

**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 sector²

1. Part II of this article provides a more complete account of this case. The writer expresses no opinion about the correctness of the arbitration award, or whether the reinstatement award, under applicable law, is enforceable.

2. *Union Members-2011*, BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR 1 (Jan. 27, 2012), <http://www.bls.gov/news.release/pdf/union2.pdf> (showing that, nationally, less than

face firing for alleged misconduct or incompetence, disputes sometimes occur about whether the discharge violated provisions in the parties' contract.³ Union and management representatives often resolve the disputes through grievance processes common in union contracts. Frequently, the representatives work out a mutually agreeable resolution. This may result in acceptance of the firing as justified, a negotiated resignation, or reversal of the discharge. In the process, parties may compromise on lesser discipline, such as suspensions without pay, reprimands, or "last chance" agreements. When the parties to the union contract cannot agree on such a mutually acceptable resolution, the dispute typically winds up in a hearing before an arbitrator, mutually selected by the union and employer, for a "final and binding" decision.⁴

This system has been in place for more than sixty years in American labor relations, and in the great majority of cases, involving many thousands of disputes, the arbitration system works well.⁵ Arbitrators sometimes reverse the firings, and sometimes sustain them as entirely justified under the facts, circumstances, and the language of the parties' contract. In many cases, unions and attorneys counsel against challenge of disciplinary actions because investigation and

7% of private sector employees work for unionized employers, however unions represent more than 35% of public sector employees).

3. For example, most union contracts require "just cause" and/or procedural "due process" before firing a non-probationary employee. These safeguards may include a warning for inadequate performance, a fair investigation before action is taken, and progressive and consistent discipline, excluding cases of serious misconduct. *See infra* note 23 and accompanying text.

4. By 1960, more than ninety percent of all union contracts contained arbitration clauses. *See* Edward B. Shills, *Arthur Goldberg: Proof of the American Dream*, 120 MONTHLY LAB. REV. 56, 65 (1997).

5. The U.S. Supreme Court has sought to extend the arbitration system to non-unionized, private sector employers for disputes arising, not from union contracts, but from public laws, such as, Title VII (sex, race, national origin, and religious discrimination) and the Fair Labor Standards Act (minimum wage and overtime pay disputes). *E.g.*, *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001). *Circuit City* rests on the legal fiction that company policies or other boilerplate provisions, that mandate submission of disputes arising from employment or consumer transactions, create "voluntary" agreements to substitute the arbitral forum for courts and jury trials.). As with union contract arbitration, arbitration in individual employment cases receives limited judicial review. *E.g.* *Biller v. Toyota Motor Corp.*, 668 F.3d 655 (9th Cir. 2012) (affirming arbitral award of \$2.5 million liquidated and \$100,000 punitive damages in favor of the employer, and against former in-house counsel, who was responsible for products liability cases). In *Biller*, the award was based on the ground that the attorney improperly used confidential information in consulting business after alleged constructive discharge, and the court rejected the attorney's affirmative defense that the company allegedly engaged in unethical discovery practices.

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

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.

9. *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 41 (1987) (quoting *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960) (“[T]hough the arbitrator’s decision must draw its essence from the agreement, he ‘is to bring his informed judgment to bear in order to reach a fair solution of a problem. *This is especially true when it comes to formulating remedies.*’”)) (emphasis in original).

10. For example, front pay is sometimes ordered by judges in lieu of reinstatement in discrimination cases under Title VII of the 1964 Civil Rights Act, codified in section 2000(e) of chapter 42 of the United States Code and other statutes. Though, it can be contended, that front pay is a legal damages remedy outside the traditional authority of labor union contract arbitrators, most of the U.S. Courts of Appeal hold that front pay is an equitable remedy under the discrimination statutes and, thus, not subject to jury determination or damage caps set forth

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 discretion¹² 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

in the federal discrimination statutes. *E.g.*, *Gotthardt v. Nat'l R.R. Passenger Corp.*, 191 F.3d 1148, 1153–54 (9th Cir. 1999) (“If . . . front pay awards are ‘compensatory damages’ . . . the district court should have capped the total amount If . . . front pay is a form of equitable relief . . . front pay does not fall within section 1981a's definition of ‘compensatory damages’ and the district court correctly refused to cap Gotthardt's front pay award. The circuits are divided on whether front pay falls within section 1981a's cap on damages. The Sixth Circuit has held that front pay falls within the cap The Eighth, Tenth, and District of Columbia Circuits have rejected [the Sixth Circuit's] view, concluding that . . . front pay is an equitable remedy When Congress enacted section 1981a to authorize awards of compensatory and punitive damages in Title VII cases, it included language making it clear that the statute was not intended to cut back on the courts' existing authority to grant equitable relief. . . . Before section 1981a's enactment, this and other circuits treated front pay as one of the forms of equitable relief. . . . We therefore conclude that Congress understood that front pay was one of the preexisting ‘type[s] of [equitable] relief’ . . . that would not fall within the section 1981a(b)(3) cap.”). *See also* *Pollard v. E.I. du Pont de Nemours & Co.*, 532 U.S. 843 (2001) (holding that front pay is not subject to damages caps in employment discrimination statute).

11. *Infra* Part III-C.

12. *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

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 Court's Public Policy Trilogy.

Part VI concludes by distilling "Seven Principles" for a revitalized public policy exception—an exception narrow enough to maintain the labor relations policy favoring "final and binding" arbitral resolution of disputes, but broad enough to constrain

13. See *infra* Part III-A.

14. As this case is still pending, the author expresses no opinion about the correctness of the arbitration award in this controversy, nor whether this award should be enforced under applicable legal standards. The case, however, illustrates the passion, confusion, and difficulty often surrounding the public policy exception.

15. *Infra* Part IV-A.

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

16. *E.g.*, Maxine Bernstein, *Portland Police Documents Detail Aaron Campbell's Shooting*, OREGONIAN BLOG (Feb. 16, 2010, 9:07 PM), http://www.oregonlive.com/portland/index.ssf/2010/02/portland_police_release_report.html; Denis Theriault, *Fire Frashour? Done. The Cop Who Shot Aaron Campbell is Canned: Three Others are Suspended*, PORTLAND MERCURY (Nov. 18, 2010), <http://www.portlandmercury.com/portland/fire-frashour-done/Content?oid=3053450>.

17. *See infra* note 24, at 31.

18. *E.g.*, Maxine Bernstein, *City of Portland and James Chasse's Family Reach \$1.6 Million Settlement in Death-in-Custody Case*, OREGONIAN BLOG (May 11, 2010, 1:51 PM), http://www.oregonlive.com/portland/index.ssf/2010/05/city_and_chasse_reach_16_milli.html; Maxine Bernstein, *Portland Police Fail To Learn From Past Mistakes in Officer-Involved Shootings, Review Says*, OREGONIAN BLOG (May 31, 2012, 7:55 PM), http://www.oregonlive.com/portland/index.ssf/2012/05/portland_police_fail_to_learn.html; Mark Friesen, *Potter: Staff Bungled Chasse Call*, OREGONIAN BLOG (Sept. 28, 2006, 12:46 PM), http://blog.oregonlive.com/Oregonianextra/2006/09/potter_staff_bungled_chasse_ca.html; Editorial, *Remember Nathan Thomas*, OREGONIAN, Nov. 28, 1994; *Good Cops, Bad Cop*, WILLAMETTE WEEK, May 31, 1993–June 6, 1993; Erin Hover & Nena Baker, *Police and Deadly Fire: Looking for Middle Ground*, OREGONIAN, Aug. 26, 1994; OIR Group, *Report to the City of Portland On Portland Police Bureau Officer-Involved Shootings*, PORTLAND ONLINE (May 2012), <http://www.portlandonline.com/auditor/index.cfm?a=399048&c=52199> (reviewing 7 police shootings from 2004 to 2010); Brad Schmidt, *Insurance Company Won't Pay \$1.5 Million in Legal Bills, Including James Chasse Case*, OREGONIAN BLOG (Jan. 4, 2012, 2:06 PM), <http://www.>

Of course, as often is not presented in press accounts, two sides of the story existed. In the view of the police officers' union and Officer Frashour, the shooting, concededly tragic, was reasonable under the circumstances appearing to the officer at the moment of his fatal shot. In this perspective of the shooting, Officer Frashour, in a span of two seconds, had to make the decision whether Campbell posed an immediate threat of death or serious physical injury. According to one person with knowledge of the police union's view of the tragedy, "Mr. Campbell said he had a gun, said he wanted to commit suicide by police, his girlfriend said he had a gun, and [after emerging from his apartment] he was within a foot or two of hard cover, he was reaching for the area [his jacket] where police are taught suspects carry guns."¹⁹

After an investigation, Police Chief Mike Reese fired Officer Frashour. In doing so, Chief Reese declared that Officer Frashour, who had in two previous incidents received "command counseling" about use of a taser and about the Portland Police Bureau's "pursuit policy," failed to meet bureau standards for the use of deadly force in the Aaron Campbell shooting.²⁰ Although a grand jury declined to

oregonlive.com/portland/index.ssf/2012/01/insurance_company_wont_pay_15.html; John Snell, *City to Fire Officer in Shooting*, OREGONIAN, Oct. 9, 1993; John Snell, *Moose Fires Policeman for Extreme Use of Force*, OREGONIAN, Oct. 9, 1993; *The Death of James P. Chasse Jr.: Why The Story Won't Go Away*, OREGONIAN BLOG (May 14, 2010, 2:00 PM), http://www.oregonlive.com/opinion/index.ssf/2010/05/the_death_of_james_p_chasse_jr.html. See also Human Rights Watch, *Shielded from Justice: Police Brutality in the U.S.—Portland Incidents*, <http://www.hrw.org/legacy/reports98/police/uspo117.htm> (last visited Oct. 22, 2012). Of course, such controversy is not unique to Portland. E.g., Edecio Martinez, *Five Cops Suspended After Beating Mentally-Disabled Homeless Man to Death*, CBS NEWS (Aug. 3, 2011, 12:03 PM), http://www.cbsnews.com/8301-504083_162-20087469-504083.html (a controversy in Fullerton, Cal.); Maxine Bernstein, *Portland Police Officer Dane Reister pleads not guilty to assault, negligent wounding charges in June 30 shooting*, OREGONLIVE (Sept. 13, 2012), http://www.oregonlive.com/portland/index.ssf/2011/12/portland_police_officer_dane_r.html. See also, Human Rights Watch, *supra* note 18. Of course, such controversy is not unique to Portland. E.g., Edecio Martinez, *Five Cops Suspended After Beating Mentally-Disabled Homeless Man to Death*, CBS NEWS (Aug. 3, 2011), http://www.cbsnews.com/8301-504083_162-20087469-504083.html (describing a similar controversy in Fullerton, California).

