2002

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DO PUBLIC POLICY GROUNDS STILL EXIST FOR VACATING ARBITRATION AWARDS?

Judith Stilz Ogden*

I. INTRODUCTION

Collective bargaining agreements frequently call for the resolution of grievances through the use of binding arbitration, a practice long recognized in the labor field. Federal law supports and encourages the use of arbitration, and greatly limits the ability of courts to intervene. One of the few situations in which courts may vacate an arbitration award is where there has been a violation of public policy. However, federal courts have differed on how this exception should be interpreted. Many hoped that the recent Supreme Court decision in Eastern Associated Coal Corp. v. United Mine Workers of America would help clarify the confusion.

Complicating the analysis is the fact that these cases often involve the discharge of employees in safety sensitive positions following the alleged violations of their employers’ drug and alcohol policies. Contrary to public perception, the majority of adults who use illicit drugs

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2. Misco, 484 U.S. at 36; see also United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593, 599 (1960) (stating “courts have no business overruling him [arbitrator] because their interpretation of the contract is different from his”).

3. Samuel Estreicher & Kenneth J. Turnbull, The “Public Policy” Defense Revisited, 224 N.Y. L.J., Aug. 9, 2000, at 3 (declaring “the Supreme Court has also emphasized that courts have the power to vacate an arbitrator's award under a collective bargaining agreement where the award is contrary to public policy”).


5. See Estreicher & Turnbull, supra note 3; see also Samuel Estreicher & Kenneth J. Turnbull, Supreme Court Decides Eastern Associated Coal and Green Tree, 225 N.Y. L.J., Jan. 16, 2001.

are employed. In its 1997 survey, the Department of Health and Human Services found that a majority of the 73% of people who had reported using illicit drugs in the prior month were employed.\(^7\) In the same study, marijuana was found to be the most commonly abused illicit drug, with 80% of all drug users admitting to having used marijuana in 1997.\(^8\) Additionally, eleven million Americans reported consuming five or more drinks per occasion, five or more times a month.\(^9\) Such use of drugs can impact the workplace through increased job turnover, absenteeism, increased accidents and injuries, increased use of health care benefits, lost productivity, increased security hazards and thefts, decreased training effectiveness, and depressed employee morale.\(^10\)

The statistics on recidivism of those who seek rehabilitative services are even more distressing. For example, during the four years after treatment, 90% of alcoholics experienced at least one relapse.\(^11\) Moreover, 41% of alcoholics that abstained for two years after treatment later relapsed, many after more than ten years of sobriety.\(^12\) The success of drug rehabilitation programs is even more dismal; 79% of illicit drug users continued to use drugs at the same rate even after receiving treatment.\(^13\) Those concerned with these issues may find it difficult to understand how an arbitration award reinstating a person who has violated an employer’s drug and alcohol policy (and possibly committed a criminal act) can be upheld.

This article analyzes the legal precedents of the public policy exception, evaluates the conflicting interpretations of the Courts of Appeals, and discusses whether *Eastern Associated Coal* clarifies or eliminates the public policy exception. This article also examines how courts have dealt with the public policy issue since the decision in *Eastern Associated Coal*.

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8. *Id.*
9. *Id.*
12. *Id.*
13. *Id.*
II. LEGAL BACKGROUND FOR THE PUBLIC POLICY EXCEPTION

The well-known Steelworkers Trilogy\textsuperscript{14} established the limited role of the courts in labor arbitration, and mandated that courts give deference to an arbitrator’s interpretation of a collective bargaining agreement.\textsuperscript{15} The Labor Management Relations Act provides that “[f]inal adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.”\textsuperscript{16} Nevertheless, courts are prohibited from enforcing collective bargaining agreements that are contrary to public policy.\textsuperscript{17}

Requests for setting aside arbitration awards on public policy grounds have been made in a variety of workplace disputes including employee terminations due to drug or alcohol use,\textsuperscript{18} sexual harassment,\textsuperscript{19} workplace violence,\textsuperscript{20} improper conduct by healthcare workers,\textsuperscript{21} and other safety issues not involving drugs or alcohol.\textsuperscript{22} On occasion, policy issues have also been raised in the commercial arbitration setting.\textsuperscript{23}

The framework for either enforcing an arbitration award, or setting it aside for public policy reasons, was clearly delineated in United Paperworkers International Union v. Misco, Inc.\textsuperscript{24} In Misco, the

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\textsuperscript{18} Delta Air Lines, Inc. v. Air Line Pilots Ass’n Int’l, 861 F.2d 665, 674 (11th Cir. 1988) (terminating pilot for intoxication); Monroe Auto Equip. Co. v. UAW, Local 878, 981 F.2d 261, 268 (6th Cir. 1992) (discharging mechanic for using drugs).

\textsuperscript{19} Westvaco Corp. v. United Paperworkers Int’l Union, Local Union 676, 171 F.3d 971 (4th Cir. 1999); Chrysler Motors Corp. v. Int’l Union, Allied Indus. Workers of Am., 959 F.2d 685 (7th Cir. 1992).

\textsuperscript{20} U.S. Postal Serv. v. Nat’l Ass’n of Letter Carriers, 839 F.2d 146 (3rd Cir. 1988) (terminating a postal worker for firing a gun at a supervisor’s car).


\textsuperscript{22} Stead Motors of Walnut Creek v. Auto. Machinists Lodge No. 1173, Int’l Ass’n of Machinists & Aerospace Workers, 886 F.2d 1200 (9th Cir. 1989) (terminating mechanic for repeated negligence); Local 97, IBEW v. Niagara Mohawk Power Corp., 196 F.3d 117, 121 (2d Cir. 1999) (discharging nuclear power plant employee for failing to respond properly to an alarm).


\textsuperscript{24} 484 U.S. 29 (1987).
company operated a paper converting plant and had entered into a collective bargaining agreement with various unions that provided for binding arbitration to resolve grievances. An employee, Isiah Cooper worked the night shift and operated a hazardous slitter-rewinder machine. He had been reprimanded twice for deficient performance, and on January 21, 1983, a day after the second reprimand, police searched Cooper’s house and found a substantial amount of marijuana. While the residence was being searched, a police officer was also observing Cooper’s car in the company parking lot. At one point during working hours, Cooper and two other men entered Cooper’s car and then entered another car. After the two other men had returned to the plant, Cooper was apprehended by police in the backseat of the second car. Police discovered marijuana smoke in the air and a lighted marijuana cigarette in the ashtray. In searching Cooper’s car, police found “a plastic scales case and marijuana gleanings.” On January 24, Cooper told the company that he had been arrested for possession of marijuana in his home. The company did not learn of the marijuana cigarette in the second car until January 27. On February 7, Cooper was discharged because the company felt that Cooper’s presence in the second car violated the rule against having drugs on plant premises. Cooper filed a grievance and the matter went to arbitration. Five days before the arbitration hearing, the company learned that marijuana had also been found in Cooper’s car. The Union did not learn of this fact until the hearing had begun.

