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Employment

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EMPLOYMENT

During the survey period, the West Virginia Supreme Court of Appeals considered a number of cases in the area of employment.[1] This survey discusses developments in the law of workers' compensation, unemployment compensation, and public employment. In the area of workers' compensation, the court established guidelines concerning the examination and evaluation of claimants prior to evidentiary hearings. The court also reviewed cases concerning the dismissal of a claim by way of a notice letter, dependent benefits in occupational pneumoconiosis claims, the extent of coverage of an employee injured out of state, the right of an employer to recover compensation benefits from a negligent third party, and the protection accorded an injured employee who is terminated pursuant to provisions of a collective bargaining agreement.

In the area of unemployment compensation, the court reviewed cases involving a recent statutory amendment expanding the potential eligibility of individuals, notice rights of employees aggrieved by a decision concerning compensation benefits, and the permanent disqualification of an employee discharged for "gross misconduct" from receiving benefits.

In the area of public employment, the court considered cases concerning the classification of state employees and their rights to retroactive pay after reclassification, the distinction between "public officials" and "public employees" for removal purposes, and the constitutionality of a "no solicitation" policy.

I. Workers' Compensation

A. *Medical Examinations*

Brogan v. Workers' Compensation Commissioner, 327 S.E.2d 694 (W. Va. 1984).

In its most significant decision concerning employment during the survey period, the West Virginia Supreme Court of Appeals declared that certain current practices in the processing of workers' compensation claims were "[in]consistent with the legislature's declared policy that the rights of claimants be determined as speedily and expeditiously as possible."[2] Under the court's holding in *Brogan v. Workers' Compensation Commissioner*,[3] a claimant and employer have the right to select one physician each to examine and evaluate the claimant, in addition to a neutral physician selected by the Commissioner.[4] The court also held that claimants and employers are required to exchange all medical reports and submit them to the

[1] For additional developments in the field of employment law, see the Discriminatory Discharge Subsection under *Administrative Law* in this survey.

[2] Brogan v. Worker's Compensation Comm'r, 327 S.E.2d 694, 699 (citing Workman v. State Workmen's Compensation Comm'r, 160 W. Va. 656, 657, 236 S.E.2d 236, 237 (1977)).

[3] *Brogan*, 327 S.E.2d 694.

[4] *Id.* at 699.

Commissioner without waiting for an evidentiary hearing.[5] Finally, the court found that in the event an evidentiary hearing is necessary, a physician's presence at the hearing is not required for the medical report to be admissible.[6]

The facts of this case are illustrative of the current system of processing workers' compensation claims. Zeffie Brogan sustained a knee injury during the course of employment. After Brogan returned to work, the Workers' Compensation Commissioner referred him to a neutral physician and, based on the physician's findings, granted Brogan a twenty percent permanent partial disability award. The employer protested this award and arranged for Brogan to be examined by their physician, who estimated disability at ten percent.[7]

The employer was then granted authorization by the Commissioner to have Brogan examined by another physician, who suggested an award of no more than five percent. The employer introduced both medical reports at the evidentiary hearing, and Brogan's counsel was granted a continuance in order to review the employer's medical evidence and to determine whether to cross-examine either doctor or offer rebuttal medical evidence.[8]

At the next hearing, the employer moved to introduce a third physician's report. Brogan's counsel objected, claiming that his client lacked the financial ability to "match the employer report for report."[9] The Commissioner denied Brogan's motion to strike the third medical report, reduced Brogan's disability award to fifteen percent, and declared that all payments above fifteen percent were subject to recovery. The Appeal Board affirmed this decision.[10]

By the time the Commissioner reduced the award to fifteen percent, two and one half years had elapsed since the initial award, and over four years had elapsed since the injury. The Commissioner had set five dates for evidentiary hearings.

The Supreme Court of Appeals reversed the Commissioner's decision and reinstated the twenty percent award. Justice Harshbarger's majority opinion declared that the actions of the employer and the Commissioner did not comport with the legislative intent of workers' compensation laws, and promulgated three distinct changes in the procedure.

First, West Virginia Code section 23-4-8 grants the Commissioner authority to order a claimant "to appear for examination before a medical examiner or examiners selected by the Commissioner; and the claimant and employer, respectively, shall each have the right to select *a physician* of his or its own choosing . . . to

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[5] *Id.*
[6] *Id.* at 700.
[7] *Id.* at 696-97.
[8] *Id.* at 697.
[9] *Id.*
[10] *Id.* at 698.

participate in this examination."[11] Justice Harshbarger concluded that this section "was intended to grant . . . one—but only one—. . . physician to examine and evaluate a claimant. . . ."[12] The practice, as illustrated in this case, was for the parties to seek out either "conservative" or "liberal" physicians for disability opinions, with each side trying to accumulate more favorable medical reports than the other side.[13]

Second, Justice Harshbarger reasoned that, given its proclaimed purpose of a "speedy and expeditious determination of the claimant's rights," section 23-4-8 "must require claimants and employers to promptly exchange all medical reports and submit them directly to the Commissioner without waiting for an evidentiary hearing."[14] The practice of offering medical reports only at hearings resulted in continuances granted to the opposing party so it could review the report and determine whether to cross-examine the physician. Such continuances needlessly extended the time taken to determine the claimant's rights.

By requiring the parties to submit medical reports to the Commissioner before the hearing, the court acknowledged the Commissioner's statutory authority to "make, refuse, or modify awards based upon credible evidence supplied by the parties and through independent medical evaluations, without advance evidentiary hearings. . . ."[15] Such authority was designed to determine the validity of a claim as quickly as possible.

