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Civil Rights

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I. Liquidated Damages Clause

Justice McHugh wrote in *Wheeling Clinic v. Van Pelt*[745] that

> [i]n determining whether a clause in a contract stating a sum to be paid in the event of a breach of the contract is liquidated damages or a penalty, the important question is not the intention of the parties but rather the reasonableness in fact of the agreed sum when the contract was made.[746]

J. Promissory Note

Justice McHugh held in *Young v. Sodaro*[747] that "[u]nder the rule of perfect tender in time, a debtor, absent statutory authority or contractual language to the contrary, has no right to prepay a promissory note secured by a deed of trust prior to the date of maturity."[748]

XIII. CIVIL RIGHTS

A. Judicial Review of Decision by Human Rights Commission

In *State ex rel. State of West Virginia Human Rights Commission v. Logan-Mingo Area Mental Health Agency, Inc.*,[749] Justice McHugh held:

> A determination, by the West Virginia Human Rights Commission, that an employer has accorded disparate treatment to members of different races, is a finding of fact which may not be reversed by a circuit court upon review, unless such finding is clearly wrong in view of the reliable, probative and substantial evidence on the whole record.[750]

B. Sufficiency of Administrative Complaint

Justice McHugh addressed several issues concerning prerequisites of a discrimination complaint filed with the Human Rights Commission in the case of

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745 453 S.E.2d 603 (W. Va. 1994).

746 *Id.* at Syl. Pt. 5.

747 456 S.E.2d 31 (W. Va. 1995).

748 *Id.* at Syl.

749 329 S.E.2d 77 (W. Va. 1985).

750 *Id.* at Syl. Pt. 5.

McJunkin Corp. v. West Virginia Human Rights Commission.[751] Justice McHugh held:

> In an administrative adjudication before the West Virginia Human Rights Commission, a complaint alleging a violation or violations of the West Virginia Human Rights Act, *W.Va. Code*, 5-11-1 to 5-11-19, as amended, must be sufficient to advise the adversarial party of the matters charged, and the charges must be adequately clear and specific to allow preparation of a defense.[752]

Justice McHugh also stated:

> An allegation of an illegal layoff contained in a complaint to the West Virginia Human Rights Commission does not encompass an allegation of an illegal failure to rehire where no allegation relating to such failure to rehire is filed or where no amendment regarding such failure is made to the complaint within 180 days after the failure to rehire.[753]

Justice McHugh concluded:

> Where an issue is not raised by the complainant in a complaint to the West Virginia Human Rights Commission, the Commission's hearing examiner is precluded from independently raising the issue and deciding it on the merits where the respondent has not received adequate notice of the issue in the form of a complaint or an amendment thereto nor had an opportunity to defend his or her position, provided that the issue not raised in the complaint or an amendment thereto is not heard by the express or implied consent of the parties.[754]

C. *Subpoena Authority of Human Rights Commission*

Justice McHugh examined the subpoena power of the Human Rights Commission in the case of *West Virginia Human Rights Commission v. Moore.*[755] The decision held as follows:

> A subpoena duces tecum, issued to an employer by the West Virginia Human Rights Commission is enforceable even where

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751 369 S.E.2d 720 (W. Va. 1988).

752 *Id.* at Syl. Pt. 2.

753 *Id.* at Syl. Pt. 3.

754 *Id.* at Syl. Pt. 4.

755 411 S.E.2d 702 (W. Va. 1991).