The arbitrator found that there had not been just cause for the discharge and ordered that Cooper be reinstated with back pay and full seniority. In particular, the arbitrator found that “the Company failed to prove that the employee had possessed or used marijuana on company
property. . . .” The arbitrator did not believe that a burning marijuana cigarette in the front ashtray, while Cooper was sitting in the backseat, was adequate proof for his discharge. The arbitrator refused to consider the marijuana found in Cooper’s car because the company did not know about it when Cooper was terminated. The company filed suit in district court seeking to vacate the arbitration award on several grounds including the fact that reinstating Cooper was contrary to public policy.

The district court agreed with the company, and the Court of Appeals for the Fifth Circuit affirmed. Noting that there was a circuit split on the question of whether a court may vacate an arbitration award based on public policy grounds, the Supreme Court granted certiorari, and reversed the judgment of the district court and court of appeals. The Court noted that “[t]he federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards.” Furthermore as long as the arbitrator’s decision “draws its essence from the collective-bargaining agreement,” and is not merely ‘his own brand of industrial justice,’ the award is legitimate. Reviewing courts are not authorized to reconsider the merits of an award absent fraud by the parties or arbitrator dishonesty.

However, the Supreme Court noted that a court may refuse to enforce a collective bargaining agreement that is contrary to public policy. The Court went on to comment “that a court’s refusal to enforce an arbitrator’s interpretation of such contracts is limited to situations where the contract as interpreted would violate ‘some explicit public policy’ that is ‘well defined and dominant. . . .’ This specific public policy must be determined ‘by reference to the laws and legal precedents and not from general considerations of supposed public interests.’ ”

40. Id.
41. Id.
42. Id.
43. Id.
44. Miscro, 484 U.S. at 34-35.
45. Id. at 35.
46. Id. at 36 (quoting United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593, 596 (1960)).
47. Id. at 36 (quoting Enter. Wheel & Car Corp., 363 U.S. at 597).
48. Id. at 38.
49. Miscro, 484 U.S. at 43.
50. Id. (quoting Muschany v. United States, 324 U.S. 49, 66 (1945)).
In *Misco*, the Supreme Court found that the court of appeals failed to review the existing laws and legal precedents in order to establish a public policy against the operation of dangerous machinery while under the influence of drugs. Even if the Court had accepted the court of appeals formation of a public policy, the Court would have still reversed because,

the assumed connection between the marijuana gleanings found in Cooper’s car and Cooper’s actual use of drugs in the workplace is tenuous at best and provides an insufficient basis for holding that his reinstatement would actually violate the public policy identified by the Court of Appeals “against the operation of dangerous machinery by persons under the influence of drugs or alcohol.”

III. THE PUBLIC POLICY INTERPRETATION

While all courts recognize the existence of the public policy exception, the courts of appeals have split on how it should be interpreted. Some circuits have held that an award may be vacated only if the award violates positive law. When this narrow or limited view is applied, the decision of the arbitrator is generally upheld. Other circuits took a more expansive view and indicated that the issue is really whether the employee’s conduct conflicts with some public policy. Consequently, any award reinstating that employee would also violate public policy. The Supreme Court left this issue unresolved in *Misco* and many hoped that the Court would answer it in *Eastern Associated Coal*. The circuit split can clearly be seen by comparing the First

52. *Id.* at 44.
53. *Id.* (quoting *Misco, Inc. v. United Paperworkers Int’l Union*, 768 F.2d 739, 743 (5th Cir. 1985)).
54. *Hodges, supra* note 6, at 100.
55. *Id.* at 104, 108-09 (discussing the approach taken by the Fourth, Ninth and the District of Columbia Circuits).
56. *Id.* at 114.
57. *Id.* at 110-15 (discussing the approach taken by the First, Third, Fifth, Eighth and Eleventh circuits). Hodges also suggests that the Second, Sixth, and Seventh Circuits have taken more of an intermediate approach. See *id.* at 106-08.
58. *Hodges, supra* note 6, at 101; *Misco, Inc.*, 484 U.S. at 45 n.12 (1987) (stating “[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.”).
59. 531 U.S. 57 (2000); See also *Hodges, supra* note 6, at 101.
Circuit’s ruling in *Exxon Corp. v. Esso Workers’ Union, Inc.*, which the Eastern Associated Coal Corporation had urged the courts to follow, with the *Eastern Associated Coal* ruling itself, which originated in the Fourth Circuit.

A. *Exxon Corp. v. Esso Workers’ Union, Inc.*

The ExxonMobil Corporation clearly had an interest in the outcome of the *Eastern Associated Coal* case. In fact, the company filed an amicus curiae brief with the Supreme Court urging the court to “confirm the power of federal courts to refuse to enforce awards that reinstate employees who test positive for drugs to safety-sensitive positions.”

Exxon’s interest in enforcing drug policies undoubtedly took on a greater urgency in September 1994, when a jury awarded punitive damages of five billion dollars against it as a result of the 1989 Exxon Valdez accident in Prince William Sound. Prior to the incident, Exxon had a drug policy that encouraged rehabilitation and enabled employees to return to even “safety-sensitive positions.” However, in response to the accident, and at least in part due to concerns about the Valdez’ chief officer’s alcohol abuse problem, Exxon adopted a tough new drug and alcohol policy. For example, “ExxonMobil’s new policy precludes any employee who has had problems with substance abuse from serving in any safety-sensitive position.” Approximately 10% of Exxon’s jobs fit into this “safety-sensitive” category, and the policy resulted in the demotion of several long term employees who had undergone treatment.

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60. 118 F.3d 841 (1st Cir. 1997).
64. Id. at 2.
65. Daniel Seligman, *Exxon’s Little Problem*, FORTUNE, Nov. 28, 1994, at 193. The Ninth Circuit recently vacated the five billion dollar punitive damage award and the case was remanded with instructions to decrease the award. In re Exxon Valdez, 270 F.3d 1215, 1246-47 (9th Cir. 2001).
67. Id. at 5-6.
68. Id. at 6.
for substance abuse several decades earlier.\textsuperscript{69} As a result, at least 107 lawsuits were filed against Exxon alleging that their policy violated the Americans With Disabilities Act.\textsuperscript{70} However, in February of 2000, the Fifth Circuit Court of Appeals ruled in favor of Exxon. The court held that Exxon only needed to show a “business necessity” for these safety-based qualifications, rather than a finding of a “direct threat,” which the EEOC had urged.\textsuperscript{71}

Meanwhile, Exxon was challenging arbitral awards that reinstated employees who it alleged had violated the drug and alcohol policy.\textsuperscript{72} In fact, ten out of 138 public policy challenges to arbitration awards from 1960-1999 involved Exxon, more than any other employer except the United States Postal Service.\textsuperscript{73}

In a case that made its way to the First Circuit Court of Appeals, Exxon Corporation v. Esso Workers’ Union, Inc.,\textsuperscript{74} Exxon operated a fuel terminal in Everett, Massachusetts, employing truck drivers to supply service stations and airports throughout New England.\textsuperscript{75} Exxon and the Esso Workers’ Union entered into a collective-bargaining agreement (‘‘CBA’’) that established a five-step grievance procedure culminating in binding arbitration.\textsuperscript{76} Exxon, of course, had previously implemented a comprehensive drug free workplace program.\textsuperscript{77} The program subjected employees in safety sensitive positions to random drug testing\textsuperscript{78} and required employees in these positions to sign a compliance form.\textsuperscript{79}

Albert A. Smith was employed in a safety-sensitive position\textsuperscript{80} and on August 21, 1990, he submitted to a random drug test and then drove
his regular route. When the test results came back it was revealed that 
Smith had cocaine in his bloodstream. The test, however, could not 
disclose when he used the cocaine or indicate whether he was under its 
influence while performing his job. On September 11, 1990, Exxon 
terminated Smith and the union filed a grievance. After exhausting the 
grievance procedure, the parties submitted to arbitration pursuant to the 
CBA. The arbitrator found that Exxon did not have “just cause” for the 
termination and that the dismissal was too extreme a punishment. The 
arbitrator instead found that Exxon had just cause for a two month 
suspension, to be followed by reinstatement contingent upon the passage 
of a drug test.

