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West Virginia's New Workers' Compensation Anti-Discrimination Provision: The Road to Court is Paved with Good Intentions

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WEST VIRGINIA'S NEW WORKERS' COMPENSATION ANTI-DISCRIMINATION PROVISION: THE ROAD TO COURT IS PAVED WITH GOOD INTENTIONS

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I. INTRODUCTION

During a special session in the summer of 1990, the West Virginia Legislature made significant changes to the West Virginia Workers' Compensation Act.¹ The Legislature provided for a "trial return to work" program, "special vocational rehabilitation benefits" and converted the adjudicatory process to an administrative law judge system.² Another area in which the Legislature left a distinctive mark can be found in the statutory revisions addressing discrimination against employees who seek benefits under the Workers' Compensation Act.³

². Id.
³. W. Va. Code § 23-5A-3 (Supp. 1991). The revisions made during the special session added a new section to the Article dealing with "discriminatory practices." This new section will be referred to throughout this Article as "Section 3," and its two principal subsections as "Subsection 3(a)" and "Subsection 3(b)." Likewise, Section 3's older sibling, W. Va. Code § 23-5A-1 (1985), will be referred to as "Section 1."
For a number of years, the West Virginia Workers' Compensation Act has forbidden intentional discrimination by employers against the recipients of workers' compensation benefits. The 1990 amendments now make it a discriminatory practice for an employer to terminate an employee who is drawing or is eligible to draw temporary total disability (TTD) benefits or to fail to reinstate an employee who is able to return to work. For the most part, this new provision operates without requiring any showing of malice or evil intent on the part of the employer. As such, the new provision has the potential to embroil employers in unexpected litigation and to significantly curtail the employer's traditional latitude in managing its work force. The effects will be especially prevalent in the coal industry, an industry by its nature prone to experience much involvement with the workers' compensation system. The purpose of this Article is to provide a brief discussion of the evolution of workers' compensation discrimination law, an overview of the new provision (Section 3), a survey of other jurisdictions having statutes similar to the newly enacted Section 3, a comparison of Section 3 to a proposed model act, and, finally, an analysis of issues likely to arise under the vague and ambiguous language employed by Section 3.

II. A BRIEF HISTORY OF WORKERS' COMPENSATION DISCRIMINATION LAW

An extensive discussion of the nation's statutory and case law on the issue of workers' compensation discrimination is beyond the scope of this Article. The cases are numerous and, likewise, there

6. For the year ended June 30, 1990, the West Virginia coal industry had 8,648 workers' compensation claims of one type or another. 1990 W. VA. WORKERS' COMP. FUND ANN. REP. 30.
has been a proliferation of different statutes designed to address the perceived evil of workers' compensation discrimination.\(^8\) Nevertheless, a brief discussion is necessary to properly frame the topic at hand.

Although workers' compensation laws have been on the books for a number of years,\(^9\) efforts to protect employees who file claims for workers' compensation benefits are a relatively recent phenomena. The first reported decision in favor of the employee\(^10\) was *Frampton v. Central Indiana Gas Co.*\(^11\) Therein the Indiana court found an exception to the employment-at-will doctrine which had traditionally allowed an employer to fire an employee for a good reason, a bad reason, or no reason at all.\(^12\) The *Frampton* court recognized the conflict in allowing an employee to collect benefits while at the same time providing him with no protection from retaliation for pursuing his statutory remedy.\(^13\)

10. Actions by employees for retaliatory discharge had been rejected by courts in Missouri and South Carolina. Narens v. Campbell, Sixty-Six Express, Inc., 347 S.W.2d 204 (Mo. 1961); Christy v. Petrus, 295 S.W.2d 122 (Mo. 1956); Raley v. Darling Shop, 59 S.E.2d 148 (S.C. 1950).
12. The foundation for the employment-at-will doctrine runs deep in American law. Payne v. Western & A. R. R., 81 Tenn. 507, 520 (1884), *overruled on other grounds*, Hutton v. Watters, 179 S.W. 134 (Tenn. 1915) (an employer may discharge an employee even for a "cause [that is] morally wrong"); Fidelity & Cas. Co. v. Gibson, 135 Ill. App. 290, *aff'd*, 83 N.E. 539 (Ill. 1907) (employer has lawful right to discharge employee with or without cause, for any reason, however capricious and unfounded it may be).
13. [Workers' compensation law] creates a duty in the employer to compensate employees for work-related injuries (through insurance) and a right in the employee to receive such compensation. But in order for the goals of the Act to be realized and for public policy to be effectuated, the employee must be able to exercise his right in an unfettered fashion without being subject to reprisal. If employers are permitted to penalize employees for filing [workers'] compensation claims, a most important public policy will be undermined. The fear of being discharged would have a deleterious effect on the exercise of a statutory right. Employees will not file claims for justly deserved compensation — opting, instead, to continue their employment without incident. The end result, of course, is that the employer is effectively relieved of his obligation. *Frampton*, 297 N.E.2d at 427 (emphasis in original).

The *Frampton* decision was followed closely in time by other notable decisions such as Sventko v. Kroger Co., 245 N.W.2d 151 (Mich. Ct. App. 1976) (discharge of employee in retaliation for filing
The reasoning supporting a common law remedy for the injured employee discriminated against for pursuing workers' compensation benefits derives in part from the philosophical underpinnings of workers' compensation systems generally. The intent of workers' compensation is to shift the cost of doing business, as measured in human injury and loss of life, from the employee to the employer, and eventually on to the consumer. In exchange for a system of compensation without fault, the employee is precluded from suing employers under common law tort theories. Hence, the employee exchanges one right for another. As the Frampton court recognized, "in order for the [bargain] to be effectuated, the employee must be able to exercise his right in an unfettered fashion without being subject to reprisal." The Supreme Court of Illinois, in Kelsay v. Motorola, Inc., further noted that allowing employers to exercise their discharge right without restriction forces employees to choose between their right to benefits and to employment.

It is against this backdrop that the case of Shanholtz v. Monongahela Power Co. came to the Supreme Court of Appeals of West Virginia. Shanholtz was injured during the course of his employment with his employer, Monongahela Power. He apparently suffered some type of trauma when a cart in which he was a passenger was driven into a door. He received temporary benefits and returned to work. Later that year he began to suffer "severe nose-bleeds" and, consequently, received an eight-week medical leave.

workmens' compensation claim violated public policy even though the Michigan Workmen's Compensation Act did not prohibit retaliatory discharge) and Kelsay v. Motorola, Inc., 384 N.E.2d 353 (Ill. 1978) (retaliatory discharge of an employee for pursuing a workmens' compensation claim offended the public policy of Illinois as manifested in the Workmens' Compensation Act).

