THE PUBLIC POLICY EXCEPTION TO ARBITRATION AWARD ENFORCEMENT: A PATH THROUGH THE BRAMBLE BUSH

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I. INTRODUCTION

In 2010, a Portland, Oregon police officer fatally shot an unarmed man in the back after the police were called by the victim's loved ones when he threatened "suicide by police." Though the officer subsequently was fired by the police chief for alleged violation of Portland Police Bureau policies, the police union later won an arbitration award ordering reinstatement of the officer.[1] This article grapples with the difficult issues of public and labor relations policy raised by the controversy surrounding this and similar cases. These situations raise issues under the public policy exception to arbitral award enforcement.

A. The Broader Role of Grievance Arbitration in the American Workplace

When unionized employees in both the private and public sector[2]

face firing for alleged misconduct or incompetence, disputes sometimes occur about whether the

analysis often reveals that the employer cannot be shown to have violated the contract.

In a few cases, the losing side challenges the arbitral ruling before labor boards or the courts.[6] Although review of arbitral awards is limited,[7] some of these appeals raise contentions that the arbitrator's decision conflicts with public policy. The public policy exception to arbitration award enforcement, like arbitration itself, stands on a foundation stretching back more than half a century, and is well-established in both the public and private sectors.[8]

B. The Proper Role of the Public Policy Exception As Shown In This Article

This article argues that labor union advocates, management representatives, arbitrators, and reviewing courts and labor boards sometimes misconstrue the public policy exception. Union representatives often interpret the exception too narrowly, effectively denying its existence; conversely, management lawyers often attempt to use this narrow exception to excuse a failure to prove misconduct by, or the incompetence of, the employee. For their part, arbitrators sometimes fail to give the exception proper weight in their consideration of remedies. Although arbitrators properly exercise broad remedial discretion,[9] nothing requires a rote award of reinstatement, as distinct from other forms of relief for contract violations. Arbitrators should consider a variety of other remedies including, in appropriate cases, front pay for a reasonable time in lieu of reinstatement.[10]

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6. Although unions sometimes challenge arbitral awards, these challenges, like those of employers reviewed in this article, usually fail. *E.g.*, Haw. Teamsters & Allied Workers Union, Local 996 v. United Parcel Serv., 241 F.3d 1177 (9th Cir. 2001); Am. Fed'n of State, Cnty. & Mun. Empl. Council 93 v. Sch. Dep't of Burlington, 968 N.E.2d 358 (Mass. 2012).

7. *Infra* Part III.

8. *Infra* Part III.

Additionally, courts and labor boards sometimes take either too broad or too narrow a view of the public policy exception. With a few exceptions, the Oregon courts and the Oregon Employment Relations Board (ERB) correctly interpret the state's statutory public policy exception according to the principles established in the U.S. Supreme Court's *Public Policy Trilogy*, upon which the Oregon public policy statute is modeled. In a few cases, Oregon reviewing bodies and federal courts too broadly—or too narrowly—applied the public policy exception. However, these appear to be mere "outlier" cases that the overwhelming majority of courts reject. The exception is not limited to situations in which reinstatement would affirmatively violate positive law. Instead, reviewing bodies should actively review arbitral reinstatement awards for compliance with public policies, clearly expressed in constitutions, statutes, and judicial precedents, under the facts found by the arbitrator, and the arbitrator's interpretation of the parties' contract.[11]

Properly construed, the exception plays a vital role in the American system for resolving disputes in the unionized private and public sector workforces. In this view, the public policy exception substantially constrains arbitral discretion[12] to order reinstatement where it would violate clearly-defined public policies manifested in positive law, yet work in harmony with the foundational policy favoring final and binding arbitration of union contract disputes, long recognized by the U.S. Supreme Court, and accepted by many state

courts as a bedrock of American labor law.[13]

C. Roadmap for This Article

The remainder of this article defines the current state of the public policy exception, explains its vital role, and seeks to outline its principles. Part II brings what otherwise might seem a dry and merely doctrinal issue to life by providing an example of a current public policy dispute involving a victim of a tragic and mistaken police shooting and the police officer who fired the fatal shot.[14] Part III reviews the origins of the public policy exception and the three leading U.S. Supreme Court cases applying the doctrine as a narrow, yet still significant exception to the general presumption of arbitration award enforceability. These cases are referred to herein as the *Public Policy Trilogy*.

In Part IV, the article turns to the public policy exception as applied in public sector cases, with emphasis on those in Oregon. Part IV-A reviews how U.S. Supreme Court cases provided the model for Oregon's narrowly-crafted exception enacted during the 1995 Legislative Assembly,[15] now codified in Oregon Revised Statutes section 243.706(1). Part IV-B reviews Oregon appellate and Oregon Employment Relations cases under the exception, and finds that with a few exceptions, they have remained true to the *Public Policy Trilogy*. Part IV-C reviews adoption of the *Public Policy Trilogy* by judicial decision in recent cases from Illinois and Pennsylvania, involving domestic abuse by a police officer and theft of a purse found in a garbage can.

Part V reviews private sector cases in the federal Courts of Appeals (with particular focus on the Ninth Circuit); these cases, as well, generally confirm the principles established in the Supreme

reinstatement orders which trample on clearly-defined policies delineated in the law.

II. THE TRAGIC DEATH OF AARON CAMPBELL AND THE DISPUTE OVER THE FIRING AND REINSTATEMENT ORDER CONCERNING OFFICER RON FRASHOUR

Let us illustrate the dilemmas raised in applying the public policy exception by reference to a current dispute in Portland, Oregon. As noted in the opening of this article, on January 9, 2010, Aaron Campbell's loved ones called the police after he reportedly threatened to commit "suicide by police." As reported in the local media, Mr. Campbell, unarmed, was shot in the back with an assault rifle by Portland police officer Ron Frashour.[16] Further exacerbating the bitter controversy that erupted, Aaron Campbell was an African American, and Officer Frashour is white. In addition, a breakdown in communication among officers present on the scene occurred as Mr. Campbell emerged from his apartment, at the direction of police negotiators, unknown to officers who were providing deadly force security.[17] This tragedy took place against a background of a long series of controversial police shootings and other police actions in Portland.[18]

