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XIV. LABOR LAW

A. *State Capitol Employees*

Justice McHugh decided whether the janitorial services for state capitol buildings could be performed by private contractors in the case of *O'Connor v. Margolin*.⁸⁰⁹ The court held:

W.Va. Code, 5A-4-1 [1969], which requires that the Director of the General Services Division of the Department of Finance and Administration furnish janitors for the maintenance of the State capitol buildings and grounds in Charleston, West Virginia, requires that janitors so retained be State employees, and the Commissioner of Finance and Administration and the Director of the General Services Division of that Department are without authority to terminate the employment of such employees as a class for the purpose of obtaining the same type janitorial service through private contracting.⁸¹⁰

McHugh concluded in *O'Connor* that “*W.Va. Code, 5A-4-1* [1969], which requires that the janitors employed pursuant to that statute be State employees, was not amended by way of the funding provisions in the State budget for fiscal year 1983, to provide that such janitorial services may be secured to the State by private contracting.”⁸¹¹

B. *At-Will Employment*

In *Cook v. Heck's Inc.*,⁸¹² Justice McHugh addressed the potential impact of language in an employee handbook on the status of an at-will employee. It was said initially that “[c]ontractual provisions relating to discharge or job security may alter the at will status of a particular employee.”⁸¹³ Justice McHugh noted that “[g]enerally, the existence of a contract is a question of fact for the jury.”⁸¹⁴ Turning to the central issue of the case, Justice McHugh held that

[a] promise of job security contained in an employee handbook distributed by an employer to its employees constitutes an offer for a unilateral contract; and an employee’s continuing to work,

⁸⁰⁹ 296 S.E.2d 892 (W. Va. 1982).

⁸¹⁰ *Id.* at Syl. Pt. 1.

⁸¹¹ *Id.* at Syl. Pt. 3.

⁸¹² 342 S.E.2d 453 (W. Va. 1986).

⁸¹³ *Id.* at Syl. Pt. 3.

⁸¹⁴ *Id.* at Syl. Pt. 4.

while under no obligation to do so, constitutes an acceptance and sufficient consideration to make the employer's promise binding and enforceable.⁸¹⁵

The court concluded that "[a]n employee handbook may form the basis of a unilateral contract if there is a definite promise therein by the employer not to discharge covered employees except for specified reasons."⁸¹⁶

C. *Retaliatory Discharge*

Justice McHugh addressed the issue of discharging an employee in retaliation for exercising constitutional rights in the case of *McClung v. Marion County Commission*.⁸¹⁷ It is important to note the defendant in the case was a public employer. Justice McHugh held initially that

[i]t is in contravention of substantial public policies for an employer to discharge an employee in retaliation for the employee's exercising his or her state constitutional rights to petition for redress of grievances (*W. Va. Const. Art. III, § 16*) and to seek access to the courts of this State (*W.Va. Const. Art. III, § 17*) by filing an action, pursuant to *W.Va. Code, 21-5C-8 [1975]*, for overtime wages.⁸¹⁸

It was noted for summary judgment purposes that "[w]hether the defendant in a retaliatory discharge case acted wantonly, willfully or maliciously is a function peculiarly within the province of the fact finder."⁸¹⁹ In *McClung*, the court allocated the burdens in a retaliatory discharge case as follows:

In a retaliatory discharge action, where the plaintiff claims that he or she was discharged for exercising his or her constitutional right(s), the burden is initially upon the plaintiff to show that the exercise of his or her constitutional right(s) was a substantial or a motivating factor for the discharge. The plaintiff need not show that the exercise of the constitutional right(s) was the only precipitating factor for the discharge. The employer may defeat the claim by showing that the employee would have been

⁸¹⁵ *Id.* at Syl. Pt. 5.

⁸¹⁶ *Id.* at Syl. Pt. 6.

⁸¹⁷ 360 S.E.2d 221 (W. Va. 1987).

⁸¹⁸ *Id.* at Syl. Pt. 2.

⁸¹⁹ *Id.* at Syl. Pt. 4.

discharged even in the absence of the protected conduct.⁸²⁰

D. *Maintaining Safe Work Environment*

Justice McHugh held in *United Mine Workers of America v. Faerber*⁸²¹ that

“full roof bolting” is required to be utilized in all underground coal mine sections in this State using auger-type continuous coal mining equipment, under *W.Va. Code, 22A-2-25(a)* [1985], which provides that “[t]he roof and ribs of all active underground roadways, travelways, and working places shall be supported or otherwise controlled adequately to protect persons from falls of the roof or ribs.”⁸²²

E. *Job Description*

In *Cruciotti v. McNeel*,⁸²³ Justice McHugh addressed employment of a person as a teacher and athletic trainer. The court held that

[p]ursuant to *W.Va. Code, 18A-4-16* [1982], the duties of an athletic trainer are within the definition of “extracurricular duties,” and, therefore, the assignment of a teacher to such duties shall be made only by mutual agreement of the teacher and the superintendent, or designated representative. A teacher’s contract of employment shall be separate from an agreement to perform duties as an athletic trainer and such contract shall not be conditioned upon the teacher’s acceptance or continuance of such extracurricular assignment as athletic trainer, which has been proposed by the superintendent, a designated representative, or the board of education.⁸²⁴

F. *Employee Privacy*

The issue of an employee’s right to refuse to submit to a polygraph test required by an employer was addressed in *Cordle v. General Hugh Mercer Corp.*⁸²⁵

820 *Id.* at Syl. Pt. 3.