17. 384 N.E.2d 353 (Ill. 1978).
18. Id. Professor Larson has also stated that "[i]f . . . an employer could with impunity coerce an employee into foregoing his rights, the employer could unilaterally defy and destroy the function of the act, and at the same time relieve himself of an obligation deliberately imposed on him by the legislature." 2A ARTHUR LARSON, THE LAW OF WORKMEN'S COMPENSATION § 68.36(a), at 13-180 (1952).
Shanholtz thereafter applied for occupational disease benefits. After protest hearings and an appeal to the Workmen's Compensation Appeal Board, the claim was held to be work related, compensable, and chargeable to Shanholtz's employer.\(^{20}\)

Three weeks after Shanholtz applied for occupational disease benefits, his employer terminated his employment. The reason given for his termination was that Shanholtz was "unable to satisfactorily fulfill [his] job requirements."\(^{21}\) Shanholtz, although given his termination letter on October 13, 1976, did not file suit until August 14, 1979. He alleged that his employer had discriminated against him for pursuing his right to benefits under the Workers' Compensation Act.\(^{22}\)

The West Virginia Supreme Court of Appeals, confronted with three certified questions from the trial court which had dismissed the complaint as untimely,\(^{23}\) held first that the cause of action sounded in tort rather than contract. Hence, it applied a two-year limitations period rather than a five-year period. Otherwise, the court sanctioned the plaintiff's cause of action as being cognizable under West Virginia law.

The *Shanholtz* court cited with approval the cases of *Frampton v. Central Indiana Gas Co.*\(^{24}\) and *Sventko v. Kroger Co.*\(^{25}\) More significantly, the court drew upon its earlier holding in *Harless v.*

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20. *Id.* at 180.
21. *Id.*
22. *Id.*
23. The three certified questions were as follows:
1. Does an employee, under an at-will employment contract, have a cause of action for breach of contract if the employer discharges him in retaliation for filing a workman's compensation claim, as stated in Count I of the plaintiff's complaint, thereby bringing him within the five-year rather than the two-year statute of limitations?
2. Is the cause of action stated in Counts II and III of plaintiff's complaint barred by the two-year statute of limitations?
3. Must W. Va. Code, Chapter 23, Article 5A, Section 1, be given retrospective or prospective application?

*Id.* The court answered the first question in the negative, the second in the affirmative, and as for the third, stated that prospective application must be given to the statute. The court never explained why the third certified question was germane to the case. *Id.*


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First National Bank in Fairmont, wherein the court acknowledged for the first time that the doctrine of employment-at-will had some limitations under West Virginia law:

We conceive that the rule giving the employer the absolute right to discharge an at will employee must be tempered by the further principle that where the employer's motivation for the discharge contravenes some substantial public policy principle, then the employer may be liable to the employee for damages occasioned by the discharge.

The court found the statute relied upon by Shanholtz, W. Va. Code § 23-5A-1 (Section 1), to be "a codification of . . . the law, that is, it is a contravention of public policy and actionable to discharge an employee because he filed a workmen's compensation claim against his employer." With its discussion of the prospective application of Section 1, the Shanholtz court muddied the waters as to whether a workers' compensation discrimination suit could exist absent the statement of legislative policy present in the statute. Nevertheless, the ambiguity created by the court's discussion would appear to be a moot point. The pertinent statute, Section 1, is firmly entrenched in the legislative scheme and in no danger of leaving workers' compensation discrimination as a cause of action to stand on its own in the common law realm. Moreover, no case has since come before the court which called into question the effective date of the statute.

In Stanley v. Sewell Coal Co., the West Virginia court addressed an issue left undecided by the Shanholtz decision. The sole issue before the court was the statute of limitations to be applied

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27. Id. at 275.
28. 270 S.E.2d at 183.
29. See supra note 23.
31. 285 S.E.2d 679 (W. Va. 1981). The Shanholtz case had not been decided as of the time the plaintiff in Stanley filed his suit. The plaintiff couched his suit in the language of a Harless-type action. He claimed that he had been discharged by his employer in an attempt to preclude discovery of false reporting of accidents to the Mine Enforcement Safety Administration. Because the plaintiff was involved in an accident which resulted in lost time, the facts suggest that a plaintiff today would have pursued a workers' compensation discrimination theory instead of, or in addition to, the pure Harless-type action. In any event, the court further wedded the workers' compensation discrimination suit to the doctrinal foundations of the Harless theory.
to the cause of action recognized in Harless and Shanholtz. The choice was between a one-year or two-year limitations period. The trial court had applied a one-year limitations period and had dismissed the plaintiff's civil action as untimely. The Supreme Court of Appeals concluded, however, "that the underlying principles of a retaliatory discharge cause of action are sufficiently related to an action for fraud and deceit so that the two-year statute of limitations applies under W. Va. Code § 55-2-12, and W. Va. Code § 55-7-8a."  

The West Virginia court next visited the area of workers' compensation discrimination in the case of Yoho v. Triangle PWC, Inc. Yoho had been badly injured in an industrial accident. Consequently, she was off work for more than a year. Pursuant to the terms of the collective bargaining agreement in effect at the time, Yoho was discharged on the twelve-month anniversary of her first absence. Yoho thereupon sued, alleging that her employer was guilty of (1) violating public policy, (2) a discriminatory discharge in violation of Section 1, and (3) intentional infliction of emotional distress. The court summarily rejected the claim of intentional infliction of emotional distress before turning to the other two theories for more substantive comment.

32. Id. at 683.
34. As the West Virginia court pointed out, the collective bargaining agreement did not by its terms decree that Yoho, or someone in her situation, be discharged; rather the agreement stripped all accrued seniority from an employee absent from work for more than a year. Insofar as Yoho's right to employment was rendered subordinate to the rights (i.e., seniority) of others, the employer had no alternative other than to discharge her. Id. at 210.
35. These theories were found in the plaintiff's amended complaint. In dismissing the plaintiff's original complaint, the trial court denied as being untimely the plaintiff's motion to amend her complaint. The Supreme Court of Appeals held that the motion to amend should have been allowed, but that the denial was not harmful in that other grounds existed for dismissing the plaintiff's claims. Id. at 207.
36. Because Yoho's firing was pursuant to the terms of a requirement in the collective bargaining agreement, the court held as a matter of law that Yoho's employer could not have been guilty of extreme or outrageous conduct. Id. at 209.
37. The court also held, as a preliminary matter, that Yoho's cause of action was not preempted by federal labor law, contrary to the trial court's holding. Presaging the United States Supreme Court's decision in Lingle v. Magic Chef, 486 U.S. 399 (1988), the West Virginia court found that the state causes of action did not call for the interpretation of a collective bargaining agreement and, therefore, did not conflict with the doctrine that principles of federal law should control collective bargaining agreements and their construction. Id. at 208. See discussion accompanying notes 180-246, infra.
As stated, Yoho had alleged that her discharge was in violation of a substantial public policy and, in addition, that her employer had violated Section 1, the statute forbidding discrimination against those receiving workers’ compensation. The court addressed first the public policy argument and then the purported statutory violation. Although the result would not have changed, logic would suggest that the court should have first considered the theory based in statute, it being of definite nature, and then considered the more nebulous public policy theory. Reversing the order of consideration, for purposes of this Article, casts light upon the Yoho decision as the conception point for the statutory amendments birthed by the Legislature in 1990.