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16. *E.g.*, Maxine Bernstein, *Portland Police Documents Detail Aaron Campbell's Shooting*, O

indict Officer Frashour in the shooting, the City of Portland later paid $1.2 million to settle a civil claim by Mr. Campbell's family.[21]

Not surprisingly, in light of the two polar views about the circumstances and blame for the shooting, the Portland police officers' union filed a grievance objecti

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> found the call to be a close one . . . the arbitrator still is of two minds. The arbitrator is aware that this was a controversial case in the public eyes and it has received a great deal of media attention. . . . Given the information that [Aaron Campbell] had a handgun in the jacket he was wearing inside the apartment, that he emerged from the apartment wearing a jacket, and that he made what could be construed as threats of force to use that gun against the police, and also given officers' training in circumstances such as the one at hand, the Arbitrator concludes there was a reasonable basis for believing that Mr. Campbell could [have been] armed.[25]

The arbitrator ordered Officer Frashour reinstated with back pay.[26]

A public outcry ensued,[27] and in due course, Portland's mayor announced that the City would not voluntarily comply with the arbitration award, deeming it inconsistent with "public policy."[28] Since 1995,[29] Oregon law explicitly has provided for a public policy exception to public sector labor arbitration awards in cases involving, among other things, "unjustified and egregious use of physical or deadly force."[30]

A new round of legal battles began as the police union exercised its right under the law to seek enforcement of the Frashour arbitration award with the Oregon ERB. The case, while pending, drew comments from prominent public sector management and union

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blow described in testimony to be equivalent to being hit by a 100 mph pitch in baseball) prior to turning and dropping his hands just prior to the fatal shot.).

25. *Id.* at 52 59.

26. *Id.* at 73.

27. *E.g.*, Maxine Bernstein, *Portland Council Sends Another $300,000 to Law Firm Defending Council's Discipline of Three Police Officers*, OREGONIAN BLOG (April 11, 2012, 5:30 PM), http://www.oregonlive.com/portland/index.ssf/2012/04/portland_council_sends_another.html; Maxine Bernstein, *Portland's Legal Stand Against Reinstating Fired Cop Hangs on Oregon Law That's Had Little Effect*, OREGONIAN BLOG (April 25, 2012, 9:06 PM) [hereinafter Bernstein, *Portland's Legal Stand*], http://www.oregonlive.com/portland/index

III. THE BACKGROUND, ORIGINS, AND PURPOSES OF THE PUBLIC POLICY EXCEPTION[34]

A. Limited Review of Arbitration Awards Under the Steelworkers Trilogy

Any discussion of arbitration award enforceability must start with the 1960 *Steelworkers Trilogy*.[35] As the U.S. Supreme Court has repeatedly pointed out over a half-century, the arbitral process enjoys presumptions both (1) in favor of arbitrability of labor contract disputes,[36] and (2) in favor of enforcement of awards, so long as such awards are within the authority the parties bestowed upon the arbitrator in agreeing to their contract.[37] As the U.S. Supreme Court has explained:

> To resolve disputes about the application of a collective-bargaining agreement, an arbitrator must find facts and a court may not reject those findings simply because it disagrees with

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34. *See generally* Drummonds, *Ex Ante Veto Negotiations, supra* note 29. It should be noted that the author wrote the disputed language in Oregon's public sector statute, section 243.706(1) of Oregon Revised Statutes, in 1995 as a representative of Governor John Kitzhaber in veto negotiations over Senate Bill 750 sponsored by the Republican legislative leadership; the original bill proposed by the Republican legislative leadership proposed to restrict arbitral authority to reinstate much more drastically than the public policy exception finally accepted by the veto negotiators. See *infra* Part IV.A–B.

35. *See generally* United Steelworkers of Am. v. Am. Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of Am. v. Warrior & Gulf Navigation, 363 U.S. 574 (1960); United Steelworkers of Am. Enter. Wheel & Car Corp., 363 U.S. 593 (1960); Katherine V.W. Stone, *The Steelworkers Trilogy and the Evolution of Labor Arbitration*, LABOR LAW STORIES (Laura Cooper & Catherine Fisk eds., 2005), *available at* http://ssrn.com/abstract=631343) (to find background information and context of the Trilogy and arbitration generally in American labor relations). *See also* Theodore J. St. Antoine, *Jud9.4(ES)]. Ac;11.(a)-1330 Evof Labor Are 006 Tc-94s99 327.96095-10.7(o*

> them. The same is true of the arbitrator's interpretation of the contract. The arbitrator may not ignore the plain language of the contract; but the parties having authorized the arbitrator to give meaning to the language of the agreement, a court should not reject an award on the ground that the arbitrator misread the contract.[38]

Thus, a "final and binding" arbitration award commands enforcement even if it is wrong on the facts and law, including its interpretation and application of contract language.[39] So long as an award "draws its essence" from the parties' contract and does not "simply reflect the arbitrator's own notions of industrial justice," a "final and binding" award must be enforced.[40] Although the *Steelworkers Trilogy* started in the federal private sector labor law, it has been adopted and applied to public employee labor contracts in many states, including Oregon.[41]

Arbitration is consistent with public policy for three distinct reasons. First, it generally provides a definitive means of resolving disputes that is faster and less expensive than proceedings before courts or labor boards.[42] Second, final and binding arbitration promotes the parties' autonomy to choose their own decision-maker. By agreeing to a grievance arbitration clause, the parties agree to be bound by the arbitrator's determination of the facts and the arbitrator's interpretation and application of their contract, as part and

"draw its essence" from the contract in "those egregious cases in which a court determines that the arbitrator's award ignored the plain language of the contract."[47] The parties, however, are free to restrict the authority of an arbitrator in their contract. "The parties, of course, may limit the discretion of the arbitrator . . . ; and it may be . . . that under the contract involved . . . , it [is] within the unreviewable discretion of management to discharge an employee . . . ."[48] Still, even where the scope of the arbitrator's authority is ambiguous under the contract language, "the scope of the arbitrator's authority is itself a question of contract interpretation that the parties have delegated to the arbitrator."[49]

C. The Public Policy Exception to Enforcement of Labor Arbitration Awards in the Private Sector: The U.S. Supreme Court's Public Policy Trilogy

