WHEN DO ARBITRATION AWARDS VIOLATE PUBLIC POLICY? AN ANALYSIS OF THE *EASTERN ASSOCIATED COAL* CASE

by

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The use of arbitration has long been recognized in the labor field. Collective bargaining agreements frequently call for the resolution of grievances through the use of binding arbitration. Federal law supports and encourages the use of arbitration.[1] The ability of courts to intervene is very limited.[2] One situation in which courts may vacate an arbitral award is where there has been a violation of public policy. A problem arises because federal courts have differed on how this exception should be interpreted. It was hoped that the recent U. S. Supreme Court decision in *Eastern Associated Coal Corporation v. United Mine Workers of America*[3] would clarify the matter.

Complicating the analysis is the fact that these cases often involve the discharge of employees in safety-sensitive positions following their alleged violations of the companies' drug and alcohol policies. Dealing with drug and alcohol abuse causes serious problems for employers as they try to develop effective programs. Perhaps contrary to the public perception, the majority of adults who use illicit drugs are employed. In its 1997 survey, the Department of Health and Human Services found that 73% of those who had reported using illicit drugs in the prior month were employed, and most of these were employed full time.[4] In the same study, marijuana was found to be the most commonly abused illicit drug with 80% of all drug users admitting having used it in 1997. Also, 11 million Americans reported consuming five or more drinks per occasion, five or more times a month. The use of illicit drugs can impact the workplace through increased job turnover, absenteeism, increased accidents and injuries, increased use of health care benefits and lost productivity, increased security hazards and thefts, decreased training effectiveness, and depressed employee morale.[5] The statistics on recidivism are even more distressing. Four years after treatment, 9% of alcoholic have relapsed. Ten years later, 41% have. For users of illicit drugs, 79% still use drugs after having received treatment.[6] Anyone concerned with these issues may have a difficult time understanding how an arbitral award reinstating someone who has voluntarily violated the employer's drug and alcohol policy (and possibly committed a criminal act) can be upheld.

This paper will attempt to look at the legal precedents for the public policy exception, consider the conflicting interpretations from the Courts of Appeal, and discuss *Eastern Associated Coal* and whether it clarifies the public policy exception.

Legal Background for the Public Policy Exception

The famous *Steelworkers Trilogy*[7] established the limited role of the courts in labor arbitration, and mandated that courts defer to the arbitrator's interpretation of the collective–bargaining agreement. Never the less, a court may not enforce a collective- bargaining agreement that is contrary to public policy.[8] The framework for enforcing an arbitral award or setting it aside for public policy reasons was clearly delineated in *United Paperworkers International Union v. Misco, Inc.*[9]

In *Misco*, the company operated a paper converting plant, and was involved in a collective bargaining agreement with various unions. The agreement provided for binding arbitration to resolve grievances. Employee Cooper operated a hazardous slitter-rewinder machine. On January 21, 1983, police searched Cooper's house and found a substantial amount of marijuana. A police officer was also keeping Cooper's car under observation in the Company's parking lot. At one point during working hours, Cooper and two other men entered Cooper's car, and then entered another car. The other two men returned to the plant, but Cooper was apprehended by the police in this second car. There was marijuana smoke in the air and a lighted marijuana cigarette in an ashtray. In searching Cooper's car, police found plastic scales cases and marijuana gleanings. On January 24, Cooper told the company that he had been arrested for possession of marijuana in his home. The company learned of the marijuana cigarette in the second car on 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. The company learned five days before the arbitration hearing that marijuana had 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. In particular, the arbitrator found that the Company had failed to prove that Cooper had possessed or used marijuana on Company premises. The arbitrator did not believe that a burning marijuana cigarette in the front ashtray, while Cooper was sitting in the backseat was adequate. 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 seeking to vacate the arbitration award on several grounds including the fact that reinstating Cooper was contrary to public policy.