The court had little difficulty in determining that Yoho’s discharge did not violate Section 1. That statute merely prohibits discrimination against an employee for receiving or attempting to receive workers’ compensation benefits. The court aptly observed that Yoho’s discharge had nothing to do with the receipt of benefits, per se. Rather, the discharge was mandated by a “facially neutral provision of the collective bargaining agreement.” Although Yoho was receiving workers’ compensation benefits, “she would have been terminated just as quickly under the collective bargaining agreement if she had never applied for those benefits.” This reasoning comports with the decisions of other jurisdictions with respect to facially neutral absence control policies.

The closer question, and the one receiving more discussion by the Yoho court, was whether the collective bargaining agreement’s facially neutral provision eliminating an absent employee’s seniority, and thereby effectuating a discharge, was violative of West Virginia’s public policy. The court expressed sympathy for a plaintiff who

38. Id. at 210.
39. Id.
41. The court had taken note of the principle, as expressed by the United States Supreme Court in Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985), that a collective bargaining agreement could not serve as a vehicle by which to circumvent a state law of neutral application. Id. at 270.
was forced to be off work for several months by an industrial accident and, in addition, caused to lose her job because of the absence. Nevertheless, the court was reluctant to declare the pertinent provisions of the collective bargaining agreement to be in violation of public policy. The court found the issue to be "fairly debatable or controversial in nature." The court noted that the effect of the seniority provision in question was not without merit:

It seems logical and fair that the union and [the employer] would put a cap on the accrual of seniority when an employee had been gone for over a year. During the year that he was gone the absent employee would not be learning any new job skills or keep [sic] up with the current industry practices. It is easy to see how the union and [the employer] agreed that the employee who stayed on the job for a longer time was more worthy of promotion and the other benefits of seniority than the employee who was out for a substantial period of time. 43

With words which perhaps served as an invitation to draft the new legislation, the Yoho court stated, "[t]he issue being debatable, we leave it for the legislature to decide." 44

42. In deciding to refrain from judicial activism, the Yoho court relied upon the following doctrinal teaching:

The right of a court to declare what is or is not in accord with public policy does not extend to specific economic or social problems which are controversial in nature and capable of solution only as the result of a study of various factors and conditions. It is only when a given policy is so obviously for or against the public health, safety, morals or welfare that there is a virtual unanimity of opinion in regard to it, that a court may constitute itself the voice of the communities so declaring.

Id. at 209 (quoting Mamlin v. Genoe, 17 A.2d 407, 409 (Pa. 1941)).

43. Id. at 209-10.

44. Id. at 210. It is clear that the Yoho decision served as a catalyst for the addition of Section 3 to the discriminatory practices section of the Workers' Compensation Act. Professor Emily Spieler, Workers' Compensation Commissioner at the time the amendments were enacted, has stated that Section 3 overrules the decision in Yoho. EMILY SPIELER, WORKERS' COMPENSATION ACT REVISIONS: SPECIAL RIGHTS OF THE OCCUPATIONALLY INJURED 20 (Dec. 3, 1990) (unpublished manuscript, on file with the West Virginia Law Review). Ironically, such would not appear to be true. The collective bargaining agreement at issue in Yoho did not dictate discharge of those employees off work for more than twelve months. Rather, those employees were stripped of their seniority. Because of Yoho's lack of seniority, her employer had no alternative but to discharge her. Section 3 expressly states in subsection (c) that "[a] civil action brought under this section shall be subject to the seniority provisions of a valid and applicable collective bargaining agreement . . . ." Because it was the seniority provisions of the collective bargaining agreement which produced the result in Yoho, it follows that any case presenting similar facts would presumably produce a similar result, the addition of Section 3 notwithstanding. Hence, Yoho has not been overruled.
III. The New Legislation

A. Text of Section 3

Because frequent reference will be made to Section 3, the entirety of the section is set forth below:

(a) It shall be a discriminatory practice within the meaning of section one [§ 23-5A-1] of this article to terminate an injured employee while the injured employee is off work due to a compensable injury within the meaning of Article 4 [§23-4-1 et seq.] of this chapter and is receiving or is eligible to receive temporary total disability benefits, unless the injured employee has committed a separate dischargeable offense. A separate dischargeable offense shall mean misconduct by the injured employee wholly unrelated to the injury or the absence from work resulting from the injury. A separate dischargeable offense shall not include absence resulting from the injury or from the inclusion or aggregation of absence due to the injury with any other absence from work.

(b) It shall be a discriminatory practice within the meaning of section one of this article for an employer to fail to reinstate an employee who has sustained a compensatory injury to the employee's former position of employment upon demand for such reinstatement provided that the position is available and the employee is not disabled from performing the duties of such position. If the former position is not available, the employee shall be reinstated to another comparable position which is available and which the employee is capable of performing. A comparable position for the purposes of this section shall mean a position which is comparable as to wages, working conditions and, to the extent reasonably practicable, duties to the position held at the time of injury. A written statement from a duly licensed physician that the physician approves the injured employee's return to his or her regular employment shall be prima facia evidence that the worker is able to perform such duties. In the event that neither the former position nor a comparable position is available, the employee shall have a right to preferential recall to any job which the injured employee is capable of performing which becomes open after the injured employee notifies the employer that he or she desires reinstatement. Said right of preferential recall shall be in effect for one year from the day the injured employee notifies the employer that he or she desires reinstatement: Provided, That the employee provides to the employer a current mailing address during this one year period.

(c) Any civil action brought under this section shall be subject to the seniority provisions of a valid and applicable collective bargaining agreement, or arbitrator's decision thereunder, or to any court or administrative order applying specifically to the injured employee's employer, and shall further be subject to any applicable federal statute or regulation.