Second, and most pertinent for present purposes, for many years the Supreme Court and other courts have long recognized a public policy exception.[50] Two examples of relatively early private sector public policy cases illustrate seemingly uncontroversial uses of the exception. In a 1987 case, the Eighth Circuit Court of Appeals refused to enforce an arbitration award reinstating a machinist discharged for deliberately violating important federal safety regulations at a nuclear power plant.[51] In another case a quarter-century ago, the U.S. Court of Appeals for the Eleventh Circuit refused to enforce an arbitration award reinstating a Delta airline pilot fired after flying a commercial passenger plane while intoxicated with alcohol.[52]

While it may seem obvious to deny reinstatement to a drunken airline pilot and a grossly reckless nuclear plant employee, questions

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Act, found in 9 U.S.C. § 10. 2jDS

2. Marijuana Use At Work—

arbitrator's finding that the Company failed to prove the charge of possession and use at work, the Court declared the courts below were "not free to refuse enforcement because [they] considered [the employee's] presence in the white Cutlass, in the circumstances, to be ample proof that [the company rule against drug use or being under the influence at work] was violated. No dishonesty is alleged; only improvident, even silly, factfinding is claimed. This is hardly a sufficient basis for disregarding what the agent appointed by the parties determined to be the historical facts."[62]

Nor was the arbitrator's refusal to consider the "gleanings" and "scales" evidence found in the employee's own car a ground to deny enforcement. As the Supreme Court explained:

> Here the arbitrator ruled that in determining whether Cooper had violated [the Company's rule], he should not consider evidence not relied on by the employer in ordering the discharge, particularly in a case like this where there was no notice to the employee or the Union prior to the hearing that the Company would attempt to rely on after-discovered evidence. This, in effect, was a construction of what the contract required when deciding discharge cases: an arbitrator was to look only at the evidence before the employer at the time of discharge.[63]

As the Court noted, this approach was consistent with the practice followed by other arbitrators.[64]

These parts of the Supreme Court's opinion in *Paperworkers v. Misco* reaffirmed the primacy of the *Steelworkers Trilogy* and its progeny. But there was much more in the Supreme Court's opinion. Though approving of the arbitrator's decision not to consider the "gleanings" evidence found in the employee's car, the Supreme Court went on to make six distinct, important, and subtle points about the public policy exception.

First, the court reviewing the award for compliance with public policy could consider the "gleanings" found in the employee's own car, since that fact was included in the arbitration award. The Court reasoned: "In pursuing its public policy inquiry, the Court of Appeals

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62. *Id.* at 39 (emphasis added).

63. *Id.* at 39–40. The Supreme Court noted that under its decision in John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 557 (1964), questions of procedural "arbitrability" are for the arbitrator unless expressly restricted by the parties' contract. *Id.* at 40.

64. *Id.* at 40 n.8.

quite properly considered the established fact that traces of marijuana had been found in Cooper's car."[65]

Second, public policy *might* prevent enforcement of

at work and would be likely to do so again—could be drawn from the "gleanings" found in the employee's car, that inference was for the arbitrator, not the reviewing court. In the Court's words:

> [I]t was inappropriate for the Court of Appeals itself to draw the necessary inference. To conclude from the fact that marijuana had been found in [the employee's car] that [the employee] had ever been or would be under the influence of marijuana while he was on the job and operating dangerous machinery is an exercise in factfinding about [the employee's] use of drugs and his amenability to discipline, a task that exceeds the authority of a court asked to overturn an arbitration award. The parties did not bargain for the facts to be found by a court, but by an arbitrator chosen by them who had more opportunity to observe [the employee] and to be familiar with the plant and its problems. Nor does the fact that it is inquiring into a possible violation of public policy an excuse a court for doing the arbitrator's task.[70]

Sixth, concluded the Supreme Court, the reinstatement order did not actually require reinstatement into a safety-sensitive cutting

cutting machine, and might be in the future). Sixth, on the issue of whether reinstatement might violate public policy, the court must consider the particulars of the reinstatement order and any facts found by the arbitrator as to the likelihood of a repetition of the conduct.

3. Marijuana Use Away From Work—*Eastern Associated Coal Corp. v. United Mineworkers*[72]

In 2000, a unanimous Supreme Court reaffirmed the teachings of *WR Grace* and *Misco*, and made even clearer that the public policy exception focuses on the appropriateness of a reinstatement order under all the circumstances. Justice Breyer's opinion for seven Justices repeated the restrictive phrases quoted above from the two earlier cases in the *Public Policy Trilogy*, emphasizing the narrowness of the exception. Again, the Court enforced an arbitral award, this time reinstating a truck driver who twice failed drug tests for marijuana use in contravention of DOT regulations (the second time after being reinstated by an arbitrator after being fired for the first incident).

The Supreme Court repeated its earlier admonishments that the public policy exception required an "explicit," "clearly defined," and "dominant" policy flowing from "positive law," and not "general considerations of supposed public interests."[73] The question was not whether a public policy arose from DOT regulations requiring drug testing and barring marijuana and other drug use by employees in "safety-sensitive" positions, but whether those regulations barred *reinstatement* under the circumstances. The Court held that the regulations contemplated rehabilitation, with appropriate safeguards:

> The 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 [citations omitted], for it does not preclude Eastern from assigning [the fired employee] to a non-safety-sensitive position until [he] completes [a] prescribed treatment program. It is consistent with the Testing Act's 1-year and 10-year driving license suspension requirements, for those requirements apply only to drivers who, unlike [the fired employee], actually operated vehicles under the influence of drugs

> rehabilitative concerns, for it requires substance-abuse treatment and testing before Smith can return to work.[74]

Significantly, Justice Scalia (joined by Justice Thomas) concurred in the result but wrote a separate opinion arguing for an even narrower interpretation of the public policy exception: that arbitral remedies violate public policy only when compliance affirmatively "violates the positive law."[75] But seven Justices declined to adopt this restrictive interpretation of the exception: "We agree, in principle, that a court's authority to invoke the public policy exception is *not* limited solely to instances where the arbitration award itself violates positive law."[76]

Another aspect of *Eastern Associated Coal* sometimes receives too little attention by advocates and arbitrators. The reinstatement award in that case was carefully crafted to address, not ignore, the public policy concerns inherent in the reinstatement of a pot smoking truck driver who had twice violated DOT restrictions on marijuana use by persons in "safety-sensitive" jobs. Reinstatement was conditioned upon acceptance of a three-month suspension without pay, signing of a "last chance" agreement (an undated letter of resignation), provisions for drug treatment, random drug testing at the employer's discretion, and reimbursement of the employer's costs in arbitration.[77] The Supreme Court expressly relied on these conditions in its holding:

> [T]he question to be answered is not whether [the employee's] drug use itself violates public policy, but whether the order to reinstate him does so. To put the question more specifically, does a contractual agreement to reinstate [the employee] *with specified conditions* run contrary to an explicit, well-defined public policy, as ascertained by reference to positive law and not general considerations of supposed public interests.[78]

The Court held that in view of the many conditions placed on the

74. *Id.* at 66.