821 365 S.E.2d 345 (W. Va. 1986).

822 *Id.* at Syl. Pt. 1 (alteration in original).

823 396 S.E.2d 191 (W. Va. 1990).

824 *Id.* at Syl. Pt. 2.

825 325 S.E.2d 111 (W. Va. 1984).

Justice McHugh held:

It is contrary to the public policy of West Virginia for an employer to require or request that an employee submit to a polygraph test or similar test as a condition of employment, and although the rights of employees under that public policy are not absolute, in that under certain circumstances, such as those contemplated by *W.Va. Code*, 21-5-5b [1983], such a polygraph test or similar test may be permitted, the public policy against such testing is grounded upon the recognition in this State of an individual's interest in privacy.⁸²⁶

G. Restrictive Employment Covenant

Justice McHugh determined the validity of a restrictive employment covenant in *Helms Boys, Inc. v. Brady*.⁸²⁷ The court held that “[w]hen the skills and information acquired by a former employee are of a general managerial nature, such as supervisory, merchandising, purchasing and advertising skills and information, a restrictive covenant in an employment contract will not be enforced because such skills and information are not protectible employer interests.”⁸²⁸

H. Employee Immunity from Tort Liability

Justice McHugh addressed immunity from tort liability granted to employees under the workers' compensation statutes in *Jenrett v. Smith*.⁸²⁹ The court held that

[f]or purposes of determining whether a co-employee “is acting in furtherance of the employer's business” under *W.Va. Code*, 23-2-6a [1949], and thereby entitled to immunity from tort liability, a “dual purpose” trip, that is, a journey by an employee that serves both personal and business reasons, is a personal trip if it would have been made even though the business aspect of the journey was canceled. However, it is a business trip if the journey would have gone forward even though the personal errand was canceled. In any event, if the injury or death of an employee prevents the trip from going forward, the journey may still be a business trip if the business task would have been done by some

⁸²⁶ *Id.* at Syl. Pt. 3.

⁸²⁷ 297 S.E.2d 840 (W. Va. 1982).

⁸²⁸ *Id.* at Syl.

⁸²⁹ 315 S.E.2d 583 (W. Va. 1983).

other employee at some other time.⁸³⁰

I. *Unemployment Compensation*

Justice McHugh held in *Kisamore v. Rutledge*⁸³¹ that “[f]indings of fact and conclusions of law by an arbitrator in an employment dispute matter are not binding upon the West Virginia Department of Employment Security or the courts of this State.”⁸³² The court went on to hold:

Where an employee is suspended from his employment for disciplinary reasons and his reinstatement to employment is conditional, in that work must be available and the employee must pass a physical examination, and during the suspension period the employee performs no services and no wages are payable to him from the suspending employer, such employee is “otherwise” separated from employment within the meaning of *W.Va. Code*, 21A-1-3, and such employee is totally unemployed and eligible to receive unemployment compensation benefits.⁸³³

In *Lough v. Cole*,⁸³⁴ Justice McHugh determined whether an employee who leaves an employer that is going out of business to find other work is disqualified from receiving unemployment benefits. The court held that

[w]here an employee left his employment to seek other work because the employer was in the process of going out of business, that employee was not disqualified from receiving unemployment compensation benefits under the provisions of *W.Va. Code*, 21A-6-3(1) [1981], which section states, in part, that an individual shall be disqualified for benefits “[f]or the week in which he left his most recent work voluntarily without good cause involving fault on the part of the employer and until the individual returns to covered employment and has been employed in covered employment at least thirty working days.”⁸³⁵

Justice McHugh clarified the right of a claimant to proper notice regarding unemployment compensation benefits in *Mizell v. Rutledge*.⁸³⁶ The court in *Mizell*

⁸³⁰ *Id.* at Syl. Pt. 1.

⁸³¹ 276 S.E.2d 821 (W. Va. 1981).

⁸³² *Id.* at Syl. Pt. 3.

⁸³³ *Id.* at Syl. Pt. 2.

⁸³⁴ 310 S.E.2d 491 (W. Va. 1983).

⁸³⁵ *Id.* at Syl. Pt. 2 (alteration in original).

⁸³⁶ 328 S.E.2d 514 (W. Va. 1985).

held that

[a] notice of the decision of a deputy commissioner of the West Virginia Department of Employment Security regarding the disqualification of a claimant from receiving regular unemployment compensation benefits that fails to inform the claimant that such disqualification could render him ineligible for extended benefits under chapter 21A, article 6A of the West Virginia Code violates the notice requirements of *W.Va. Code*, 21A-7-8 [1978], which statute entitles the claimant, *inter alia*, “to a fair hearing and reasonable opportunity to be heard before an appeal tribunal.”⁸³⁷

The case of *Butler v. Rutledge*⁸³⁸ required Justice McHugh examine the phrase “most recent work,” in the context of determining whether a claimant is disqualified from receiving benefits. The court made an initial general ruling:

In 1981, the West Virginia Legislature deleted from *W.Va. Code*, 21A-6-3(1), the provision that “work” means “employment with the last employing unit with whom such individual was employed as much as thirty days, whether or not such days are consecutive”; therefore, in determining whether an individual is disqualified under *W.Va. Code*, 21A-6-3(1) [1981], from receiving unemployment compensation benefits (for leaving his or her “most recent work voluntarily without good cause involving fault on the part of the employer”), “most recent work,” in that context, need not be employment in which the individual worked for “thirty days” or “thirty working days”; however, once an individual is determined to be disqualified under *W.Va. Code*, 21A-6-3(1) [1981], from receiving benefits, the disqualification continues “until the individual returns to covered employment and has been employed in covered employment at least thirty working days,” as *W.Va. Code*, 21A-6-3(1) [1981], further provides.⁸³⁹

Justice McHugh took *Butler*’s general ruling and applied it to the facts of the case. The court held:

Where individuals left their employment and took other jobs, and the individuals, prior to working at the other jobs for thirty working days, were laid off by their employers, the other jobs constituted the individuals’ “most recent work” for purposes of

837 *Id.* at Syl. Pt. 2 (alteration in original).