Exxon filed suit in the district court to set aside the arbitration 
award. The district court found it significant that the CBA between the 
parties failed to expressly equate a positive drug test with just cause for 
termination. The court concluded that since the CBA and a posted 
offense list included a variety of punishments that could be imposed for 
a positive drug test, this “created sufficient ambiguity to empower the 
arbitrator to determine whether the Company had the sole discretion to 
select the appropriate penalty to be imposed...” If the company did 
not have the sole discretion to select the appropriate penalty, it was 
questionable whether there was just cause for Smith’s termination.
In addressing the public policy issue, the court noted that the arbitrator 
did not find that the employee was under the influence when he tested 
positive, nor did the arbitrator find that he had ever worked in such a 
condition. Further, the court found that the relevant United States

81. Id. at 843-44.
82. Esso Workers’ Union, 188 F.3d at 844.
83. Id.
85. Esso Workers’ Union, 118 F.3d at 844.
86. Esso Workers’ Union, 942 F. Supp. at 704.
87. Id. at 705.
88. Esso Workers’ Union, 118 F.3d at 844.
89. Id.
90. Esso Workers’ Union, 942 F. Supp. at 703.
91. Id. at 707.
92. Id. at 708.
93. Id.
Department of Transportation regulations indicated that it is not against “public policy to reinstate a driver who has tested positive for drugs” but who had not been shown to have operated a vehicle while under the influence. The district court affirmed the arbitral award and Exxon appealed on the basis that the arbitrator exceeded his authority and that the award violated public policy. The Court of Appeals for the First Circuit rejected the argument that the arbitrator exceeded his authority but reversed the district court’s ruling on the public policy issue. The court found there was “a plentitude of positive law to support the existence of a well defined and dominant public policy against the performance of safety sensitive jobs while under the influence of drugs or other intoxicants.” The court discussed and relied upon several cases from the Third, Fifth, Eighth and Eleventh circuits that, for the most part, involved the courts’ setting aside of arbitral awards which attempted to reinstate employees who had tested positive for drug use.

The First Circuit stated that it agreed with these decisions and believed that “society has achieved a broad national consensus that persons should not be allowed to endanger others while laboring under the influence of drugs.” This consensus was made manifest by positive law, and that it constituted a well-defined and dominant public policy. The court thought it significant that the states through which Smith would drive had criminalized the behavior of operating motor vehicles under the influence of drugs or alcohol. Furthermore, Congress’ enactment of the Omnibus Transportation Employee Testing Act, which instructs the Secretary of Transportation to promulgate regulations requiring employers to conduct testing of operators, further

95. Id. See, e.g., 49 C.F.R. § 391.95(a)—(b) (1996) (prohibiting a driver who uses, or tests positive for a controlled substance, from being on duty).
96. Esso Workers’ Union, 942 F. Supp. at 711.
97. Esso Workers’ Union, 118 F.3d at 845.
98. Id. at 846.
99. Id. at 852.
100. Id. at 846-47.
101. Id. Some of the cases that the court relied upon included Exxon Shipping Co. v. Exxon Seamen’s Union (Exxon III), 73 F.3d 1287 (3rd Cir. 1996); Exxon Shipping Co. v. Exxon Seamen’s Union (Exxon II), 11 F.3d 1189 (3rd Cir. 1993); Exxon Shipping Co. v. Exxon Seamen’s Union (Exxon I), 993 F.2d 357 (3rd Cir. 1993); Gulf Coast Indus. Workers Union v. Exxon Co., 991 F.2d 244 (5th Cir. 1993); Union Pac. R.R. Co. v. United Transp. Union, 3 F.3d 255 (8th Cir. 1993); Delta Air Lines, Inc. v. Air Line Pilots Ass’n Int’l, 861 F.2d 665 (11th Cir. 1988).
102. Esso Workers’ Union, 118 F.3d at 848.
103. Id.
104. Id.
evidenced this policy. The court, therefore, concluded that judicial decisions, agency regulations, and legislative enactments combined to form a policy of positive law and a well-defined and dominant policy against performing sensitive tasks while under the influence of drugs.

Upon finding the existence of a policy, the court stated that it must next determine if the arbitral award violated that policy. The court rejected the union’s argument that discharge is permitted only when job-relatedness could be shown, finding that this would result in a “wait and see” approach. The well-defined and dominant public policy did not require the employer to wait until an accident occurred before discharging an employee who tests positive. It would make no sense to construe public policy as requiring or encouraging employers to establish and enforce drug testing programs but to preclude them from taking action against employees who test positive. The court stated that “it would be grossly counterproductive to impede Exxon’s efforts at fully implementing its [Drug Free Workplace program by forcing it to reinstate an employee who blatantly violated the program’s terms.” Smith’s reinstatement would clearly violate the well-defined and dominant public policy against performance of safety-sensitive jobs while under the influence of drugs. Consequently, the court determined that it must refuse to enforce the arbitral award.

B. Eastern Associated Coal Corp. v. United Mine Workers of America

In 1996, James Smith, a drilling operator with the Eastern Associated Coal Corporation was hired as a Mobile Equipment Operator (“MEO”). Duties performed by MEOs included the operation of equipment having gross vehicle weights ranging from 32,000 to 55,000 pounds on public roads and highways. Operators of such equipment were required to have a commercial driver’s license and were subject to

106. Esso Workers’ Union, 118 F.3d at 848.
107. Id. at 849.
108. Id.
109. Id.
110. Id.
111. Esso Workers’ Union, 118 F.3d at 850.
112. Id. at 851.
113. Id. at 852.
114. Id.
116. Id.
certain regulations set forth in the Federal Motor Carrier Safety Regulations promulgated by the United States Department of Transportation ("DOT"). Pursuant to those regulations, and Eastern’s internal policy promulgated in accordance with DOT regulations, Smith was subjected to a random drug test on March 25, 1996 and he tested positive for the presence of cannabinoids. After Eastern discharged Smith, he filed a grievance that culminated in arbitration. The arbitrator reviewed the company’s actions to determine whether there was just cause for the dismissal of Smith. On April 18, 1996, the arbitrator issued an award that returned Smith to work after a thirty day suspension without back pay. However, Smith was required to participate in a substance abuse program and was also required to submit to random drug testing for a period of five years at the discretion of Eastern or an approved substance abuse professional.