(d) Nothing in this section shall affect the eligibility of the injured employee to workers' compensation benefits under this chapter.
B. Origin of Section 3

The above statutory scheme bears some resemblance to the proposal put before the Legislature by the Workers' Compensation Advisory Board.\textsuperscript{45} According to the Board's "report," submitted to the Legislature on January 18, 1990, the intent of the proposal was to "promote return to work possibilities for injured workers . . . ."\textsuperscript{46} The report's proposal, like the statute enacted, recommended provisions protecting employees from termination and giving them a limited right to reinstatement.

The Board's proposal contained some significantly different language from that of the statute enacted. The Board recommended that a distinction be made between employers with more than fifteen employees and employers with fifteen or fewer employees.\textsuperscript{47} An employee of a "large" employer would have a right to be reinstated to his former position, if such still existed, unless his replacement had worked in that position for a longer period of time than the injured worker. In the latter situation, the employee would have preferential recall rights. Also, a "large" employer could offer an employee on TTD a "light duty job" which the employee was physically capable of performing. If the employee refused the job offer, the employer then had no further obligation to reinstate the employee. Employees of "small" employers would not have any entitlement to automatic reinstatement (that is, where the position still existed and was not occupied by a long-time replacement). Rather, those employees would have only preferential hiring rights if their employers had hired replacements. On the other hand, a "small"

\textsuperscript{45} The Workers' Compensation Advisory Board was created by the Legislature in 1979. W. Va. Code § 23-1-18 (Supp. 1991). It consists of ten members: three of its members represent the interests of employees, three of its members represent the interests of employers, and three of its members come from the medical community. The workers' compensation commissioner serves as an ex-officio member. The purpose of the Board is to render advice to the workers' compensation commissioner and report yearly to the Legislature on recommendations, plans, and matters considered.

\textsuperscript{46} Report at page 10 (the Report is on file with the West Virginia Law Review).

\textsuperscript{47} Distinctions in the law based upon number of employees is not a novel concept. See West Virginia Human Rights Act, W. Va. Code § 5-11-1 to -19 (1990) (Act only applies to employers with more than 12 employees); Title VII of Civil Rights Act of 1964, 42 U.S.C. § 2000e (1988) (Act only applies to employers with more than 15 employees); Americans with Disabilities Act, 42 U.S.C.A. § 12101 (West 1991) (when completely implemented in 1994, the Act will only apply to employers with 15 or more employees).
employer could not cut off reinstatement rights to its employees by offering light duty work.

The Legislature followed the Board’s recommendation that reinstatement and preferential recall rights be subject to the “applicable seniority provisions of a valid collective bargaining agreement or any court or administrative order.” The Legislature did not, however, make any distinction between “large” employers or “small” employers. Likewise, the Legislature excluded any reference to reinstatement rights being cut off by the refusal of a job offer. Notwithstanding these departures, the spirit of the Board’s recommendation, if not the letter, can be seen in the Legislature’s final product.

C. Commentary

That an employee should be able to seek workers’ compensation benefits without fear that the act of filing alone will subject him to retaliation is an idea with which enlightened minds can find little fault. Indeed, Professor Larson expressed surprise that a decision such as Frampton v. Central Indiana Gas Co. was so long in coming: “Perhaps the explanation may lie in the fact that the conduct involved is so contemptible that few modern employers would be willing to risk the opprobrium of being found in such a posture.”

Section 3, however, goes a step beyond protecting employees from workers’ compensation discrimination. It creates special privileges for the injured employee. As such, it can be said that the new scheme reflects a philosophy that employees who have been injured in the workforce have an entitlement to employment. They have given part of their health, their safety, their physical comfort for the employer and, consequently, they should receive more than monetary compensation in return.

48. There is much disparity in the various jurisdictions as to when protection attaches to the employee purportedly injured on the job. Compare Bryant v. Dayton Casket Co., 433 N.E.2d 142 (1982) (employee not protected from discharge until he actually files for benefits) with Webb v. Dayton Tire & Rubber Co., 697 P.2d 519 (Okl. 1985) (employee had “instituted proceedings” within the meaning of the Act when she sought medical attention at the work site).

49. 2A ARTHUR LARSON, THE LAW OF WORKMEN’S COMPENSATION § 68.36(a), at 13-180.

Such thinking possibly ignores or subjugates considerations such as comparative fault on the part of the employee, that not all accidents involve fault on the part of the employer, and the compensatory nature of the workers’ compensation system itself. For instance, an employee can return to work at full salary with a substantial award of permanent partial disability benefits, or even with an award of permanent total disability. Moreover, the Supreme Court of Appeals of West Virginia has been quite liberal in its construction of the West Virginia Workers’ Compensation Act and quite generous in its award of benefits. Taking note of such patterns is not to suggest, necessarily, that such is unjust or unwarranted. Rather, the question is whether, in the context of the “bargain” between employees and employers underlying the workers’ compensation system generally, it is equitable under all of the circumstances to add to the bundle of employees’ rights.

Reasonable minds may differ as to whether the scales have now been tipped in favor of the employee. Assuming that such is true, the realm of reason may also have room for the opinion that such is a worthy result. Nevertheless, in contemplating the balance now struck by Section 3, one must consider the following: (1) whether the existing statute, Section 1, was inadequate to address perceived evils; (2) whether the laws against handicap discrimination were

54. See, e.g., Estes v. Workmen's Comp. Comm'r, 147 S.E.2d 400 (W. Va. 1966) (workers' compensation law is remedial in nature and must be given a liberal construction).
56. The case of Powell v. Wyoming Cablevision, 403 S.E.2d 717 (W. Va. 1991), with facts arising prior to the effective date of the new provision, certainly does not suggest any impotence inherent in Section 1. The plaintiff in Powell had been injured on the job and, consequently, was unable to work. While receiving TTD benefits he was discharged by his employer. With little evidence of discriminatory animus on the part of the employer, the Supreme Court affirmed a jury verdict of $12,900 in back wages, representing the time from the plaintiff's release to return to work until he secured other employment. The court emphasized its liberality in, first, allowing these cases to go to the jury and, second, upholding jury verdicts in favor of the employee.
ill-suited to assist employees in returning to work;\textsuperscript{57} and (3) whether there exists any evidence, independent of the first two considerations, that employees were not being returned to work by employers.\textsuperscript{58}

The evidence available suggests that little consideration was given to the above points. Rather, it would appear that the amendment was made as the next generational step in the ever-expanding evolution of employee rights.

IV. REHIRE STATUTES FROM OTHER JURISDICTIONS

West Virginia does not stand alone in having created statutory rights of reinstatement or preferential recall for injured employees. No fewer than seven jurisdictions\textsuperscript{59} have such statutes.\textsuperscript{60} The law of each jurisdiction is discussed in turn.