To the extent that the Commissioner may make a determination based solely on written reports of medical experts, the *Brogan* holding overruled *Hoff v. State Workers' Compensation Commissioner.*[16] In *Hoff*, the court prohibited the making of an award based solely upon the report prepared by the Commissioner's examiner. The court in *Brogan* clearly stated that the Commissioner may indeed make an award based solely on such a report.

Justice Harshbarger recognized, however, that because the Commissioner has a statutory duty to conduct a hearing within thirty days after an objection to the award,[17] medical examinations and evaluations are seldom exchanged within the time period. Although necessary delays in obtaining reports constitute good cause for continuance, Justice Harshbarger's desire for more realistic rules was quite clear. In order for current practice to be consistent with legislative design, the time period should be lengthened to allow for the practical difficulties of obtaining, exchanging, and submitting medical reports and evaluations.

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[11] *Id.* (emphasis added). See W. VA. CODE § 23-4-8 (1985).
[12] *Brogan*, 327 S.E.2d at 699.
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] Hoff v. State Workers' Compensation Comm'r, 148 W. Va. 33, 132 S.E.2d 772 (1963).
[17] *Brogan*, 327 S.E.2d at 701. *See* W. VA. CODE § 23-5-1 (1985).

Justice Harshbarger's third change in procedures provided that "nothing in the statute, the administrative rules and regulations, or our decisions requires a physician's presence at an evidentiary hearing for his report to be received in evidence."[18] Although contrary to the general rules of evidence, this practice is consistent with the mandate of West Virginia Code section 23-1-15 that "[t]he Commissioner shall not be bound by the usual common-law or statutory rules of evidence . . . and may make investigations in such manner as in his judgment is best calculated to ascertain the substantial rights of the parties and to carry out the provisions of this chapter."[19]

The changes in procedures as promulgated by the court comport with the legislative intent in workers' compensation statutes. The new standards not only contribute to a more expeditious determination of a claimant's rights, but also eliminate such financial overmatch as appeared in *Brogan*.

B. *Dismissal of Claims*

Adkins v. Workers' Compensation Commissioner, 330 S.E.2d 329 (W. Va. 1985). *Inc.*, 330 S.E.2d 329 (W. Va. 1985).

Recently the court addressed the issue of whether a claimant who has properly furnished medical evidence and has been awarded a series of benefits may be deprived of such benefits because of a failure to respond to a notice letter. The court's decision in *Adkins v. Workers' Compensation Commissioner*,[20] reversed the Commissioner's decision to deny benefits in such a situation.

The employee, Jay Adkins, filed a claim for a knee injury, to which the employer made a timely protest. The employee's physician was subpoenaed by the Commissioner to attend the protest hearing. At the conclusion of this hearing, the employer's attorney moved for another hearing for further medical testimony and requested notice to be sent to the employee advising him to appear at the hearing for cross-examination. The notice did not advise the employee of any penalty in the event he failed to attend the hearing.[21]

When the employee did not attend the hearing, the Commissioner sent an informal letter informing him that he had fifteen days to show good cause why he did not appear.[22] The letter indicated that, if the employee failed to respond or show good cause why he did not appear, his claim would be dismissed. When the employee failed to respond within fifteen days, the Commissioner not only dismissed

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[18] *Brogan*, 327 S.E.2d at 700.

[19] *Id. See* W. VA. CODE § 23-1-15 (1985).

[20] Adkins v. Workers' Compensation Comm'r, 330 S.E.2d 329 (W. Va. 1985).

[21] *Id.* at 331.

[22] *Id.*

the claim, but also declared that all disability benefits paid to the employee should be recovered. The Appeal Board affirmed the decision.

In reversing the Commissioner's decision, the court determined that its holding in *Butcher v. State Workers' Compensation Commissioner*[23] was controlling: "Where a claimant has properly furnished medical evidence and has been awarded a series of temporary total disability benefits, the claimant may not be deprived of these benefits by the Commissioner because he failed to respond to the fifteen-day notice letters. . . ."[24] Justice Miller's opinion in *Adkins* reasoned that workers' compensation hearings, unlike other administrative hearings, are devoid of regulations controlling the evidentiary development of a case at hearings.[25] Indeed, even the Commissioner's brief in the case explained that such hearings are conducted piecemeal, with many claims being litigated for several years. "As a result," the Commissioner's brief conceded, "it is not unusual for the parties and/or a witness to fail to attend a hearing at some point in the litigation."[26]

The court's holding in *Adkins* expanded the applicability of its *Butcher* decision. The employer had argued, and the Appeal Board agreed, that *Butcher* was inapplicable because, in that case, the employer had failed to make a timely protest and thus could not challenge the compensability of the claim. Where the employer in *Butcher* was not entitled to cross-examine the claimant, the employer in *Adkins*, by making a timely protest, had preserved the right to cross-examine.

Yet, Justice Miller reasoned that "the issue in the present case is not that the employer should be denied a right to cross-examine the claimant, but rather under what circumstances the employee's claim can be dismissed when he fails to appear for cross-examination."[27] Even when the employer has made a timely protest, preserving the right to challenge the compensability of the claim and activating the employee's duty to be present at the hearing, the claim cannot be dismissed for failure to respond to a fifteen-day notice letter.

Justice Miller noted, however, that the Commissioner is vested with subpoena power and may utilize the subpoena to compel an employee or physician to attend a hearing. Under West Virginia Code section 23-1-9, if an individual fails or refuses to comply with the Commissioner's subpoena, "the circuit judge . . . shall compel obedience by attachment proceedings. . . ."[28] The court left open the question of whether, upon failure to comply with the subpoena, the employee's claim may also be dismissed.

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[23] Butcher v. State Workers' Compensation Comm'r, 315 S.E.2d 563 (W. Va. 1983).
[24] *Id.* at 565.
[25] *Adkins*, 330 S.E.2d at 332.
[26] *Id.*
[27] *Id.*
[28] W. VA. CODE § 23-1-9 (1985).