838 329 S.E.2d 118 (W. Va. 1985).

839 *Id.* at Syl. Pt. 3.

determining whether they were disqualified under *W.Va. Code*, 21A-6-3(1) [1981], from receiving unemployment compensation benefits.⁸⁴⁰

Relying upon the decision in *Belt v. Cole*,⁸⁴¹ Justice McHugh held in *Ash v. Rutledge*⁸⁴² that

[u]nemployment compensation claimants meet statutory eligibility requirements of “total or partial unemployment” and “availability for work” even if they are not working because of a labor dispute. *W.Va. Code*, 21A-6-3(4) must be applied to their cases to determine whether they are disqualified or fall within an exception to disqualification. Syllabus Points 3, 4, and 5 of *Pickens v. Kinder*, 155 W.Va. 121, 181 S.E.2d 469 (1971), are overruled.⁸⁴³

Justice McHugh addressed the issue of whether conduct by an employee constituted misconduct for the purpose of unemployment compensation in the case of *Peery v. Rutledge*.⁸⁴⁴ The court noted initially that “[d]isqualifying provisions of the Unemployment Compensation Law are to be narrowly construed.”⁸⁴⁵ The court held:

A claimant for unemployment compensation benefits is not guilty of disqualifying “misconduct” when the claimant refuses to perform a job assignment because he or she reasonably and in good faith believes that performance of the job assignment would jeopardize the claimant’s own health or safety or the health or safety of others.⁸⁴⁶

Justice McHugh also indicated that

[a] claimant for unemployment compensation does not necessarily waive the right to raise the issue of his or her reasonable and good faith apprehension of harm to the health or safety of the claimant or others by accepting employment with the knowledge that the

⁸⁴⁰ *Id.* at Syl. Pt. 4.

⁸⁴¹ 305 S.E.2d 340 (W. Va. 1983).

⁸⁴² 348 S.E.2d 442 (W. Va. 1986).

⁸⁴³ *Id.* at Syl. Pt. 1.

⁸⁴⁴ 355 S.E.2d 41 (W. Va. 1987).

⁸⁴⁵ *Id.* at Syl. Pt. 1.

⁸⁴⁶ *Id.* at Syl. Pt. 2.

working conditions involve a health or safety risk.⁸⁴⁷

The court in *Peery* went on to set out the burden of proof when an employer alleges an employee violated a work directive or rule. The court held that

[i]f the former employer establishes that the unemployment compensation claimant has violated an ordinarily reasonable job assignment directive or work rule, the burden of going forward with the evidence shifts to the claimant to show that he or she was justified, or at least exercised good faith, in not complying with the directive or rule. If the claimant then introduces evidence of his or her reasonable fear of harm to the claimant's or others' health or safety, the former employer must rebut the reasonableness of the claimant's apprehension.⁸⁴⁸

In *Davis v. Gatson*,⁸⁴⁹ Justice McHugh wrote:

An unemployed individual shall be eligible to receive benefits only if the Commissioner finds, *inter alia*, that he has been totally or partially unemployed during his benefit year for a waiting period of one week prior to the week for which he claims benefits for total or partial unemployment, under *W.Va. Code*, 21A-6-1(4) [1994]. The terms total and partial unemployment are defined in *W.Va. Code*, 21A-1-3 [1994]. However, under the definition of wages found in *W.Va. Code*, 21A-1-3 [1994], the term wages shall not include vacation pay received by an individual before or after becoming totally or partially unemployed but earned prior to becoming totally or partially unemployed, provided that the term totally or partially unemployed shall not be interpreted to include employees who are on vacation by reason of the employer's request provided they are unequivocally so informed at least ninety days prior to such vacation.⁸⁵⁰

In the case of *Smittle v. Gatson*,⁸⁵¹ Justice McHugh examined employer conduct to reduce wages and the employer shutdown exception for unemployment benefits. The court held initially that

W.Va. Code, 21A-6-3(4) [1990] allows the payment of

⁸⁴⁷ *Id.* at Syl. Pt. 4.

⁸⁴⁸ *Id.* at Syl. Pt. 3.

⁸⁴⁹ 464 S.E.2d 785 (W. Va. 1995).

⁸⁵⁰ *Id.* at Syl. Pt. 3.