75. *Id.* at 67–69 (Scalia, J., concurring) ("It is hard to imagine how an arbitration award could violate a public policy, identified in this fashion, without actually conflicting with positive law.").

76. *Id.* at 63 (emphasis added).

77. *Id.* at 60–61.

78. *Id.* 62–63 (citation omitted) (emphasis added).

reinstatement award, it did not violate public policy.

Eastern Associated Coal

A. The Adoption of the Public Policy Exception in Oregon in 1995 from Private Sector Precedents

The 1995 Oregon Legislature amended Oregon's Public Employee Collective Bargaining Act,[85]

guidance on the scope of the public policy exception in Oregon.[90] Indeed, the language of section 243.706(1) (quoted in the preceding paragraph) closely tracks the language of the Supreme Court in *WR Grace* and *Paperworkers v. Misco*.[91] Thus, in 1995, "the Governor and Republican leadership looked to private sector precedents,

award, the ERB, which has initial jurisdiction[97] of such disputes under Oregon's Public Employee Collective Bargaining Act,[98] ordered enforcement of the award.[99] In enforcing the award, the ERB noted that public policy generally favors rehabilitation, and pointed to conditions of the reinstatement order, including: the seven-month effective suspension without pay, a requirement of "appropriate drug counseling," and the absence of any requirement that reinstatement be to a "safety-sensitive position."[100] This reliance on conditions to reinstatement in the arbitral order, and on rehabilitation as one goal of public policy, follows the U.S. Supreme Court's approach in *Eastern Associated Coal*.[101]

The Oregon Court of Appeals, however, reversed the labor board and held the reinstatement award violated public policy because an Oregon statute required revocation of police certification after an officer was "convicted of violating any law . . . involving the use . . . of a controlled substance."[102] Marijuana is a controlled substance under federal law.[103] The officer had not been convicted, nor given notice and hearing as required by the police certification statute. Note that if the officer had been convicted in a criminal proceeding and given the required notice and hearing concerning loss of his certification, the case would have fallen into the most restrictive interpretation of the public policy exception espoused unsuccessfully by Justice Scalia in *Eastern Associated Coal*: that the exception only applies when enforcement09 Tms*.0012 ficl D8(w)54(09 Ta4(09 Td)12( )]TJ-ti4(e4

On a third issue in *Washington County*, the Supreme Court remanded to the Court of Appeals the question of whether the officer's untruthfulness during the initial part of an internal investigation disqualified him from reinstatement under the public policy exception. On remand, the Oregon Court of Appeals held that the reinstatement order did not violate a "clearly defined" public policy against reinstatement.[112] Consider the circumstances: although the officer was initially untruthful, he later admitted his off-duty marijuana use, was not shown to have been under the influence at work, was significantly punished by an effective seven-month

initially about his knowledge of a terrorist plot in an internal investigation (but later "came clean"), was fired for such untruthfulness, and was ordered reinstated by an arbitrator. Or suppose an officer who was shown to have repeatedly been untruthful to his superior officers about involvement in a commercial marijuana operation, was fired for such untruthfulness, and was ordered reinstated by an arbitrator. In such circumstances, assuming a statute or precedent could be found "clearly" (i.e., "free from doubt") requiring police officers to be truthful with their superior officers, reinstatement might well violate public policy under section

reinstatement would violate public policy.

Still, the holding in *Deschutes County* can be defended based on other grounds. Nothing in the facts of the case, as found by the arbitrator, suggest that the suspended officer presented an ongoing threat to inmates upon his reinstatement, as ordered by the arbitrator. Both the internal investigation and the arbitrator found that the initial use of pepper spray against the inmate was justified because the inmate resisted when the correctional officers tried to move the inmate to a new cell.[128] Though the internal investigation found that a subsequent "fogging" of the cell by another officer was inappropriate and that the grievant was "vicariously responsible" for the pepper spray "fogging," the arbitrator found that spraying did not, under the circumstances, violate the County's use of force policy. As to the last act of pepper spraying after the inmate's resistance had ceased, that episode was disputed and the internal investigation found that the charge was not proven. Though the arbitrator disagreed, and the arbitrator's resolution of the disputed facts was what the parties contracted for, the arbitrator did not judge that violation serious enough to deny reinstatement. And critically, nothing in the facts found by the arbitrator suggested that the deputy represented a continued threat to inmates. One inappropriate use of non-deadly force, in an episode that started with an appropriate use of pepper spray against a resisting inmate, does not automatically render the officer unfit for further duty. That conclusion finds further support from the decision of the employing county sheriff not to terminate the corrections officer, but merely to suspend him for four days, and to remove him from his positions as a training officer and reserve

drug testing process.[130] Tri-Met was willing to reinstate the driver, but insisted that the driver undergo a "substance abuse evaluation" (SAE) by a professional as a condition of reinstatement, arguing that such an evaluation was required by the applicable federal DOT regulations.[131] The employee and union refused to comply with this condition. ERB found that Tri-Met committed an unfair labor practice by failing to comply with the arbitrator's award, which did not impose the substance abuse evaluation as a condition of reinstatement.[132]

The Court of Appeals affirmed the ERB, but its opinion identifies several nuances about the public policy exception now embodied in section 243.706(1) of the Oregon Revised Statutes. These nuances involve cases where implementation of an arbitrator's award allegedly affirmatively violates federal law. As noted above, even the narrowest view of the public policy exception would invalidate arbitral reinstatement awards that would affirmatively violate the law.