> the complainant/employee has signed a release waiving all claims against the employer which might arise out of the employment relationship, because the legislature has granted the Commission the authority to investigate alleged discriminatory practices pursuant to *W.Va. Code*, 5-11-10, as amended, and the authority to issue a subpoena duces tecum pursuant to *W.Va. Code*, 5-11-8(d)(1), as amended. Additionally, the procedural requirements of issuing such a subpoena duces tecum must have been met and the evidence sought by the Commission must be relevant and material to the investigation.[756]

D. Definitions

Justice McHugh held in *Shepherdstown Volunteer Fire Department v. State ex rel. State of West Virginia Human Rights Commission*[757] that

> [a] volunteer fire department, organized and operated pursuant to the laws of the State of West Virginia, and which receives funding from public sources, is a "place of public accommodations" as defined by *W.Va. Code*, 5-11-3(j) [1981], and is thereby subject to the provisions of The West Virginia Human Rights Act, as amended, *W.Va. Code*, 5-11-1 *et seq.*[758]

Justice McHugh stated in *Board of Education of County of Lewis v. West Virginia Human Rights Commission*[759] that "[a] county board of education is a "person" pursuant to *W.Va. Code*, 5-11-3(a), as amended, and a "place of public accommodations" pursuant to *W.Va. Code*, 5-11-3(j), as amended, and, therefore, may not discriminate against the handicapped in violation of *W.Va. Code*, 5-11-9(f), as amended."[760]

In *Chico Dairy Co., Store No. 22 v. West Virginia Human Rights Commission*,[761] Justice McHugh was concerned with the procedure used by the Human Rights Commission to define a statutory term. The court held:

> The rule of the West Virginia Human Rights Commission, 6 *W.Va. Code of State Rules* § 77-1-2.7 (1982), defining a "handicapped person," for purposes of the West Virginia Human Rights Act, to include a person who does not in fact have a

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756 *Id.* at Syl.

757 309 S.E.2d 342 (W. Va. 1983).

758 *Id.* at Syl. Pt. 1.

759 385 S.E.2d 637 (W. Va. 1989).

760 *Id.* at Syl. Pt. 2.

761 382 S.E.2d 75 (W. Va. 1989).

> "handicap," as defined by *W.Va. Code*, 5-11-3(t), as amended, but who "is regarded as having such a handicap," is invalid. That rule is a "legislative rule" under *W.Va. Code*, 29A-1-2(d), as amended, but was not submitted to the legislative rule-making review committee for its approval, as required by *W.Va. Code*, 29A-3-9 to 29A-3-14, as amended.[762]

Justice McHugh ruled in *Benjamin R. v. Orkin Exterminating Co.*[763] that "[a] person at any stage of infection with the human immunodeficiency virus, including a person who has tested positive for the antibodies to such virus but who is asymptomatic, is a person with a 'handicap' within the meaning of *W.Va. Code*, 5-11-3(t) [1981]."[764]

Justice McHugh said in *Dobson v. Eastern Associated Coal Corp.*[765] that "[i]n a case brought under the West Virginia Human Rights Act, *W.Va. Code*, 5-11-1, *et seq.*, an offer of reinstatement that is subject to the passing of a physical examination is not an 'unconditional' offer of reinstatement."[766]

Justice McHugh stated in *Woodall v. International Brothers of Electric Workers, Local 596*[767] that

> [p]ursuant to the West Virginia Human Rights Act, set forth in *W.Va. Code*, 5-11-1 *et seq.*, a labor organization is liable for unlawful discriminatory practices in its capacity as an employer only if it meets the definition of employer set forth in *W.Va. Code*, 5-11-3(d) [1981] because *W.Va. Code*, 5-11-9(c) [1981] only applies to a labor organization's representative capacity which involves its dealings with employers and union members.[768]

Justice McHugh also held that

> [p]ursuant to *W.Va. Code*, 5-11-3(e) [1981] officers and directors of a corporation are not employees for jurisdictional purposes under the West Virginia Human Rights Act unless they have additional duties which qualify them as employees outside of their

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762 *Id.* at Syl. Pt. 1.

763 390 S.E.2d 814 (W. Va. 1990).

764 *Id.* at Syl.

765 422 S.E.2d 494 (W. Va. 1992).

766 *Id.* at Syl. Pt. 5.

767 453 S.E.2d 656 (W. Va. 1994).