⁸⁵¹ 465 S.E.2d 873 (W. Va. 1995).

unemployment benefits when “an employer shuts down his plant or operation or dismisses his employees in order to force wage reduction, changes in hours or working conditions.” In order to qualify for benefits under the employer shutdown exception of *W.Va. Code*, 21A-6-3(4) [1990], an employee must show, first, that the employer acted to shut down the work site, and second, that the shutdown was “to force” a change detrimental to the employee.⁸⁵²

It next held that

[t]he determination of when an employer is trying “to force wage reduction” or other changes in benefits under *W.Va. Code*, 21-6-3(4) [1990], is made by comparing the employer’s proposed change(s) to the status quo as shown by the expiring contract. If the employer’s proposed change(s) would result in detrimental terms for the employee, then the employer is considered to be seeking “to force wage reduction, changes in hours or working conditions.”⁸⁵³

Justice McHugh concluded in *Smittle* that “[u]nder *W.Va. Code*, 21A-6-3(4) [1990], employees are entitled to unemployment benefits when an employer rejects continuing the expiring contract for a reasonable time ‘to force wage reduction, change in hours or working conditions.’”⁸⁵⁴

J. *Workers’ Compensation*

Justice McHugh held in *Geeslin v. Workmen’s Compensation Commissioner*⁸⁵⁵ that “[w]here an altercation arises out of the employment, the fact that claimant was the aggressor does not, standing alone, bar compensation under the West Virginia Workmen’s Compensation Act, *W.Va. Code*, 23-1-1 et seq., for injuries claimant sustained in the altercation.”⁸⁵⁶ The court in *Geeslin* addressed prior precedent that was in conflict with its decision and held that “[t]he Syllabus of *Jackson v. State Compensation Commissioner*, 127 W.Va. 59, 31 S.E.2d 848 (1944), is overruled. *Claytor v. Compensation Commissioner*, 144 W.Va. 103, 106 S.E.2d 920 (1959), and *Turner v. State Compensation Commissioner*, 147 W.Va. 106, 126 S.E.2d 40 (1962), are overruled to the extent they are inconsistent with the

852 *Id.* at Syl. Pt. 4.

853 *Id.* at Syl. Pt. 6.

854 *Id.* at Syl. Pt. 7.

855 294 S.E.2d 150 (W. Va. 1982).

856 *Id.* at Syl. Pt. 1.

principles enunciated herein.”⁸⁵⁷

Justice McHugh addressed the issue of whether suicide while at work was compensable under the workers’ compensation statutes in *Hall v. State Workmen’s Compensation Commissioner*.⁸⁵⁸ The court held:

An employee’s suicide which arises in the course of and results from covered employment is compensable under *W.Va. Code*, 23-4-1 [1974], provided, (1) the employee sustained an injury which itself arose in the course of and resulted from covered employment, and (2) without that injury the employee would not have developed a mental disorder of such degree as to impair the employee’s normal and rational judgment, and (3) without that mental disorder the employee would not have committed suicide.⁸⁵⁹

Justice McHugh addressed the issue of proper notice to an employer of default in payment of assessed interest on past unpaid premiums in *Mid-Eastern Geotech, Inc. v. Lewis*.⁸⁶⁰ The court held:

Where an employer required to subscribe and pay premiums to the West Virginia Workers’ Compensation Fund was determined by the West Virginia Workers’ Compensation Commissioner to be in default for failure to pay interest assessed for past due quarterly premium payments, and that employer received no notice of the interest assessment and, nevertheless, maintained its account with the workers’ compensation fund at the level required by law by way of the payment of premiums and the payment of periodic account deficiencies, that employer was entitled to notice in writing of its right, under the provisions of *W.Va. Code*, 23-2-5b [1983], to apply to the Commissioner for a settlement of the amount of the employer’s default.⁸⁶¹

Justice McHugh addressed the issue of timely processing workers’ compensation claims in *Scites v. Huffman*.⁸⁶² It was initially held in the opinion that

[i]n view of the policy of the West Virginia workers’ compensation system, reflected in *W.Va. Code*, 23-5-3a [1971],

⁸⁵⁷ *Id.* at Syl. Pt. 2.

⁸⁵⁸ 303 S.E.2d 726 (W. Va. 1983).

⁸⁵⁹ *Id.* at Syl. Pt. 1.

⁸⁶⁰ 318 S.E.2d 428 (W. Va. 1984).

⁸⁶¹ *Id.* at Syl.

⁸⁶² 324 S.E.2d 152 (W. Va. 1984).

that “the rights of claimants for workmen’s [now workers’] compensation be determined as speedily and expeditiously as possible,” the time limits specified in *W.Va. Code*, 23-5-1 [1973], with respect to actions by the Commissioner concerning the processing of claims for workers’ compensation, are mandatory.⁸⁶³

The court in *Scites* went on to elaborate as follows:

The West Virginia Workers’ Compensation Commissioner and Appeal Board are subject to the following statutory and regulatory time requirements concerning the processing before the Board of claims for workers’ compensation benefits: (1) regular sessions of the Board, designated as “Appeal Board Hearing Days,” shall, pursuant to *W.Va. Code*, 23-5-2 [1981], continue “as long as may be necessary for the proper and expeditious transaction of the hearings, decisions and other business before it,” (2) upon appeal, the commissioner shall, pursuant to Commissioner’s regulation ch. 23-1, series VI, 8.02 (1984), prepare and transmit claim files to the Board “within thirty working days from the date of receipt of notice of appeal in the Fund,” (3) the Commissioner shall, pursuant to *W.Va. Code*, 23-5-3 [1953], “forthwith make up a transcript of the proceedings before him and certify and transmit the same to the board,” (4) the Board shall, pursuant to *W.Va. Code*, 23-5-3 [1953], review actions of the Commissioner “at its next meeting after the filing of notice of appeal, provided such notice of appeal shall have been filed thirty days before such meeting of the board, unless such review be postponed by agreement of parties or by the board for good cause” and (5) “[a]ll appeals from the action of the commissioner shall [pursuant to *W.Va. Code*, 23-5-3 [1953]] be decided by the board at the same session at which they are heard, unless good cause for delay thereof be shown and entered of record.” Those requirements are essential to the speedy and expeditious determination of the rights of claimants for workers’ compensation benefits and are, therefore, mandatory.⁸⁶⁴

Justice McHugh held in *Fausnet v. State Workers’ Compensation Commissioner, Workers Compensation Appeal Board*⁸⁶⁵ that

[a]n employee injured in another state in the course of and resulting from his employment is entitled to seek workers’

⁸⁶³ *Id.* at Syl. Pt. 2 (alteration in original) (citation omitted).