19. E-mail from Will Aitcheson, Attorney for the Portland Police Association, to author (May 24, 2012) (on file with author).

20. See Maxine Bernstein, *Portland-Area Church Group Leaders Submit Legal Brief in Frashour Arbitration Case*, OREGONIAN BLOG (June 18, 2012, 6:06 PM), http://www.oregonlive.com/portland/index.ssf/2012/06/Portland-area_church_group_lea.html; Maxine Bernstein, *Portland Police Chief Mike Reese Fires Officer Ron Frashour in Aaron Campbell's Fatal Shooting*, OREGONIAN BLOG (Nov. 16, 2010, 10:54 AM), http://www.oregonlive.com/portland/index.ssf/2010/11/portland_police_chief_mike_ree.html

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 objecting to Frashour's termination under its labor contract with the City. The labor contract contained "just cause"²² and other protections against unjust dismissal of police officers. The City's contract with the police union also contained, as is typical in union contracts, an agreement to submit disputes that could not be resolved by the parties to a neutral arbitrator selected by the parties for "final and binding" resolution.²³

It was more than two years after Mr. Campbell's death when the arbitration process finally concluded. The arbitrator determined, after seventeen days of hearings, that the police union's contention was meritorious and that officer Frashour's termination lacked just cause. According to the arbitrator, Officer Frashour's actions fell within the training guidelines he had received from the Portland Police Bureau. Furthermore, communication problems occurred between the officers talking via telephone with Campbell and those assigned to deadly weapon security.²⁴ As explained by the arbitrator, she

(According to this account, Chief Reese conceded that his decision was a "difficult one," and declared that: "I have decided the use of [deadly] force and less lethal force were out of the Bureau's policy . . ." [there were] "significant policy violations.>"). See also Jim Redden, *Adams Says City Plans to Challenge Frashour Reinstatement*, PORTLAND TRIBUNE (April 2, 2012), <http://portlandtribune.com/pt/9-news/21941-adams-says-city-plans-to-challenge-frashour-reinstatement> (According to press reports, the City ultimately agreed to pay a \$1.2 million settlement to Aaron Campbell's family. However, a grand jury declined to indict Officer Frashour on criminal charges.).

21. Redden, *supra* note 20.

22. "Just cause" is a term of art common in labor contracts that embodies both procedural and substantive fairness. As the Supreme Court noted in a 1987 case, the arbitrator applied seven criteria in making a judgment about whether the employer had "just cause" to fire an employee: "These considerations were the reasonableness of the employer's position, the notice given to the employee, the timing of the investigation undertaken, the fairness of the investigation, the evidence against the employee, the possibility of discrimination, and the relation of the degree of discipline to the nature of the offense and the employee's past record." *Paperworkers*, 484 U.S. at 34 n.5. The seven criteria noted by the Supreme Court in *Paperworkers* are commonly used by arbitrators. See generally FRANK ELKOURI, EDNA ASPER ELKOURI, & ALAN MILES RUBEN, *HOW ARBITRATION WORKS* (6th ed. 2004).

23. See ELKOURI, *supra* note 22.

24. Jane Wilkinson, *Arbitrator's Opinion & Award*, (March 30, 2012), http://media.oregonlive.com/portland_impact/other/City%20of%20PortlandPPA,%20Frashour,%20Arbitration%20Award.pdf (Arbitrator Jane Wilkinson, found that Campbell was unarmed, initially complied with directions to raise his hands as he emerged from his apartment at police direction, and was shot at multiple times with a bean bag weapon (and struck at least once, a

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

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.ssf/2012/04/portlands_push_to_reinstate_of.html.

28. Bernstein, *Portland's Legal Stand*, *supra* note 27.

29. *See generally* Henry H. Drummonds, *A Case Study of the Ex Ante Veto Negotiations Process: the Derfler-Bryant Act and the 1995 Amendments to the Oregon Public Employee Collective Bargaining Law*, 36 WILLAMETTE L. REV. 69 (1996) [hereinafter Drummonds, *Ex Ante Veto Negotiations*]. *See also id.*, in AFTER SB 750: IMPLICATIONS OF THE 1995 REFORM OF OREGON'S PUBLIC EMPLOYEE COLLECTIVE BARGAINING ACT 13, 13 (1996), *available at* <http://pages.uoregon.edu/lerc/public/pdfs/mono14.pdf> (republishing substantially the same article).

30. OR. REV. STAT. § 243.706(1) (1999).

advocates in Oregon.³¹ The former disparaged the 1995 Oregon law, with one management attorney calling the public policy exception in Oregon's statute a dead letter.³² For their part, union advocates lauded the primacy of "final and binding" arbitration for resolving disputes, as if repeating that mantra constituted an adequate response for the resolution of difficult cases like the one triggered by Officer Frashour's tragic and fatal shooting of Aaron Campbell.³³

31. Maxine Bernstein, *Attorneys for Portland Consider a Fatal Shooting by a Police Officer 'Unjustified and Egregious,'* OREGONIAN (June 10, 2012), http://www.oregonlive.com/portland/index.ssf/2012/06/attorneys_for_portland_consider.html. This article reported city-hired attorneys as saying that "the state board's past interpretation of the 'public policy exemption' adopted into state law in 1995 is too narrow and 'inconsistent' with the intent of state law makers who drafted it." It also quoted Howard Rubin and Jennifer Nelson as stating the following in their brief for the city: "The three-part analysis for enforcement of arbitration awards created by the Board, and which forms the basis for the PPA's argument, is a recipe for rubber-stamping rather than meaningful review," and "If the Board allows the arbitrator's award and reinstatement remedy to stand, the result will be that the PPB and other Oregon law enforcement agencies, will not be able to set and enforce the higher standards for the use of force that the federal and state law endorse and our community expects." Further, this article reported the Portland Police Association as arguing that, "the city will loose [sic] outright on the first question [of a three-part test used by the OERB to determine whether the arbitrator's decision violates public policy] because the arbitrator found that Frashour acted within bureau policy and training. This article also reported that union attorneys "cont[end] that returning Frashour to the force would not violate public policy clearly set out in a statute or judicial decision, and that local policies aren't relevant in the board's consideration."

32. Bernstein, *Portland's Legal Stand*, *supra* note 20. Former state senator Neil Bryant, who negotiated the language of Oregon Revised Statutes section 243.701(1), was quoted in this article as saying: "It's been eroded from what we initially passed and intended." A prominent public sector management attorney declared that the public policy exception had "virtually no application" and "the law is dead."

33. *E.g.*, Barbara Diamond, Attorney, Diamond Law, Address at the Panel Discussion Regarding the Public Policy Exception Sponsored by the Labor and Employment Relations Association (May 24, 2012).

III. THE BACKGROUND, ORIGINS, AND PURPOSES OF THE PUBLIC POLICY EXCEPTION³⁴

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

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, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny*, 75 MICH. L. REV. 1137 (1977) (cited by the U.S. Supreme Court in *E. Assoc. Coal Corp. v. United Mine Workers*, 531 U.S. 57, 62 (2000)); Carlton Snow, *The Steelworkers Trilogy in Oregon's Public Sector*, 21 WILLAMETTE L. REV. 445 (1988).

36. *E.g.*, *Warrior & Gulf Navigation*, 363 U.S. at 582–83 (1960) (“[U]nless it may be said with positive assurance that the contract is not susceptible to an interpretation” allowing arbitration of the dispute, a court should order arbitration of a labor contract dispute.); *ATT Tech. v. Comm’n Workers of Am.*, 475 U.S. 643, 650–51 (1985) (“Finally it has been established that where the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that ‘[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.’”) (Whether a dispute falls within the arbitration clause, in light of this presumption, is for the court or reviewing body.).

37. *Enter. Wheel & Car Corp.*, 363 U.S. at 597.

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

38. *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987).

39. *See Enter. Wheel & Car Corp.*, 363 U.S. at 598–99; *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 765–66 (1983); *Paperworkers*, 484 U.S. at 37–38. *See also* *E. Assoc. Coal Corp. v. United Mine Workers*, 531 U.S. 57, 62 (2000); *Major League Baseball Players Assn. v. Garvey*, 532 U.S. 504, 509 (2001) ("Courts are not authorized to review the arbitrator's decision on the merits despite allegations that the decision rests on factual errors or misinterprets the parties' agreement.").

40. *See E. Assoc. Coal*, 531 U.S. at 62; *Paperworkers*, 484 U.S. at 37–38 (citing *Enter. Wheel & Car Corp.*, 363 U.S. at 599); *Major League Baseball Players*, 532 U.S. at 509; *Enter. Wheel & Car Corp.*, 363 U.S. at 599.