The District Court agreed, and the Court of Appeals for the Fifth Circuit affirmed. Noting that the Circuits were

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split on the question of whether a court may set aside an arbitration award on public policy grounds, the United States Supreme Court granted certiorari, and reversed.[10] The Court noted that, "the federal policy of settling labor dispute by arbitration would be undermined if courts had the final say on the merits of the awards," and as long as the award " 'draws its essence from the collective bargaining agreement,' and is not merely 'his own brand of industrial injustice,' the award is legitimate."[11] Reviewing courts are not authorized to reconsider the merits of an award absent fraud by the parties or the arbitrator's dishonesty.

The Supreme Court did note that " ' a court may not enforce a collective-bargaining agreement that is contrary to public policy.' "[12] However, this is only true when that which is involved is " 'some explicit public policy' that is 'well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests.'"[13] The Supreme Court in *Misco* found that the Court of Appeals had made no attempt to review existing laws and legal precedents in order to demonstrate that they establish a well-defined and dominant policy against the operation of dangerous machinery while under the influence of drugs. Furthermore, the Court held that the assumed connection between the marijuana gleanings found in Cooper's car and his actual use of drugs in the workplace was tenuous at best and provided an insufficient basis for finding that Cooper's reinstatement violated public policy.

The Public Policy Interpretation

While all recognize the existence of the public policy exception, the federal Courts of Appeal are split on how it should be interpreted.[14] In some circuits (the Fourth, Ninth, and the District of Columbia) courts have held that an award may be vacated only if the award violates positive law. This is a narrow or limited view, and when applied the arbitral awards are generally upheld.[15] Other circuits (the First, Third, Fifth, Eighth, and Eleventh) take a more expansive view and indicate 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.[16] The Supreme Court left this issue unresolved in *Misco*, and it was hoped that they would answer it in *Eastern Associated Coal*. The split in interpretations can be illustrated by the First Circuit case of *Exxon Corp. v. Esso Workers' Union, Inc*.[17] and by *Eastern Coal*, which came from Fourth Circuit to the U.S. Supreme Court.

Exxon Corp. v. Esso Workers' Union, Inc.

It can be assumed that the Exxon-Mobile Corporation had an interest in the outcome of the *Eastern Coal* case. In fact, the company filed an amicus curiae brief with the Supreme Court on the case.

Exxon's interest in enforcing drug policies may date back to September of 1994, when a jury awarded punitive damages of $5 billion against it as a result of the 1989 Exxon Valdez accident in Prince William Sound.[18] Exxon is still appealing that award. However, in response, and at least in part due to concerns about the Valdez' chief officer's alcoholism, Exxon adopted a tough new drug and alcohol policy. For example, the policy provided that anyone who had ever been treated for drug or alcohol problems could not work in any company designated safety-sensitive position. Approximately 10% of its jobs fit into that category, and the policy resulted in the demotion of several long time employees.[19] It also affected employees who had undergone treatment several decades earlier.[20] At least 107 lawsuits were filed against Exxon alleging that this policy violated the Americans with Disabilities Act.[21] In February of 2000, the Court of Appeals for the Fifth Circuit agreed with Exxon that it need only show a "business necessity" for the safety-based qualifications, rather than a finding of the "direct threat" that the EEOC was urging.[22]

Meanwhile, Exxon was challenging arbitral awards that reinstated employees who it alleged had violated the policy. Ann C. Hodges determined that out of 138 public policy challenges to arbitration awards from 1960-1999, Exxon was involved in ten of them, more than any other employer except the United States Postal Service.[23]
In a case that made its way to the Court of Appeals for the First Circuit, Exxon had operated a fuel terminal in Everett, Massachusetts, and employed several truck drivers to supply service stations and airports throughout New England. Exxon and the Esso Workers' Union entered into a collective bargaining agreement (CBA) that established a five-step grievance procedure that culminated in binding arbitration. Exxon, of course, had implemented the comprehensive drug-free workplace program. The program subjected employees in safety-sensitive positions to random drug testing, and required them to sign a compliance statement. Employee Albert A. Smith was in such a sensitive position, and on August 21, 1990, he submitted to a drug test and then drove his regular route that day.[24] The test results were not available until the next week and revealed that Smith had had cocaine in his bloodstream. The test could not disclose when he had used the cocaine or indicate whether he was under its influence while performing his job.[25] On September 11, 1990, Exxon terminated Smith, and the Union filed a grievance. The grievance led to arbitration.[26] The arbitrator found that the company did not have "just cause" for the termination, and also 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 his reinstatement if he passed a drug test.[27]