⁸⁶⁴ *Id.* at Syl. Pt. 5 (alterations in original).

⁸⁶⁵ 327 S.E.2d 470 (W. Va. 1985).

compensation benefits in West Virginia, where the employee's employment in the other state is temporary or transitory in nature within the meaning of *W.Va. Code*, 23-2-1 [1976], and *W.Va. Code*, 23-2-1a [1975], under which statutes "employers" and "employees" subject to this State's workers' compensation laws are determined.⁸⁶⁶

The case of *Deller v. Naymick*⁸⁶⁷ required Justice McHugh to determine the applicability of the co-employee immunity from suit to a doctor employed by a subscriber to the workers' compensation fund or by a self-insured employer, and the effect, if any, of carrying liability insurance on such immunity. The court held initially that

[a] professional person is an "employee" for workers' compensation purposes when he or she provides his or her services "to an employer largely to the exclusion of otherwise special employment, for a certain fixed and determined period, at a regular salary, and hold[s] [himself or herself] in readiness at all times to serve [his or her] employer[.]"⁸⁶⁸

The court in *Deller* then held:

If a doctor, who is employed by a subscriber to the Workmen's [Workers'] Compensation Fund to render medical and surgical aid and treatment to its employees, is so unskill[ly]ful and negligent in his treatment of an employee, injured in the course of and resulting from his employment, that the injury is aggravated thereby, such action on the part of the doctor comes within the [Workers'] Compensation Act. Therefore, under such a state of facts, an action is not maintainable against the doctor.⁸⁶⁹

Justice McHugh noted in *Deller* that "[t]he so-called 'dual capacity' or 'dual *persona*' doctrine does not except a full-time, salaried doctor employed by a subscriber to the Workers' Compensation Fund or by a self-insured employer from the immunity provided by *W.Va. Code*, 23-2-6a [1949]."⁸⁷⁰ The court concluded that "[t]he immunity from tort liability provided by *W.Va. Code*, 23-2-6a [1949] is not waived to the extent that liability insurance coverage is available."⁸⁷¹

⁸⁶⁶ *Id.* at Syl.

⁸⁶⁷ 342 S.E.2d 73 (W. Va. 1985).

⁸⁶⁸ *Id.* at Syl. Pt. 1 (alterations in original).

⁸⁶⁹ *Id.* at Syl. Pt. 2 (alterations in original) (citation omitted).

⁸⁷⁰ *Id.* at Syl. Pt. 3.

⁸⁷¹ *Id.* at Syl. Pt. 4.

Justice McHugh stated in *Williams v. Robinson*⁸⁷² that “*W.Va. Code*, 23-4-6(a), (b) and (d) [1986], and *W.Va. Code*, 23-4-14 [1986], when read in *pari materia*, require the Workers’ Compensation Commissioner to recalculate permanent total disability benefits annually, based on the state average weekly wage.”⁸⁷³

In the case of *Dalton v. Spieler*,⁸⁷⁴ Justice McHugh held:

Pursuant to *W.Va. Code*, 23-4-7a(c)(1), as amended, when an authorized treating physician recommends a permanent partial disability award of fifteen percent or less, and such recommendation is based upon an examination performed prior to the closing of a claimant’s temporary total disability benefits, then the workers’ compensation commissioner has a mandatory duty to enter an award of permanent partial disability benefits based upon the recommendation of the authorized treating physician.⁸⁷⁵

In *Pannell v. Inco Alloys International, Inc.*,⁸⁷⁶ Justice McHugh restricted the reach of a statute giving employees a cause of action against employers, if they are terminated while recovering from work-related injuries. The court stated that “[a]bsent a clear expression by the legislature that retroactive application was intended, *W.Va. Code*, 23-5A-3 [1990], which confers substantial rights on injured employees, must be applied prospectively.”⁸⁷⁷

Justice McHugh ruled in *Pugh v. Workers’ Compensation Commissioner*⁸⁷⁸ that

W.Va. Code, 23-4-16 [1983], in part, permits the power and jurisdiction of the Workers’ Compensation Commissioner to continue over cases before the Commissioner and to make modifications or changes with respect to former findings or orders as may be justified, provided that no further award may be made in the cases of nonfatal injuries more than two times within five years after the Commissioner shall have made the last payment in the original award or any subsequent increase thereto in any

⁸⁷² 376 S.E.2d 304 (W. Va. 1988).

⁸⁷³ *Id.* at Syl. Pt. 1.

⁸⁷⁴ 401 S.E.2d 216 (W. Va. 1990).

⁸⁷⁵ *Id.* at Syl. Pt. 3.

⁸⁷⁶ 422 S.E.2d 643 (W. Va. 1992).

⁸⁷⁷ *Id.* at Syl. Pt. 4.