Pursuant to the arbitrator’s decision, Smith was randomly tested on three separate occasions and tested negative for illegal drug use each time. On June 27, 1997, Smith was randomly tested again and this time the test came back positive for cannabinoids. Once again Eastern discharged Smith, he filed a grievance and the case proceeded to arbitration. During the second arbitration hearing, Eastern argued that it had just cause to discharge Smith because he tested positive twice for drug use during a sixteen month period, while he was employed as a heavy equipment .operator. Eastern further argued that "DOT Regulations and its own internal drug policy were implemented to curb drug use by employees occupying safety sensitive positions." The union argued that since these were the only two incidents in Smith’s seventeen-year employment history, the penalty of mandatory discharge

117. Id. at 798 & n.1.
118. Id. at 798. The results of the drug test were not challenged by either party. Id. at 798 n.2.
119. E. Associated Coal, F. Supp. 2d at 798. The CBA stated that “no employee covered by this agreement may be disciplined or discharged except for just cause.” Id.
120. Id. The CBA stated, If the arbitrator determines that the Employer has failed to establish just cause for the Employee’s discharge, the Employee shall be immediately reinstated to his job. If the arbitrator determines that there was just cause for the discharge, the discharge shall become effective upon the date of the arbitrator’s decision.

Id.
121. Id.
122. E. Associated Coal, 66 F. Supp. 2d at 798.
123. Id.
124. Id. at 798-99.
125. Id. at 799.
126. Id.
was too harsh and was not required by either Eastern's drug policy or the DOT regulations.\textsuperscript{128}

Smith's personal appeal that a family problem had led to this one time lapse apparently moved the arbitrator to reinstate him.\textsuperscript{129} Among other things, the arbitrator ordered that Smith receive a thirty day suspension with no back pay, that he reimburse the company and the union for the arbitrator's bill in both cases, that he participate in a random drug testing program, and that he resign if he tested positive for illegal drugs in the next five years.\textsuperscript{130}

At the district court proceeding, Eastern moved for summary judgment seeking to vacate the arbitration award as contrary to public policy and that the award failed to draw its essence from the collective bargaining agreement.\textsuperscript{131} Eastern also argued that the arbitrator had exceeded his authority under the agreement by failing to address the issue of whether Eastern had just cause to discharge Smith.\textsuperscript{132} The union also moved for summary judgment arguing that "the award did not contravene any well defined and dominant public policy" and sought enforcement of the arbitrator's award.\textsuperscript{133}

The district court noted that an award does not draw its essence from the collective bargaining agreement if the award "conflicts with the express terms of the contract."\textsuperscript{134} In making a determination regarding "whether an award draws its essence from the collective bargaining agreement, it is also appropriate to consider whether the arbitrator exceeded his contractual authority."\textsuperscript{135} According to the court, under the present agreement:

Eastern has the exclusive right to direct its work force, including the right to hire and discharge its employees. Eastern's right to discharge employees is limited, however, to those situations where the company has just cause. The term "just cause" is not defined in the Wage Agreement itself. Thus, Arbitrator Barrett was obligated to look to other sources, including the company's substance abuse policy, for

\textsuperscript{128} Id.
\textsuperscript{129} Id. at 800.
\textsuperscript{130} Id.
\textsuperscript{131} Id. The CBA between Eastern and the United Mine Workers of America was known as The National Bituminous Coal Wage Agreement of 1993. \textit{E. Associated Coal}, 66 F. Supp. 2d at 798.
\textsuperscript{132} Id. at 800.
\textsuperscript{133} Id.
\textsuperscript{134} Id. at 801.
\textsuperscript{135} Id.
guidance in determining whether Mr. Smith’s discharge was warranted. Eastern’s substance abuse policy requires that an employee who tests positive for drugs be “removed from any safety sensitive position and subject to disciplinary action up to and including termination.”

Therefore, the award was rational under the agreement and the arbitrator had not exceeded the authority granted to him under the agreement.

The court next considered whether the arbitrator’s award should be set aside due to public policy reasons. To vacate the award based on public policy grounds, the court must find that “an explicit, well defined and dominant public policy exists and the policy is one that specifically militates against the relief ordered by the arbitrator.” A well defined and dominant public policy is one that may “be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interest.” The court found that a well defined and dominant public policy existed against the use of controlled substances by those who perform safety sensitive jobs. However, to set aside the arbitrator’s award as contrary to public policy, the court must also find that an employee’s reinstatement contravenes the identified policy. The court here found that “the DOT Regulations do not express an explicit well defined public policy permanently enjoining the employment of commercial motor vehicle drivers who test positive for drug use.” The public policy exception did not apply, as the award was consistent with the DOT Regulations. Therefore, the court denied Eastern’s motion for summary judgment and granted the Union’s motion.

In an unpublished opinion, the Fourth Circuit found that the district court had correctly decided the issues before it and affirmed the decision. The Supreme Court granted certiorari to determine whether

136. E. Associated Coal, 66 F. Supp 2d at 802.
137. Id. at 803.
138. Id.
139. Id. (quoting United Food & Commercial Workers Int’l Union, Local 588 v. Foster Poultry Farms, 74 F.3d 169, 174 (9th Cir. 1995)).
140. Id. (quoting United Paperworkers Int’l Union v. Misco, Inc., 484 U.S. 29, 43 (1987)).
141. E. Associated Coal, 66 F. Supp. 2d at 804.
142. Id.
143. Id. at 804-05.
144. Id. at 805.
145. Id.
146. E. Associated Coal Corp. v. United Mine Workers of Am., 188 F.3d 501 (4th Cir. 1999).
considerations of public policy require courts to refuse the enforcement of some arbitration awards.147

1. The Issues and Arguments in *Eastern Associated Coal*

It was anticipated that a number of issues would be resolved by the Supreme Court in *Eastern Associated Coal*. The most obvious was the question that the Court failed to answer years earlier in *Misco*, i.e., whether the public policy test focused solely on whether the arbitral award violated a positive law, or whether a broader public policy test focusing on the conduct of the employee may be used. Additionally, there was the issue of whether the contractual reinstatement requirement violated a specific public policy, as can be found in a statute or regulation, or whether it only needed to violate some vague or general public policy. The union in *Eastern Associated Coal* argued that setting aside arbitration awards without a direct conflict with positive law would be tantamount to the judicial insertion of a substantive term that would limit the power of the arbitrator, a power courts do not have.148

The National Academy of Arbitrators filed an amicus curiae brief with the U.S. Supreme Court in *Eastern Associated Coal* on behalf of the union.149 In addition to making arguments about positive law and explicit public policy, the Academy proposed that *Eastern Associated Coal* essentially involved a contract issue and that consequently, based on the terms of the contract, the arbitrator’s award should be considered final and binding.150 The Academy also argued that the arbitrators should be able to award anything that the parties could have decided on their own and characterized the arbitrator as the “agent” or “alter ego” of the parties.151 Consequently, the award reinstating Smith should have been enforced unless public policy would have prevented Eastern from reinstating him on its own.152

A number of other arguments were made in the amicus briefs filed in this case. The Institute for a Drug Free Workplace, in its amicus brief,
observed that the drug testing program must include appropriate sanctions to be effective. One of the Institute’s surveys found that 70% of its members always terminate employees after a second positive test. The Institute argued that if an employee was reinstated after a second positive test, the policy would have no deterrent effect. The Air Transport Association of America’s amicus brief noted that even the FAA has recognized the poor success rate of alcohol treatment programs and has barred recidivists from certain safety positions.

