarly, in *Landgraf v. USI Film Products*,\(^{140}\) the Court of Appeals for the Fifth Circuit held that the employer satisfied Title VII standards by reprimanding an employee who engaged in offensive sexual physical contact and verbal harassment and reducing his contact with the victim.

Finally, in *Barrett v. Omaha National Bank*,\(^{141}\) the Court of Appeals for the Eighth Circuit held that the employer had properly remedied a hostile working environment when it fully investigated allegations of sexual harassment, reprimanded an employee for touching a co-worker in a sexual manner and talking about sexual activity, placed him on probation for ninety days, and warned him that any further misconduct would result in discharge.

The arbitration award attacked and overturned in *Newsday* provided for reinstatement without back pay, the equivalent of a lengthy unpaid suspension. This is a far more serious response than a warning of possible suspension, or a letter or reprimand.

**VII. A PROPOSED SOLUTION**

The appropriate standard for court review of an arbitration award on public policy grounds should be a narrow one. Only if the arbitrator's award would compel a party to violate positive law should it be vacated.

The reasons for adopting such a simple and straightforward approach are many. Such an approach is consistent with the role of arbitration under a collective bargaining agreement, provides a degree of predictability to future cases not possible under alternative approaches that invite more review, and is totally consistent with both the rationale and outcome of *W.R. Grace*.

First, it should be recognized that the "contract" at issue is the collective bargaining agreement. The collective bargaining agreement's provision providing for binding arbitration of contractual disputes does not violate public policy. A contract provision providing that discipline, including discharge, must be for "just cause," also does not vio-

---

139. 830 F.2d 552 (4th Cir. 1987).
140. 968 F.2d 427, 430 (5th Cir. 1992) ("Title VII does not require that an employer use the most serious sanction available to punish an offender . . . .").
141. 726 F.2d 424 (8th Cir. 1984).
late public policy. Thus, a court's traditional power to refuse to enforce a contract that violates public policy does not apply to these situations. Nonetheless, the Supreme Court has attempted to make these cases fit the mold, asserting, as the Court did in Misco, that the question is whether the contract, as interpreted by the arbitrator, violates public policy. This is different from the mainstream of public policy contract law.

In a traditional case, it is the job of a court to interpret a contract, and it will generally read the contract in a manner consistent with law. In a labor arbitration case, it is the arbitrator whose job it is to read the contract. It is difficult to see how the arbitration award, the product of a lawful contract's bargained for and lawful dispute resolution process, can be unlawful, unless it orders either party to violate the law. It is not the contract that ought be construed by a reviewing court, but merely the arbitral order. If the order directs the parties to take an action which they might legally have taken on their own, it is difficult to see why such an order ought to be struck down.

Second, it is important to consider the alternatives to the narrow approach stated. Asking whether an award "condones" misconduct or undermines the employer's ability to prevent such activity introduces a high level of subjectivity that would leave vulnerable all cases involving discharge for misconduct. It also inappropriately sug-

144. See, e.g., Williams v. Maremont Corp., 875 F.2d 1476 (10th Cir. 1989).
145. At a November 19, 1993 presentation at the Midwest Arbitrators Symposium attended by the author, Professor Theodore St. Antoine suggested the following test for whether an award should be set aside on public policy grounds:

In determining whether to sustain or vacate an arbitral award reinstating a discharged employee on the grounds of public policy, I believe the judicial test should be: could the employer (prescinding from the effect of the collective bargaining agreement) acting on its own have taken the same action ordered by the arbitrator, without violating any law or controlling public policy? In effect, I think the employer should be regarded as having contracted with the union to "delegate" its authority over the employee to the arbitrator; what the employer could do (in the exercise of discretion), the arbitrator can do as well.