⁸⁷⁸ 424 S.E.2d 759 (W. Va. 1992).

permanent disability case.⁸⁷⁹

Justice McHugh addressed the issue of physician confidentiality in workers' compensation in *Morris v. Consolidation Coal Co.*⁸⁸⁰ Justice McHugh wrote:

A fiduciary relationship exists between a treating physician and a claimant in a workers' compensation proceeding. This fiduciary relationship prohibits oral *ex parte* communication which involves providing confidential information and any other *ex parte* communication which involves providing confidential information which is not authorized under the statutes or procedural rules governing a workers' compensation claim between the treating physician and the adversarial party. When a claimant files a workers' compensation claim, he does consent to the release of written medical reports to the adversarial party pursuant to *W.Va. Code, 23-4-7* [1991]; however, this consent does not waive the existing fiduciary relationship thereby permitting *ex parte* oral communication between the physician and the adversarial party which involves providing confidential information unrelated to the written medical reports authorized by *W.Va. Code, 23-4-7* [1991].⁸⁸¹

Justice McHugh ruled in *Bush v. Richardson*⁸⁸² that

[b]y the enactment of *W.Va. Code, 23-2A-1* [1990], which provides that the Commissioner of Workers' Compensation "shall be allowed subrogation" when a workers' compensation claimant collects moneys from a third-party tortfeasor, the legislature expressly modified the usual, ordinary meaning of subrogation as it is used in that Code section by making the made-whole rule inapplicable. Therefore, the following provisions set forth by the legislature in *W.Va. Code, 23-2A-1(b)* [1990] shall be followed: "[T]he commissioner or a self-insured employer shall be allowed subrogation with regard to medical benefits paid as of the date of the recovery: Provided, That under no circumstances shall any moneys received by the commissioner or self-insured employer as subrogation to medical benefits expended on behalf of the injured or deceased worker exceed fifty percent of the amount received

⁸⁷⁹ *Id.* at Syl. Pt. 2.

⁸⁸⁰ 446 S.E.2d 648 (W. Va. 1994).

⁸⁸¹ *Id.* at Syl. Pt. 3.

⁸⁸² 484 S.E.2d 490 (W. Va. 1997).

from the third party as a result of the claim made by the injured worker, his or her dependents or personal representative, after payment of attorney's fees and costs, if such exist (emphasis added).⁸⁸³

K. *Private Hospital Employee Discipline*

In *Mahmoodian v. United Hospital Center, Inc.*,⁸⁸⁴ Justice McHugh outlined minimum procedural requirements private hospitals must utilize in determining disciplinary measures against medical staff, in addition to setting out the degree of judicial review of such procedures. The court held:

The decision of a private hospital to revoke, suspend, restrict or to refuse to renew the staff appointment or clinical privileges of a medical staff member is subject to limited judicial review to ensure that there was substantial compliance with the hospital's medical staff bylaws governing such a decision, as well as to ensure that the medical staff bylaws afford basic notice and fair hearing procedures, including an impartial tribunal.⁸⁸⁵

It was further concluded that

[a] private or a public hospital, regardless of the breadth of discretion that is extended to it, may revoke or otherwise affect adversely the staff appointment or clinical privileges of a medical staff member only if, as an element of basic notice, the medical staff bylaws provide a reasonably definite standard proscribing the conduct upon which the revocation or other adverse action is based.⁸⁸⁶

Justice McHugh indicated that

[a] hospital may adopt and enforce a medical staff bylaw providing that the disruptive conduct of a physician, in the sense of his or her inability to work in harmony with other health care personnel at the hospital, is a ground for denying, suspending, restricting, refusing to renew or revoking the staff appointment or clinical privileges of the offending physician, when such inability may have an adverse impact upon overall patient care at the

⁸⁸³ *Id.* at Syl. Pt. 4 (alterations in original).

⁸⁸⁴ 404 S.E.2d 750 (W. Va. 1991).

⁸⁸⁵ *Id.* at Syl. Pt. 1.

⁸⁸⁶ *Id.* at Syl. Pt. 2.

hospital.⁸⁸⁷

The court concluded that “[t]he decision of a private hospital revoking or otherwise affecting adversely the staff appointment or clinical privileges of a medical staff member will be sustained when, as an element of fair hearing procedures, there is substantial evidence supporting that decision.”⁸⁸⁸

L. *Suspension of Government Employee*

Justice McHugh observed in *Parham v. Raleigh County Board of Education*⁸⁸⁹ that “[t]he authority of a county board of education to suspend a teacher under *W.Va. Code*, 18A-2-8 [1990] must be based upon the causes listed therein and must be exercised reasonably, not arbitrarily or capriciously.”⁸⁹⁰

M. *Collective Bargaining Agreement*

Several issues concerned with collective bargaining were presented to Justice McHugh in *Local Division No. 812 of Clarksburg, West Virginia, of Amalgamated Transit Union v. Central West Virginia Transit Authority*.⁸⁹¹ The court held at the outset:

In determining whether or not the parties to a collective bargaining agreement have agreed to submit a particular dispute to arbitration, it must be recognized that there is a presumption favoring arbitration, and this presumption may be rebutted only where it can be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.⁸⁹²

The court held next that “[p]rocedural questions arising from a labor dispute and bearing on its final disposition are matters to be determined by an arbitrator.”⁸⁹³ Justice McHugh ended the opinion by holding:

Where a transit authority has entered into a collective bargaining agreement to submit “[a]ll grievances arising between the Transit Authority and union” to arbitration and *W.Va. Code*, 8-27-21(g)

⁸⁸⁷ *Id.* at Syl. Pt. 3.

⁸⁸⁸ *Id.* at Syl. Pt. 4.