A. California

California does not have a "rehire statute" as such.\textsuperscript{61} Rather, its statute\textsuperscript{62} is similar in nature to other states\textsuperscript{63} in that its language

\textsuperscript{57} The West Virginia Human Rights Act forbids an employer from discriminating against an employee, or former employee, who (1) has a handicap; (2) has a record of a handicap; or (3) is perceived as being handicapped. An administrative remedy or a direct action in court is available to the aggrieved employee. Price v. Boone County Ambulance Authority, 337 S.E.2d 913 (W. Va. 1985). Moreover, the federal Americans with Disabilities Act becomes effective on July 26, 1992 (for employers with 25 or more employees) and duplicates or supplements the substantial remedies available under West Virginia law.

\textsuperscript{58} In his article introducing a proposed model act, Professor Mark Rothstein acknowledged that "[t]here are no readily available data for any state specifying how many employees are reinstated upon recovery from their injuries." Rothstein, supra note 50, at 264. Rather, he speculated, based upon a sampling of cases and anecdotal reports, that "the problem of injured workers with the ability to return to work being discharged because of excessive absences is substantial." Id. at 265. This author is unaware of any quantitative study of workers' compensation-related discharges in West Virginia.

\textsuperscript{59} CAL. LAB. CODE § 132a (Supp. 1988); HAW. REV. STAT. § 386-142 (1985); MASS. GEN. LAWS ANN. ch. 152, § 75A (West 1988); MONT. CodE ANN. § 39-71-317 (1990); OR. REV. STAT. §§ 659.415, .420 (Supp. 1987); Wis. STAT. ANN. § 102.35(3) (West 1986).

\textsuperscript{60} California's statute cannot be designated, strictly speaking, as a rehire statute; rather the California Supreme Court, in its inimitable fashion, has implied a right of reinstatement in the statute. Judson Steel Corp. v. Workers' Comp. Appeals Bd., 586 P.2d 564 (1978).

\textsuperscript{61} Id.

\textsuperscript{62} CAL. LABOR CODE § 132a (Supp. 1988).

\textsuperscript{63} See, e.g., W. VA. CODE § 23-5A-1 (1985). Similar to the California statute, this provision in West Virginia's Workers' Compensation Act, the first anti-discrimination provision incorporated into the Act, prohibits intentional discriminatory acts taken by the employer in retaliation for the employee making a compensation claim. It requires a nexus between the employment decision and the claim for compensation.
requires the employment action (discharge or threats to discharge) to be "because" of the claim for benefits. 64 Unlike other such statutes, however, the California statute opens with prefatory language that "[i]t is the declared policy of this state that there should not be discrimination against workers who are injured in the course and scope of their employment." 65 It was this language that the Supreme Court of California seized upon in Judson Steel Corp. v. Workers' Compensation Appeals Board 66 in converting the statute into something akin to a "rehire statute."

The facts in Judson Steel were somewhat similar to those of Yoho. The plaintiff was off work due to a compensable accident and, after a twelve-month absence, was effectively terminated due to the seniority provisions of the applicable collective bargaining agreement. The plaintiff argued that he would not have been discharged but for the absence spawned by his work-related injury. The California court agreed and found that the plaintiff's discharge contravened the legislature's declaration of "a general policy in favor of preventing all discrimination against injured employees." 67

The dissent in Judson Steel emphasized that the employer had a contractual right, pursuant to a negotiated collective bargaining agreement, to terminate the plaintiff's employment. 68 The majority 69 skirted that issue at first by pointing out that the employer had extended the twelve-month leave period for other employees but failed to do so for the plaintiff. Thus, the majority strongly implied that the plaintiff had been discriminatorily singled out for harsh treatment. 70 There was no evidence of disparate treatment, however, and

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64. The statute contains four enumerated sections spelling out prohibited conduct by employers and their insurers. In each instance, the language of prohibition is connected to the language describing the protected activity by the word "because."


67. Id. at 569.

68. Id. at 571 (Richardson, J. dissenting).

69. Four of the seven justices supported the decision.

70. Note that the West Virginia Supreme Court suggested in Yoho that an otherwise neutral policy or contractual provision on absenteeism could give rise to a cause of action if it were to be discriminatorily applied against employees receiving workers' compensation benefits. 336 S.E.2d at 210, n.6.
the majority appeared to abandon that ground as support for its holding when it declared generally at the close of the opinion that "an employer may not discharge an employee because of the employee's absence from his job as the consequence of an injury sustained in the course and scope of employment."71

The court in Judson Steel, through dicta, created two exceptions to its general rule that employers may not discharge or refuse to reinstate injured employees: (1) the employer did not have to reemploy an "unqualified employee,"72 and (2) a position had to be available for the employee.73 These elements would appear to be common to most of the rehire statutes in existence. Contrary to the automatic nature of rehire statutes, however, a California appellate court added a scienter element to the California scheme when it held that an employer could not be liable for discrimination when it fired an employee for excessive absenteeism without knowing that two of the absences in question were industrially caused.74

B. Connecticut

Under Connecticut law, an employee disabled by an industrial injury has a right to be transferred to "available suitable work" at his employer's establishment.75 All of the enforcement is handled by the administrative agency known as the Workers' Compensation Commission. If the Commissioner finds an employee to be disabled, he can order the employer to transfer the employee to "available suitable work." Moreover, Connecticut's statute even addresses claims by employees who are working and have no missed time as a result of injury or disease. If such an employee experiences difficulty in doing his job, he can petition the Commissioner for an order directing the employer to transfer him from the position which

71. 586 P.2d at 570.
72. Id. at 569. See also Barnes v. Workers' Compensation Appeals Board, 266 Cal. Rptr. 503, (1989) (employer can refuse to reinstate employee to position which employer reasonably believes will produce further injury to employee).
73. Id. Based upon the facts of Judson Steel, it can be assumed that the court meant that the position had to be "vacant" rather than just in "existence." That is, the position would be available if the employer had not hired a replacement employee.
75. CONN. GEN. STAT. § 31-313 (1985).
is detrimental to his health, or which cannot be performed by an employee so disabled, to "other suitable full-time work in the employer's establishment, if available . . . ." Such a transfer, however, cannot conflict with the provisions of a collective bargaining agreement.

The Connecticut statute does not provide for a private right of action. Rather, all enforcement would appear to be left in the hands of the Commissioner. If an employer fails to comply with a transfer order, the Commissioner may assess a civil penalty of not more than $500 against the employer. All monies collected under such assessments are paid over to Connecticut's Second Injury and Compensation Assurance Fund.77

C. Hawaii

Hawaii has a rather simple rehire statute.78 An employer cannot discharge or suspend an employee who suffers a compensable injury, solely because of that injury, unless the employer can establish to the "director"79 that (1) the employee is no longer capable of performing his job because of the injury and (2) the employer has no other available work which the employee is capable of performing. The use of the word "solely" suggests that an employer could discharge an injured employee for any reason separate from the compensable injury.