41. *See, e.g.*, *Westmoreland Intermediate v. Westmoreland Intermediate Classroom Assistants Support Pers. Ass'n*, 939 A.2d 855 (Pa. 2007); *Decatur Police Benevolent & Protective Ass'n Labor Comm. v. City of Decatur*, 968 N.E.2d 749, 756 (Ill. Ct. App. 2012); Carlton Snow, *The Steelworkers Trilogy in Oregon's Public Sector*, 21 WILLAMETTE L. REV. 445 (1998).

42. In the absence of a grievance arbitration clause in a union contract review for alleged contract violations occurs in the federal or state courts, or before a labor relations board. *See Labor Management Relations Act 301*, 29 U.S.C. § 185 (2012) (private sector); OR. REV. STAT. §§ 243.672(1)(g), (2)–(3) (2009) (Oregon public sector).

parcel of their overall agreement.⁴³ Third, “the reasons for insulating arbitral decisions from active judicial review are grounded in the . . . statutes regulating labor-management relations. These statutes reflect a decided preference for private settlement of labor disputes without the intervention of government.”⁴⁴

In summary, as long as the “arbitrator is even arguably construing or applying the contract and acting within the scope of his [or her] authority, that a court is convinced [she or] he committed serious error does not suffice to overturn the decision.”⁴⁵ Over many decades this system generally has worked well to resolve many thousands of disputes.

B. Exceeding the Arbitrator’s Authority

Of course, limits to this broad arbitral authority exist. First, the arbitrator must act within the scope of authority given to her in the parties’ contract. As the Ninth Circuit has explained, the party challenging the arbitral award bears “the heavy burden of demonstrating the arbitrator failed to even arguably construe or apply the CBA.”⁴⁶ The arbitration award will only be set aside for failing to

43. *See, e.g., Paperworkers*, 484 U.S. at 37–38 (“Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator’s view of the facts and of the meaning of the contract that they have agreed to accept.”).

44. *See, e.g., Paperworkers*, 484 U.S. at 37; Labor Management Relations Act § 154, 29 U.S.C. § 173(d) (“Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.”); OR. REV. STAT. § 243.706(1) (2011) (“A public employer may enter into a written agreement with the exclusive representative of an appropriate bargaining unit setting forth a grievance procedure culminating in binding arbitration or any other dispute resolution process agreed to by the parties.”); OR. REV. STAT. § 243.656(5) (“It is the purpose of [the Public Employee Collective Bargaining Act] to obligate public employers, public employees and their representatives to enter into collective negotiations with willingness to resolve grievances and disputes relating to employment relations and to enter into written and signed contracts evidencing agreements resulting from such negotiations.”); OR. REV. STAT. § 243.752(1) (“A . . . decision of the arbitrat[or]”, under OR. REV. STAT. § 243.706 “shall be final and binding upon the parties.”).

45. *United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987).

46. *E.g., Teamster Local 58 v. BOC Gases*, 249 F.3d 1089, 1093 (9th Cir. 2001). This deference to arbitral rulings extends beyond union contract arbitration to commercial and individual employment claims, for example, Title VII claims. *See, e.g., U.S. Life Ins. Co. v. Superior Nat’l Ins. Co.*, 591 F.3d 1167, 1173–74 (9th Cir. 2010). Union contract arbitration and individual employment/consumer arbitration doctrine, however, arise from two different sources. Labor union arbitration arises from Section 301 of the Labor Management Relations Act. Individual employment/consumer arbitration doctrine arises from the Federal Arbitration

“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

Act, found in 9 U.S.C. § 10. The standards for judicial review of arbitral awards are not identical in the two systems although this is sometimes confused. Review of an arbitrator’s award under the Federal Arbitration Act rests on statutory directives, whereas, review of union labor contract awards arise from the case law of the U.S. Supreme Court under Section 301.

47. *See* *Sprewell v. Golden State Warriors*, 266 F.3d 979, 986–87 (9th Cir. 2001).

48. *Paperworkers*, 484 U.S. at 41.

49. *W.R. Grace & Co. v. Rubber Workers*, 761 U.S. 757, 765 (1983).

50. *See generally W.R. Grace & Co.*, 461 U.S. at 766 (citing cases going back to the 1940’s). Two additional exceptions exist for dishonesty by the arbitrator and fraud by the parties. *Paperworkers*, 484 U.S. at 38.

51. *See Iowa Elec. Light & Power Co. v. Local 204 of the IBEW*, 834 F.2d 1424 (8th Cir. 1987).

52. *See Delta Airlines v. Air Line Pilots Ass’n*, 861 F.2d 665 (1989).

remained about how broadly the exception might sweep, and what sources of public policy might find recognition. In the *Public Policy Trilogy*, the U.S. Supreme Court emphasized the narrowness of the exception, lest it undermine, or even swallow the *Steelworkers Trilogy* policies favoring final and binding arbitration as a means of resolving labor contract disputes. As will be seen below, however, the Court rejected the narrowest approach to the exception (that it applied only when reinstatement would affirmatively violate the law), and explained that in appropriate cases, clearly defined public policy might prevent reinstatement even where such reinstatement would *not* violate the positive law.

1. Conflicting Obligations under CBA and EEOC Conciliation—
*WR Grace v. Rubber Workers*⁵³

In the first of the *Public Policy Trilogy*, strikers' rights to reinstatement under a contract seniority clause (as interpreted by an arbitrator) clashed with an EEOC conciliation agreement the employer had voluntarily entered into with respect to largely female replacement workers. Recognizing a public policy exception (citing federal cases as far back as 1945),⁵⁴ the U.S. Supreme Court cautioned that the public policy must be "explicit," "well defined," and "dominant," by "reference to the laws and legal precedents and not from general considerations of supposed public interests."⁵⁵ Noting that the employer voluntarily undertook two inconsistent contractual obligations, the Court found no public policy violation in an award in favor of the strikers.⁵⁶

53. 461 U.S. 757 (1983).

54. *Muschany v. United States*, 324 U.S. 49, 68 (1945). *Muschany* was not a case arising from a collective bargaining agreement, but rather involved certain contracts entered into by the War Department during WWII alleged to violate public policy because the government's agent was paid on a contingency basis, and the vendor was paid on a "cost plus" basis. The Supreme Court rejected the public policy challenges. *Id.*

55. *W.R. Grace & Co.*, 461 U.S. at 766.

56. *Id.* at 770 ("Because of the Company's alleged prior discrimination against women, some readjustments and consequent losses were bound to occur. The issue is whether the Company or the Union members should bear the burden of those losses. As interpreted by Barrett, the collective bargaining agreement placed this unavoidable burden on the Company. By entering into the conflicting conciliation agreement, by seeking a court order to excuse it from performing the collective bargaining agreement, and by subsequently acting on its mistaken interpretation of its contractual obligations, the Company attempted to shift the loss to its male employees, who shared no responsibility for the sex discrimination. The Company voluntarily assumed its obligations under the collective bargaining agreement and the arbitrators' interpretations of it. No public policy is violated by holding the Company to those

2. Marijuana Use At Work—*Paperworkers v. Misco*⁵⁷

Four years later, in 1987, the U.S. Supreme Court rejected a public policy challenge to an arbitration award reinstating an employee who allegedly possessed and smoked marijuana at work in violation of company policy at a Louisiana paper converting plant. The fired employee operated a machine with sharp cutting blades which had caused “numerous injuries”; moreover, the employee had received two reprimands within two months for deficient performance.⁵⁸ Shortly after the second reprimand, a police officer observed the fired employee walking through the parking lot during work hours with two other men.

The three men . . . walked to another car, a white Cutlass, and entered it. After the other two men later returned to the plant, Cooper was apprehended by police in the backseat of this car with marijuana smoke in the air and a lighted marijuana cigarette in the front seat ashtray. The police also searched [the employee’s] car [not the Cutlass] and found a plastic scales case and marijuana gleanings.⁵⁹

The employer, concerned about a persistent problem of marijuana use at its plant, fired the employee.

An arbitrator found that the Company failed to prove that the employee had possessed or used marijuana on company property. Finding [the employee] alone in the backseat of a car with a “burning marijuana cigarette in the front-seat ashtray was insufficient proof that [the employee] was using or possessed marijuana on company property. “The arbitrator further “refused to accept into evidence the fact that marijuana [the “gleanings”] had been found in [the employee’s] car on company premises because the Company did not know of this fact” when it fired the employee, and “therefore did not rely on it as a basis for the discharge.”⁶⁰ The lower courts declined to enforce the award.

A unanimous Supreme Court enforced the award.⁶¹ As to the

obligations, which bar the Company’s attempted reallocation of the burden.”).

57. 484 U.S. 29 (1987).

58. *Id.* at 32–33.

59. *Id.* at 33.

60. *Id.* at 34 (internal citations omitted).

61. Justice Blackman and Justice Brennan concurred. *Id.* at 46 (Blackman, J. & Brennan, J., concurring).

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

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 reinstatement into a safety-sensitive position operating a cutting machine if the employee was shown to have been under the influence of marijuana at work, with a reasonable likelihood of recidivism. Though repeating its earlier admonitions in *WR Grace v. Rubber Workers*, that a public policy must be "well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents,'"⁶⁶ the Court assumed such a public policy did exist as to the operation of safety sensitive machines by someone under the influence of drugs.⁶⁷

Third, and more important, the Supreme Court declared that, although the arbitrator was not required to consider the "gleanings" found in the employee's car on the issue of whether the firing violated the parties contract, the reviewing court *could* consider that fact (as recited in the arbitral award) on the issue of whether reinstatement might nonetheless violate public policy.⁶⁸

Fourth, the "gleanings" found in the employee's car did not establish, for purposes of the public policy review, that the employee consumed marijuana at work (and thus operated the cutting machine under the influence). As the Court explained:

[T]he assumed connection between the marijuana gleanings found in [the employee's] car and [the employee's] actual use of drugs in the workplace is tenuous at best and provides an insufficient basis for holding that his reinstatement would actually violate the public policy . . . against the operation of dangerous machinery by persons under the influence of drugs or alcohol. A refusal to enforce an award must rest on more than speculation or assumption.⁶⁹

Fifth, even if the inference—that the fired employee used drugs

65. *Id.* at 44.