Professor Theodore St. Antoine, Presentation at the Midwest Arbitrators Symposium (Nov. 19, 1993)(copy of remarks on file with author). Similarly, Professor Charles Craver has suggested that the public policy exception should be restricted to "those extremely rare instances in which the action ordered by the arbitrator would be wholly improper if directed by the negotiating parties themselves." Craver, supra note 33, at 604.

These tests and their contract-based rationale fit perfectly into a logical contract-based framework for judicial review of labor arbitration awards. See generally Clyde W. Summers, supra note 33.

146. See Stroehmann Bakeries v. Local 776, Int'l Bhd. of Teamsters, 969 F.2d 1436, 1442 (3d Cir. 1992); Newsday Inc. v. Long Island Typographical Union, No. 915, 915 F.2d 840, 845 (2d Cir. 1990).
gests that a court should be able to review an employee's past conduct, find facts, and decide for itself whether he or she should be punished further.

Similarly, asking whether disfavored conduct is "integral to the performance of employment duties" and part of an "employment decision,"\(^{147}\) while adding a vague limit to the doctrine, provides little guidance for what kind of reinstatements violate public policy. Finally, giving a court reviewing a reinstatement order the broad authority to balance a general public policy, like the policy against drug use, against a general public policy, like the policy in favor of rehabilitating drug offenders,\(^{148}\) gives the court a free hand to ignore the product of the parties' negotiated dispute resolution process and, indeed, the strong statutory policy requiring that the parties negotiate workplace standards.\(^{149}\)

A vague and uncertain public policy exception can only encourage employers to present court challenges to awards with which they are unsatisfied.\(^{150}\) Such litigation, with its attendant delays, can only harm the working and bargaining relationship of the parties without necessarily enhancing the public policy at issue.

In addition, a rule limiting the public policy exception to cases where the arbitrator's award directs a party to violate positive law is consistent with Supreme Court decisions dealing with the relationship between labor arbitration, Title VII, and other private causes of action.\(^{151}\) In *W.R. Grace*, the court enforced an arbitration award in circumstances where the employer argued that the outcome was inconsistent with Title VII public policy in the form of a conciliation agreement between the employer and the EEOC. The employer had laid off employees in the order called for by the conciliation agreement and the arbitrator, finding that this order of layoff violated the seniority provisions of the collective bargaining agreement, awarded back pay to two laid-off grievants.

---

148. See Oil Workers, Int'l Union, Local No. 4-228 v. Union Oil Co., 818 F.2d 437 (5th Cir. 1987).
149. Judge Edwards has suggested that a broad public policy exception can "lead to a de facto evisceration" of the public policy behind the duty to bargain. Edwards, *supra* note 4, at 25-27. He argues that a court's decision vacating an arbitrator's decision which deals with a mandatory subject of bargaining in effect allows the employer to take unilateral action rather than follow its statutory duty to bargain over changes. See id. See also Ray, *supra* note 33, at 12 ("Delay caused by judicial review can cause uncertainty, interfere with the bargaining process and undermine the union.").
150. See Edwards, *supra* note 4, at 34.
W.R. Grace parallels the sexual harassment reinstatement situation in two important ways. First, the Court recognized that employers can have dual obligations. After noting that voluntary compliance and conciliation under Title VII constituted an important public policy, the court stated that "absent a judicial determination, the Commission, not to mention the company, cannot alter the collective bargaining agreement without the Union's consent," and that to permit such a result would "undermine the federal labor policy that parties to a collective bargaining agreement must have reasonable assurance that their contract will be honored." Thus, the Court recognized the importance to national labor policy of preserving the parties' contractual bargain and, by its decision, indicated that the employer should be obliged to follow both the policies of Title VII and its collective bargaining agreement. Similarly, an employer is obliged by Title VII to provide a workplace free of sexual discrimination and harassment while also observing the terms of its collective bargaining agreement.