If an employee is discharged or suspended because of the work injury, then he has "first preference" to reemployment at any position which he is capable of performing and which is available. The preference, however, lasts until such time as the employee is reemployed or finds other employment.80 The Hawaii statute does not provide for any remedies or penalties.

76. Id.
77. Id.
78. HAW. REV. STAT. § 386-142 (1985).
79. By clear implication, an employee in Hawaii must seek relief from the director of the Workers' Compensation Commission for illegal discrimination.
80. By contrast, Section 3 provides for a one-year preferential right of recall. If the employer finds other employment during that one-year period, his right of preference is not affected.
THE ANTI-DISCRIMINATION PROVISION

D. Massachusetts

The Massachusetts statute is one-dimensional in nature. It provides reinstatement rights but makes no provision for protection from discharge or suspension in the first instance. Indeed, the statute assumes that employees may lose their jobs due to work-related injuries. It provides preference rights to "[a]ny person who has lost a job as a result of an injury compensable under this chapter ..."82 Such an employee has a right of preference in hiring over any individual not employed by the employer at the time of the protected employee’s application for reemployment. The employer is required only to reinstate the protected employee to a "suitable job" that is "available."83

The Massachusetts statute authorizes a private cause of action. If an employer is found in violation, an employee can recover lost wages and attorney fees, as well as reinstatement to a suitable job.84 As to this latter remedy, there would appear to be no "availability" requirement. The employer would either have to create a position for the employee or compensate the wronged employee as if employed. Finally, the Massachusetts’ statute expressly subjugates its requirements to the provisions of an applicable collective bargaining agreement. In the event of inconsistencies, the collective bargaining agreement controls.

E. Montana

Montana has adopted a first-in-the-nation comprehensive wrongful discharge statute which has essentially abrogated the employment-at-will doctrine in that jurisdiction.85 In 1991, the legislature amended the Workers’ Compensation Act to preclude an employer from using the filing of a workers’ compensation claim as grounds

81. MASS. GEN. LAWS ANN. ch. 152, § 75A (West 1988).
82. Id. The wording of the statute leaves room for an employer to argue that an employee is not entitled to preference rights on account of being discharged for reasons other than the work-related injury.
83. Id.
84. Id.
for terminating an employee under the wrongful discharge statute. More significantly, the new statute provides an injured employee a preferential right of hire to a comparable position which becomes available within two years of the date of the injury. The employee must receive a medical release to return to work and must be able to perform the work of the comparable position.

Under this provision, an employee would lose his preference to reinstatement if he did not "recover" from his injuries within two years. If he recovered and made a reapplication within two years, however, a Montana employee would appear to have an indefinite right of preferential hire. Unlike other statutory schemes, however, the reinstatement would be to a "comparable position," rather than to "any position." As to that "comparable position" the statute dictates that it must be "consistent with the worker's physical condition and vocational abilities."

F. Oregon

The Oregon statutory scheme is very similar to that of West Virginia. Indeed, parallels in language suggest that the Oregon statute, more than any other, served as a model for the new West Virginia legislation.


87. Id.

88. This statutory scheme would appear to provide a powerful incentive for the employee to get well. On the other hand, it would punish more seriously injured employees. For instance, although entitled to a maximum of up to four years of temporary total disability benefits under West Virginia law, a seriously injured employee would be penalized for availing himself of the full period under a statutory scheme such as Montana's.

89. Section 3, by comparison, provides first for consideration of reinstatement to a "comparable position" and then, if necessary, to "any job." W. VA. CODE § 23-5A-3(b) (Supp. 1991).


92. For instance the Oregon statute provides that "[a] certificate by a duly licensed physician that the physician approves the worker's return to the worker's regular employment shall be prima facie evidence that the worker is able to perform such duties." OR. REV. STAT. § 659.415(1) (Supp. 1987). Whereas, Section 3 provides that "[a] written statement from a duly licensed physician that the physician approves the injured employee's return to his or her regular employment shall be prima facie evidence that the worker is able to perform such duties." W. VA. CODE § 23-5A-3(b) (Supp. 1991). Clearly the similarities are more than coincidence.
Unlike West Virginia, however, Oregon has split its rehire statute between two distinct statutory sections. Neither section provides protection from termination (unlike section 3), but, rather, addresses "reinstatement" and "reemployment" respectively. The first section provides that an employee who has sustained a compensable injury must be reinstated to his former position if such is available and the employee is not disabled from performing the duties of the position. If the former position is not available, then the employee must be "reinstated in any other position which is available and suitable." A certificate from a physician stating that the employee is able to return to his regular employment is prima facie evidence that the employee can perform the duties of that employment. The statute also provides that the "right of employment shall be subject to the provisions for seniority rights and other employment restrictions contained in a valid collective bargaining agreement between the employer and a representative of the employer's employees."

The second statutory section in Oregon's scheme fills a hole not readily apparent in the first section. The first section speaks of an employee demanding reinstatement to his "former position of employment" and of that employee being medically approved to return to his "regular employment." In other words, it assumes that the employee has made a full, or nearly full, recovery. The second section picks up where the first section leaves off.

Under the second section, an employee disabled by a compensable injury from performing the duties of his regular employment must be reemployed by his employer "at employment which is available and suitable." In accordance with this change in emphasis,

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94. Id.
95. OR. REV. STAT. § 659.415(2) (1989). The Oregon statute specifically uses the phrase "employment restrictions contained in a valid collective bargaining agreement." Hence, Oregon expressly subjects its statute, in large part, to the terms of employment negotiated by an employer and its represented employees. Section 3, however, is much narrower in that regard. See infra text accompanying notes 180-87. It is subject only to the seniority provisions of a collective bargaining agreement. Other "employment restrictions" in the collective bargaining agreement, to the extent they conflict with Section 3, would bow to the dictates of the statute.
97. Id.
the section rewords the “certificate of [the] physician” so that the
physician must certify that “the worker is able to perform described
types of work.”\textsuperscript{98} Hence, under Oregon’s statutory scheme, provi-
sion is made for the employee who fully recovers from his injury
and for the one who does not.