C. *Dependent Benefits*

Parker v. Workers' Compensation Commissioner, 324 S.E.2d 142 (W. Va. 1984). *Corp.*, 324 S.E.2d 142 (W. Va. 1984).

In the complex field of occupational pneumoconiosis, a claimant who meets "exposure requirements" is referred to the Occupational Pneumoconiosis Board for proper medical evaluation.[29] The authority of the Workers' Compensation Commissioner in such cases is limited to determining whether the claimant meets the non-medical exposure requirements.[30] In *Parker v. Workers' Compensation Commissioner*,[31] the court clarified this procedure and found that a dependent, as well as a living claimant, is entitled to the Occupational Pneumoconiosis Board's evaluation.

Sharon Parker filed an application for dependent's benefits, alleging that her husband's death was due to occupational pneumoconiosis. An autopsy report with a diagnosis consistent with the claim was also submitted. The Commissioner rejected the application on the ground that no prima facie showing had been made that the employee's death was due to occupational pneumoconiosis.[32]

In so ruling, the Commissioner had ignored the standard for evaluating occupational pneumoconiosis claims, as articulated in *Godfrey v. State Workmen's Compensation Commissioner*.[33] In *Godfrey*, the court held that, when an occupational pneumoconiosis claim is filed, the Commissioner's statutory duty is to make a non-medical period of exposure determination.[34] "Then, if the claimant meets the exposure requirements, the Commissioner is required to refer the claim to the Occupational Pneumoconiosis Board for medical evaluation."[35]

The employer attempted to distinguish *Godfrey* from this case by indicating that *Godfrey* involved a living claimant while *Parker* involved a claim of the dependent of the deceased. The court was unable to find any provision or rationale in Workers' Compensation law that would justify treating a dependent's claim differently than the claim of an employee. The purpose of Workers' Compensation laws, the court found, necessitated that a dependent, as well as a living claimant, be allowed the benefit of the Board's expertise in this complex field.[36]

Indeed, the court could not find anything in the relevant statutes that would empower a Commissioner, under any circumstances, to make medical determina-

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[29] Parker v. Worker's Compensation Comm'r, 324 S.E.2d 142, 144 (1984). *See* W. VA. CODE § 23-4-8C (1985).

[30] *Id. See* W. VA. CODE § 23-4-15B (1985).

[31] *Parker*, 324 S.E.2d 142.

[32] *Id.* at 143.

[33] Godfrey v. State Workmen's Compensation Comm'r, 276 S.E.2d 802 (W. Va. 1981).

[34] *Parker*, 324 S.E.2d at 144. *See* W. VA. CODE § 23-4-15B (1985).

[35] *Godfrey*, 276 S.E.2d at 803.

[36] *Parker*, 324 S.E.2d at 144.

tions on an initial application without medical advice from the Occupational Pneumoconiosis Board.[37] The finding of the Appeal Board was, therefore, reversed.

D. *Coverage of Employees Injured Out of State*

Fausnet v. State Workers' Compensation Commissioner, 327 S.E.2d 470 (W. Va. 1985).

In *Fausnet v. State Workers' Compensation Commissioner*,[38] the court addressed the question of whether an employee may receive workers' compensation benefits in West Virginia when he or she was injured in another state. The court ruled that such an employee is entitled to seek benefits in West Virginia if "the employee's employment in the other state is temporary or transitory in nature. . . ."[39] The court, however, stopped short of setting a standard for determining temporary or transitory employment.

Bernard Fausnet, a resident of North Carolina, was hired in West Virginia by Appalachian Drilling Co. in January, 1978. In May, 1978, after working on two job sites in West Virginia, the employee was sent to work on a project in Ohio, where he sustained a back injury. He subsequently left the job with Appalachian and returned to North Carolina. He later filed this claim for benefits in West Virginia.

The Commissioner rejected the application, determining that Fausnet "was not an employee subject to coverage" under West Virginia's workers' compensation laws.[40] The Appeal Board affirmed, concluding that the employee's Ohio employment, although expected to last only two months, was not temporary in nature thus excluding Fausnet from coverage under West Virginia Code section 23-2-1.[41] It reasoned that, "although the claimant might have stayed with the company after that job was finished, it is not certain that his next job would have been located in the State of West Virginia."[42]

In reversing the Commissioner's decision, the court determined that there was sufficient contact between the employer and the State of West Virginia, and that the employee's Ohio employment was temporary in nature. Although West Virginia statutes focus upon the question of whether an injured employee's employment

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[37] The court in *Godfrey* invalidated section 20.03 of the Workers' Compensation Administrative regulations which empowered the Commissioner to dismiss occupational pneumoconiosis claims "if the medical evidence in the initial application fails to diagnose occupational pneumoconiosis.

[38] Fausnet v. State Workers' Compensation Comm'r, 327 S.E.2d 470 (W. Va. 1985).

[39] *Id.* at 474.

[40] *Id.* at 471. The Commissioner had originally held the claim to be compensable. Fausnet received benefits for the period of May 18, 1978 to June 3, 1978.

[41] *Id. See* W. VA. CODE § 23-2-1 (1985).

[42] *Fausnet*, 327 S.E.2d at 471.

in another state was temporary or transitory in nature, Justice McHugh's opinion seemed to place great emphasis on the fact that the employee was actually hired in West Virginia. "We are of the opinion that the hiring of an employee in West Virginia is a factor to be considered concerning the question of whether that employee's work in a foreign state is, in fact, temporary or transitory."[43]

In reaching its decision, the court also indicated that the employee had worked at two job sites in West Virginia and that there was no evidence that he would be permanently located in Ohio. Also, the fact that the employer maintained an office in Charleston further demonstrated the employee's contact with the State.