Exxon filed suit in the District Court to set aside the arbitration award. The District Court found it significant that the CBA 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 stated that there were a range of punishments that might 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."[28] If not, it was questionable whether there was just cause for his 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 that he had ever worked in such a condition. Further, the court found that the relevant United States Department of Transportation regulations indicate that it is not against public policy to reinstate an employee who has tested positive for drugs where it has not been shown that he or she had operated a vehicle while under the influence of drugs.[29] 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[30] rejected the argument that the arbitrator exceeded his authority, but it reversed the District Court's ruling on the public policy issue. The court found that there was "a plenitude 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."[31] The court discussed and relied upon several cases from the third, fifth and eighth circuits which for the most part involved the courts' setting aside of arbitral awards which attempted to reinstate employees who had tested positive for drug use.[32]

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."[33] The court found that the consensus was made manifest by positive law, and it constituted a well-defined and dominant public policy. The court thought it significant that the states through which the employee would drive had criminalized the behavior. The court further stated that Congress' enactment of the Omnibus Transportation Employee Testing Act,[34] which instructs the Secretary of Transportation to promulgate regulations to require employers to conduct testing of operators, further evidenced the 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 it. The court rejected the Union's argument that discharge is permitted only when job-relatedness can be shown, finding that that would result in a "wait-and-see" approach. The court found that 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. The court also found that it makes no sense to construe public policy as requiring employers to establish and enforce drug testing programs, but to preclude them from taking action against employees who test positive. The court further stated that, "it would be grossly counterproductive to impede Exxon's efforts at fully implementing its DFW program by forcing it to reinstate an employee who blatantly violated the program's terms."[35] The Court concluded that 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.

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

In 1996 James Smith, who was a drilling operator with Eastern Associated Coal Corporation, applied for and was hired for a position as a Mobile Equipment Operator (MEO). MEOs performed duties, which included the operation of equipment having gross vehicle weights ranging from 32,000 to 55,000 pounds on public road. Operators were required to have a commercial driver's license and were subject to Department of Transportation regulations.[36] Pursuant to those regulations, Mr. Smith was subjected to a random drug test on March 25, 1996, and he tested positive for marijuana. Eastern discharged Smith, and he filed a grievance challenging his discharge. The case proceeded to arbitration. The arbitrator issued an award on April 18, 1996, which returned Mr. Smith to work after a 30-day suspension without back pay. However, he was required to participate in a substance abuse program, and was required to submit to random drug testing for a period of five years.[37]

Smith passed three random drug tests, but on June 27, 1997 during a random drug test, he again tested positive for marijuana. Once again Eastern discharged him, and once again he filed a grievance, and the case proceeded to arbitration.[38] Eastern argued that it had just cause to discharge Smith because he twice tested positive during a sixteen month period during the time he was employed as a heavy equipment operator. It further argued that DOT regulations and its own policy were implemented to curb drug use by employees in safety sensitive positions. The Union pointed out that these were the only two incidents in Mr. Smith's 17-year employment history. The Union argued that the penalty was too harsh and was not required by Eastern's drug policy or the DOT regulations.[39]