Although specific issues arising under Section 3 are discussed
below, the examination of the Oregon statute reveals one aspect of
Section 3 which is best analyzed in comparison to the Oregon statute.
As mentioned, it would appear that the Oregon statute, at least in
part, served as a model for the West Virginia statute. The similarity
in language is too close to suggest otherwise.\textsuperscript{99} If the West Virginia
Legislature did indeed borrow from Oregon’s cupboard, it only took
half a loaf. Section 3 makes no provision, unlike Oregon’s statute,
for the injured employee who is unable to return to his former
position due to his injury, as can be seen from the hierarchical flow
of Section 3. First, the injured employee must be considered for his
former position. He might possibly be aided in this consideration
by “a written statement” from a physician, which would constitute
“prima facie evidence that the worker is able to perform such
duties.”\textsuperscript{100} The phrase “such duties” obviously refers to the em-
ployee’s “former position of employment.” Second, if the former
position is not available, the employee must be considered for “a
comparable position.” This consideration would presumably go for-
ward on the premise that the employee, being physically and men-
tally fit for his former position, would be fit for the “comparable
position.”\textsuperscript{101} Third, if a “comparable position” is not available, then
the employee is entitled to preferential recall for one year to “any
job” which comes open and which the employee is capable of per-
forming.

Based upon the hierarchy established in Section 3, a disabled
employee would never surmount the first hurdle of being able to
perform the duties of his former position of employment. Therefore,

\textsuperscript{98} Id.
\textsuperscript{99} See supra note 92.
\textsuperscript{100} W. VA. CODE § 23-5A-3(b) (Supp. 1991).
\textsuperscript{101} See supra text accompanying note 91.
the disabled employee would not even be considered for "any job." Of course, the disabled employee would still be entitled to the protections afforded by the West Virginia Human Rights Act\textsuperscript{102} and, subsequent to its effective date, the Americans With Disabilities Act.\textsuperscript{103} Neither of these statutes, however, carry with them any preferential right of reinstatement absent a showing of intentional discrimination.\textsuperscript{104} Hence, the disabled employee falls outside of the protection of Section 3.

\subsection*{G. Wisconsin}

In protecting injured employees from discharge and promoting reinstatement, the Wisconsin statute\textsuperscript{105} uses two different standards. With respect to termination or other types of "discrimination," the statute incorporates the element of "intent": an employer cannot discriminate against an employee "because of a claim or attempt to claim compensation benefits from such employer . . . ."\textsuperscript{106} Thus, a Wisconsin employee has no absolute right to be free from suspension or termination in the event of a work-related injury.\textsuperscript{107} In contrast, however, the injured employee does have expanded rights to reinstatement.

A Wisconsin employer who refuses to rehire\textsuperscript{108} an injured employee,\textsuperscript{109} without reasonable cause,\textsuperscript{110} "where suitable employment

\begin{thebibliography}{10}
\item \textsuperscript{102} W. VA. CODE §§ 5-11-1 to 19 (1990 and Supp. 1991).
\item \textsuperscript{103} 42 U.S.C. § 12101 (Supp. 1991). The Act becomes effective on July 26, 1992, for employers having 25 or more employees, and becomes effective on July 26, 1994, for employers having 15 or more employees. Under the ADA, a requirement to make a "reasonable accommodation" might include assigning the disabled employee to a vacant position. 42 U.S.C. § 12101(9)(B) (Supp. 1991). Thus, in some instances, the ADA would fill a gap in Section 3.
\item \textsuperscript{104} Indeed, handicap discrimination statutes are drafted with an eye to creating a level playing field for disabled employees. By design they do not elevate those rights above those of non-disabled employees. See Henry H. Perritt, Americans With Disabilities Act Handbook 59-60 (1991).
\item \textsuperscript{105} Wis. STAT. ANN. § 102.35 (West 1991).
\item \textsuperscript{106} Wis. STAT. ANN. § 102.35(2) (West 1991).
\item \textsuperscript{107} In the event that an employer would discriminate against an employee for filing a claim or attempting to file a claim, the employer would forfeit to the state a sum not less than fifty dollars ($50) nor more than five hundred dollars ($500) for each offense. \textit{Id}.
\item \textsuperscript{108} Any rehiring must be done in good faith. Dielectric Corp. v. Labor & Indus. Review Comm'n, 330 N.W.2d 606 (Wis. Ct. App. 1983).
\item \textsuperscript{109} The statute's protection is not limited to employees who are absent from work due to injuries. All that is required is that an employee be injured while employed and then not rehired
\end{thebibliography}
is available within the employee's physical and mental limitations," 111 must pay the employee his wages lost during the period of refusal, not to exceed one year in wages. Under this provision, the burden of proof is on the employer to establish "reasonable cause." 112 Reinstatement of injured employees is subject to "any written rules promulgated by the employer with respect to seniority or the provisions of any collective bargaining agreement with respect to seniority . . . ." 113

V. THE PROPOSED MODEL ACT

Upon review of the crazy quilt woven by the few jurisdictions with rehire statutes, Professor Mark Rothstein 114 proposed a model act to address the relationship between the employer and its employee injured on the job. 115 The proposed model act draws upon the experiences of those states with rehire statutes and incorporates elements of those statutes, as well as case law interpretation thereof, into its provisions. Unfortunately, the drafters of Section 3 did not draw upon Professor Rothstein's scholarship. 116 Indeed, there is little similarity between the proposed model act and West Virginia's statute. 117

110. Under this provision, an employer can only refuse an employee, when suitable work is available, for reasons that are fair, just, or fit under the circumstances. West Allis School Dist. v. Dep't of Indus., 342 N.W.2d 415 (Wis. 1984).


114. Professor of Law and Director, Health Law Institute, University of Houston. Formerly Professor of Law at West Virginia University College of Law.

115. Mark Rothstein, A Proposed Model Act For The Reinstatement of Employees Upon Recovery From Work-Related Injury or Illness, 26 Harv. J. on Legis. 263 (1989). See pages 275-78 of Professor Rothstein's article for the complete text of the proposed model act. For ease of reading, quotation marks are not used for language taken from the proposed model act and used in the discussion to follow. Attribution to Professor Rothstein is understood throughout.

116. Professor Rothstein's article was published in 1989. The Workers' Compensation Advisory Board made its recommendations to the Legislature in January 1990. The Legislature acted upon those recommendations in the Summer of 1990. At the time of enactment, the drafters of the legislation were unaware of the proposal put forth by Professor Rothstein. Telephone interview with Emily Spieler, former West Virginia Workers' Compensation Commissioner (September 1991).

117. To the extent that there are similarities, it would presumably be the result of drawing upon a common pool of source material, the other rehire statutes.
The utility in discussing the proposed model act is found in its comprehensive nature. It provides a checklist to which Section 3 can be compared. The following discussion, therefore, relates to provisions of the proposed model act and its counterpart, or lack thereof, in Section 3. Where appropriate, the proposed model act provides points of departure for discussion of Section 3.