Because of the subjective nature of the court's decision, the evaluation of workers' compensation claims must proceed on a case by case basis. Although the court's holding in *Fausnet* helps to clarify the relevant statutes and their applicability to similar cases, the court failed to indicate which factors were accorded greater weight in the decision, or whether other circumstances could be included in the determination. For example, how would the court view a situation in which an employee was hired in West Virginia but the Ohio project was his first assignment? It is clear that a "grey area" remains in the circumstance where a worker seeking benefits was injured in another state.

E. *Third Party Negligence*

National Fruit Product Co. v. Baltimore & Ohio Railroad Co., 329 S.E.2d 125 (W. Va. 1985).

West Virginia is one of only three states that does not give the right of subrogation, by statute, to recover Workers' Compensation benefits paid to employees injured by third party negligence. Such "subrogation statutes" typically diminish the amount an injured employee recovers in a separate action against a negligent third party by the amount of workers' compensation benefits the employee receives. The absence of a subrogation statute in West Virginia was critical in the court's decision in *National Fruit Product Co. v. Baltimore and Ohio Railroad Co.*[44] In this case, National Fruit alleged that two of its employees were injured when the door of a boxcar, owned by the defendant, fell on them as they were preparing to load the car. Because National Fruit was required to make increased payments into the Workers' Compensation Fund to cover the benefits received by the employees, it argued that it was entitled to recover this increase from the defendant. Recognizing that West Virginia does not have a subrogation statute, National Fruit claimed its right to recover the increase under the theories of implied indemnity and loss of employee services.

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[43] *Id.* at 474.

[44] National Fruit Prod. Co. v. Baltimore & O.R.R., 329 S.E.2d 125 (W. Va. 1985).

The court affirmed the circuit court's decision that National Fruit's action could not be maintained. Specifically, the court stated that, for the employer to have a cause of action for indemnity, "there must be a common or coextensive obligation existing between the employer and the negligent third party."[45] Because the employer's obligation to the employee arose from the workers' compensation laws, in which the employee's injury need not arise from negligence, its cause of action under the theory of implied indemnity failed.

The employer's second cause of action—that the third party was liable for the loss of services of the two employees—was also dismissed. The rule in West Virginia, as articulated in *Nemo Foundations v. New River Co.*,[46] is that the employer may maintain an action against a third party for the loss of services of its employees only when the third party *intentionally* injured the employees. Because National Fruit claimed that the defendant negligently injured the employees, the court concluded that no cause of action existed.

Under a typical subrogation statute, National Fruit would have been able to recoup its compensation benefits from any award obtained against the negligent third party. Consequently, its cause of action for indemnity or loss of employee services would have been unnecessary. For this reason, National Fruit argued that the court should judicially recognize a cause of action for an employer against a negligent third party to recover compensation benefits. The court refused to do this, however, stating that because the workers' compensation system in West Virginia is statutorily based, judicial intrusion is unwarranted.[47] The court recognized that the rights and obligations of employers, employees, and third parties are so intertwined and complex that "this area of law is best addressed by the Legislature through the passage of detailed subrogation statutes."[48]

Although the court refused to intervene in this area of law, its message to the Legislature was quite clear, "[o]ur legislature has not acted, although it must be aware from our cases that we are one of three states that does not accord a statutory subrogation right in our Workers' Compensation Act."[49]

F. *Collective Bargaining Agreements*

Yoho v. Triangle PWC, Inc., 336 S.E.2d 204 (W. Va. 1985).

Recently, the court addressed the question of what protection should be accorded an injured employee who is terminated pursuant to the provisions of a collective

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[45] *Id.* at 129.
[46] Nemo Foundations, Inc. v. New River Co., 155 W. Va. 149, 181 S.E.2d 687 (1971).
[47] *National Fruit*, 329 S.E.2d at 132.
[48] *Id.*
[49] *Id.*

bargaining agreement because of her unavailability for work. The court's holding in *Yoho v. Triangle PWC, Inc.*[50] offers little protection to the individual in such a situation.

The appellant, Elizabeth Yoho, was employed by Triangle as a utility laborer when she accidentally spilled acid on herself, resulting in second and third degree burns over thirty-five percent of her body.[51] The Workers' Compensation Commissioner awarded her temporary total disability benefits.[52] A year after the accident, the appellant's employment with Triangle was terminated pursuant to the provisions of a collective bargaining agreement.[53] The reason for her termination was based upon her unavailability for work over the preceding twelve-month period due to her injury.

The appellant's original complaint alleged three grounds for relief: that she was the victim of retaliatory discharge, that the contractual provision under which she was discharged violated West Virginia public policy, and that Triangle's action in discharging her constituted an intentional infliction of emotional distress.[54] She later moved to amend the complaint, eliminating references to the collective bargaining agreement. The circuit court denied the motion to amend, and then granted the appellee's motion to dismiss.[55]

The supreme court held that the circuit court's denial of the appellant's motion to amend was in error because "the theories of recovery and the facts relied upon remained essentially the same."[56] Since the West Virginia Rules of Civil Procedure provide that leave to amend "shall be freely given when justice so requires,"[57] and because the changes were minor, the court had difficulty seeing how the appellee would have been prejudiced by the amendment.

The court also found that the trial court erred in dismissing the claim based on a preemption of federal law.[58] The lower court presumably based its decision on the United States Supreme Court decision in *Allis-Chalmers Corp. v. Lueck*[59] which stated, "when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between parties in a labor contract, that claim must either be treated as a section 301 claim[60] . . . or dismissed as preemp-

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[50] Yoho v. Triangle PWC, Inc., 336 S.E.2d 204 (W. Va. 1985).

[51] *Id.* at 206.

[52] Elizabeth also received a substantial settlement in a *Mandolidis* action against Triangle.