768 *Id.* at Syl. Pt. 1.

duties as officers and directors.[769]

In *Williamson v. Greene*,[770] Justice McHugh held that

> [p]ursuant to *W.Va. Code* 5-11-3(d) [1994] of the West Virginia Human Rights Act, the term "employer" means the state, or any political subdivision thereof, and any person employing twelve or more persons within the state: Provided, That such terms shall not be taken, understood or construed to include a private club. To be an "employer" under *W.Va. Code*, 5-11-3(d) [1994], a person must have been employing twelve or more persons within the state at the time the acts giving rise to the alleged unlawful discriminatory practice were committed.[771]

E. Employment Discrimination Based on Handicap

Justice McHugh outlined the burden of proof in cases alleging handicap discrimination in employment discharge, in the case of *Morris Memorial Convalescent Nursing Home, Inc. v. West Virginia Human Rights Commission*.[772] Justice McHugh held that

> [i]n order to establish a case of discriminatory discharge under *W.Va. Code*, 5-11-9 [1989], with regard to employment because of a handicap, the complainant must prove as a prima facie case that (1) he or she meets the definition of "handicapped," (2) he or she is a "qualified handicapped person," and (3) he or she was discharged from his or her job. The burden then shifts to the employer to rebut the complainant's prima facie case by presenting a legitimate nondiscriminatory reason for such person's discharge. If the employer meets this burden, the complainant must prove by a preponderance of the evidence that the employer's proffered reason was not a legitimate reason but a pretext for the discharge.[773]

In *Hosaflook v. Consolidation Coal Co.*,[774] Justice McHugh held that

> [i]n order to establish a prima facie case of handicap

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769 *Id.* at Syl. Pt. 3.

770 490 S.E.2d 23 (W. Va. 1997).

771 *Id.* at Syl. Pt. 4.

772 431 S.E.2d 353 (W. Va. 1993).

773 *Id.* at Syl. Pt. 2.

774 497 S.E.2d 174 (W. Va. 1997).

> discrimination pursuant to W.Va. Code, 5-11-9 [1992] of the West Virginia Human Rights Act, which provides that it is unlawful "[f]or any employer to discriminate against an individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment if the individual is able and competent to perform the services required even if such individual is . . . handicapped[,]" a claimant must prove, inter alia, that he or she is a "qualified handicapped person" as that term is defined in 77 C.S.R. § 1-4.2 [1991]. 77 C.S.R. § 1-4.2 [1991] defines "qualified handicapped person" as "an individual who is able and competent, with reasonable accommodation, to perform the essential functions of the job in question." Furthermore, 77 C.S.R. § 1-4.3 [1991] defines "able and competent" as "capable of performing the work and can do the work[.]" An individual who can no longer perform the essential functions of a job either with or without reasonable accommodation and, thus, who is receiving benefits under a salary continuance plan which does not provide otherwise, is not performing the essential functions of a job by being a benefit recipient. Therefore, that person is not a "qualified handicapped person" within the meaning of the West Virginia Human Rights Act.[775]

F. Discrimination Based on Mental Impairment

Justice McHugh addressed the issue of employment discrimination against the mentally ill in the case of *State ex rel. Ash v. Randall*.[776] The opinion held initially that "*W.Va. Code*, 27-5-9(a) [1977], provides, inter alia, that '[n]o person shall be deprived of any civil right solely by reason of his receipt of services for mental illness.'"[777] Justice McHugh then ruled that

> [w]here an employee has been discharged from employment in violation of the provisions of W.Va. Code, 27-5-9(a) [1977], "solely by reason of his receipt of services for mental illness," that employee in contesting the discharge must nevertheless establish under Hurley v. Allied Chemical Corporation, 164 W.Va. 757, 262 S.E.2d 757 (1980), that he or she is "otherwise qualified" for that employment, which means that the mental illness would not impair his or her ability to perform the duties of that employment.[778]

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775 *Id.* at Syl. Pt. 6 (alterations in original).