66. *Id.* at 43.

67. *Id.* at 44 ("Even if the Court of Appeals' formulation of public policy is to be accepted, no violation of that policy was clearly shown in this case . . . [T]he public policy identified by the Court of Appeals [was] against the operation of dangerous machinery by persons under the influence of drugs or alcohol.").

68. *Id.* at 44.

69. *Id.* (citation omitted).

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 machine job, but rather allowed reinstatement into any “equivalent position for which he was qualified.”⁷¹

Six broader lessons arise from these six points in *Paperworkers v. Misco*. First, an arbitration award is not unenforceable merely because the arbitrator made a “silly” ruling on the facts (i.e., that the Company failed to prove the fired employee used and possessed marijuana in the Cutlass auto where he was found alone with a burning marijuana cigarette). Second, the arbitrator’s refusal to consider evidence not known or considered by the employer at the time of the firing (the “gleanings” evidence), does not render an arbitral award unenforceable. Third, the performance of safety-sensitive job duties free of the influence of drugs like marijuana constitutes an important public policy. Fourth, a reviewing court *can* consider uncontroverted facts, not considered by the arbitrator but recited in the award, on the issue of whether reinstatement might violate public policy. Fifth, in considering such uncontroverted facts in the arbitral award, the reviewing court *cannot* assume further facts (in *Misco*, the debatable inference that the gleanings established that the fired employee had been under the influence at work on his

70. *Id.*

71. *Id.* at 44–45.

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 [citation omitted]. The award is also consistent with the Act's

72. 531 U.S. 57 (2000).

73. *Id.* at 62–63.

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 also carries important lessons for our discussion. First, the exception is narrow, but *can* be invoked by an arbitrator or reviewing body even though enforcement would *not* itself *violate* the positive law. Second, the public policy must nonetheless *arise* from positive law that is “explicit,” “clearly defined,” and “dominant.”⁷⁹ Third, it is the reinstatement order, not the arbitrator’s findings of fact and/or contract violation, that must be measured by arbitrators and reviewing bodies against such a public policy. Fourth, in reviewing whether a reinstatement order violates public policy, all of the facts and circumstances must be taken into consideration, including mitigating circumstances and any conditions placed upon the reinstatement award. Finally, in the specific case of employees fired for drug use, public policy sometimes favors rehabilitation with appropriate safeguards and sanctions.

IV. THE PUBLIC POLICY EXCEPTION IN PUBLIC SECTOR LABOR LAW

Neither the *Steelworkers Trilogy*, nor the *Public Policy Trilogy*—all decided under the federal Labor Management Relations Act,⁸⁰ which excludes public employees of state and local governments⁸¹—carry binding precedential force under state public sector labor relations statutes. Nonetheless, public employees in some states bargain collectively under state labor relations statutes,⁸² and as shown below, many—including Oregon—adopt the principles of the *Public Policy Trilogy*. Sometimes this occurred by decisions of state appellate courts, as in Illinois⁸³ and Pennsylvania.⁸⁴ On other occasions, for example Oregon in 1995, the principles of the *Public Policy Trilogy* were adopted by legislative action.

79. As used here, “positive law” means a statute, constitutional provision, or judicial precedent.

80. Labor Management Relations Act of 1947, 29 U.S.C. §§ 141–97 (2012).

81. *Id.* at § 152(2).

82. “An overwhelming number of states (approximately four-fifths plus the District of Columbia) have statutes authorizing public employee collective bargaining for at least some groups of employees.” JOSEPH GRODIN, JUNE WEISBERGER & MARTIN MALIN, PUBLIC SECTOR EMPLOYMENT, CASES AND MATERIALS 82 (1st ed. 2004).

83. *E.g.*, Decatur Police Benevolent and Protective Ass’n Labor Committee v. City of Decatur, No. 4-11-0764 (Ill. App. Ct. April 20, 2012). *See infra* Part IV–C.

84. *E.g.*, Westmoreland Intermediate v. Westmoreland Intermediate Classroom Assistants Support Pers. Ass’n, 939 A.2d 855 (Pa. 2007). *See infra* Part IV–C.

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 originally enacted in 1973,⁸⁶ in many ways, including an express adoption of a public policy exception to arbitral award enforcement.⁸⁷ The statute now provides:

As a condition of enforceability, any arbitration award that orders . . . reinstatement . . . for misconduct, shall comply with public policy requirements as clearly defined in statutes and judicial decisions, including but not limited to polices respecting sexual harassment or sexual misconduct, *unjustified and egregious use of physical or deadly force*, and serious criminal misconduct related to work.⁸⁸

Oregon's public policy exception borrows from the well-established private sector principles reviewed above. For almost 20 years before the 1995 Oregon statute was enacted, Oregon courts had interpreted the Oregon PECBA consistently with private sector precedent on labor arbitration award enforcement, expressly recognizing the policies favoring final and binding labor contract arbitration in the *Steelworkers' Trilogy*.⁸⁹ To those that drafted section 243.706(1) of the Oregon Revised Statutes in 1995, it seemed entirely consistent to turn to the federal private sector precedents for

85. Public Employee Collective Bargaining Act, 1995 Or. Laws 683 (1995) (codified at OR. REV. STAT. §§ 243.650–782 (2012)). See *supra* notes 29, 34 and accompanying text (discussing the influence of legal precedent on the Public Employee Collective Bargaining Act negotiations between the legislature and the Governor). See also *infra* note 90 and accompanying text (discussing the same).

86. Act of July 21, 1973, 1973 Or. Laws 1166 (1973).

87. See OR. REV. STAT. § 243.706(1) (2012) (declaring that the enforceability of every arbitration award hinges upon its compliance with public policy requirements as defined by statute and common law).

88. *Id.* (emphasis added). It should be noted that the disputed language in Oregon's public sector statute was written in veto negotiations between Democratic Governor John Kitzhaber (represented by the author) and 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 generally Drummonds, *Ex Ante Veto Negotiations*, *supra* note 29, at 137–38 (discussing the negotiation history behind Oregon Revised Statutes sections 243.650–782 in the context of an analysis of the ex ante veto negotiation process).

89. *E.g.*, *Corvallis Sch. Dist. v. Corvallis Educ. Ass'n*, 581 P.2d 972, 974–75 (Or. Ct. App. 1978). See generally Snow, *supra* note 35, at 526 (discussing the applicability of the principles set forth in the *Steelworker's Trilogy* in the public sector).

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, recognizing a narrow public policy exception to arbitration award enforcement.”⁹² Accordingly, section 243.706(1)’s public policy exception incorporated the same limiting phrases found in the U.S. Supreme Court precedents under the then well-established private sector labor law.

But some differences did appear. First, the Oregon statute omitted the word *dominant* in describing the types of public policy which must be found in the laws and case precedents in order to invoke the public policy exception; this provides a textual basis for inferring that the Oregon public policy exception was intended to be slightly broader than its federal ancestors. Second, the Oregon statute explicitly conditions enforceability on compliance with “public policy requirements,” again providing a textual basis for a somewhat more firm Oregon exception. Finally, the Oregon statute expressly identified three non-exclusive situations in which the public policy exception might be invoked: sexual harassment and other sexual misconduct, unjustified and “egregious” use of physical or deadly force, and “serious” criminal conduct related to work. These explicit statutory examples of public policy reflected legislative concern about arbitration awards prior to 1995 that seemed to some to ignore public policy constraints.⁹³

90. Moreover, in ERB and court cases predating the 1995 statute, the Oregon ERB and courts had already interpreted the Public Employee Collective Bargaining Act to incorporate a public policy defense to award enforcement based on these same private sector antecedents. See *Willamina Educ. Ass’n v. Willamina Sch. Dist.*, 623 P.2d 658, 661 n.7 (Or. Ct. App. 1981) (stating an arbitration award would be contrary to public policy if it “requires the commission of an unlawful act.”). See also Drummonds, *Ex Ante Negotiations*, *supra* note 29, at 137 (discussing the recognition and incorporation of a public policy exception to arbitration award enforcement in private-sector case law).

91. Drummonds, *Ex Ante Negotiations*, *supra* note 29, at 137.

92. *Id.* (pointing to the influence of *Paperworkers* on the 1995 amendment to the Public Employee Collective Bargaining Act).

93. “It is impossible to get rid of employees who are not performing” Bernstein, *Portland’s Legal Stand*, *supra* note 27 (quoting a Marion County Sheriff’s 1995 testimony in support of Senate Bill 750).

B. Oregon Decisions Applying the Public Policy Exception

We start our review of Oregon public sector cases with three judicial decisions and one decision of the Oregon Employment Relations Board. The Oregon decisions mainly follow the teachings of the *Public Policy Trilogy*. However, as shown below, in some cases the reviewing bodies strayed from the principles established by the U.S. Supreme Court's *Trilogy*, which provided the model for the Oregon public policy statute. The cases reviewed involved a pot smoking sheriff's deputy, a bus driver who failed to produce urine for a drug test required by federal regulations, a corrections officer involved in the inappropriate use of pepper spray against an inmate, and a similar case in which a corrections officer mistreated an inmate by handcuffing him to a bed and leaving him alone with other inmates who "pantsed" the victim. In all of these cases, public employers fired or suspended the employees, but arbitral orders of reinstatement were enforced by the reviewing court.