[53] Article IV of the agreement provides that continuous service, which defines seniority, shall be broken by "layoff for lack of work or other reason for a continuous period in excess of one (1) year for employees with less than five (5) years seniority at the time of such layoff." *Id.* at 207 n.3.

[54] *Yoho*, 336 S.E.2d at 206.

[55] *Id.*

[56] *Id.* at 207.

[57] W. VA. R. CIV. P. 15(a).

[58] *Yoho*, 336 S.E.2d at 208.

[59] Allis-Chalmers Corp. v. Lueck, 105 S. Ct. 1904 (1985).

[60] National Labor Relations Act § 301, 29 U.S.C. § 185 (1982).

ted by federal labor-contract law."[61] The West Virginia Supreme Court of Appeals found that the appellant's claim was not substantially dependent on analysis of the terms of the collective bargaining agreement and therefore should not have been dismissed because of preemption of federal law.[62]

After declaring that the appellant's amended complaint should have been allowed, the court proceeded to find all three causes of action groundless. The court held that the appellant's claim for intentional infliction of emotional distress should have been dismissed because such action, under the rule set out in *Harless v. First National Bank of Fairmont*,[63] required extreme and outrageous conduct intentionally or recklessly causing severe emotional distress.[64] Because Triangle was merely following the mandate of the collective bargaining agreement when it fired the appellant, the court concluded that this was not extreme or outrageous conduct.[65]

The appellant also alleged that Triangle discriminated against her because she received worker's compensation benefits after Triangle discharged her.[66] The court found this claim to be meritless because under the facially neutral provision of the agreement, the appellant would have been terminated just as quickly if she had never applied for workers' compensation benefits.[67]

The court's dismissal of the appellant's third cause of action, that the contract provision under which she was terminated violated public policy, is the most troubling. The appellant had suffered a physically and emotionally painful injury which caused her to be off work for twelve months. She was then dismissed from her job because of a collective bargaining agreement. Although the court declared its sympathy for her plight, it stated that the power to declare an action against public policy is difficult to define[68] and that "an issue which is fairly debatable or controversial in nature is one for the legislature and not for this Court."[69]

The "debatable or controversial nature" of the issue, the court reasoned, was the competitive nature of seniority. "While this Court has consistently fought to aid the injured employee, we will not go so far as to give an advantage to the injured employee over the other employees."[70] Obviously, the union and Triangle had agreed that the employee who stayed on the job longer was more worthy of

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[61] *Allis-Chalmers*, 105 S. Ct. at 1916.

[62] *Yoho*, 336 S.E.2d at 208.

[63] Harless v. First National Bank of Fairmont, 289 S.E.2d 692 (W. Va. 1982).

[64] *Id.* at syllabus point 6.

[65] *Yoho*, 336 S.E.2d at 209.

[66] W. VA. CODE § 23-5A-1 (1985) provides: "No employer shall discriminate in any manner against any of his present or former employees because of such present or former employee's receipt of or attempt to receive [workers' compensation benefits]."

[67] *Yoho*, 336 S.E.2d at 210.

[68] *Id.* at 209.

[69] *Id.*

[70] *Id.*

promotion and job security than an employee who had been off the job for a substantial period of time, even if that employee had been injured.

II. Unemployment Compensation

Butler v. Rutledge, 329 S.E.2d 118 (W. Va. 1985).

Mizell v. Rutledge, 328 S.E.2d 514 (W. Va. 1985).

Federoff v. Rutledge, 332 S.E.2d 855 (W. Va. 1985).

In deciding three unemployment compensation cases during the survey period, the West Virginia Supreme Court of Appeals was guided by the principle that unemployment compensation statutes, being remedial in nature, should be liberally construed to achieve their benign purposes.[71] In the first case, *Butler v. Rutledge*,[72] the court determined that a recent statutory amendment expanded the potential eligibility of individuals for unemployment compensation benefits.

The *Butler* case was a consolidation of several actions, each involving an individual who left his original employment (in which he had worked for at least thirty days) to take another job. In each case the individual was subsequently laid off from that job prior to working thirty work days. By looking only at the employees' original employment, the Department of Employment Security determined that they had left that employment voluntarily, therefore disqualifying the petitioners indefinitely from receiving unemployment compensation benefits.[73] The circuit court affirmed, holding that the employees were disqualified under West Virginia Code section 21A-6-3(1).[74]

In so ruling, the circuit court apparently overlooked the 1981 amendment to the statute which deleted the definition of "work" from the relevant section. The deleted section defined "work" as "employment with the last employing unit with whom such individual was employed as much as 30 days. . . ."[75] Under this statute, an individual must be involuntarily dismissed from a job he or she has held for at least thirty working days to be eligible for benefits.

In reversing the lower court's decision, the court held that by deleting the definition of "work" from the statute in the 1984 amendment, the Legislature intended to grant eligibility to individuals who have involuntarily left employment, even if that employment lasted less than thirty days.[76] The court relied upon its reasoning

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[71] *See* Davis v. Hix, 140 W. Va. 398, 84 S.E.2d 404 (1954).

[72] Butler v. Rutledge, 329 S.E.2d 118 (W. Va. 1985).

[73] *Id.* at 121. The West Virginia Unemployment Compensation Act is designed to compensate individuals who are involuntarily unemployed. *See* Lee-Norse Co. v. Rutledge, 291 S.E.2d 477, 482 (W. Va. 1982).

[74] *Id.*

[75] W. Va. Code § 21A-6-3(a) (1978) (amended 1981).

[76] *Butler*, 329 S.E.2d at 124.

in *Hall v. Baylous*: "The Legislature must be presumed to know the language employed in former acts, and, if in a subsequent statute on the same subject it uses different language in the same connection, the court must presume that a change in the law was intended."[77] The court reasoned that a sentence of such importance does not disappear from a statute without intention.