Eastern argued that the arbitrator’s decision to reinstate Smith, or any other employee, might affect a third party who has not consented to the collective bargaining agreement. Consequently, another underlying issue in the case was whether matters involving public policy should be decided by an arbitrator or by the courts. ExxonMobil’s amicus brief argued that “the delicate and difficult task of reconciling competing public policies is too important to be left to a labor arbitrator who by definition is not charged with ascertaining the true public interest from among conflicting public policies.” Conversely, the United States argued that an arbitrator might have a significant advantage over a federal judge due to an arbitrator’s specialized training and repeated exposure to workplace disputes.

Samuel Estreicher and Kenneth J. Turnbull stated that the question for the Supreme Court in this case was whether the union’s view of the public policy exception

(i) adequately protects legitimate employer interests in preventing employees in “safety sensitive” positions from exposing the firm to liability and, more importantly, the public to physical harm; and (ii) adequately serves public policy interests in allowing employers latitude to consider the best disciplinary response to employees who, as in the

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153. Brief of Amicus Curiae Institute for a Drug-Free Workplace at 15, E. Associated Coal (No. 99-1038).
154. Id.
155. Id.
158. Id. at 24-27.
159. Brief of Amicus Curiae ExxonMobil Corp. at 8, E. Associated Coal (No. 99-1038).
instant case, repeatedly use illegal drugs despite provision of rehabilitation assistance.164

2. The Supreme Court’s Opinion in Eastern Associated Coal

The Supreme Court upheld the arbitration award to reinstate Smith and unanimously affirmed the judgment of the Fourth Circuit.162 Justice Breyer, writing for the Court, noted that, “both employer and union have granted to the arbitrator the authority to interpret the meaning of their contract’s language, including such words as ‘just cause.’”163 Breyer also reiterated that a court would set aside an arbitrator’s interpretation only in rare instances.164 Consequently, the court must treat the award as if it represented an agreement between the two parties as to the proper meaning of the words “just cause.”165 The question was then whether a contractual reinstatement requirement is within the legal exception, making a collective bargaining agreement that is contrary to public policy unenforceable.166 The question, according to the Court, was not whether Smith’s drug use violated public policy but whether an agreement or an award to reinstate him would violate public policy.167 Moreover, the court stated that, in principle, a court’s authority to invoke the public policy exception was not limited just to instances where the award itself violated positive law.168

The Court noted that neither the Omnibus Transportation Act nor the Department of Transportation’s implementing regulations “forbid an employer to reinstate in a safety-sensitive position an employee who fails a random drug test once or twice.”169 The Act states that rehabilitation is a critical component of a testing program and that rehabilitation should be made available to those who need it.170 The Court stated “[t]he award violates no specific provision of any law or regulation. It is consistent with DOT rules requiring completion of substance-abuse treatment before returning to work.”171 The Court noted

163. Id. at 61.
164. Id. at 62.
165. Id.
166. Id.
168. Id. at 63.
169. Id. at 65.
170. Id. at 64.
171. Id. at 66.
that Eastern’s own policy did not require termination, which was apparently a significant flaw upon which the justices commented during oral arguments. While discussing the collective bargaining agreement, the attorney for Eastern was specifically asked,

you didn’t have to as a contracting party rely on what a court might or might not declare to be the public policy. Could you have not said, a driver gets tested and shows up positive twice, he’s out. You could have said that. You could have negotiated for that. Additionally, Justice O’Connor stated

[s]o in other words, what you’re seeking, then, would be a rule that says the public policy kicks in if the employer wants to discharge this person, but suppose the employer would say, we’re going to give him a second chance, even a third chance, there would be no public policy to come into that picture.

The court recognized that reasonable people could differ as to which is the more appropriate remedy but noted that both the employer and the union had agreed to entrust the decision to the arbitrator.

In Justice Scalia’s concurring opinion, in which Justice Thomas joined, Justice Scalia took exception to the majority’s statement that a court’s authority to invoke the public policy exception is not limited only to instances where the award violates positive law. Justice Scalia believed that the authority of the court to invoke the public policy exception should be limited to situations where the award violates positive law. He indicated that it would be hard to imagine an award violating public policy, as defined in W.R. Grace & Co. v. Local Union 759, Int’l Union of the Rubber Workers, that is explicit, well defined, dominant, and “ascertained by reference to the laws and legal precedents

173. Id. at 5.
175. E. Associated Coal, 531 U.S. at 67.
176. Id. at 67-69.
177. Id. at 67-68.
178. Id.
and not from general considerations of supposed public interests," without actually conflicting with positive law.\textsuperscript{180}

3. Analysis of the \textit{Eastern Associated Coal} Decision

Does \textit{Eastern Associated Coal} answer the question that \textit{Misco} failed to answer? Not exactly, but one might say that both sides received something. The Court in \textit{Eastern Associated Coal} did hold that the focus in a public policy determination should be on the award and not on the conduct of the terminated employee.\textsuperscript{181} This holding is inconsistent with numerous court of appeals decisions, which adopted the broader view and which often vacated the awards.\textsuperscript{182} However, the Court did not state that only a violation of positive law would trigger the public policy exception.\textsuperscript{183} The Court did not indicate what might qualify for this public policy exception. Estreicher and Turnbull suggest that the reinstatement of an employee who is guilty of repeated tortious or discriminatory conduct, which thereby ignores liability issues for the employer, might be such a situation.\textsuperscript{184}

The \textit{Eastern Associated Coal} opinion may also be advantageous for employers. While discussing how the law for employers has improved in some circuits, such as the Fourth Circuit, Neal Mollen, whose firm filed an Amicus Curiae Brief on behalf of the Air Transport Association of America, stated, "[b]efore this, if you couldn't show that implementing the award would cause the employer to violate a law or statutory provision, there was no discretion on the judge's part. We now know that's not the rule of law."\textsuperscript{185} Mr. Mollen concluded by saying that although the new rule is still not clear, it seems as though it is "more deferential to employers."\textsuperscript{186}

It should be reiterated that any public policy discussed herein is one which prohibits someone from using drugs or alcohol while performing a safety sensitive job.\textsuperscript{187} Public policy is not violated if the employee is not discharged\textsuperscript{188} because there is no legal requirement that the employee

\begin{itemize}
\item \textsuperscript{180} \textit{E. Associated Coal}, 531 U.S. at 68.
\item \textsuperscript{181} \textit{Id.} at 62-63.
\item \textsuperscript{182} \textit{See} cases cited \textit{supra} note 101.
\item \textsuperscript{183} \textit{E. Associated Coal}, 531 U.S. at 63.
\item \textsuperscript{184} \textit{Supra} note 5, at 5.
\item \textsuperscript{185} Marcia Coyle, \textit{Arbitrator's Order Wins Court's Favor}, \textit{Nat'l L.J.}, Dec. 11, 2000, at B1, B3.
\item \textsuperscript{186} \textit{Id.} at B3.
\item \textsuperscript{187} Transcript of Oral Arguments, \textit{supra} note 173, at 10.
\item \textsuperscript{188} \textit{E. Associated Coal}, 531 U.S. at 65.
\end{itemize}
be terminated. In fact, rehabilitation is a component part of the relevant laws.