1. Off-duty Marijuana Use by Police Officer—*Washington County Police Association v. Washington County*⁹⁴

This leading case constitutes the only decision of the Oregon Supreme Court interpreting and applying the Oregon public policy statute. A Washington County sheriff's deputy suffered termination after he failed a drug test and initially lied about his off-duty use of marijuana (which was not shown to have affected him at work). The County's agreement with the sheriff deputies union provided that an employee "may not be disciplined for the use of illegal drugs unless the employee *previously* tested positive for the use of illegal drugs or refused to participate in the employee assistance and [drug and alcohol] counseling."⁹⁵ An arbitrator found that the County violated the deputies' union contract when it fired the deputy for a first positive test for marijuana use. The arbitrator also found that the officer's initial unsworn untruthfulness about his off-duty use did not provide just cause for termination; however, though ordering reinstatement, the arbitrator denied back pay, in effect imposing a seven-month suspension without pay.⁹⁶

After a dispute erupted about the enforceability of the arbitration

94. 63 P.3d 1167 (Or. 2003).

95. *Id.* at 1168 (emphasis added).

96. *Id.* at 1169.

award, the ERB, which has initial jurisdiction⁹⁷ 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 enforcement of a reinstatement order would affirmatively violate the law.¹⁰⁴ Though no "conviction" had occurred, the Court of Appeals nonetheless gleaned a public policy violation from the statute which the court said "clearly defined" a policy against police officers' possession or use of illegal drugs whether on duty or not.¹⁰⁵

97. OR. REV. STAT. § 243.676 (2012).

98. Public Employee Collective Bargaining Act, 1995 Or. Laws 683 (1995) (codified at OR. REV. STAT. §§ 243.650–782 (2012)).

99. *Wash. Cnty. Police Ass'n*, 63 P.3d at 1169.

100. *Id.*

101. *See supra* Part III.C.3.

102. *Wash. Cnty. Police Ass'n*, 63 P.3d at 1169–70.

103. The Ninth Circuit recently reaffirmed that marijuana use is illegal under federal law notwithstanding state law "medical use" statutes, rejecting an Americans with Disabilities Act claim by marijuana smokers with medical cards. *James v. City of Costa Mesa*, 684 F.3d 825 (9th Cir. 2012) (split decision).

104. *See supra* Part III.B.3.

105. *Wash. Cnty. Police Ass'n*, 63 P.3d at 1169–1170.

Justice Gillette, writing for a unanimous Oregon Supreme Court, reversed the Court of Appeals in an opinion that applied several of the principles established in the *Public Policy Trilogy*. First, Justice Gillette emphasized that it is the reinstatement order, rather than the underlying conduct that occasioned the firing, which must be measured against the asserted public policy.¹⁰⁶ Second, a “clearly defined” public policy arising from positive law means that “no serious doubt” about the “content or import” of the policy can exist.¹⁰⁷ Third, given that the officer in question had not been “convicted” of any offense, his reinstatement would not violate any “clearly defined” public policy. “If the legislature meant to express a public policy against *use* rather than conviction, it would have been easy to do so.”¹⁰⁸ In summary, as the Oregon Supreme Court saw the issue, reinstatement of a police officer who engaged in off-duty marijuana use, not shown to have affected the officer at work, violated no “clearly defined” public policy arising from the positive laws under the “no serious doubt” respecting the “content or import” standard.¹⁰⁹ “[W]e cannot say that the public policy . . . on which the Court of Appeals relied exists at all, much less is ‘clearly defined’, as that phrase is used in ORS 243.706 (1).”¹¹⁰

The Supreme Court also rejected the County’s argument that the purchase and use of marijuana off the job constituted “serious criminal misconduct, related to work,” one of the specifically enumerated public policies in section 243.706(1) of the Oregon Revised Statutes—at the time, possession and use of the quantity of marijuana involved constituted only an “offense” under Oregon law, and “no one in Oregon . . . was likely to be prosecuted for a similar offense.”¹¹¹

106. *Id.* at 1170 (“Thus, the enforceability of the arbitrators award does not turn on whether the employee’s purchase and personal use of marijuana or being dishonest about it in response to the positive drug test violated some public policy. The proper inquiry, instead, is whether the award itself complies with the specified kind of public policy requirements [D]oes an award ordering reinstatement of an officer who has purchased and used marijuana and then been dishonest about it fail to comply with some public policy that are clearly defined in the statute or judicial decision?”).

107. *Id.* at 1170–71.

108. *Id.* at 1171.

109. *Id.*

110. *Id.*

111. *Id.* *But see* James v. City of Costa Mesa, 684 F.3d 825 (9th Cir. 2012) (marijuana is a violation of federal law notwithstanding state statute). For a case involving a different violation of law, see Salem-Keizer Ass’n of Classified Empl. v. Salem-Keizer Sch. Dist. 24J, Case No. UP-83-99, 19 PECBR 349 (Or. E.R.B. 2001), *aff’d*, 61 P.3d 970 (Or. Ct. App. 2003).

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 suspension without pay, and was required to undergo drug counseling. The Court of Appeals, however, used loose language—a mere dictum given the facts of the case—arguably suggesting that reinstatement of a police officer found to have engaged in unsworn lies during an internal investigation could *never* violate public policy.¹¹³

Several qualifications to that suggestion seem appropriate. First, the Court of Appeals' remand holding is best understood as a ruling on the specific facts and circumstances of *Washington County*. The officer's untruthfulness did not come in the context of sworn statements, or statements in an official proceeding. Second, suppose an officer's untruthfulness was more serious than an initial denial of off-duty marijuana use. For example, suppose an officer who lied

In *Salem-Keizer*, the arbitration award reinstated an instructional assistant arrested for—but never charged with—shoplifting. The Court found no public policy against reinstatement of the instructional assistant. *Id.* at 974. An Oregon statute prohibiting school district employment for individuals convicted of certain crimes did not apply because the instructional assistant had not been convicted and second degree theft [including shoplifting] was not among the crimes listed in the statute. *Id.* Additionally the offense did not involve "serious criminal misconduct, related to work," under section 243.706(1) of the Oregon Revised Statutes. *Id.*

112. Wash. Cnty. Police Officers' Ass'n v. Wash. Cnty., 69 P.3d 767, 770 (Or. Ct. App. 2003).

113. *Id.* ("Nor can the county succeed in arguing that [the officer's] dishonesty renders his reinstatement contrary to public policy. Again, the precise question (in light of the Supreme Court's treatment of the drug-use question) is not whether public policy dictates that public safety officers should be honest. Rather, it is this: Does some statute or judicial opinion "outline, characterize, or delimit a public policy" against reinstating a police officer whom an investigation has found to be, and who has admitted to having been, dishonest but who has not been convicted of dishonesty; and does the statute or decision articulate that policy "in such a way as to leave no serious doubt or question respecting the content or import of that policy"? [Citation omitted]. The county has suggested no such statute or judicial decision, and we cannot find one. We therefore affirm ERB's order. The county committed an unfair labor practice when it refused to implement the arbitrator's decision to reinstate [the officer].").

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 243.706(1).

2. Pepper Spray Abuse of Inmate by Corrections Officer—
*Deschutes County Sheriff's Association v. Deschutes County*¹¹⁴

Although it reached a defensible holding in this 2000 case involving the pepper spraying of an inmate, the Court of Appeals arguably adopted too restrictive a view of the public policy exception. Departing from the teachings of the *Public Policy Trilogy*, the Court of Appeals held that ERB could not properly consider certain facts found by the arbitrator in its public policy review. The facts in question involved other incidents of misconduct by the employee. Though not relevant to the issue of just cause under the parties' contract because those charges were not relied upon by the employer at the time of discipline, the facts were relevant, as the U.S. Supreme Court held in an analogous case, to the question of whether reinstatement would violate a clearly established public policy under all the circumstances.

The case involved the pepper spraying of an inmate at a Deschutes County jail. Under County policy, the use of pepper spray on inmates was considered justified in some circumstances, but not justified in others. The corrections officer was originally charged with four separate, though related violations, but an internal investigation exonerated the officer on all but one.¹¹⁵ After the County Sheriff suspended the officer based on the one violation sustained internally, an arbitrator ordered the officer reinstated, finding no just cause because the incident for which the officer was disciplined “did not violate any established departmental policy.”¹¹⁶

114. 9 P.3d 742 (Or. Ct. App. 2000).

115. *Id.* at 744.

116. *Id.* at 743.

This follows the teaching in *Paperworkers v. Misco*,¹¹⁷ that arbitrators properly limit their consideration of whether discipline violated a union contract to the charges relied on by the employer at the time of discipline.

However, the arbitrator made two “gratuitous” findings of fact on the charges that were not sustained in the internal investigation, and not relied upon by the sheriff in imposing discipline. First, the arbitrator found that the inmate was pepper sprayed in the face after the inmate’s resistance stopped—again, one of the separate incidents for which the officer was exonerated in the internal investigation and for which the officer had not been disciplined.¹¹⁸ Second, the arbitrator also found that the suspended officer was guilty on the original allegation of untruthfulness in his report about that incident—also not sustained in the internal investigation, and not a basis for the Sheriff’s decision to discipline.¹¹⁹

After the county failed to reinstate the officer, ERB declined to enforce the arbitrator’s reinstatement order under the public policy exception for “unjustified and egregious” use of physical force, one of the expressly recognized public policies in Oregon’s statute.¹²⁰ In doing so, ERB relied on the arbitrator’s finding that the use of pepper spray continued after the inmate’s resistance stopped. Under the U.S. Supreme Court’s interpretation of the public policy exception, which formed the model for the Oregon statute,¹²¹ it was proper for the reviewing body to consider facts found by the arbitrator on the issue of whether reinstatement would violate public policy. As reviewed earlier in this article, for example, the “gleanings” found in the grievant’s car in *Paperworkers v. Misco*, according to the U.S. Supreme Court’s decision, could be considered by the federal Court of Appeals in determining whether reinstatement would violate public policy, even though the employer was unaware of this evidence and did not rely on it at the time discipline was decided upon.¹²² In both the *Deschutes County* and *Paperworkers v. Misco* cases, arbitrators made findings of fact not relevant to whether grounds relied upon by the employer to impose discipline constituted just cause under the

117. *See supra* Part III.C.2.