However, the court further determined that, once an individual is determined to be disqualified from receiving benefits (*i.e.*, if the individual left his or her most recent work voluntarily and applied for benefits at that time), that disqualification continues "until the individual returns to covered employment and has been employed in covered employment at least 30 working days."[78] Therefore, if the individuals in this case had applied for benefits after they had been disqualified under West Virginia Code section 21A-6-3(1), their disqualification would have continued even after they were laid off from the later jobs, because those jobs did not continue for the required thirty working days.

The court's propensity to construe unemployment compensation statutes in favor of claimants was also evident in its decision in *Mizell v. Rutledge*.[79] Also a consolidation of actions, *Mizell* involved the issue of notice rights of claimants, employers, and other interested parties who have been aggrieved by a decision concerning unemployment compensation benefits.

The claimants in *Mizell* were discharged from their respective employments for alleged misconduct. Upon filing claims for unemployment compensation benefits, they were temporarily disqualified from receiving such benefits due to their discharges for alleged misconduct. None of the claimants appealed the Deputy Commissioner's decisions, primarily for reasons of convenience and economics. Upon expiration of the disqualification period, each claimant began receiving regular benefits.

Upon exhaustion of their regular benefits, the claimants applied for extended benefits. They were declared ineligible for extended benefits because of their previous disqualifications for misconduct, pursuant to West Virginia Code section 21A-6A-1(12)(G).[80] Each claimant appealed, but the decisions were affirmed by the circuit court.

The claimants argued that if they had been informed that the Commissioner's decision to disqualify them for regular benefits would later render them ineligible to receive extended benefits, they would have contested the decisions on appeal. The Department of Employment Security conceded that the notices sent to the

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[77] Hall v. Baylous, 109 W. Va. 1, 153 S.E. 293, Syllabus Point 2 (W. Va. 1930).

[78] *Butler*, 329 S.E.2d at 125.

[79] Mizell v. Rutledge, 328 S.E.2d 514 (W. Va. 1985).

[80] W. VA. CODE § 21A-6A-1(12)(G) (1985) provides in relevant part:

An individual shall not be eligible to receive extended benefits with respect to any week of unemployment in his eligibility period if such individual has been disqualified for regular benefits under this chapter because he or she voluntarily left work, was discharged for misconduct, or refused an offer of suitable work. . . .

claimants did not inform them that they would be ineligible for extended benefits in the future.[81]

The court reversed the circuit court's decision and declared the claimants eligible for extended benefits holding that the Deputy Commissioner's failure to inform the claimants that their disqualifications could render them ineligible for extended benefits violated the notice requirements of West Virginia Code section 21A-7-8.[82] Under this section, an individual aggrieved by a decision of a Deputy Commissioner is entitled "to a fair hearing and reasonable opportunity to be heard before an appeal tribunal. . . ."[83] Thus, such a governmental action is certainly not fair when the claimant has not been informed of the consequences of the disqualification needed to make an informed decision concerning appeal.

It should be noted that the court's liberal interpretation of the notice requirement will not always result in a favorable decision for the claimant. In the case of *Ottenheimer Publishers*,[84] cited by the court, a discharged employee was disqualified from receiving unemployment compensation benefits because she had refused available work. The notice sent to the employer did not inform him that the disqualification was temporary. When the claimant later began to receive benefits, the employer protested. Holding that the notice violated the relevant statute because it failed to "fully inform" the employer, the Court of Appeals of Maryland granted the employer an opportunity to appeal the original decision.[85] *Ottenheimer* illustrates the point that notice requirements must be adhered to across the board to allow claimants, employers, and other interested parties the information necessary to make informed decisions.

As stated in *Mizell*, West Virginia Code section 21A-6-3 mandates a six-week disqualification for unemployment compensation benefits if it is determined that the claimant was discharged for ordinary misconduct. Section 21A-6-3 also provides that permanent disqualification results if the reason for discharge is "gross misconduct."[86] In *Federoff v. Rutledge*,[87] the court clarified the distinction in its decision concerning an employee's discharge for alleged intoxication.

Sidney Federoff, a maintenance foreman at Maitland Mine with a reputation for drinking and absentee problems, was orally warned by the superintendent that coming to work drunk or smelling of alcohol would subject him to discharge.[88]

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[81] *Mizell*, 328 S.E.2d at 517.

[82] *Id.* at 518. *See* W. VA. CODE § 21A-7-8 (1985).

[83] W. VA. CODE § 21A-7-8 (1985).

[84] Ottenheimer Publishers, Inc. v. Employment Security Admin., 275 Md. 514, 340 A.2d 701 (1975).

[85] *Id.* at 519, 340 A.2d at 704.

[86] W. VA. CODE § 21A-6-3 (1985) provides that an employee discharged for actions constituting "gross misconduct" "shall be and remain disqualified for benefits until he has thereafter worked for at least 30 days in covered employment."

[87] Federoff v. Rutledge, 332 S.E.2d 855 (W. Va. 1985).

[88] *Id.* at 856.

Federoff received his second warning one week later when he reported to work with alcohol on his breath. Several months later Federoff reported for night shift work approximately five hours late, again with alcohol on his breath. He was discharged at this time, although he testified that he had a "couple of drinks" at 7:00 p.m. and overslept the start of his 12:00 p.m. shift.[89]

When Federoff applied for unemployment compensation benefits, the Deputy Commissioner permanently disqualified him because his discharge for "reporting to work in an intoxicated condition" constituted discharge for gross misconduct.[90] The administrative law judge and the Board of Review affirmed the Deputy Commissioner's decision, yet neither indicated the specific statutory basis for their conclusion that Federoff was terminated for gross misconduct.