The arbitrator was apparently moved by Smith's personal appeal that a family problem had led to this one time lapse, and the arbitrator reinstated Smith. Among other things, the arbitrator ordered that Smith would receive a 30-day suspension with no back pay, that he would reimburse the company and the union for the arbitrators' bills in both cases, that he would participate in a substance abuse program, and that he would resign if he tested positive for illegal drugs in the next five years (a so-called "last chance" agreement).[40] Eastern sought a vacation of the arbitration award on the grounds that the award was contrary to public policy, and that the award failed to draw its essence from the collective bargaining agreement,

known as the National Bituminous Coal Wage Agreement of 1993, between Eastern and the United Mine Workers of America. 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. The Union argued, among other things, that the award did not contravene any well-defined and dominant public policy.[41]

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."[42] The court also noted that in making this determination, it is appropriate to consider if the arbitrator exceed his contractual authority. The court determined that under the agreement, Eastern had the exclusive right to direct its workforce, including the right to hire and discharge its employees. The right to discharge is limited to those situations where the company has just cause. Since just cause is not defined in the agreement, the arbitrator was obliged to look to other sources including Eastern's substance abuse policy. The policy required 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."[43] The court found that the award was rationally inferable from the agreement, and that the arbitrator had not exceeded his authority under the agreement.

The court further noted that the arbitrator's award should be set aside where the contract, as interpreted, would violate "some explicit public policy that is well defined and dominant."[44] 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 interests.[45] 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 have found that the reinstatement contravened the identified policy. The court found that the DOT regulations do not express an explicit, well-defined public policy permanently "enjoining the employment of commercial motor vehicles drivers who test positive for drug use."[46] The court concluded that the public policy exception did not apply as the award was consistent with the DOT regulations, and denied plaintiff's motion for a summary judgment while granting defendant's motion for a summary judgment.

In an unpublished opinion, the Court of Appeals for the Fourth Circuit found that the District Court had correctly decided the issues before it, and affirmed the decision.[47] Due to the disagreement in the Circuits, the Supreme Court granted certiorari.[48]

The Issues in Eastern Associated Coal

There were a number of issues that, it was hoped, would be resolved by the Supreme Court in *Eastern*. The most obvious was the question that the court failed to answer in *Misco;* that is, whether the public policy test should focus 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 reinstatement violated a specific public policy, as can be found in a statute or regulation, or whether this was just some vague or general public policy. The Union in *Eastern* had argued that since the courts have no authority to add substantive terms to a labor agreement, setting aside 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.[49]

The National Academy of Arbitrators filed an amicus curiae brief in the case.[50] In addition to making arguments about positive law and explicit public policy, the Academy proposed that the case 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. The Academy also argued that the arbitrator should be able to award anything that the parties could have done on their own.

Samuel Estreicher and Kenneth J. Turnbull have stated that the question for the Supreme Court 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 instant case, repeatedly use illegal drugs despite provision of rehabilitation assistance.[51]

The Supreme Court's Opinion in *Eastern*

In an opinion dated November 28, 2000, the United States Supreme Court upheld the arbitration award, and unanimously affirmed the judgment of the Court of Appeals.[52]

Justice Breyer, writing for the Court, noted that both the employer and the union granted to the arbitrator the authority to interpret the meaning of the contract's language, including the words, "just cause." Also, he reiterated that a court would set aside an arbitrator's interpretation only in rare instances. 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." The question is then whether a contractual reinstatement requirement would fall within the legal exception making unenforceable a collective bargaining agreement that is contrary to public policy. 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. Any public policy must be "explicit," "well defined," and "dominant." The court further 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.[53]

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."[54] Also, the Act says that rehabilitation is a critical component of a testing program. The award in this case violated no specific provision of any law or regulation. It was consistent with DOT regulations requiring a drug treatment program before returning.