First, Tri-Met contended that federal regulations required the SAE, and federal law preempts state law under the Supremacy Clause of the U.S. Constitution. In the event of a conflict, the ERB should have reviewed the merits of the arbitration award (as held by the Court of Appeals) on the narrow question of whether the DOT

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then be deemed under the federal regulations to be a refusal to submit to drug testing; treated the same as a positive drug test. In that event, an SAE was required. The arbitrator found, however, that the "irregularities in the testing procedure were such that the test should have been cancelled rather than deemed refused."[134] Thus, according to the Court of Appeals, because "the arbitrator correctly determined the drug test procedure did not comply with the [DOT regulations'] 'shy bladder' protocol, we conclude on that basis that the arbitrator's order declaring the test cancelled does not conflict with DOT regulations and is thus not preempted."[135]

4. Improper Restraint of Inmate by Corrections Officer—*Marion County Law Enforcement Association*[136]

Like the *Deschutes County* case discussed above,[137] *Marion County Law Enforcement Association* involved alleged abuse of inmates by a corrections officer. An officer who was fired after handcuffing an inmate to bed posts, and then leaving that inmate alone in the dark with other inmates where the inmate was subsequently "pantsed," appealed her discharge through the union contract grievance process. The fired officer had also locked two other inmates scheduled for release in a small "box" holding cell in an incident of "horseplay" for which the inmates made no complaint (until the officer was fired).

An arbitrator ordered the correctional officer reinstated. As to the latter "box"/"horseplay" incident, the arbitrator found that the county lacked just cause for a two day suspension because the county failed in its burden to prove violation of a rule against "disrespectful and discourteous" treatment of inmates.[138] As to the "handcuffing incident," the arbitrator noted that the correctional officer admitted she had violated at least four regulations, and that these were "not minor violations." Nonetheless, the arbitrator reversed the discharge under principles of progressive discipline, citing a work record over a

134. *Id.* at 394. The arbitrator found that the driver in question was not allowed three hours to produce the specimen.

135. *Id.* at 400.

136. Case No. UP-24-08, 2010 WL 1419334 (Or. ERB 2010).

137. *See supra* Part IV.B.2.

138. *Marion Cnty. Law Enforcement Ass'n*, No. 4P-24-08, 2010 WL 1419334, at *5. The arbitrator expressed skepticism about the two-day suspension, believing the county was merely trng to belatedly support an argument that it followed "progressive" discipline, even though both the suspension and the firing occurred pursuant to the same investigation.

"number of years" in which supervisors described the grievant's work as "exceeding expectations," and the "vast difference in treatment" (a mere one day suspension) of another correctional officer also "culpable" in the handcuffing incident. The arbitrator ordered the termination reduced to a thirty-day suspension without pay, conditioned on the grievant's submission to additional training regarding the proper treatment of inmates.[139]

ERB enforced the reinstatement award in a lengthy opinion:

> The County has failed to demonstrate that any of the cases or constitutional provisions [invoked by the County] define a clear public policy that prohibits *reinstatement* of a corrections officer who engages in the specific misconduct in which [the grievant] engaged. . . . There is no reason to believe [the grievant's] reinstatement would endanger inmates. . . . The arbitrator concluded that although [grievant's] actions in handcuffing [the inmate] got out of hand, she did not act with any intent to abuse or intimidate [the inmate].[140]

In this case, the ERB correctly applied the principles of the *Public Policy Trilogy*. First, it recognized that in a more egregious situation than "horseplay" incidents, public policy might prevent enforcement of a reinstatement award; thus, it was significant that the officer did not maliciously abuse the inmates.[141] Second, while it is the reinstatement order and not the underlying misconduct which must be measured against the public policy exception, all of the facts and circumstances found by the arbitrator must be taken into account in determining whether reinstatement would impinge on important and clearly defined public policies, like the protection of inmates in our jails and prisons. In *Marion County Law Enforcement Association*, the circumstances did not suggest a continuing threat to inmates.[142] Additionally, the ERB noted that the arbitrator did not

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139. *Id.* at *6–7.

140. *Id.* at *18 n.16 (emphasis in original).

141. *Id.* at *7, 16–17.

142. "There is no reason to believe [the officer's] reinstatement would endanger inmate. The arbitrator determined that [the officer] was honestly contrite and that she demonstrated an understanding that what she did was wrong. The arbitrator found that [the officer] could be rehabilitated (and thus found, at least implicitly, that she was unlikely to repeat her misconduct). The arbitrator authorized the County to require [the officer] to complete a course of training on the proper supervision of inmates. IN THESE CIRCUMSTANCES, there is no reason to believe [the officer] will engage in similar misconduct in the future or that inmates

find "egregious" but only "unjustified" use of the handcuffs; the Oregon public policy statute requires that in misuse of force cases the public policy can be invoked only when the force is both "unjustified" and "egregious."

In summary, a review of Oregon judicial decisions shows that, in general, the Oregon courts followed the principles established by the U.S. Supreme Court as intended in 1995 when the legislature and Governor adopted the public policy exception in section 243.706 (1) of the Oregon Revised Statutes. One departure was the Court of Appeals' error in holding that ERB, in reviewing an arbitral reinstatement order, could not consider facts not relied upon by the employer in disciplining the employee.[143] That decision confused the issue of whether the discipline violated the contract with the issue of whether a reinstatement *remedy* (for a contract violation found by the arbitrator) violates public policy. But the conclusion that the reinstatement award should be enforced based on the facts and circumstances found by the arbitrator—the holding of that case—can be sensibly defended.

C. Other Public Sector Jurisdictions Follow the Principles of Active Review of the Reinstatement Remedy for Compliance with Public Policy Clearly Established in Positive Law

1. Illinois—Domestic Violence By Police Officer

In a 2012 decision,[144] an Illinois appeals court refused to enforce an arbitration award reinstating a police officer fired after allegations of domestic battery, and untruthfulness in a subsequent internal investigation into the allegations.[145] The officer had been previously suspended for thirty days on a prior charge of domestic violence, and then was arrested on a second incident. Illinois models its public policy exception to arbitration award enforcement on the U.S. Supreme Court's *Public Policy Trilogy*. The court remarked:

> We agree with the trial court—there is a well-defined and dominant public policy against acts of domestic violence. Acts of

would be in danger if [the officer] is reinstated." *Id.* at *18 (emphasis added).