⁸⁸⁹ 453 S.E.2d 374 (W. Va. 1994).

⁸⁹⁰ *Id.* at Syl. Pt. 2.

⁸⁹¹ 365 S.E.2d 76 (W. Va. 1987).

⁸⁹² *Id.* at Syl. Pt. 1.

⁸⁹³ *Id.* at Syl. Pt. 4.

[1969] provides that the transit authority or any employees thereof have the right to submit to final and binding arbitration “any labor dispute relating to the terms and conditions of employment which is not settled through any established grievance procedure,” an employee discharge falls within the definition of “terms and conditions of employment” and, accordingly, the matter of an employee discharge should be submitted to arbitration.⁸⁹⁴

N. *Employment Contract*

Justice McHugh confronted the issue of a lifetime employment contract in *Williamson v. Sharvest Management Co.*⁸⁹⁵ The court held:

An implied lifetime employment contract may be enforceable where the employee furnishes sufficient consideration in addition to those services incident to the terms of his or her employment. However, if the intent of the parties is clear and unequivocal that a lifetime employment contract exists, there is no requirement for additional consideration.⁸⁹⁶

O. *Parental Leave*

Justice McHugh addressed the Parental Leave Act in the case of *Hudok v. Board of Education of Randolph County.*⁸⁹⁷ The court held:

The plain language of *W.Va. Code, 21-5D-4* [1989] mandates unpaid parental leave for up to twelve weeks, after the exhaustion of all annual and personal leave, during any twelve-month period, because of the birth of a child of an employee covered by the Parental Leave Act, *W.Va. Code, 21-5D-1 to 21-5D-9* [1989]. The legislature, by including employees of “any county board of education in the state” in its definition of employees under *W.Va. Code, 21-5D-2* [1989], clearly intended to grant parental leave rights to school teachers under the Parental Leave Act.⁸⁹⁸

⁸⁹⁴ *Id.* at Syl. Pt. 3 (alteration in original).

⁸⁹⁵ 415 S.E.2d 271 (W. Va. 1992).

⁸⁹⁶ *Id.* at Syl. Pt. 2.

⁸⁹⁷ 415 S.E.2d 897 (W. Va. 1992).

⁸⁹⁸ *Id.* at Syl. Pt. 3.

P. *Public Employee Retirement System*

Justice McHugh indicated in *West Virginia Public Employees Retirement System v. Doda*⁸⁹⁹ that “[a]t common law, as under *W.Va. Code*, 5-10A-1 to 5-10A-10 [1976], a public officer’s or public employee’s service must be honorable at all times, and if not, there is a total forfeiture of the public pension.”⁹⁰⁰ The case also addressed constitutional attacks on a statute providing for disqualification of retirement benefits. The court held:

The Act on the “Disqualification for Public Retirement Plan Benefits,” *W.Va. Code*, 5-10A-1 to 5-10A-10 [1976], is not unconstitutional as cruel and unusual, or disproportionate, punishment (*W. Va. Const. art. III, § 5*), as a bill of attainder or bill of pain and penalties or an *ex post facto* law (*W. Va. Const. art. III, § 4*), as an impairment of contract (*W. Va. Const. art. III, § 4*), as a deprivation of property without due process of law (*W. Va. Const. art. III, § 10*) or as a forfeiture of estate (*W. Va. Const. art. III, § 18*). Furthermore, that Act is exempt, under 29 U.S.C. § 1003(b)(1) (1988), from the section of the Employee Retirement Income Security Act of 1974, as amended, on nonforfeitability of a normal retirement benefit, 29 U.S.C. § 1053(a) (1988).⁹⁰¹

In *State ex rel. Dadisman v. Caperton*,⁹⁰² Justice McHugh stated:

Where the mandate of an opinion of this Court requires a determination of whether the Public Employees Retirement System has been rendered actuarially unsound by past underfunding and, if so, requires appropriations which will return the System to actuarial soundness to be made, such appropriations are not necessary if it is determined that the System has not been rendered actuarially unsound by that underfunding.⁹⁰³

Justice McHugh said in *State ex rel. Lambert v. County Commission of Boone County*⁹⁰⁴ that

[t]he West Virginia Public Employees Retirement Act, set forth in *W.Va. Code*, 5-10-1, *et seq.*, must be read *in pari materia* with the

899 396 S.E.2d 725 (W. Va. 1990).

900 *Id.* at Syl. Pt. 1.

901 *Id.* at Syl. Pt. 3.

902 413 S.E.2d 684 (W. Va. 1991).

903 *Id.* at Syl. Pt. 1.

904 452 S.E.2d 906 (W. Va. 1994).

West Virginia Public Employees Insurance Act, set forth in *W.Va. Code*, 5-16-1, *et seq.* (specifically, §§ 2(7), 10, 22 and 24 of chapter 5, article 16 of the *W.Va. Code*). These statutes relate to providing benefits to retired employees who participate in the Public Employees Retirement System. Therefore, employers who elect to participate in the Public Employees Retirement System must, pursuant to *W.Va. Code*, 5-16-22 [1992], contribute to the Public Employees Insurance Agency when its retired employee elects to participate in the Public Employees Insurance Agency. After all, it is by virtue of the employer's participation in the Public Employees Retirement System that the retired employee has the option of electing to participate in the Public Employees Insurance Agency.⁹⁰⁵

Justice McHugh wrote in *In re Appeal or Judicial Review of Decision of West Virginia Consolidated Public Retirement Board*⁹⁰⁶ that