118. *Deschutes Cnty. Sheriff’s Ass’n*, 9 P.3d at 744.

119. *Id.* at 745.

120. *Id.* at 746.

121. *See supra* Part IV.A.

122. *See supra* Part III.C.2.

parties' contract. In both cases, these "gratuitous" findings, though not relevant to the issue of contract violation itself, were relevant to the issues of the proper remedy for the contract violation found, and whether the reinstatement remedy selected violated public policy.

However, the Court of Appeals, in an opinion by future Oregon Supreme Court Chief Justice Paul De Muniz, reversed ERB, holding that ERB should not have considered the arbitrator's "gratuitous" findings regarding the incidents not relied upon by the sheriff. In making those findings, in then-Judge De Muniz's view, the arbitrator exceeded his authority.¹²³ The additional facts found by the arbitrator, unnecessary to his decision, could not provide a public policy basis for ERB's refusal to enforce the arbitrator's reinstatement award.¹²⁴ Then-Judge De Muniz explained, "[a]s we understand the County's argument, an arbitration award that reinstates an employee, who is found *not guilty* of the misconduct for which he was disciplined, may be rendered unenforceable by findings of misconduct that are beyond the arbitrator's authority to consider under the collective bargaining agreement. We reject that argument."¹²⁵

This reasoning departs from the teachings of the *Public Policy Trilogy*, and constitutes an unwarranted restriction on review for compliance with public policy contemplated in the Oregon statute, modeled as it was on the private sector precedents, including specifically, *Paperworkers v. Misco*.¹²⁶ So long as the facts relied upon in the public policy review were found by the arbitrator (who the parties contracted with to make factual findings), then the reviewing body, as the U.S. Supreme Court said in *Paperworkers v. Misco*,¹²⁷ *should* consider those facts in judging whether

123. *Deschutes Cnty. Sheriff's Ass'n*, 9 P.3d at 747 ("Findings made beyond the scope of the [the parties'] agreement are not within the arbitrator's jurisdiction, and, consequently, no award may be based on such findings . . . We therefore conclude that findings made by an arbitrator that are beyond the scope of the parties' collective bargaining agreement are not part of an arbitration award.").

124. *Id.* at 747-48.

125. *Id.* at 455. *See also* State v. SEIU Local 503, Case No. AR-1-05, 21 PECBR 307 (Or. ERB 2006) (upholding an arbitration award reversing a four-month disciplinary reduction in pay of an Oregon OSHA inspector charged with intentional assaults and batteries against fellow employees; the arbitrator found that the physical hitting charged was not intentional, as assumed by the public employer, but rather a "startle response," a condition verified as a bone fide medical condition; it is the arbitrator's findings on disputed facts that the parties have agreed to be "final and binding.").

126. *See supra* Parts III.C.2, IV.A.

127. 484 U.S. at 44-45.

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 sheriff’s deputy. Thus, the Court of Appeals reached a defensible result, albeit for the wrong reasons.

3. Failure to Furnish Urine for Required Drug Test—
*Amalgamated Transit Union Local 757 v. Tri-Met*¹²⁹

When a Portland, Oregon bus driver failed to provide enough urine for a drug test, she was fired. Random drug tests for mass transit employees are specifically mandated by federal DOT regulations. Subsequently, an arbitrator overturned the dismissal under a just cause clause because of procedural irregularities in the

128. *Deschutes Cnty. Sheriff’s Ass’n*, 9 P.3d at 744.

129. 195 P.3d 389 (Or. Ct. App. 2008), *adhered to on recons.*, 197 P.3d 60 (Or. Ct. App. 2008).

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 regulations did in fact require an SAE, before an employee could legally operate a safety sensitive mass transit vehicle after failing to provide adequate urine for a random drug test. “If Tri-Met cannot abide by the arbitration order without violating DOT regulations, the order is preempted and ERB cannot enforce the [arbitrator’s order].”¹³³

Second, under the federal regulations, in order to eliminate the possibility of a medical condition (such as “shy bladder syndrome”) preventing an adequate urine sample, the employer was required to give the employee up to 3 hours to supply the urine after taking fluids. If still unsuccessful, the federal regulations required the employee to be referred to a medical professional for determination as to the employee’s medical ability to supply the required urine. Failure to provide the required specimen without a medical explanation would

130. *Id.* at 391.

131. *Id.*

132. *Id.* at 400.

133. *Id.* at 396.

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 trying 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

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 policy to require the continued employment of an officer who had been found to have been abusive and untruthful. The arbitrator concluded that the act [of domestic violence] was committed . . . and that the [officer’s] lie was prove[n]¹⁴⁶

2. Pennsylvania # 1—Possession/Use of Controlled Substance at School by Classroom Assistant

In a 2007 case, a teaching assistant used and possessed illegally a controlled substance (a prescription drug) in a public school restroom, and was fired for “immorality.”¹⁴⁷ An arbitrator found that, under all the circumstances, the school district lacked just cause to fire the assistant and ordered reinstatement with numerous conditions.¹⁴⁸ A trial court vacated the award, holding it violated Pennsylvania’s “core functions” exception to arbitral award enforcement, and an appellate court affirmed in a split decision. The Pennsylvania Supreme Court reversed the trial court citing the “essence” test and limited judicial review under the *Steelworkers Trilogy*,¹⁴⁹ the court also adopted a public policy exception and remanded the case for reconsideration under that exception as elucidated in *Eastern Associated Coal*.^{150,151}

3. Pennsylvania # 2—Theft of Money in Purse Found in Garbage Can

Four years later, in 2011, an intermediate Pennsylvania appellate court again considered the public policy exception. This case involved a Pennsylvania sanitation worker who found a purse in a garbage can with several hundred dollars.¹⁵² Although advised to turn the purse over to managerial staff, the sanitation worker kept the

146. *Id.* at 758 (emphasis added).

147. *Westmoreland Intermediate Unit # 7 v. Westmoreland Intermediate Unit # 7 Classroom Ass’t Educ. Support Pers.*, 939 A.2d 855 (Pa. 2007).

148. These conditions included completion of a one-year probation in criminal proceeding, drug treatment, random drug testing, and counseling. *Id.* at 859.

149. *See supra* Part III.A.

150. *See supra* Part III.C.3.

151. *Westmoreland*, 939 A.2d at 866–67.

152. *City of Bradford v. Teamsters Local Union No. 110*, 25 A.3d 408 (Pa. Commw. Ct. 2011).

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 statute. OR. REV. STAT. § 243.706 (1) (1999).

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.

155. See generally Andrew M. Campbell, Annotation, *Vacating on Public Policy Grounds Arbitration Awards Reinstating Discharged Employees*, 142 A.L.R. Fed. 387 (1997).

156. *Teamsters Local Union Local 58 v. BOC Gases*, 249 F.3d 1089, 1093 (9th Cir. 2001); *United States Life Ins. Co. v. Superior Nat’l Ins. Co.*, 591 F.3d 1167, 1177 (9th Cir. 2010). Cf. *Biller v. Toyota Motor Corp.*, 668 F.3d 655 (9th Cir. 2012) (upholding award in favor of employer of \$2.5 million against former lawyer charged with revealing confidential secrets about company’s defense of products liability claims after leaving company in whistleblowing dispute).

157. E.g., *Pa. Power Co. v. Local 272 of IBEW*, 276 F.3d 174 (3rd Cir. 2001) (holding that the arbitrator exceeded his authority and failed “essence” test in holding Company required to offer retirement benefit to employees it had implemented for supervisors, where CBA required non-discrimination based on union status). Then-Judge (now Supreme Court Justice) Alito dissented, arguing *Steelworkers Trilogy* concepts of limited judicial review. *Id.* at 181–82.

158. E.g., *Hoffman Plastics v. NLRB*, 535 U.S. 137 (2002) (employees terminated as a result of protected union activity under the National Labor Relations Act could not be reinstated or receive back pay for work they were not authorized to do under the Immigration Reform and Control Act).

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 days to explain or correct the mismatches, and ultimately fired 33 employees who did not respond about a week later.¹⁶²

An arbitrator, appointed under the employees’ union contract, found the firings were without just cause, and ordered the employees reinstated with back pay. The company refused to comply, claiming that to do so would violate the Immigration Reform and Control Act (IRCA),¹⁶³ under which employers incur civil and criminal liability if they knowingly or with constructive knowledge employ undocumented workers.¹⁶⁴ The arbitrator ruled that the employer furnished “no convincing evidence that any of the fired workers was undocumented.”¹⁶⁵

The Ninth Circuit Court of Appeals rejected the employer’s public policy challenge to reinstatement, and in doing so laid out several principles in public policy cases. First, the court stressed that it ““must focus on the award itself, not the behavior or conduct of the

159. See *supra* Part III.C.3; *E. Associated Coal Corp. v. Mine Workers*, 531 U.S. 57 (2000) (Scalia, J., dissenting in part).