776 301 S.E.2d 832 (W. Va. 1983).

777 *Id.* at Syl. Pt. 1.

778 *Id.* at Syl. Pt. 2.

G. Discrimination Based on Pregnancy

Justice McHugh addressed the issue of employment discrimination against a pregnant female employee in the case of *Frank's Shoe Store v. West Virginia Human Rights Commission.*[779] The opinion held at the outset that "[d]iscrimination based upon pregnancy constitutes illegal sex discrimination under the West Virginia Human Rights Act, *W.Va. Code*, 5-11-9(a) [1981]."[780] Justice McHugh wrote next that "[w]hen a pregnant employee who capably performs her duties experiences a reduction in work hours, solely because of her pregnant condition, such action by the employer constitutes illegal discrimination based upon the employee's sex and is violative of *W.Va. Code*, 5-11-9(a) [1981]."[781] The decision then outlined the elements of a plaintiff's burden of proof on a claim of retaliatory discharge under the Human Rights Act:

> In an action to redress an unlawful retaliatory discharge under the West Virginia Human Rights Act, *W.Va. Code*, 5-11-1, *et seq.*, as amended, the burden is upon the complainant to prove by a preponderance of the evidence (1) that the complainant engaged in protected activity, (2) that complainant's employer was aware of the protected activities, (3) that complainant was subsequently discharged and (absent other evidence tending to establish a retaliatory motivation) (4) that complainant's discharge followed his or her protected activities within such period of time that the court can infer retaliatory motivation.[782]

Justice McHugh concluded the opinion by holding that "[a]n award of back pay is proper in a case where an employer has violated *W.Va. Code*, 5-11-9(a) [1981], by reducing work hours for discriminatory reasons of a pregnant employee and ultimately discharging her in retaliation for her involvement in protected activities."[783]

H. Discrimination Based on Age

Justice McHugh addressed the use of statistical evidence to prove age discrimination in *Dobson v. Eastern Associated Coal Corp.*[784] The decision held that

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779 365 S.E.2d 251 (W. Va. 1986).

780 *Id.* at Syl. Pt. 2.

781 *Id.* at Syl. Pt. 3.

782 *Id.* at Syl. Pt. 4.

783 *Id.* at Syl. Pt. 5.

784 422 S.E.2d 494 (W. Va. 1992).

> [s]tatistical evidence may be employed by a plaintiff in proving a claim of age discrimination in employment under the West Virginia Human Rights Act, *W.Va. Code*, 5-11-1, *et seq.* Under Rule 702 of the West Virginia Rules of Evidence it is not an abuse of discretion for the circuit court to allow the use of such statistical evidence if the defendant has the opportunity to rebut the same.[785]

I. Sexual Harassment

Justice McHugh outlined the burden of proof on a claim of sexual harassment in the case of *Westmoreland Coal Co. v. West Virginia Human Rights Commission*.[786] The court held:

> In order to prove "quid pro quo" sexual harassment at the workplace, the complainant must prove: (1) that the complainant belongs to a protected class; (2) that the complainant was subject to an unwelcome sexual advance by an employer, or an agent of the employer who appears to have the authority to influence vital job decisions; and (3) the complainant's reaction to the advancement was expressly or impliedly linked by the employer or the employer's agent to tangible aspects of employment.[787]

Justice McHugh also held that "[t]he fact that sex-related conduct was 'voluntary,' in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit."[788]

J. Discrimination Based on Hearing Impairment

Justice McHugh held in *Board of Education of County of Lewis v. West Virginia Human Rights Commission*[789] that

> [h]earing-impaired children, between five and twenty-three years of age, are handicapped for purposes of *W.Va. Code*, 18-20-1, as amended. Therefore, when a county board of education fails to provide an appropriate education for a hearing-impaired child between five and twenty-three years of age, such failure constitutes unlawful discrimination based upon handicap and is

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785 *Id.* at Syl. Pt. 3.