The Court analyzed this case from a contract perspective: The justices emphasized that mandatory firing could be a provision of the CBA. To allow Eastern to set aside the award would enable them to benefit from terms that they did not or could not attain in the CBA. An employer might have given up this provision in exchange for receiving something else. If the employer could then just have the arbitration award set aside, the employer would receive the benefit of both provisions. If the situation had been reversed in this case and it was the union trying to vacate the award, the employer might well have argued that the union was bound by the arbitration award, even if the union disagreed with it.

Furthermore, one might ask if this was actually such a bad award. Smith’s punishment was consistent with the terms of the regulations. The punishment for Smith’s second offense was more severe than his punishment for the first and it included a last chance clause, ensuring he would not be given a third chance. The arbitrator apparently believed that there were extenuating circumstances that justified giving Smith a second chance. If we view this case primarily as a contract dispute, we are reminded that the role of the arbitrator is to resolve the dispute between the parties to the contract, and not necessarily to address public concerns. This is the basic difference between arbitration and litigation in courts, especially in the labor area.

One may ask what effect the Eastern Associated Coal decision will have on nonunion arbitration cases. There is not as great a history or acceptance of arbitration in nonunion cases. The Supreme Court, in a 5-4 decision, recently held that individual employees’ agreements to arbitrate employment disputes would be enforced under the Federal Arbitration Act (“FAA”). An arbitration award may be set aside under

189.  Id. at 67.
190.  Id. at 64.
192.  49 C.F.R § 382.605 (1999) (providing, in part, that the employee will be advised of the drug and alcohol resources available, that the employee will be evaluated by a substance abuse professional, that the employee will be subjected to a drug or alcohol test before returning to work and will be subjected to random tests after returning to work).
193.  E. Associated Coal, 531 U.S at 60-61.
194.  Id. at 60.
195.  Id. at 62.
Vacating Arbitration Awards

the FAA in the following circumstances: (1) the award was procured by corruption, fraud or undue means; (2) the arbitrator was corrupt or partial; (3) the arbitrator was guilty of prejudicial misconduct; or (4) the arbitrator exceeded his or her own powers or so imperfectly executed them that a mutual, final, and definite award was not made. Nonunion employers can also be faced with problems involving drug or alcohol abuse. Given the Supreme Court’s reluctance to disturb arbitration awards, it can be expected that a similar analysis would be used in such nonunion settings.

C. Public Policy Cases Since Eastern Associated Coal

A number of cases cite Eastern Associated Coal, but not necessarily because of the public policy issue. Generally this line of cases cited Eastern Associated Coal when discussing the limited scope of judicial review of arbitration awards. Eastern Associated Coal was also cited in a case dealing with the issue of whether an arbitrator had manifestly disregarded the law.

There have been a number of cases that decided the public policy issue by specifically relying on Eastern Associated Coal. In Boston Medical Center v. Service Employees International Union, Local 285, the hospital terminated a nurse it felt was responsible for a baby’s death. When an arbitrator reinstated the nurse, the hospital attempted

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197. 9 U.S.C. § 10(a) (2001). "Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators." Id. § 10(a)(5).


199. George Watts & Son, Inc. v. Tiffany & Co., 248 F.3d 577, 581 (7th Cir. 2001) (citing Eastern Associated Coal as limiting the "manifest disregard" principle to two situations: (1) where the arbitral order requires the parties to break the law and (2) where the arbitral award does not adhere to the principles of the contract, and is therefore unenforceable under the Federal Arbitration Act. But see Id., 248 F.3d at 582 (Williams, J., concurring) (criticizing the majority's reliance upon Eastern Associated Coal as neither addressing the manifest disregard principle, nor supporting the majority's interpretation of the manifest disregard principle).

200. 260 F.3d 16 (1st Cir. 2001).

201. Id. at 18-20.
to have the award vacated on the grounds that the reinstatement violated the public policy of delivering safe and competent nursing care. In making its decision, the district court considered nursing regulations, statistics, and news articles about the importance of patient safety to identify the existence of this public policy. However, the First Circuit, in relying on *Eastern Associated Coal*, found that the question was not whether the nurse's conduct violated a public policy in favor of competent nursing care, but whether the award to reinstate her violated that policy. Consequently, the court had to determine whether Massachusetts had a public policy that would prohibit reinstating the nurse. The court, while recognizing that laws, regulations, and cases all reflected a concern about the quality of nursing care, could find no public policy that prohibited the reinstatement "with the clarity demanded by *Eastern Associated Coal*." The Court stated "[e]ven in the absence of a specific law or regulation barring reinstatement in the circumstances of this case, we acknowledge that there might be conduct so egregious that reinstatement might threaten the general public policy promoting the competence of nurses and patient safety." However, the court concluded that this was not such a case. Since the hospital had signed an agreement conveying substantial authority to the arbitrator, the award should be enforced. The court went on to state that if the hospital now regrets signing the agreement, it should negotiate for different terms the next time the collective bargaining agreement is up for negotiation.

In *Teamsters Local Union 58 v. BOC Gases*, a driver was terminated for "gross carelessness" and dishonesty. After the arbitrator reinstated the driver, the employer alleged this violated the public policy that mandated commercial truck drivers to be physically and

202. *Id.* at 20, 23.
203. *Id.* at 23. The district court vacated the award on the grounds that the arbitrator had exceeded her authority and that the award was unenforceable because it violated a public policy in Massachusetts in favor of safe and competent nursing care. *Id.* at 20.
204. *Boston Medical*, 260 F.3d at 23 (citing *E. Associated Coal*, 531 U.S. at 62-63).
205. *Id.* at 23.
206. *Id.* at 25.
207. *Id.*
208. *Id.*
209. *Boston Medical*, 260 F.3d at 27.
210. *Id.*
211. 249 F.3d 1089 (9th Cir. 2001).
212. *Id.* at 1091.
213. *Id.* at 1091-92 (stating that the driver was reinstated subject to passing a physical and mental exam).
mentally fit to perform their duties. The court quoted *Eastern Associated Coal* and stated that even if they could find a public policy in the federal regulations governing the transportation of hazardous materials, they could not conclude that the arbitrator's award violated it because the parties had agreed to have the arbitrator make that determination.