143. Deschutes Cnty. Sheriff's Ass'n v. Deschutes Cnty., 9 P.3d 742, 747 (Or. Ct. App. 2000). *See supra*, note 114 and accompanying text.

144. Decatur Police Benevolent & Protective Ass'n Labor Comm. v. City of Decatur, 968 N.E.2d 749 (Ill. App. 4th Dist. 2012).

145. *Id.*

> domestic violence are even more disturbing when committed by a police officer—whether on or off duty. It is a violation of public

money. The purse had been reported stolen earlier the same day. The employee lied in the initial investigation, but later admitted his theft. An arbitrator ordered his reinstatement after grievance proceedings and a Pennsylvania appellate court ordered the award enforced in the face of a public policy challenge. The question was whether reinstatement "poses an unacceptable risk that it will undermine the implicated public policy [against theft by public employees] and cause the public employer to breach its . . . public duty." The Court answered in the negative, finding that: (1) the firing arose from one isolated incident; (2) the employee had made restitution and had otherwise shown remorse; (3) the garbage handler was not in a position of trust; and (4) the theft was spontaneous, not planned, and was not likely to be repeated.[153]

4. Summary of Reviewed Public Sector Cases in Other States

Both Illinois and Pennsylvania adopted the *Steelworkers Trilogy* presumptions favoring the arbitral process for resolving labor contract disputes, and both similarly adopted the *Public Policy Trilogy* principles for a public policy exception to enforcement. The cases in these jurisdictions teach that the facts and circumstances found by the arbitrator matter. Reinstatement of a public employee who uses illicit drugs, or steals from a purse found in a garbage can might (or might not), pose a threat to the public employer's mission and public confidence, and also may constitute a threat to clearly defined public policy, depending on mitigating circumstances, conditions imposed upon reinstatement, and the likelihood of a further offense. Assuming: (1) that the arbitrator finds misconduct or incompetence,[154] and (2) that a reinstatement award implicates a "clearly defined" public policy arising from positive law or legal precedents, courts, labor boards, and arbitrators must make a judgment based on the facts and circumstances found by the arbitrator as to whether reinstatement would violate that clear public policy. And, as Justice Scalia's concurring opinion in *Eastern Associated Coal* explained, under the prevailing judicial view, a reinstatement award need not affirmatively violate the law to trigger the exception to enforcement founded on such public policy grounded in positive law.

153. *Id.*

154. In Oregon, however, only public policy claims based on misconduct, not incompetence, fall within the stcinD.0017 Tc29(co)217 Tce. O howecoii i

V. PRIVATE SECTOR CASES IN THE COURTS OF APPEAL

Hundreds of cases challenging labor arbitration awards have been litigated in the U.S. Courts of Appeal.[155] In general, the cases adhere to the *Steelworkers Trilogy* presumptions limiting judicial review of labor arbitration awards while also recognizing a public policy exception. The Ninth Circuit cases, which are the focus of this review, repeatedly stress that to overturn an arbitral award under the "essence test," the challenging party must bear the "heavy burden of demonstrating that the arbitrator failed even arguably to construe or apply the CBA."[156] A few cases in other Circuits occasionally appear to depart from the *Trilogy*, but these are "outlier" cases; either drawing sharply critical dissents, or not being followed in later cases in that same Circuit.[157]

Private sector cases implicating the public policy exception fall into several categories. As might be expected where reinstatement orders are involved, some of the cases exhibit various types of alleged culpable conduct by the employee: drug or alcohol related offenses, abuse or mistreatment of fellow employees or supervisors, and serious performance errors on the job that might result in serious safety or health threats or harms. In contrast, some cases involve no offense by the employee, but concern public policy issues raised by statutes that challenge the employee's authorization to work. Under those circumstances, compliance with a reinstatement award might require an affirmative violation of the law.[158] We start with examples of the latter type of public policy case.

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155. *See generally* Andrew M. Campbell, Annotation,

A. Claims That Compliance Would Affirmatively Violate The Law Because The Employees Are Not Authorized to Work

Two cases presented claims that, even under the narrowest definition, where compliance with an arbitral award would violate positive commands of the law,[159] public policy prevented enforcement of the award. In both of them, however, the reviewing courts acknowledged the defense, but rejected its application under the facts and circumstances found by the arbitrator.

1. Firing Workers Who Failed in Short Time to Respond to "No Match" letters—*Aramark Facilities Services v. SEIU*[160]

One case involved the firing of workers for whom the employer had received "no match" letters from the Social Security Administration (SSA).[161] The employer notified the employees of the letters, gave the employees three

party in question.'"[166] Second, "'courts should be reluctant to vacate arbitral awards on public policy grounds,' because the finality of arbitral awards must be preserved if arbitration is to remain a desirable alternative to courtroom litigation."[167] Third, "the public policy inquiry proceeds by taking the facts as found by the arbitrator."[168]

The court accepted the employer's premise that IRCA67 147

B. The Drug and Alcohol Related Cases

1. Recall the U.S. Supreme Court Decisions

Recall that two of the U.S. Supreme Court's *Public Policy Trilogy* arose from drug-related allegations.[179] *Paperworkers v. Misco*[180] involved unproven allegations that an employee possessed and used marijuana at work. The arbitrator could make even "silly" findings of fact—i.e., that being the sole occupant of a car in which a marijuana cigarette was burning is not sufficient proof an employee possessed and used marijuana at work. Further, "gleanings" of marijuana found in the worker's own car in the company parking lot did not show use or sale at work, which the court conceded might support a public policy claim. Moreover, even if there was a "clearly defined" public policy against drug use by operators of safety sensitive equipment, no public policy barred rehabilitation and reinstatement of drug users with appropriate conditions such as treatment, punishment, and consent to random drug testing at the discretion of the employer.

The second of the U.S. Supreme Court's drug related public policy cases, *Eastern Associated Coal*, involved an employee who twice failed mandatory drug tests under U.S. Department of Transportation regulations.[181] Again pointing out that rehabilitation of drug users was an important public policy, the Court enforced reinstatement for an operator of safety sensitive equipment conditioned on punishment, treatment, consent to random drug testing, and other safeguards.