786 382 S.E.2d 562 (W. Va. 1989).

787 *Id.* at Syl. Pt. 1.

788 *Id.* at Syl. Pt. 2.

789 385 S.E.2d 637 (W. Va. 1989).

violative of *W.Va. Code*, 5-11-9(f), as amended.[790]

K. Lawful Discrimination

Justice McHugh made a distinction in *Chico Dairy Co., Store No. 22 v. West Virginia Human Rights Commission*[791] between employment discrimination practices that are unlawful and employment discrimination practices that are not prohibited by law. The court held that

> [i]t is an unlawful discriminatory practice under the West Virginia Human Rights Act for an employer to refuse to offer a job promotion to an employee on account of the person's "handicap," as defined by *W.Va. Code* § 5-11-3(t), as amended. However, where a complainant never alleges, and the evidence does not indicate, that the discrimination was on account of the complainant's "handicap," as statutorily defined, but solely because the employer regarded the complainant's physical appearance to be unacceptable, the conduct of the employer is not actionable under the clearly restrictive definition of "handicap" contained in the West Virginia Human Rights Act.[792]

L. Burden of Proof in Hiring Discrimination

In *Shepherdstown Volunteer Fire Department v. State ex rel. State of West Virginia Human Rights Commission*,[793] Justice McHugh outlined the burden of proof in cases alleging discrimination in employment hiring and access to places of public accommodations. Justice McHugh held that

> [i]n an action to redress unlawful discriminatory practices in employment and access to "place[s] of public accommodations" under The West Virginia Human Rights Act, as amended, *W.Va. Code*, 5-11-1 *et seq.*, the burden is upon the complainant to prove by a preponderance of the evidence a prima facie case of discrimination, which burden may be carried by showing (1) that the complainant belongs to a protected group under the statute; (2) that he or she applied and was qualified for the position or opening; (3) that he or she was rejected despite his or her qualifications; and (4) that after the rejection the respondent continued to accept the applications of similarly qualified persons. If the complainant is successful in creating this rebuttable

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790 *Id.* at Syl. Pt. 3.

791 382 S.E.2d 75 (W. Va. 1989).

792 *Id.* at Syl. Pt. 3.

793 309 S.E.2d 342 (W. Va. 1983).

> presumption of discrimination, the burden then shifts to the respondent to offer some legitimate and nondiscriminatory reason for the rejection. Should the respondent succeed in rebutting the presumption of discrimination, then the complainant has the opportunity to prove by a preponderance of the evidence that the reasons offered by the respondent were merely a pretext for the unlawful discrimination.[794]

Justice McHugh outlined the burden for setting out a prima facie case of discriminatory discharge in *State ex rel. State of West Virginia Human Rights Commission v. Logan-Mingo Area Mental Health Agency, Inc.*[795] The opinion held that

> [a] complainant in a disparate treatment, discriminatory discharge case brought under the West Virginia Human Rights Act, [W.Va.] Code, 5-11-1, *et seq.*, may meet the initial prima facie burden by proving, by a preponderance of the evidence, (1) that the complainant is a member of a group protected by the Act; (2) that the complainant was discharged, or forced to resign, from employment; and (3) that a nonmember of the protected group was not disciplined, or was disciplined less severely, than the complainant, though both engaged in similar conduct.[796]

Justice McHugh elaborated on the burden of proof in employment discrimination in the case of *West Virginia Institute of Technology v. West Virginia Human Rights Commission.*[797] Justice McHugh stated that "[t]he complainant's prima facie case of disparate-treatment employment discrimination can be rebutted by the employer's presentation of evidence showing a legitimate and nondiscriminatory reason for the employment-related decision in question which is sufficient to overcome the inference of discriminatory intent."[798] Justice McHugh noted:

> The complainant will still prevail in a disparate-treatment employment discrimination case if the complainant shows by the preponderance of the evidence that the facially legitimate reason given by the employer for the employment-related decision is

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

795 329 S.E.2d 77 (W. Va. 1985).