The court noted that Eastern's own policy did not require termination. This was apparently a serious flaw that the justices commented on during oral argument. John G. Roberts, Jr., attorney for Eastern Associated Coal Corporation, while discussing the collective bargaining agreement, was specifically asked,

> …you didn't have to as a contracting party rely on what a court might or might not declare to be public policy. Could you have not said, a driver gets tested and show up positive twice, he's out. You could have said that. You could have negotiated for that.[55]

Additionally, Justice O'Connor stated,

> So 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.[56]

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.

Justice Scalia wrote a concurring opinion with which Justice Thomas concurred. Justice Scalia took exception to court's statement that court's authority to invoke the public policy exception is not limited to instances where the award violates positive law. He thought that it should be.

Analysis

Does *Eastern* answer the question that *Misco* failed to answer? Not exactly, but one might say that both sides got something. The Court did say that the focus in a public policy determination should be on the award, and not on the conduct of the terminated employee. This differs from the rulings of the Courts of Appeal which had adopted the broader view, and which often vacated the awards. However, the Court did not say that only a violation of positive law would trigger the public policy exception. The Court was apparently allowing for unforeseen contingencies. However, they gave us no indication of what situation 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.[57]

The opinion may also offer something for employers. Neal Mollen, who's firm filed an amicus brief on behalf of the Air Transport Association of America, in discussing circuits like the fourth, was reported to have stated, "Before 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."[58] Of course, Mr. Mollen went on to say that we are not really sure what replaces it.

It should also be stressed that even if Eastern had been correct that laws and cases had established a public policy, that policy prohibited someone from performing a safety sensitive job while under influence of drugs or alcohol. The public policy was not violated because the person was not fired. In fact, rehabilitation is a component part of the laws. There is no legal requirement that the employee be terminated.

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 get 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 get the benefit of both provisions. If the situation had been reversed in this case, and it was the union that was trying to have the award vacated, the employer might well have argued that union was bound by arbitration award, even if the union believed it was a bad decision. Furthermore, one might ask if this was actually such a bad award. Smith's punishment was very similar to the terms in the regulations.[59] The penalties were more severe than with his first violation, and they included a last chance clause, so he will not be given a third chance. The arbitrator apparently believed that there were extenuating circumstances that justified giving him this second chance. Also, 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 a basis difference between arbitration and the courts, especially in the labor area.

It may be asked what effect this decision will have on nonunion arbitration cases. The Supreme Court, in a 5-4 decision, recently held that individual employees' agreements to arbitrate employment disputes will be enforced under the Federal Arbitration Act (FAA).[60] An arbitration may be set aside under 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 powers or so imperfectly executed them that a mutual, final, and definite award was not made.[61] Nonunion employers can also be faced with problems involving drug or alcohol abuse. The public policy exception has also been raised in arbitration cases involving sexual harassment. Given the Supreme Court's reluctance to disturb arbitration awards, it can be expected that a similar analysis would be used in nonunion settings. Finding just a general public policy against sexual harassment may not be sufficient.

There is one thing that is clear from *Eastern*. If employers want to guarantee their ability to terminate employees for violations of drug and alcohol policies without concern that an arbitrator will reinstate the employee, the employers must specifically state in their policy that an employee will be terminated for a violation, or they must negotiate for this as a term in the collective bargaining agreement.

Conclusion

Eastern Associated Coal Corporation v. United Mine Workers of America has not answered all questions, but it does demonstrate that it will be difficult to have an arbitration award set aside. The Supreme Court has indicated in this and other recent cases,[62] that it will support and uphold the arbitration process. Employers have a difficult task before them in dealing with drug and alcohol problems among their workers, but the problem will not be solved by setting aside arbitration awards that they do not believe further their objectives. Employers must be pro active. If they want to be able to terminate employees this must be clearly required in the drug and alcohol policy or in the collective bargaining agreement.

Footnotes

[1] Arbitration awards in labor cases are enforced due to §301 of the Labor Management Relations Act, 29 USC §185. Although §301 does not specifically address arbitration, federal courts have recognized a preference for private settlement. *See* United Paperworkers International Union v. Misco, Inc., 484 U.S. 29, 37, 108 S.Ct. 364, 370, 98 L.Ed. 2d 286, 1987 U.S.LEXIS 5028 (1987).