Taken together, the two Supreme Court cases show that the public policy review is to be active, with the court weighing reinstatement against public policies disfavoring reinstatement. For example, if it is shown that the employee is using drugs at work, or under the influence at work, legitimate safety concerns are raised. But the Court does not retry the facts *de novo*; rather, it takes the facts as found by the arbitrator. The Court's focus is on questions like whether reinstatement involves a reasonable risk of recidivism, with the employee again being under the influence at work. The following case illustrates a situation in which public policy concerns for safety dictate a refusal to enforce an award.

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179. *See supra* Part III.C.

180. 484 U.S. 29 (1987). *See also supra* Part III.C.2.

181. 531 U.S. 57 (2000). *See also supra* Part III.C.3.

2. *Delta Airlines, Inc. v. Air Line Pilots' Association*[182]

This case, arising only a year after the *Paperworkers v. Misco* decision, presented the paradigm case for a public policy challenge to a reinstatement award: a perceived active threat to the health and welfare of third parties. A pilot flew a commercial airline flight while intoxicated,[183] with a blood alcohol content of 0.13 grams. Under state law, 0.1 grams raises a presumption of operating a vehicle while under the influence.[184] A grievance board reduced the pilot's discharge to a suspension without pay, and reinstated him, ordering Delta Airlines to pay for treatment which he had already undertaken.[185]

The Eleventh Circuit Court of Appeals refused to enforce reinstatement. Citing statutes in forty states outlawing the flying of a plane while intoxicated, the court declared that "Delta . . . was under a duty to prevent the wrongdoing of which its [pilaa1i5 TD.0

What is striking about the *Delta Airlines* case is that the appeals court spends little time explaining why the pilot's assumed rehabilitation in treatment should not have addressed the safety concern about the risk this pilot would again fly drunk with passengers following reinstatement. The only distinction offered is the on duty/off duty divide. Off-duty conduct—say, the pilot was observed to be drunk continuously while off duty—might make a relevant predictor of future behavior. But on duty conduct—say, an impromptu party with holiday alcoholic "cheer—might not be a good predictor of future at work conduct (especially if adequate punishment, blood alcohol sampling, and training under the circumstances is required).

3. *Florida Power Corp. v. International Brotherhood of Electrical Workers*[189]

In contrast to the intoxicated pilot who flew a commercial jet on duty, the employee in *Florida Power Corp.* was accused of off-duty drug and weapons violations, and driving his auto under the influence at 3:00 a.m. The employee, a coal yard equipment operator, was fired. A labor arbitrator ruled the employer violated the labor contract and ordered reinstatement. A U.S. District Court found the award violated public policy, and, further, that the award did not draw its "essence" from the parties' contract. The Eleventh Circuit reversed and enforced the award. Citing *Paperworkers v. Misco*[190] on the public policy issue, the court held that, though it had "no enthusiasm" for the arbitrator's decision (that the employer lacked "just cause" to fire the employee), the parties contracted for the arbitrator's, not the court's, interpretation and application of the just cause clause in the parties' contract.[191] One judge dissented, arguing that, though the employee was not convicted on the sale of drugs charges, he had admitted the same, and that the collective bargaining agreement clearly permitted firing for sale of drugs; thus in the dissenters view, the award did not draw its "essence" from the parties agreement.[192]

189. 847 F.2d 680 (11th Cir. 1988).
190. 484 U.S. 29 (1987*); supra* Part III-B.
191. *Fla. Power Corp.*, 847 F.2d at 683.
192. *Id.* at 683–85.

by competent medical officers) in the context of workers in the gas pipeline industry raised a red flag to reinstatement; but to the majority, the drug tests technically violated DOT regulations, and therefore raised no violation of any policy expressed in those regulations.

5. *Continental Airlines v. Air Line Pilots Association*[200]

A recent case out of the Fifth Circuit illustrated the "on duty/off duty" distinction and raised unique public policy questions. A pilot with persistent alcohol problems entered into a "last chance agreement" (LCA), but later refused, after being placed on disability, to take a no-notice alcohol test pursuant to the LCA. Continental fired the pilot, but the System Board of Adjustment (SBA) found that the discharge violated the LCA because the airline gave insufficient consideration to mitigating circumstances offered by the pilot. The Fifth Circuit enforced the decision reinstating the pilot under the *Steelworkers Trilogy's*

C. Severe Performance Problems with Serious Consequences for Third Parties

1. Willful Violation of Safety Regulation at Nuclear Power Plant—*Iowa Light and Power Company v. Local 204 of the IBEW*[206]

Cases where severe performance issues posed a risk of harm to third parties constitute the third category in this review. One involved a nuclear plant maintenance worker who deliberately violated safety regulations, was fired, and then reinstated under an arbitration award that found the worker's training did not specifically cover the situation, and that the worker was unaware of the seriousness of the violation.[207] The Eighth Circuit Court of Appeals refused to enforce the award of reinstatement, but made it clear that its opinion was not condoning "a blanket justification for the discharge of every employee who breaches a public safety regulation at a nuclear power plant. There may be circumstances in which a violation might be excused."[208] Thus the court focused on the circumstances, namely that the employee engaged in a "knowing violation" of a regulation that he "knew . . . was important."[209]

2. *Boston Medical Center v. SEIU, Local 285* [210]

The second case involving performance deficiencies concerned a nurse who was discharged for a "substandard practice" that resulted in an infant patient's death. An arbitrator reinstated the nurse for lack of just cause to fire: the employee previously had an unblemished ten-year service record and, as interpreted by the arbitrator, the parties' contract required "progressive discipline" under the circumstances. The First Circuit Court of Appeals enforced the award, drawing a distinction between the violations of required medical procedures and the question of reinstatement.[211] While conceding that public policy in various statutes expressed the importance of ensuring competent medical professionals, those policies did not establish a public policy

206. 834 F.2d 1424 (8th Cir. 1987).
207. *Id.* at 1426 (8th Cir. 1987).
208. *Id.* at 1430.
209. *Id.* at 1429–30.
210. 260 F.3d 16 (1st Cir. 2001).
211. *Id.* at 23.