The court reversed the decision and reduced the disqualification period to six months. It held that the decision should be reversed whether the previous determination was based on Federoff's alleged intoxication on the job, or on his having the smell of alcohol on his breath.

The majority opinion, penned by Justice McGraw, stated that, if the lower court's decision was based on the employee having alcohol on his breath after being warned, then the ruling was incorrect because section 21A-6-3 states that such "gross" misconduct occurs only when the individual has received prior written warning.[91] Federoff received only oral warnings.

Likewise, the court found that in the context of unemployment compensation proceedings, evidence of "drinker's breath" alone is insufficient to support a finding of intoxication.[92] The supervisor testified only to the smell of alcohol and he later testified that Federoff's walk and speech appeared normal.[93] Although the court did not specify what type of evidence *would* be sufficient to prove an employee's intoxication, it clearly believed that the smell of alcohol, by itself, was insufficient.

The remainder of Justice McGraw's opinion dealt with the economic and social problem of alcohol in the workplace. Although stating that "the afflicted employee must assume the responsibility of dealing with this problem,"[94] Justice McGraw articulated several possible affirmative steps that employers could take to encourage treatment and rehabilitation, including:

> (1) education of supervisory personnel on detecting affected employees; (2) institution of progressive discipline programs which motivate employees to seek treatment to avoid further discipline or discharge; (3) in-house education or counseling

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[89] *Id.* at 857.

[90] *Id.*

[91] *Id.* at 859. *See* W. VA. CODE § 21A-6-3 (Supp. 1984).

[92] *Id.* at 859, *see also* 4 R. GRAY & L. GORDY, ATTORNEY'S TEXTBOOK OF MEDICINE, § 133.10 (3rd ed. 1985).

[93] *Federoff*, 332 S.E.2d at 859.

[94] *Id.* at 861.

programs by large employers; (4) systematic procedures for referral to locally available rehabilitative programs offered by Alcoholics Anonymous and community mental health centers; and (5) "opting in" for statutorily required offerings of coverage of treatment for alcoholism by insurance plans.[95]

III. Public Employment

American Federation of State, County, and Municipal Employees v. Civil Service Commission. 324 S.E.2d 363 (W. Va. 1984).

Mullins v. Kiser, 331 S.E.2d 494 (W. Va. 1985).

West Virginia University Association of Concerned Employees v. Saunders, No. 161-85, slip op. (W. Va. July 1, 1985).

During the survey period, the court considered cases concerning the classification of state employees, the distinction between "public officials" and "public employees" for removal purposes, and the constitutionality of a "no solicitation" policy.

In the first case, *AFSCME v. Civil Service Commission*,[96] the court addressed the issue of whether retroactive pay was appropriate after the Commission had reclassified employees who were performing duties outside of their classification. Such classifications, as determined by the Department of Human Services, must adhere to the principle "equal pay for equal work," as reflected in West Virginia Code section 29-6-10.[97]

In *AFSCME*, the Department of Human Services had divided Economic Service Workers into three classifications, with Economic Service Worker III receiving the highest salary. The petitioners were classified as Economic Service Workers I and II, and they alleged that, because they were performing the same duties as an Economic Service Worker III, they were entitled to that classification with appropriate salary and retroactive pay.

After a study revealed that the petitioners were indeed performing the same duties as required for Economic Service Worker III, the Commission modified the classifications, eliminating the Economic Service Worker III, and differentiating between the I and II classifications by the "level of difficulty of the duties per-

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[95] *Id.*

[96] AFSCME v. Civil Service Commission of West Virginia, 324 S.E.2d 363 (W. Va. 1984).

[97] *Id.* at 367. *See* W. Va. Code § 29-6-10 (1980) which provides in part:
Each employee shall be paid at one of the rates set forth in the pay plan for the class of position in which he is employed. The principle of equal pay for equal work in the several agencies of the state government shall be followed in the pay plan as established hereby.

formed and responsibility assumed."[98] However, even after this finding the Commission denied the petitioners retroactive pay.[99]

The court determined that the petitioners were entitled to the difference in compensation between the Economic Service Worker I and II classifications and the III classification.[100] Chief Justice McHugh cited *Theroux v. State*,[101] in which certain California employees were arbitrarily excluded from a statutory salary adjustment. In finding the employees were entitled to retroactive pay, the California court in *Theroux* concluded: "During the period in question respondent's right to full compensation for services rendered matured immediately upon their rendition, regardless of the date the amount of such compensation was finally fixed."[102] Likewise, the West Virginia court in *AFSCME* ruled that the petitioners were entitled to retroactive pay for the *entire* period in which they were performing the same duties as the Economic Service Worker III employees.[103]

The original classifications formulated by the Department were anomalous to the principle of "equal pay for equal work" because they created three separate pay scales for employees doing essentially the same work. To be consistent with the court's decision, the Civil Service Commission must not only grant retroactive pay to employees for the period in which they worked out of classification, but also use precision and detail in the formation of such classification.

In the second public employment case decided in the survey period, the court clarified the distinction between "public officials" and "public employees" for the purpose of removal of an employee. In *Mullins v. Kiser*,[104] the court ruled that a public school teacher was a public employee, and subject to the removal provisions of West Virginia Code section 18A-2-8.[105]

The West Virginia Code provisions concerning the removal of a public official are separate and distinct from provisions concerning removal of a public employee.[106] Although the Code states these provisions clearly and succinctly, it does not define exactly what constitutes a public official and a public employee. The distinction between job titles therefore must be clarified judicially, as the court in *Mullins* has done.