[2] *Misco*, 484 U.S. at 36; United Steelworkers of America v. Enterprise Wheel & Car Corp, 363 U.S. 593, 599, 80 S.Ct. 1358, 4 L.Ed. 2d 1424 (1960).

[3] 531 U.S. 57, 121 S. Ct. 462, 148 L. Ed. 2d 354, 2000 U.S.LEXIS 8083 (2000).

[4] The Department of Health and Human Services' 1997 National Household Survey on Drug Abuse, conducted by the Substance Abuse and Mental Health Services Administration, *available at http://*www.samhsa.gov. A summary of the survey is *available at http://*www.drugfreeworkplace.org/research.html.

[5] Robert G. Knowles, *Most Drug Abuse Seen to Be Among Workers, National* UNDERWRITER, June 25, 1990, at 19.

[6] Brief of Amici Curiae Institute for a Drug-Free Workplace, 531 U.S. 57 (2000) (No. 99-1038).

[7] United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593, 80 S. Ct. 1358, 4 L. Ed. 2d 1424 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960); United Steelworkers of America v. American Mfg. Co., 363 U.S. 564, 80 S. Ct. 1343, 4 L. Ed. 2d 1403 (1960).

[8] This exception was first enunciated in W.R. Grace & Co. v. Rubber Workers, 461 U.S. 757, 766 (1983).

[9] 484 U.S. 29, 108 S.Ct. 364, 370, 98 L.Ed. 2d 286, 1987 U.S.LEXIS 5028 (1987).

[10] *Id*.

[11] 484 U.S. at 36, 108 S. Ct. at 370, quoting *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596, 597 (1960).

[12] 484 U.S. at 43, 108 S. Ct. at 373, quoting *W. R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 766 (1983).

[13] *Id*.

[14] *See* Ann C. Hodges, *Judicial Review of Arbitration Awards on Public Policy Grounds: Lessons from the Case Law*, 16 OHIO ST. J. ON DISP. RESOL. 91, 101-115 (2000).

[15] *Id*.

[16] *Id*. Hodges also suggests that the Second, Sixth and Seventh Circuits have taken more of an intermediate approach.

[17] 118 F.3d 841, 1997 U.S.App.LEXIS 17228 (1st Cir. 1997).

[18] Daniel Seligman, *Exxon's Little Problem*, FORTUNE, Nov.28, 1994, at 193.

[19] *Id*.; *Supreme Court Ponders Drug Testing Case, Rehab vs. Public Safety*, WORKPLACE SUBSTANCE ABUSE ADVISOR, Oct. 19, 2000, *available at* LEXIS-NEXIS Academic Universe.

[20] Jones, Walker, Waechter, Poitevent, Carrere & Denegre, L.L.P., *Court Rejects EEOC's Analysis of Safety Requirements under ADA*, LOUISIANA EMPLOYMENT LAW LETTER, March 2000, *available at* LEXIS-NEXIS Academic Universe.

[21] Seligman, *supra* note 18.

[22] EEOC v. Exxon Corp., 203 F.3d 871, 2000 U.S.App.LEXIS 1886 (5th Cir. 2000).