*Eastern Associated Coal* was cited by both the majority and the dissent in *Southern California Gas Company v. Utility Workers Union of America, Local 132*. In that case, utility workers were terminated after the company's medical review officer ("MRO") found that the employees had failed federally required random drug tests. When the medical review officer was arrested for impersonating a physician, the union sought reinstatement. The company refused to reinstate the workers and the case proceeded to arbitration. The arbitrator ordered reinstatement and the company sought to vacate the award on public policy grounds. Relying on *Eastern Associated Coal*, the court found that the inquiry should not have been whether drug use in a safety sensitive position violated public policy, but whether the reinstatement pursuant to an arbitration award would violate public policy. The company cited a DOT regulation which provided that "an operator may not knowingly use as an employee any person who fails a drug test required by this part..." It also argued that since a qualified MRO later confirmed that the employees had taken drugs, it would be against public policy to employ these workers. The majority rejected this argument, noting that the DOT also established procedures that must be followed in order to classify someone as a drug user. Since those procedures were not followed in this case, the employee is not deemed to have failed a drug test. The dissent found that reinstatement did violate

214. *Id.* at 1093. The district court had vacated the arbitrator's award. *Id.* at 1092-93.
215. *BOC Gases*, 249 F.3d at 1094.
216. 265 F.3d 787, 792, 795, 800 (9th Cir. 2001).
217. *Id.* at 789-91.
218. *Id.* at 789, 791.
219. *Id.*
220. *Id.* at 789, 792.
222. *Id.* at 795.
223. *Id.*
224. *Id.*
225. *Id.*
public policy because, unlike *Eastern Associated Coal*, the reinstatement of these workers was unconditional.\(^{227}\)

In *Southwest Ohio Regional Transit Authority v. Amalgamated Transit Union, Local 627*,\(^{228}\) a bus repairman was terminated pursuant to the transit authority’s “zero tolerance” policy, after testing positive for metabolites in his blood.\(^{229}\) An arbitration panel found that the automatic discharge sanction violated the “sufficient cause” discharge standard in the collective bargaining agreement.\(^{230}\) The Ohio Supreme Court refused to vacate the award on public policy grounds.\(^{231}\) The court commented on how similar this case was to *Eastern Associated Coal*.\(^{232}\) As in *Eastern Associated Coal*, the worker’s reinstatement included punishments and safeguards against recidivism.\(^{233}\) The court noted that this holding was not meant to imply that drug use could never be the basis for automatic discharge.\(^{234}\) Rather, other factors must also be considered, such as the employees’ overall disciplinary record, the egregiousness of the violation, and problems with recidivism.\(^{235}\)

Courts repeatedly have observed that *Eastern Associated Coal* stands for the principle that the public policy inquiry does not involve whether the drug use by those in safety sensitive positions violates public policy but whether the award reinstating the employee violates the public policy. Therefore, to avoid the same result as the court reached in *Eastern Associated Coal*, courts must conclude that reinstatement of the worker violates public policy.

In *Chicago Fire Fighters Union Local No. 2 v. City of Chicago*,\(^{236}\) twenty-eight firefighters were discharged or received suspensions for drinking alcoholic beverages inside the firehouse and for other inappropriate behavior, which was caught on videotape.\(^{237}\) An arbitrator concluded that the disciplinary actions should be rescinded.\(^{238}\) The city argued that the arbitrator had “exceeded his authority and that the award violated public policy.”\(^{239}\) In reviewing the state’s legislation, the Illinois

\(^{227}\) Id. at 804-06.
\(^{228}\) 742 N.E.2d 630 (Ohio 2001).
\(^{229}\) Id. at 632.
\(^{230}\) Id.
\(^{231}\) Id. at 636.
\(^{232}\) Id. at 635-36.
\(^{233}\) *Southwest Ohio Reg’l Transit Auth.*, 742 N.E.2d at 636.
\(^{234}\) Id.
\(^{235}\) Id.
\(^{237}\) Id. at 1171.
\(^{238}\) Id. at 1172.
\(^{239}\) Id. at 1174.
Appellate Court for the First District found that an established public policy existed in Illinois favoring safe and effective fire protection services. The arbitrator had held that a six and one-half month delay in instituting disciplinary action violated the collective bargaining agreement because the city was required to begin a disciplinary investigation “at the time” it learned of the alleged misconduct. The appellate court relied on previous Illinois Supreme Court decisions involving similar circumstances and held that “public policy considerations regarding the health, safety and welfare of the public regarding its fire prevention services mitigates against inappropriate remedies for violations.” The appellate court noted that the arbitrator had cited six reasons why he was assured that the employees posed no further danger to the public but that the record belied his conclusions. The arbitrator’s award, according to the court, failed to show that “any precautionary steps were taken to deter any future misconduct” and that the award failed “to promote the safety and welfare of the public in direct contravention of well-established public policy.” The appellate court noted that on appeal the first time, the Illinois Supreme Court had vacated the appellate court’s original decision and remanded the case after the Supreme Court’s decision in Eastern Associated Coal. However, since the appellate court determined that a well-defined, explicit public policy existed in this case, the arbitrator’s award was vacated.

In Illinois Nurses Ass’n v. Board of Trustees of the University of Illinois, an arbitrator reinstated nurses who had been terminated by the University for misconduct. The reinstatement of one of the nurses was reversed on public policy grounds. The Appellate Court of Illinois for the First District found the instant case to be inapposite with Eastern Associated Coal because the arbitrator’s award of reinstatement violated the public policy favoring safe nursing care. The court found this

240. *Id.* at 1176-77.
242. *Id.* at 1178.
243. *Id.* at 1179.
244. *Id.*
245. *Id.* at 1179.
247. *Id.*
248. *Id.* at 1181-82.
250. *Id.* at 1016.
251. *Id.* at 1024.
252. *Id.* (noting that the arbitrator’s decision in Eastern Associated Coal was not contrary to
public policy in various sections of the Nursing Act, prohibited behavior that "demonstrates incapacity or incompetency to practice" and "dishonorable, unethical or unprofessional conduct of a character likely to deceive, defraud, or harm the public." Although the Act does not mandate discharge for violations, the court found that since the nurse jeopardized the lives of two patients in a three-day period, her reinstatement violated the public policy favoring safe nursing care.

In Washington County Police Officers' Ass'n and Paul Cuff v. Washington County, the Oregon Court of Appeals found that federal cases such as Eastern Associated Coal were not instructive in determining public policy. The Oregon court noted that in Eastern Associated Coal, the Supreme Court held that several relevant policies should be taken together to ascertain the appropriate public policy, whereas "[u]nder Oregon law, the relevant policies are only those clearly defined in statutes or judicial decisions." In Washington County, a deputy sheriff who failed a drug test was terminated despite a provision in the collective bargaining agreement stating that a first time failure of a drug test would result in a referral to a counselor but not discipline. An arbitrator ordered the deputy sheriff to be reinstated without back pay and the county refused to implement the award on the grounds that the reinstatement was contrary to public policy.