[p]ursuant to *W.Va. Code*, 5-10-2(6) [1988], an individual is an employee for membership in the Public Employees Retirement System if such individual is employed full time and his or her tenure is not restricted as to temporary or provisional appointment. These requirements apply to any person who serves regularly as an officer or employee, on a salary basis, in the service of, and whose compensation is payable, in whole or in part, by any political subdivision, as well as to an officer or employee whose compensation is calculated on a daily basis and paid monthly or on completion of assignment.⁹⁰⁷

Q. Health Care Plan

In *State ex rel. City of Wheeling Retirees Ass'n, Inc. v. City of Wheeling*,⁹⁰⁸ Justice McHugh determined whether health care rates charged to retirees could be different from the rates charged regular employees. The court held:

W.Va. Code, 8-12-8 [1986] provides, in part, that “[i]n the event that a municipality changes insurance carriers, as a condition precedent to any such change, the municipality shall assure that all retirees, . . . are guaranteed acceptance, at the same cost for the same coverage as regular employees of similar age groupings[.]” However, because *W.Va. Code*, 8-12-8 [1986] is remedial, and,

⁹⁰⁵ *Id.* at Syl. Pt. 2.

⁹⁰⁶ 476 S.E.2d 185 (W. Va. 1996).

⁹⁰⁷ *Id.* at Syl. Pt. 2.

⁹⁰⁸ 407 S.E.2d 384 (W. Va. 1991).

therefore, to be liberally construed, even though the municipality does not change insurance carriers, retirees who are insured under the provisions of this section are to be insured at the same cost for the same coverage as regular employees of similar age groupings where the present insurance carrier changes its rates and such change results in retirees being charged different rates for the same coverage as regular employees.⁹⁰⁹

R. *Deliberate Intention Action Against Employer*

Justice McHugh stated in *Sias v. W-P Coal Co.*⁹¹⁰ that

[t]he portion of the statute which authorizes “prompt judicial resolution” of “deliberate intention” actions against employers, specifically, *W.Va. Code, 23-4-2(c)(2)(iii)(B)* [1983, 1991], relates to plaintiffs’ more specific substantive law burden under the five-element test of *W.Va. Code, 23-4-2(c)(2)(ii)(A)-(E)* [1983, 1991], but the preexisting procedural law still applies for granting employers’ motions for summary judgment, directed verdict and judgment notwithstanding the verdict.⁹¹¹

S. *Federal Employers’ Liability Act*

Justice McHugh held in *Gardner v. CSX Transportation, Inc.*⁹¹² that “[t]o prevail on a claim under The Federal Employers’ Liability Act, 45 U.S.C. § 51 (1939), a plaintiff employee must establish that the defendant employer acted negligently and that such negligence contributed proximately, in whole or in part, to plaintiff’s injury.”⁹¹³

Justice McHugh elaborated upon the Federal Employers’ Liability Act in the case of *McGraw v. Norfolk & Western Railway Co.*⁹¹⁴ He noted:

Under the Federal Employers’ Liability Act, 45 U.S.C. § 51 (1939), inter alia, “[e]very common carrier by railroad while engaging in commerce . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative . . . for such injury or death

909 *Id.* at Syl. (alterations in original).

910 408 S.E.2d 321 (W. Va. 1991).

911 *Id.* at Syl. Pt. 3.

912 410 S.E.2d 473 (W. Va. 1997).

913 *Id.* at Syl. Pt. 6.

914 500 S.E.2d 300 (W. Va. 1997).

resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier[.]”⁹¹⁵

Justice McHugh held next that

[p]ursuant to 45 U.S.C. § 56 (1948), federal and state courts have concurrent jurisdiction of claims brought under the Federal Employers’ Liability Act, 45 U.S.C. § 51 (1939). Although a state court may use procedural rules applicable to civil actions in the state court unless otherwise directed by the Federal Employers’ Liability Act, substantive issues under the Federal Employers’ Liability Act are determined by the provisions of the statute and interpretative decisions of the Federal Employers’ Liability Act given by the federal courts.⁹¹⁶

The court continued in *McGraw* and held that

[u]nder the Federal Employers’ Liability Act, 45 U.S.C. § 51 (1939), to establish that a railroad breached its duty to provide its employees with a safe workplace, the plaintiff must show circumstances which a railroad, in the exercise of due care, could have reasonably foreseen as creating a potential for harm.⁹¹⁷

It was further held that

[u]nder the Federal Employers’ Liability Act, 45 U.S.C. § 51 (1939), even though the foreseeable danger to an employee is from intentional or criminal misconduct, an employer nevertheless has a duty to make reasonable provision against it. Breach of that duty would be negligence and whether the employee’s injury was the result, in whole or in part, from such negligence, is a question of fact for the jury.⁹¹⁸

Justice McHugh concluded in *McGraw* that “[b]ecause the Federal Employers’ Liability Act, 45 U.S.C. § 51 (1939), inter alia, imposes liability upon an employer for ‘the negligence of any of the officers, agents, or employees’ of such employer, under the act, a railroad may be liable for the negligence of any railroad employee.”⁹¹⁹

⁹¹⁵ *Id.* at Syl. Pt. 3 (alterations in original).

⁹¹⁶ *Id.* at Syl. Pt. 4.

⁹¹⁷ *Id.* at Syl. Pt. 5.

⁹¹⁸ *Id.* at Syl. Pt. 6.

⁹¹⁹ *Id.* at Syl. Pt. 8.