[23] Hodges, *supra* note 14, at 98-99.
[24] Exxon Corp. v. Esso Workers' Union, Inc., 118 F.3d at 844.
[25] *Id*.
[26] Exxon Corp. v. Esso Workers' Union, Inc., 942 F. Supp. 703, 704, 1996 U.S.Dist. LEXIS 14556 (D.C.Mass. 1996)
[27] 118 F.3d at 844.
[28] 942 F. Supp. at 708.
[29] 942 F.Supp. at 710, citing 49 CFR 391.95 (a) and (b).
[30] 118 F.3d 841, 1997 U.S. App. LEXIS 17228 (1st Cir. 1997).
[31] *Id*. at 846-847.
[32] Some of the cases upon which the court relied included Exxon Shipping Co. v. Exxon Seamen's Union, (Exxon I), 993 F. 2d 357 (3rd Cir. 1993); 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 III), 73 F.3d 1287 (3rd Cir.), cert. denied, 116 S. Ct. 2515 (1996); Gulf Coast Indus. Workers Union v. Exxon Co., 991 F. 2d 244 (5th Cir. 1993); Union Pacific 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).
[33] 118 F.3d at 848.
[34] 49 USC §31306.
[35] 118 F.3d at 851.
[36] Eastern Associated Coal Corp. v. United Mine Workers of America, 66 F. Supp. 2d 796, 798, 1998 U.S.Dist. LEXIS 22390 (S.D.WV 1998)
[37] *Id*.
[38] *Id*. at 798, 799.
[39] *Id*. at 799.
[40] *Id*. at 800.
[41] *Id*.
[42] *Id*. at 801.
[43] *Id*. at 802.
[44] *Id*. at 803.
[45] *Id*.
[46] *Id*. at 804, 805.
[47] 188 F. 3d 501, 1999 WL 635632, 1999 U.S.App.LEXIS 19944 (1999).
[48] 529 U.S. 1017, 120 S.Ct. 1416, 2000 U.S.LEXIS 2144, 68 U.S.L.W. 3593 (2000).
[49] Samuel Estreicher and Kenneth J. Turnbull, *The "Public Policy" Defense Revisited*, NEW YORK LAW JOURNAL, Aug. 9, 2000, at Arbitration Section 3, citing Respondent's Brief at 26 ff.
[50] Theodore J. St. Antoine, Address at the American Bar Association, Section of Labor & Employment Law, ADR in Labor & Employment Law Committee, 2991 Midyear Meeting (February 21, 2001).
[51] Estreicher, *supra* note 49, at 4. The authors' law firm represented Exxon Mobile Corporation as amicus curiae in support of the petitioner in the Eastern Associated Coal case.
[52] 531 U.S. 57, 121 S. Ct. 462, 148 L. Ed. 2d 354, 2000 U.S.LEXIS 8083 (2000).
[53] 121 S. Ct. at 467.
[54] *Id*. at 468.
[55] Transcript of oral argument, October 2, 2000, at 5, *available at* http://www.supremecourtus.gov.
[56] *Id*. at 7.
[57] Samuel Estreicher and Kenneth J. Turnbull, *Supreme Court Decides Eastern Associated Coal and Green Tree*, NEW YORK LAW JOURNAL, Jan. 16, 2001, at Arbitration Section 3.
[58] Marcia Coyle, *Arbitrator's order wins court's favor,* NATIONAL LAW JOURNAL, Dec.11, 2000, at B1, B3.
[59] 49 CFR §382.605. The Regulations provide in part that the employee will be advised of the drug and alcohol resources available, and that the employee will be evaluated by a substance abuse professional. 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.
[60] Circuit City Stores, Inc. v. Adams, 121 S. Ct. 1302, 149 L. Ed 2d 234, 2001 U.S.LEXIS 2459, 69 U.S.L.W. 4195 (2001); 9 USC §§1-16.
[61] 9 USC §10(a).
[62] Other recent Supreme Court cases involving arbitration include Circuit City; Green Tree Financial Corp. v. Randolph, 531 U.S. 79, 121 S. Ct. 513, 148 L.Ed. 2d 373, 2000 U.S. LEXIS 8279 (2000) (Holding that an arbitration agreement in a consumer sales contract is not unenforceable because the agreement is silent on the costs of arbitration.); Major League Baseball Players Association v. Garvey, 2001 U.S.LEXIS 3811, 69 U.S.L.W.3725 (2001)(Reiterating the courts' limited role in reviewing the merits of an arbitration award.)