160. 530 F.3d 817 (9th Cir. 2008).

161. *Id.* at 820. “No Match” letters are sent when the SSA discovers a discrepancy between the social security numbers supplied by the employer and SSA files.

162. *Id.* at 820.

163. *Id.* at 824.

164. 8 U.S.C. § 1324a(a)(1)(A) (2004); 8 C.F.R. § 274a.1(l). A leading case on constructive knowledge under IRCA is *Collins Foods Int’l v. INS*, 948 F.2d 549 (9th Cir. 1991).

165. *Aramark*, 530 F.3d at 820.

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 IRCA expressed a public policy against the employment of undocumented workers,¹⁶⁹ but rejected the contention that reinstatement of the workers would violate IRCA. Neither the SSA’s “no match” letters, nor the employees’ failure to respond within the three-day timeline set by the employer, supported a finding that the employees were in fact undocumented.¹⁷⁰ Concerning the “no match” letters, the court noted that even under proposed, more stringent regulations on constructive knowledge, it would consider “no match” letters as part of an “all the circumstances” analysis. The letters alone did not constitute the “positive information” necessary for constructive notice.¹⁷¹ As to the lack of response from the employees, after acknowledging that the question was a “close one,” the court felt that “two considerations weigh against a finding of constructive notice”: first, the arbitrator’s finding that there “was no convincing evidence” the employees were in fact undocumented, and second, the three-day turnaround time allowed for the employees to respond to the no match letters.¹⁷² Even though the employer offered to rehire employees who belatedly furnished some explanation for the mismatch—in essence releasing the employees from the three-day timeline—the arbitrator was entitled to disregard this evidence since the offer occurred after the firings which were properly before the arbitrator.¹⁷³ Although the circumstances raised a reasonable suspicion that the workers were undocumented, “the law did not permit the [employer and reviewing

166. *Id.* at 823.

167. *Id.* (citations omitted).

168. *Id.* at 823.

169. *Id.* at 824.

170. *Id.* at 826 (“In addition to misuse by undocumented workers, SSN mismatches could generate no match letters for many reasons, including typographical errors, name changes, compound last names . . . and inaccurate or incomplete employer records.”). The Court also noted that the SSA’s records contain literally millions of errors. *Id.*

171. *Id.* at 827–28.

172. *Id.* at 828–29.

173. *Id.* at 830.

court] to rely on this suspicion.”¹⁷⁴

2. *Extendicare Health Services Inc. v. District 1199P, SEIU*¹⁷⁵

A care facility medication assistant, with four misdemeanor convictions for receiving stolen property (fourteen years before), was fired under a statute that made it illegal to employ workers with two prior theft-related convictions in elderly care jobs. The employee had worked without incident in the industry for six years and an arbitrator ordered the employee reinstated. Though acknowledging that if reinstatement would violate “prior thefts” statute, the award could not be enforced, the Third Circuit Court of Appeals held that the statute did not preclude the employee’s reinstatement.¹⁷⁶

As explained by the Third Circuit, the state supreme court had earlier determined that, under a provision of the state constitution guaranteeing the right to pursue lawful occupations, the prior thefts statute could not be used against employees who had demonstrated rehabilitation through successful employment for a number of years. Applying the state court’s decision as positive law limiting the reach of the “prior thefts” statute, the Third Circuit enforced the award because, under the Pennsylvania Supreme Court’s construction of the “prior thefts” statute, reinstatement would not violate the statute under the circumstances. Those circumstances were that the employee in question had worked successfully and without incident in the elderly care job for a number of years. Upon discovery of the prior theft-related convictions, the employer fired the seemingly rehabilitated employee.¹⁷⁷ Because the Pennsylvania Supreme Court had definitively interpreted the state’s “prior thefts” statute not to cover workers with a demonstrated record of successful employment as an indicator of rehabilitation, reinstatement would not violate the statute in the case at hand.¹⁷⁸

This case demonstrates that not only is the public policy review based on facts found by the arbitrator, but also that state case law defining the contours of state prohibitions also may control cases involving claims that compliance with an arbitration award would require illegal acts.

174. *Id.* at 832.

175. No. 06-4768, 2007 WL 3121341 (3d Cir. Oct. 26, 2007).

176. *Id.* at *7.

177. *Id.* at *1.

178. *Id.* at *5.

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.

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 [pilot] was guilty, and it could not agree to arbitrate the matter."¹⁸⁶ The Eleventh Circuit drew a distinction between off-duty and on-duty conduct, with the latter heightening the public policy safety concern:

[W]e are not suggesting that an airline pilot may not be reinstated under different circumstances or that a discharged pilot cannot be rehabilitated and hired once again to fly. . . . However the arbitrator in this case was not authorized to decide whether, having been rehabilitated [the employee] should be rehired. The arbitrator's decision was limited to whether Delta had cause to fire [the pilot] after he had flown an airplane while drunk. . . .¹⁸⁷

The Court, however, upheld the portion of the award (apart from reinstatement) requiring the airline to pay for the pilot's treatment under its limited review.¹⁸⁸

182. 861 F.2d 665 (11th Cir. 1988).

183. *Id.* at 671.

184. *Id.* at 667–68.

185. *Id.* at 668.

186. *Id.* at 674.

187. *Id.* The Court seems to have confused the well-established arbitral rule that just cause for discipline is a question considered on the facts known to the employer at the time, from the principle of *Eastern Associated Coal*, that even facts not known to the employer at the time of discipline may be taken into account, so long as found by the arbitrator, on the issue of the appropriateness of reinstatement as a remedy. See also *E. Assoc. Coal Corp. v. Mine Workers*, 531 U.S. 57 (2000); *supra* Part III.C.3.

188. *Delta Air Lines*, 861 F.2d at 674–75.

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.

4. *Southern California Gas Co. v. Utility Workers Union of America, Local 132*¹⁹³

This case involved reinstatement of employees who failed drug tests after their cases were certified to their employer by an imposter medical officer. An arbitrator ordered the employees reinstated on the basis that the drug tests did not comply with DOT regulations: “If the procedures are not followed, a person is not deemed to have failed a drug test, under the regulations, and there is no prohibition against employing him.”¹⁹⁴ The Ninth Circuit enforced the award, finding that no public policy prevented the reinstatement of employees who tested positive under invalid drug testing procedures.¹⁹⁵

Although the arbitrator found a contract violation and ordered relief in the employees’ favor, the arbitrator gratuitously indicated he had “‘little doubt’ about the employees’ purported drug use”¹⁹⁶ This triggered a dissent by Judge Alarcon, who argued that the award reinstating the workers “flagrantly violates public policy in exposing members of the public to serious injury or death as a result of the conduct of drug abusing employees holding safety sensitive positions in the gas pipeline industry.”¹⁹⁷ The dissent found a violation of public policy in the reinstatement of employees to safety-sensitive positions under the applicable DOT regulations, which provide that an employer “may not knowingly use . . . any person who . . . fails a drug test required by [the regulations].”¹⁹⁸ Furthermore, although the initial certification of results had been done by an imposter, the results were later reconfirmed by a certified medical review officer.¹⁹⁹

The dispute between the majority and dissent in *Southern California Gas Co.* demonstrates that the review of a potential public policy violation is an active review in which legitimate interests like safety are weighed against countervailing policies, such as those favoring broad arbitral discretion and rehabilitation of drug users. In any weighing process, judges may evaluate the considerations differently. To Judge Alarcon, the positive drug tests (as reconfirmed

193. 265 F.3d 787 (9th Cir. 2001).

194. *Id.* at 795.

195. *Id.* at 796.

196. *Id.* at 794.

197. *Id.* at 800 (Alarcon, J., dissenting).

198. *Id.* at 803. “The policy behind the regulation is clear. Once an employee fails a drug test and [a medical review officer] confirms that the test is a true positive, he or she may not be used as an employee in any capacity.” *Id.* (emphasis omitted).

199. *Id.* at 809.

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 principles of limited review.²⁰¹ Assuming an adequately well-defined public policy “against reinstating employees who engage in substance abuse while actually performing a safety sensitive task,”²⁰² the Fifth Circuit noted that there was “absolutely no evidence that [the employee] was discharged for drinking while engaged in a safety-sensitive task.”²⁰³ Further, the court noted that Continental could always pay its contractual liability to the pilot rather than violate its duty to protect the public.²⁰⁴

Curiously, the court declined to enforce a condition placed on reinstatement requiring that the employee continue participation in an employee assistance program for two years. The program did not technically comply with the regulations requiring that “only a [substance abuse program] may have anything to do with the substance abuse assistance recommended for a safety-sensitive employee.”²⁰⁵

200. 555 F.3d 399 (5th Cir. 2009).

201. *Id.* at 421.

202. *Id.* at 418.

203. *Id.* at 419.

204. *Id.* at 420–21.

205. *Id.* at 421.

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 category of private sector cases reviewed here: cases involving abuse of fellow employees or supervisors.

D. Abusive Conduct Cases

A common fact pattern for public challenges involves abuse by the employee of fellow employees, supervisors, or third parties. Several private sector cases illustrate the application of the public policy exception to labor arbitration reinstatement orders in this context.

212. *Id.* at 24–25. “The precedent on the public policy exception supports this fact-specific approach to considering the consequences of reinstating an employee found to have engaged in misconduct.” *Id.* at 26.

213. *Id.* at 26–27.

214. *Id.* at 25–26.