against reinstatement of the nurse under the circumstances.[212] The court reasoned that the nurse had not "demonstrated a propensity to engage in multiple bad acts or unwillingness to modify her behavior. . . . [W]e cannot conclude that [the nurse's] one act of professional negligence during her ten-year career, serious though it was, means that her reinstatement violates the public policy . . . promoting the competence of nurses for patient safety."[213] The First Circuit emphasized that its public policy review was based on a "fact specific approach", which included the consideration that the nurse had an "unblemished" ten-year record prior to the case in question, that the error by the nurse was not willful, and that there was "no evidence" that the nurse's "continued employment . . . would threaten patient safety."[214]

The cases involving performance deficiencies jeopardizing the public safety follow the teachings of the U.S. Supreme Court's Public Policy Trilogy. Whether reinstatement of an employee who commits serious safety errors—such as those at a nuclear power plant or a hospital—violates public policy depends on all the facts and circumstances. Courts independently review the public policy issue based on the facts found in the arbitral award and focus on issues like the willfulness of the error, the employee's past employment performance, and the likelihood that such an error might be repeated in the future.

We turn now to the last 2(es.)12.ot93i.2188 mry(od)11.7((prvh)12.1(at)8.8((sc12.ot93i.218ort
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1. Striking Coach in Anger—*Sprewell v. Golden State Warriors* [215]

One interesting case involved an NBA player who twice assaulted and battered his coach.[216] This case illustrates how sometimes, the "essence" test and limited judicial review works against the union and employee, and in favor of the employer. Additionally, it identifies and discusses four exceptions to the presumption of arbitral award enforceability, each of which the Ninth Circuit rejects, including a public policy objection that the award

arbitrator was "arguably construing or applying the contract."[221] Therefore, the award easily passed the "essence" test.

Second, the Ninth Circuit rejected Sprewell's contention the arbitrator exceeded his authority by changing the sanction to a one-year suspension, rather than just upholding or rejecting the Golden State Warrior's termination of his contract:

> The Supreme Court has held that an arbitrator should be given substantial latitude in fashioning a remedy under a CBA. Sprewell has failed to demonstrate why the above rule should not be applied with full vigor in the instant case. Accordingly, we reject Sprewell's contention that the arbitrator exceeded the scope of his authority by fashioning an originative remedy.[222]

Sprewell's third contention—Carlesimo's alleged racial

2. Harassment of Fellow Employee—*American Eagle Airlines v. Airline Pilots Association*[225]

The case involved a pilot's bizarre behavior around and harassment of another employee.[226] The pilot was fired for the harassment, carrying a weapon in violation of security regulations, and sleeping on duty.[227]

the "list of 7" as non-exclusive grounds for summary dismissal. The Ninth Circuit rejected the union's attack on the award under the "essence" test: "[T]he fact that an arbitrator arguably misinterpreted a contract does not mean that he did not engage in the act of interpreting it."[233]

4. Sexual Harassment of Fellow Employees—*EEOC v. Indiana Bell Telephone*[234]

Though not involving an arbitration award, *EEOC v. Indiana Bell Telephone* illustrates the potential clash between an employer's duty to take action against sexual harassers under the employment discrimination laws, and the employer's duties under a collective bargaining agreement. Three distinct questions arise: (1) the effect, in the discrimination case, of any restrictions on discipline of the arbitrator in the CBA; (2) the effect of a factual finding of "no harassment" by the arbitrator; and (3) the effect of an award finding harassment but reinstating the employee upon conditions such as sexual harassment training. Thus, there is a distinct tension between an employer's duty to protect employees from sexual harassment and

discrimination action.

VI. CONCLUSION

The cases involving both the public and private sector, in Oregon and elsewhere, reveal that the public policy exception must be applied narrowly because, as part and parcel to their voluntary agreement, the parties have generally vested in the arbitrator the authority to determine facts, and interpret and apply the labor contract. On the other hand, reviewing bodies properly engage in active review of the question of whether reinstatement would violate clearly defined public policies, based on the facts, as found by the arbitrator. The following "Seven Principles" derive from the cases reviewed above.

1. In Oregon public sector jurisdictions (but not in some other states or in the private sector), the public policy defense arises only in cases of misconduct, not, for example, poor performance.

2. The reviewing body is not limited to facts known to the employer at the time of discharge in considering whether public policy would be violated by the reinstatement remedy for a contract violation. Even if the reviewing body was so limited, this would not prevent the employer from initiating a new disciplinary action based on facts not charged in the original grievance/arbitration proceeding.

3. The facts, as found by the arbitrator, control the review for public policy violations. This is in accordance with the terms of the parties' agreement, which require that danc mNuesr

The wording of the Oregon statute suggests a slightly broader public policy exception in Oregon, compared to the private sector cases under the federal labor law, since the public

These principles strike a balance between the protection of final and binding arbitration as a mechanism for resolving contract disputes, and the preservation of important public policies clearly expressed in positive law. However, in awards like that involving Officer Frashour and the Aaron Campbell shooting, with which this article started, more is at stake than just a dispute between a union and an employer.[240] From either perspective, a tragic death occurred. Public policy must be considered, but this consideration must also be constrained by recognition of the fair play and due process that labor arbitration attempts to achieve for employees and employers alike.

A revitalized, yet constrained public policy exception promotes public confidence in the arbitral process. Events in Wisconsin[241] and elsewhere[242] teach that while advocates understandably reflect the narrower perspective of their immediate clients, larger issues are at stake in terms of the public credibility of the collective bargaining and grievance arbitration process as a whole. Far from being a dead letter, the public policy exception—in cases involving sexual misconduct, unjustified and egregious violence, public safety, serious instances of dishonesty, and criminal offenses related to work—should be a vital part of the process for resolving public- and private- sector labor contract disputes.

240. Again, this writer expresses no opinion as to whether the Frashour/Campbell reinstatement award should be enforced.

241. *E.g.*, Ben James, *Wisconsin Ruling May Boast Labor Opposition in Other States*, LAW 360 (Apr. 9, 2012), http://www.law360.com/articles/327131/wis-ruling-may-boost-labor-opposition-in-other-states.

242. *Id.*