The Oregon Court of Appeals acknowledged that the question was whether the reinstatement of a public safety officer who had admitted to illegally using marijuana off duty complied with public policy and not whether the officers' conduct violated public policy. The court relied on a state statute which provided that a public safety officer's certification would be denied or revoked if that officer were convicted of violating any law "involving the unlawful use, possession, delivery or manufacture of a controlled substance, narcotic or dangerous drug." The fact that the officer had not received the notice or hearing required

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any dominant public policy).
254. Ill. Nurses Ass'n, 741 N.E.2d at 1023 & n.1.
255. Id. at 1024.
256. 45 P.3d 515 (Or. Ct. App. 2002).
257. Id. at 517.
258. Id.
259. Id at 516.
260. Wash. County, 45 P.3d at 516-17.
261. Id. at 517.
262. Id. at 517-18 & n.2. (referring to OR. REV. STAT. § 181.662(3) (1999) which was in effect when Officer Cuff was discharged and was subsequently amended by the state legislature in 2001 to eliminate conviction of a drug law as grounds for denial or revocation of certification)
by the statute and that he had not been convicted of any crime, did not
deter the court from concluding that the underlying public policy
statement was that officers who used controlled substances should not be
certified. Consequently, the court found that the statute rendered the
officer’s reinstatement unenforceable.

D. Applying Eastern Associated Coal in the Sexual Harassment Context

Even after Eastern Associated Coal, courts have come to different
conclusions in sexual harassment cases. In Weber Aircraft Inc. v.
General Warehousemen & Helpers Union Local 767, an employee was
accused of sexual harassment and was subsequently terminated. An
arbitrator reinstated the worker and ordered that he be given no back pay
for the eleven month period between the discharge and the award. The
arbitrator found that two additional allegations of sexual harassment
involved incidents that would have occurred prior to sexual harassment
having been reclassified as a violation subject to immediate suspension
and possible discharge. Furthermore, these prior incidents had not been
previously reported. The arbitrator was impressed with the employee’s
prior record of service and found that the evidence was insufficient to
prove that the victim was truly threatened. The Fifth Circuit relied on
Misco and Eastern Associated Coal in holding that the question was not
whether the employee’s sexual harassment of female employees violated
public policy but whether the collective bargaining agreement, as
interpreted by the arbitrator and which provided for his reinstatement
violated public policy. The court also relied on Westvaco Corp. v.
United Paperworkers International Union, Local 676, which held that
there is no public policy requiring that every harasser be fired. The
court concluded that Weber’s public policy claim must be rejected.
In City of Brooklyn Center v. Law Enforcement Labor Services, Inc., the Minnesota Court of Appeals found that the reinstatement of an alleged harasser violated public policy. After a police officer was acquitted of charges that he harassed and stalked a woman, the City of Brooklyn Center conducted an internal investigation and found that more than thirty complaints had been filed against the officer. The police officer was terminated based on a report by an independent investigation. An arbitrator found that "much of the alleged conduct was time-barred for disciplinary purposes and that the remaining conduct, while serious, did not warrant outright dismissal." The City of Brooklyn Center moved to have the award vacated on public policy grounds.

The Minnesota Court of Appeals concluded that Eastern Associated Coal required that they analyze the matter as though the labor agreement contractually called for the officer’s reinstatement. The court found that state administrative rules impose an affirmative duty on governmental units to prevent sexual harassment and sexual conduct by police officers. The court also found that federal law makes a municipality liable for failing to take remedial action after learning of repeated incidents of misconduct committed by a police officer. In addition, Title VII of the Civil Rights Act of 1964 and the Minnesota Human Rights Act impute liability for sexual harassment to the employer. While the court acknowledged that prior public policy cases involving sexual harassment have had mixed results, the cases appear to be consistent in recognizing that public policy concerns exist where there have been prior offenses and warnings. For these reasons, the Minnesota Court of Appeals held that the arbitrator’s decision violated public policy and must be vacated.

276.  Id. at 244.
277.  Id. at 238.
278.  Id. at 239.
279.  Id. at 240.
280.  Brooklyn Ctr., 635 N.W.2d at 240.
281.  Id. at 242.
282.  Id.
285.  MINN. STAT. ANN. §§ 363.01, (17), (28), 363.03 (1),(2) (West 1991).
286.  Brooklyn Ctr., 635 N.W.2d at 243.
287.  Id.
288.  Id. at 244.
It is worth noting that *Eastern Associated Coal* was also relied upon in a slightly different case, where it was alleged that an award of disability benefits violated the public policy of promoting a drug-free workplace.\(^{289}\) Following an on-the-job injury, an employee had refused to submit to a drug test.\(^{290}\) The Court of Appeals of Mississippi held that the employer's right to impose drug-testing procedures did not nullify the employee's right to benefit from work-related injuries.\(^{291}\)

**IV. CONCLUSION**

An initial reading of *Eastern Associated Coal* might have caused one to predict that public policy challenges to arbitration awards would be unsuccessful. However, the lower courts continue to make distinctions and find exceptions to the holding in *Eastern Associated Coal*.\(^{292}\) In *Eastern Associated Coal*, the Supreme Court emphasized that it must be the reinstatement that violated public policy, not the employee's conduct.\(^{293}\) Consequently, the courts now simply conclude that reinstatements violate public policy.\(^{294}\)

These distinctions are not always persuasive. It does not appear that the public policy against reinstatement, in any of those cases where the court found it existed, was any more explicit, well defined, and dominant than in *Eastern Associated Coal*. Perhaps Justice Scalia was correct when he argued it would take nothing less than finding reinstatement violated a positive law.\(^{295}\) Otherwise, courts will always be able to conclude that some public policy has been violated.

Courts have also come to different results where no conditions have been placed on the reinstatement, or where the employee was a repeat offender. It is not clear that the Supreme Court would make these distinctions.

The Supreme Court did seem to stress the fact that the collective bargaining agreement in *Eastern Associated Coal* did not require the

\(^{290}\) *Id.* at 1104.
\(^{291}\) *Id.* at 1107.
\(^{292}\) *See generally* Hodges, supra note 6 (discussing various interpretations by the lower courts).
\(^{295}\) *E. Associated Coal*, 531 U.S. at 67-68.
employee’s termination. Thus, it would appear that employers would prevail where termination is mandated. Of course, employers may not always want to include such a provision because it relieves them of all discretion.

Mandatory rules may create problems of their own. In *Southwest Ohio Regional Transit Authority*, such a provision was unsuccessful. An arbitration panel found that a “zero tolerance” policy conflicted with the collective bargaining agreement’s “sufficient cause” discharge standard, and the Ohio Supreme Court refused to vacate the panel’s award.

An interesting issue is whether the employer is liable if a reinstated employee causes on the job injury or damage while using drugs, alcohol or sexually harassing a co-worker. It has been suggested that employers have a good faith defense if the reinstatement was the result of something bargained for in the collective bargaining agreement. However, this is far from clear. In *City of Brooklyn Center*, the Minnesota Court of Appeals seemed to suggest that the various civil rights laws would impose liability on the employer regardless of why the harasser returned to work.

*Eastern Associated Coal* has not answered all questions, but it does demonstrate that it will be difficult to have an arbitration award set aside. In recent cases, the Supreme Court has indicated that it will continue to support and uphold the arbitration process. Employers have a difficult task before them in dealing with drug and alcohol problems among their workers. The setting aside of arbitration awards, that do not further the employers’ objectives, will not solve the problem.

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296. Id. at 60.
298. Id. at 632, 637.
299. *Brooklyn Ctr.*, 635 N.W.2d at 243.
300. *E. Associated Coal*, 531 U.S. at 63.