Second, the W.R. Grace opinion notes that the case involved a "dilemma" that "was of the Company's own making." It had committed to "conflicting contractual obligations" and, when it "dishonored its contract with the Union," it "incurred liability for breach of contract." Similarly, an employer that disciplines or discharges an employee in a manner inconsistent with the contract and argues that Title VII compels the result is enmeshed in a dilemma of its own making. Had it taken the steps required by the contract before imposing discipline or discharge, it could have met both its obligations. As in W.R. Grace, the judicial review process should not be used to extricate a party from either its violations of law or contract.

Finally, a close reading of W.R. Grace indicates that its outcome is consistent with a rule requiring an explicit violation of law to invalidate an arbitration on public policy grounds. An added complication of W.R. Grace was the existence of a federal district court order directing the employer to follow the conciliation agreement at issue. The employer complied with this order. This makes the W.R. Grace situation a stronger case for vacation than the typical reinstatement discharge case in which there is no direct order or requirement that a

152. Id. at 771.
153. Id.
154. Id. at 767.
155. Id.
156. Professor Clyde W. Summers has suggested that an award should be set aside on public policy grounds only if the interest to be protected "is the public's interest, not the employer's private interest." See Summers, supra note 33, at 1054-55. In many of the sexual harassment cases, it is really the employer's interest at issue.
person necessarily be fired. The Court stated, however, that, even assuming the district court's order was a mandatory injunction, nothing in the collective bargaining agreement as interpreted by the arbitrator required the company to violate that order. The Court further noted that enforcement of the award would "not create intolerable incentives to disobey court orders."  

In the sexual harassment arbitration decisions reviewed by courts, nothing in the arbitrator's interpretation of the contract "required that the company violate" Title VII. Nothing in the award created "intolerable incentives to disobey" Title VII. \textit{W.R. Grace} is consistent with a rule which requires that an arbitrator's order must explicitly require a violation of law before it can be overturned on public policy grounds.

This rule also is consistent with Supreme Court decisions holding that national labor statutes do not preempt a state law based claim merely because the claim involves the same facts or some analysis of facts. As the Supreme Court held in its 1988 \textit{Lingle v. Norge Division of Magic Chef} decision, and its 1994 \textit{Hawaiian Airlines v. Norris} decision, such state law claims are preempted only if resolution of the state law claim is dependent on interpretation of the collective bargaining agreement.

These cases demonstrate that, in other public policy areas as well, an employee does not necessarily forfeit available public policy remedies merely because the facts of his or her case have been taken to arbitration. Since the decisions have the clear effect of ruling that labor arbitration is not an employee's sole safeguard of public policy issues, there is less need for broad public policy review.\textsuperscript{164}

\begin{footnotes}
\item[158.] \textit{Id.} at 768.
\item[159.] \textit{Id.} at 769.
\item[160.] The arbitration award merely creates an incentive to obey both Title VII and the collective bargaining agreement rather than allowing the employer to evade its duties under its negotiated agreement. It may and should discipline persons who commit acts of sexual harassment. It should, however, do so in a manner consistent with its contractual promises.
\item[161.] A standard requiring an "intolerable" incentive to disobey the law requires far more than a subjective judicial conclusion that an award somehow seems to "condone" the past behavior of a single employee.
\item[162.] 486 U.S. 399 (1988)(involving discharge for filing workers compensation claim).
\item[163.] 114 S. Ct. 2239 (1994)(holding that airline and railroad employees claiming wrongful discharge for reporting safety violations may sue in state court on public policy grounds instead of submitting claims to arbitration; Railway Labor Act does not preempt such state court lawsuits).
\item[164.] It should be recognized that there may be a reciprocal relationship between the standard of review applied to arbitration awards and the degree to which courts will allow independent lawsuits arising out of the same discharge. Professor Bernard Meltzer has argued, for example, that allowing courts only a very limited role for public policy review of arbitration awards could have the consequence of leading to state court suits alleging that a discharge was tortious because it vio-
\end{footnotes}
VIII. CONCLUSION

The only reason why a court should vacate the award of a labor arbitrator on public policy grounds is if the award compels a party to violate positive law. Such limited review is demanded by national labor policy requiring speed and finality from the labor arbitration process. Even cases involving reinstatement of individuals discharged for sexual harassment, one of our most clear public policies, do not require a different rule. The law provides the victim of sexual harassment with independent remedies against the employer, and the arbitration awards at issue do not excuse the employer from maintaining a workplace free of discrimination.