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

797 383 S.E.2d 490 (W. Va. 1989).

798 *Id.* at Syl. Pt. 2.

merely a pretext for a discriminatory motive.[799]

The court shifted its focus in holding that

> [u]nlawful employment discrimination in the form of compensation disparity based upon a prohibited factor such as race, gender, national origin, etc., is a "continuing violation," so that there is a present violation of the antidiscrimination statute for as long as such compensation disparity exists; that is, each paycheck at the discriminatory rate is a separate link in a chain of violations.[800]

Justice McHugh concluded by holding that "*W.Va. Code*, 5-11-10, as amended, does not authorize a 'cap' or time limits on back pay in continuing violation cases."[801]

M. Liability of State for Unlawful Discrimination

In *Kerns v. Bucklew*,[802] Justice McHugh determined whether the state's constitutional immunity from civil liability shielded the state from liability under state and federal civil rights laws. Justice McHugh held that

> [i]n addition to the overriding effect of the supremacy clause of the Constitution of the United States (art. VI, cl. 2) upon contrary state law, federal legislation which is expressly authorized by section 5 of the fourteenth amendment to the Constitution of the United States and which implements such amendment will by its own force override contrary state constitutional or statutory law, such as governmental immunity (W.Va. Const. art. VI, § 35), which state law provides less protection or relief than provided by the fourteenth amendment and its implementing legislation, such as the Equal Employment Opportunity Act of 1972, as amended, 42 U.S.C. §§ 2000e to 2000e-17 (1982).[803]

Justice McHugh continued in *Kerns* by holding:

> Affirmative relief, such as an award of back pay and reasonable attorney's fees, is recoverable against the State of West Virginia as an employer in employment discrimination cases adjudicated

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799 *Id.* at Syl. Pt. 3.

800 *Id.* at Syl. Pt. 4.

801 *Id.* at Syl. Pt. 5.

802 357 S.E.2d 750 (W. Va. 1987).

803 *Id.* at Syl. Pt. 1.

> before the West Virginia Human Rights Commission or in the court system of this State, as well as being recoverable in actions or proceedings in federal forums, state constitutional governmental immunity notwithstanding. In employment discrimination cases the federal law, which is paramount, is intended by the fourteenth amendment and Congress to "be vindicated at the state or local level."[804]

N. Public Policy Cause of Action Against Exempt Employer

Justice McHugh determined in *Williamson v. Greene*[805] whether an employer, not covered under the Human Rights Act, could nevertheless be brought within the Act through public policy. The court held:

> Even though a discharged at-will employee has no statutory claim for retaliatory discharge under *W.Va. Code,* 5-11-9(7)(C) [1992] of the West Virginia Human Rights Act because his or her former employer was not employing twelve or more persons within the state at the time the acts giving rise to the alleged unlawful discriminatory practice were committed, as required by *W.Va. Code,* 5-11-3(d) [1994], the discharged employee may nevertheless maintain a common law claim for retaliatory discharge against the employer based on alleged sex discrimination or sexual harassment because sex discrimination and sexual harassment in employment contravene the public policy of this State articulated in the West Virginia Human Rights Act, *W.Va. Code,* 5-11-1, *et seq.*[806]

O. Damages Under Human Rights Act

Justice McHugh noted in *Dobson v. Eastern Associated Coal Corp.*[807] that "[w]here a plaintiff, as an alternative to filing a complaint with the Human Rights Commission, has initiated an action in circuit court to enforce the West Virginia Human Rights Act, *W.Va. Code*, 5-11-1, *et seq.*, then he or she may recover damages sounding in tort."[808]

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804 *Id.* at Syl. Pt. 2.

805 490 S.E.2d 23 (W. Va. 1997).

806 *Id.* at Syl. Pt. 8.

807 422 S.E.2d 494 (W. Va. 1992).

808 *Id.* at Syl. Pt. 4.