David Kiser was a tenured high school teacher whose removal was sought by petitioners, residents of Lincoln County. The petitioners alleged that Kiser directed five students to hold a learning disabled student captive for an afternoon.[107] Peti-

[98] *AFSCME*, 324 S.E.2d at 365.
[99] *Id.*
[100] *Id.* at 367.
[101] Theroux v. State, 152 Cal. App.3d 1, 199 Cal. Rptr. 264 (1984).
[102] *Id.* at 8, 199 Cal. Rptr. at 267-68.
[103] *AFSCME*, 324 S.E.2d at 367.
[104] Mullins v. Kiser, 331 S.E.2d 494 (W. Va. 1985).
[105] W. VA. CODE § 18A-2-8 (1984).
[106] *Mullins*, 331 S.E.2d at 495.
[107] *Id.*

tioners filed suit in the circuit court to have Kiser removed under the provisions of section 6-6-7, asserting that Kiser was a public official.[108]

In holding that a teacher is a public employee and not a public official, the court cited its own test articulated in *Christopher v. City of Fairmont*:

> As a general rule it may be stated that a position is a public office when it is created by law, with duties cast on the incumbent which involve an exercise of some portion of the sovereign power and in the performance of which the public is concerned, and which are continuing in their nature and not occasional or intermittent. But one who merely performs the duties required of him by persons employing him under an express or implied contract, though such persons themselves be public officers, and though the employment be in or about public work or business, is a mere employee.[109]

A public school teacher's position is not created by law, nor does it exercise any portion of sovereign power of the state. A teacher may perform duties under the direction of public officials, but is not himself a public official.

The reason behind the petitioners' suit was the fear that the Code provisions for the removal of public employees were ineffective. Specifically, they assert that they had no recourse if the Board decided not to act, and that if the Board did act, it must allow an "improvement period."[110]

Justice Brotherton's opinion assuaged these fears by explaining that the Board has a duty to act upon a citizen's complaint and may be compelled to do so by appropriate legal action if its inaction is arbitrary.[111] Also, the "improvement period" requirement applies only to correctable behavior and it does not prevent immediate discharge in appropriate circumstances.[112]

The court's holding in *Mullins* reaffirmed the fact that the *Christopher* test is determinative of whether an individual is a public official or a public employee. Yet, the court correctly pointed out that the difference in the removal provisions in the West Virginia Code do not create unfair barriers for the removal of a public school teacher. A teacher may be dismissed on a complaint initiated by a citizen outside the school system,[113] and the School Board has a legal duty to act upon such complaints.[114]

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[108] *Id.* at 494.

[109] Christopher v. City of Fairmont, 280 S.E.2d 284, 285 (W. Va. 1981), quoting State *ex rel.* Key v. Bond, 94 W. Va. 255, 260, 118 S.E. 276, 279 (1923).

[110] *Mullins*, 331 S.E.2d at 496. *See* West Virginia Board of Education Policy No. 5300(6)(a).

[111] *Mullins*, 333 S.E.2d at 496. *See* Mason Co. Board of Education v. State Superintendent of Schools, 274 S.E.2d 435 (W. Va. 1981), and State *ex rel.* Withers v. Board of Education, 153 W. Va. 867, 172 S.E.2d 796 (1970).

[112] *Mullins*, 331 S.E.2d at 496.

[113] *Mason County*, 274 S.E.2d at 439.

[114] In at least one way it is easier to bring an action to remove a public employee than a public official. Note that five or more voters are needed to bring a complaint in W. VA. CODE § 6-6-7 (1979), whereas a sole citizen may bring a complaint under W. VA. CODE § 18A-2-8 (1984).

In the third public employment case, *West Virginia University Association of Concerned Employees v. Saunders*,[115] the court addressed the constitutionality of a regulation promulgated by the Board of Regents. Because "public officials are not free to promulgate clearly unconstitutional regulations impinging upon the first amendment rights of thousands of State employees," the court found the Board's "no solicitation" policy unconstitutionally broad.[116]

The petitioners, who allegedly violated the "no solicitation" policy, sought a writ of mandamus against the Board compelling modification of the policy.[117] The Board, under court directions to show good cause why the petitioners' request should not be awarded, modified the policy and moved to dismiss the petition as moot. The modified policy provided, in relevant part, that, "[e]xcept to solicit participation in official University programs and activities, no University employee or other person shall solicit organizational memberships during declared work time in working areas of the University."[118]

The court found that, although the modification ameliorated most of the vagueness and overbreadth of the previous policy, it was still overly broad with respect to its worktime and workplace prohibitions.[119] In particular, the court found that the definition of "declared work time" as "the period from the commencement of a work shift to the meal break and from the end of the meal break to the end of the work shift"[120] to be overly broad.

Because the stated goal of the policy was to maintain "continuous service, order and discipline,"[121] the policy should have exempted not only meal breaks but also coffee breaks and other periods of the work day when work tasks were not being performed.[122] In order to accomodate the important constitutional interests involved, the court declared that the "no solicitation" policy must be limited to "while work tasks are being performed."[123]

Based on its findings, the court ordered the removal from the petitioners' personnel records of all references to their alleged violations of the policy. The court also awarded the petitioners' attorney's fees payable from the general operating funds of West Virginia University.[124]

The court's decision is illustrative of the principle that regulations governing the exercise of free speech rights must be both narrowly and clearly drawn.[125]

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[115] West Virginia Univ. Ass'n of Concerned Employees v. Saunders, No. 161-85, slip op. (W. Va. July 1, 1985).

[116] *Id.* at 2.

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] *Id.* at 2-3.

[124] *See* Allen v. Human Rights Comm'n, 324 S.E.2d 99, 127 (W. Va. 1984).

[125] *Saunders*, No. 161-85, slip op. at 2.

Although it infers that a correctly phrased "no solicitation" policy is a constitutionally sound regulation of free speech rights which would ensure "continuous service, order, and discipline," *Board of Regents* is indicative of the narrowness to which such regulations must be drawn to pass constitutional muster.

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