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 reflected “racism.” After striking his coach (T.J. Carlesimo), Sprewell received two disciplinary actions: suspension by the NBA, and termination of his team contract with the Golden State Warriors. An arbitrator found that suspension for one year (but not more) was warranted under the applicable just-cause standard.²¹⁷ Sprewell challenged the arbitrator’s ruling, arguing that four exceptions to enforcement existed. The Ninth Circuit emphasized the scope of review was “extremely limited.” So as long as the arbitrator is even “arguably construing or applying the contract, and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn the decision.”²¹⁸ The Court then considered and rejected each of the four “exceptions” asserted by Sprewell.²¹⁹

Disposing summarily with Sprewell’s first claim, the Ninth Circuit acknowledged Sprewell’s argument that a CBA provision—subjecting players “to disciplinary action for just cause *by his Team or by the Commissioner*”²²⁰—was stated in the disjunctive, thus arguably expressing a contractual intent that players either receive League or Team discipline, but not both. The Ninth Circuit rejected this argument—in construing the clause in broader context to allow discipline by both the NBA Commissioner and the player’s team, the

215. 266 F.3d. 979 (9th Cir. 2001).

216. *Id.* at 984–85.

217. *Id.* at 985.

218. *Id.* at 986.

219. *Id.* The Ninth Circuit identified four exceptions to the presumption in favor of arbitral award enforcement: “(1) when the award does not draw its essence from the collective bargaining agreement; (2) when the arbitrator exceeds the scope of the issues submitted; (3) when the award runs counter to public policy; and (4) when the award is procured by fraud.” *Id.* Sprewell sought relief under all four of the exceptions. *Id.*

220. *Id.* at 986 (emphasis added).

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 goading—invoked the public policy against the “virus of racism” as a ground for challenging the arbitration award upholding a one year suspension. Rejecting the claim, the Ninth Circuit declared:

To vacate an arbitration award on public policy grounds, we must (1) find that ‘an explicit, well defined and dominant policy’ exists here and (2) that ‘the policy is one that specifically militates against the relief ordered by the arbitrator.’ The latter element is dispositive of Sprewell’s claim. . . . Sprewell has failed to demonstrate that the public policy of California militates against the enforcement of the arbitration award.²²³ Finally, Sprewell claim[ed] that the NBA and the Warriors tainted the arbitral process by introducing false statements and doctored pictures of [the coach’s] injuries, thus requiring that the award be vacated on account of fraud. This claim can be summarily dismissed under the rule that ‘where the fraud or undue means is not only discoverable, but discovered and brought to the attention of the arbitrators, a disappointed party will not be given a second bite.’ Sprewell’s fraud claim was presented in its entirety to, and ruled upon by, the arbitrator. Thus, we do not find it necessary to revisit this issue.²²⁴

221. *Id.* at 987–88.

222. *Id.* (citation omitted).

223. *Id.* (citation omitted).

224. *Id.* at 987–88.

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 A board of review, appointed under the pilot union's contract, reversed the discharge, reducing the firing to a ten-week suspension without pay.²²⁸ In a split decision, the majority of a Fifth Circuit Court of Appeals panel refused to enforce the award, finding that the contract forbade the board from considering the question of suspension as opposed to discharge, and the board of review "implicitly" found just cause for the firing. The board "act[ed] beyond its jurisdiction by fashioning an alternate remedy once it has concluded—implicitly or otherwise—that an employee's conduct constitutes just cause for dismissal."²²⁹ As the dissenting judge pointed out *American Eagle* departs from a long line of cases recognizing broad arbitral authority to fashion an appropriate remedy in discipline cases. The dissent "relied on the foundational rule that the limits on an arbitrator's discretion are only found in the collective bargaining agreement itself Here there is no such contractual definition of just cause limiting the arbitrator's discretion."²³⁰

3. Profanity Addicted, Insubordinate Employee—*Hawaii Teamsters and Allied Workers, Local 996 v. United Parcel Service*²³¹

In *Hawaii Teamsters*, an employee received a summary discharge for insubordination after refusing to stop cursing an HR manager. The contract listed seven grounds for summary discharge without progressive discipline, but did not list the employee's offense among them.²³² Nonetheless, the arbitrator upheld the firing, reading

225. 343 F.3d 401 (5th Cir. 2003).

226. *Id.* at 403–04. The behavior included: discussion about the war in Chechnya and why the harassed employee was not fighting in it, display of a reverse swastika, display of a knife brought onboard an airliner, and sleeping on duty. *Id.*

227. *Id.* at 404.

228. *Id.* at 404. The Board found the evidence insufficient on the sleeping on duty charge. *Id.*

229. *Id.* at 410.

230. *Id.* at 413–14.

231. 241 F.3d 1177 (9th Cir. 2001).

232. *Id.* at 1180.

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 the employer’s duties under a union contract.

Indiana Bell Telephone presented the issue of the tension between EEOC obligations and contract obligations under a CBA. The EEOC sued the employer, alleging [very gross]²³⁵ sexual harassment of female employees by a former employee, and a jury awarded compensatory and punitive damages. Judge Easterbrook’s opinion for the majority of the Seventh Circuit Court of Appeals, en banc, held that in the Title VII case, the employer could properly introduce evidence of constraints on the employer under the just cause, and other provisions of a CBA covering the alleged harasser, but that evidence would not preclude Title VII liability.²³⁶ Moreover, the employer’s potential costs in dismissing the harassing employee

233. *Id.* at 1183.

234. 256 F.3d 516 (7th Cir. 2002).

235. *Id.* at 519 (“The record establishes [beside exposing himself to his supervisor on two occasions] other misconduct . . . including . . . telling female co-workers that he was in love with them, flashing them, sending notes with sexual messages or propositions, grabbing them and rubbing their hair or buttocks. . . and allowing himself to be seen masturbating at his desk. Ameritech could have negotiated for a provision defining sex harassment (or other discrimination) as ‘just cause,’ or limiting the arbitrator’s authority to reinstate persons discharged for events that violate federal law.”).

236. *Id.* at 523–25.

under the grievance/arbitration process would not justify inaction.²³⁷ CBA restrictions placed on an employer's discretion to discipline except for just cause did not excuse the employer's Title VII duty to take actions designed to stop immediately a multiple year harassment of other employees.²³⁸

The second issue raised by the sexual harassment cases would arise if we imagine a reinstatement award based on a finding that, though the employee was guilty of harassment, the employee could be rehabilitated by proper warnings and punishment, and sexual harassment training required as a condition of reinstatement. Since the public policy against sexual harassment arises from the discrimination statutes, is "clearly defined" and "dominant," and imposes an affirmative duty on an employer to stop the harassment, the public policy exception could be invoked against enforcement of a reinstatement award. The reinstatement award might (or might not) violate public policy; but the determination would depend on all the facts and circumstances concerning whether the reinstated harasser would pose a future threat to other employees. Thus, the court would have to conduct an "all the circumstances" review, based on facts found by the arbitrator, on the issue of whether public policy precluded reinstatement.²³⁹

Now suppose the labor arbitrator finds that the harassment did *not* occur. Under the principles outlined in the cases above, an employer would face a "Catch 22." If some employee plaintiffs believed that the harassment did occur, the employer could still be on the hook under the discrimination laws since the arbitrator's findings would not bind employees who were not party to the arbitration. But the court on review in the arbitration proceeding would be bound by the factual findings of the arbitrator, reflecting the parties' own agreement to have disputed facts determined in arbitration. In that situation, the employer might face double liability—to the alleged harasser under the union contract and to the plaintiff employees in the

237. *Id.* at 523.

238. *Id.* at 522 ("Ameritech could have negotiated for a provision defining sex harassment (or other discrimination) as 'just cause,' or limiting the arbitrator's authority to reinstate persons discharged for events that violate federal law.") Judge Posner wrote a concurrence, arguing (along with several process points) that even the erroneous exclusion of the CBA evidence (on the question whether the employer's acted "reasonably" in responding to the initial sexual harassment complaints of the female employees) was "harmless in view of the overwhelming evidence of the employer's inadequate response to a serial harasser." *Id.* at 529.

239. *Id.* at 529.

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 disputes under their labor agreement shall be determined by the arbitrator, and are “final and binding.”
4. In the Oregon public sector, the wording of the statute suggests that public policy must be clearly defined in statutes, the constitution, or judicial precedents, and not merely the reviewing body’s own concept of public policy. The public policy exception, however, is *not* limited to situations where enforcement of reinstatement would affirmatively violate the positive law.

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 policy need only be clear (“free from doubt”) and not “dominant,” as in the private sector. Further, the Oregon statute explicitly identifies sexual misconduct, unjustified and egregious use of force, and serious criminal violations related to work as non-exclusive bases for invoking the public policy exception. Finally, the Oregon statute expressly conditions enforcement of reinstatement on compliance with public policy.

5. Assuming the facts and contract violation found by the arbitrator do raise an issue of public policy, as so defined, arbitrators should consider public policy in the exercise of their broad discretion to fashion relief. Reinstatement is only one form of relief, and in some cases, it may not be the most appropriate relief even where a violation of the parties’ labor agreement is found.
6. Assuming the facts as found by the arbitrator raise an issue of public policy, as defined above, regarding enforcement of a reinstatement order, the reviewing body should weigh all the facts and circumstances (determined by the arbitrator) in deciding whether to enforce the reinstatement award. The public policy review of reinstatement is thus active, and is not deferential on the question of whether enforcement of an award would violate public policy.
7. A determination that reinstatement would violate public policy does not require invalidation of the entire award. A reviewing body may simply strike the reinstatement order. In such an event, the reviewing body might substitute “front pay” for reinstatement (as, for example, is sometimes done in Title VII sexual harassment cases where the court determines that reinstatement would not be an effective remedy). Or a reviewing body that determines that an arbitral award of reinstatement violates public policy could remand the issue of remedy to the arbitrator chosen by the parties to resolve their labor contract disputes.

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 Wisconsin²⁴¹ and elsewhere²⁴² 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 Boost 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.*