Given the current muddled state of the law, however, parties and arbitrators should take a number of steps to clarify the arbitration process and reduce the potential for judicial review with its attendant costs, uncertainties, and delays. An employer wishing to have the arbitrator uphold a discharge for sexual harassment under a just cause standard must be prepared to prove its case before the arbitrator and show that it has satisfied each of the elements of just cause. It should forcefully present its Title VII duties and concerns to the arbitrator rather than saving such arguments for a court. Further, in cases where there is a chance of reinstatement, the employer should argue in the alternative that if reinstatement is directed, it be done in a manner which will protect the interests of the harassment victim.

A union is in a unique and difficult position. It has a duty to fairly represent the grievant and, for the benefit of all bargaining union members, insure that contractual just cause promises are met. On the other hand, in cases of co-worker harassment, the union also represents the victim. Since most arbitration cases are settled before hearing, a union should be particularly sensitive to protecting the interests of the victim when settlement terms are negotiated. Often, the grievant can be reinstated to a shift or location where his presence will not directly affect the working environment of the victim. This protects the union’s interest in uniform application of just cause provi-

165. The union has a duty to fairly represent all members of the bargaining unit. A union can breach this duty of fair representation by actions that are “arbitrary, discriminatory or in bad faith.” Vaca v. Sipes, 386 U.S. 171, 177, 184-85 (1967).
sions while recognizing the victim's right to a work environment free of harassment. If the case goes to hearing, the union will want to provide detailed evidence to establish the possibility that deterrence and rehabilitation can be accomplished with a remedy short of discharge.166

Both parties should consider the issue of sexual harassment in negotiations. Explicit contract provisions detailing how such cases are to be handled can eliminate much of the uncertainty found in the arbitration system and limit the possibility of judicial review.

As for arbitrators, the decision and opinion can be structured in a manner to minimize the risk of judicial review or reversal. Cases in which the arbitrator has decided that the contract requires reinstatement of a person accused of harassment require care. Given the propensities of some courts and the acknowledged importance of eliminating sexual harassment from the workplace, the arbitrator should explicitly acknowledge that he or she is aware of and has considered the employer's Title VII duties to eliminate sexual harassment. The arbitrator should explicitly state that she or he does not intend by the award to send a message condoning sexual harassment and then explain the contractual concerns that require reinstatement. In framing a remedy, the arbitrator should be sensitive to two issues. First, if the grievant has been found to have committed an act of sexual harassment, but the arbitrator determines that a sanction less than discharge is required by the contract, a finding that the recommended sanction should be sufficient to deter further acts of harassment will go a long way toward insulating the award from review, even under the currently confused state of the law. Second, if the grievant is to be reinstated, a remedy that is sensitive to the needs of the victims or potential victims of harassment can often be tailored. What is important under Title VII is providing employees with a nondiscriminatory working environment, and a remedy can often be tailored that will give the employer flexibility to avoid reinstating a grievant into the victim's immediate work environment.

In summary, the interests of collective bargaining and preserving the workplace bargain requiring just cause for discharge are not necessarily incompatible with Title VII and an employer's duty to provide a working environment free of sex discrimination. A standard of court review which allows arbitration awards to be overturned on public policy grounds only if they order a party to violate the law will not compromise the important Title VII interests underlying sexual harassment rules and will add much needed predictability to the entire question of court review of arbitration awards. The finality of arbitration awards is itself an important public policy.

166. See Gould, supra note 33, at 493.