A. The Right to Reinstatement

The proposed model act does not address the termination or suspension of injured employees. It is limited to the reinstatement of employees following either an interruption in active employment or a severance of the employer-employee relationship due to a work-related injury. With respect to reinstatement, an employee who has suffered a compensable work-related injury or illness involving lost work time must be reinstated to his former position within fifteen (15) working days of making written application for such

118. See supra text accompanying notes 49-59.
119. One measure of the proposed model act's thoroughness can be seen when its length is compared to that of Section 3. The proposed model act contains approximately 1,050 words, whereas Section 3 contains approximately 450 words. Rothstein, supra note 115, at 275-78.
120. Although some employers may find portions of the proposed model act, such as provisions for compensatory and punitive damages, to be repugnant, it is this author's opinion that most employers would settle for clearly marked boundaries as to what they could and could not do with injured employees.
121. Indeed, it is entitled, "Act for the Reinstatement of Employees Upon Recovery from Work-Related Injury or Illness." Rothstein, supra note 115, at 275.
122. Unlike the proposed model act, the West Virginia statute prohibits the severance of the employment relationship. In tandem with W. Va. Code § 23-5A-2 (1985), Section 3 thus creates the possibility that the injured employee will remain covered under his employer's medical insurance policy, if coverage is controlled by "employment." See infra note 260. For advocates of employee rights, therefore, Section 3 has one advantage over the proposed model act.
123. Under Wisconsin's statute an employee would not have had to experience "lost work time" in order to be protected. Dalco Metal Products, Inc. v. Labor & Indus. Review Comm'n, 419 N.W.2d 292 (Wis. Ct. App. 1987). Section 3 is similar to the proposed model act in that it requires an employee to be "off work due to a compensable injury." W. Va. Code § 23-5A-3(a) (Supp. 1991).
An employer can refuse to reinstate an employee for "reasonable cause." The employee must be able to perform the duties of the position, and a physician's certificate approving the employee's return to employment is prima facie evidence that the employee is able to perform such duties. An employer is allowed to extend that fifteen (15) day period by a maximum of seven (7) working days so as to provide for an independent medical examination to determine the employee's fitness for duty.

The proposed model act would give an employee reinstatement rights for a period of three years after the employee ceases work due to a compensable injury or illness. For the first year after leaving work, the employee would be able to come back to his former position notwithstanding that the employer had hired a replacement. If the employee was unable to return within one year, he would then be given preference during the next two years for reinstatement to any full-time position that had become available and was commensurate with the employee's skill, training, and physical and men-

124. Section 3 contains no requirement that the "demand for reinstatement" be in writing. The lack of a written document could pose evidentiary problems for both the employer and the employee if a dispute were later to arise as to whether the employee should have been entitled to consideration for a particular opening. It would behoove employers to create a form of some nature by which the employee could unequivocally notify the employer of his availability.

125. This provision is obviously borrowed from the Wisconsin statute. Wis. Stat. Ann. 102.35(2) (West 1991). Consistent with holdings under that statute, the proposed model act provides elsewhere that the employer has the burden of showing "reasonable cause," and such showing must not implicate either the employee's application for benefits or his disability. Dielectric Corp. v. Labor & Indus. Review Comm'n, 330 N.W.2d 606, 610 (Wis. Ct. App. 1983).


127. West Virginia's Section 3 makes no express provision for an independent medical examination to serve as rebuttal to the certifying physician. The use of the phrase "prima facie evidence," however, suggests that the physician's certificate is not the end of the inquiry. In fact, Article III, Subsection (j)(3) of the National Bituminous Coal Wage Agreement of 1988, although drafted prior to the origin of Section 3, provides for a group of three physicians to examine the injured employee: an employer-approved physician, an employee-approved physician and a physician agreed to by the employer and the employee. The employee cannot be terminated, refused recall from a panel, or refused recall from sick or injured status without the concurrence of a majority of the physician group. See also W. Va. Code § 23-4-8 (Supp. 1991) (employer and employee can each designate a physician to participate in an examination by a physician selected by the Commissioner).

128. Of the jurisdictions with rehire statutes, only Oregon allows injured employees to return to work and bump replacement employees. Shaw v. Doyle Milling Co., Inc., 683 P.2d 82 (Or. 1984). Under Section 3 an injured employee would have no entitlement to his former position if he had been replaced.
tal condition. This scheme is composed of at least two admirable qualities. First, it provides an incentive to the injured employee to return to work within a year if he is able.129 Second, it provides a bright line of demarcation for the employer as to the time requirements for the employee’s reinstatement rights. As discussed infra, under West Virginia’s current scheme, it is hazy, to say the least, as to when an employee’s entitlement to preference may end.130

If an employee who has suffered a work-related, compensable injury is able to return to work, but because of the disabling effects of his injury is unable to return to his former position, the proposed model act gives him preference as to the first full-time position that becomes available.131 The employee must be capable of performing the duties of the position and it must be commensurate with his skill and training. The injured employee could not displace incumbent employees and the preference would last for two years.

B. Loss of Reinstatement Rights

1. Failure to Notify Employer of Demand for Reinstatement

In marked contrast to Section 3, the proposed model act provides three instances in which an employee may lose the right to reinstatement. An employee loses such right if he fails to notify the employer in writing within sixty working days of the termination of his temporary total disability status that he is able to return to work. Section 3 contains no such time limit. Conceivably, a West Virginia employee could wait months or even years after termination of temporary total disability benefits before making a demand for reinstatement.132 Presumably, a court would fashion some equitable relief,

129. Of course, on the other side of the coin, knowledge that their jobs are guaranteed for at least one year might provide an incentive to slightly injured employees to lengthen their stays on temporary total disability.
130. See infra text accompanying notes 268-73.
131. As discussed, West Virginia’s Section 3 does not provide a preference for the disabled employee who cannot return to his former position because of his injuries. See supra text accompanying notes 101-04.
132. Although some may find this notion farfetched, it is not difficult to imagine a scenario where an injured employee has left the area of his former employment for personal reasons, only to return some time later with a demand for reinstatement. Moreover, given the one-year time limit on
such as application of the doctrine of laches,\textsuperscript{133} to curb abuse by employees presenting stale demands for reinstatement.

2. Refusal to Accept Position

A second instance under the proposed model act in which an employee's reinstatement rights can be cut off is he refuses to accept employment with the employer in a full-time position commensurate with the employee’s skill, training, and physical and mental condition. Such a provision is commendable in that it reserves to the employer its traditional prerogative to manage its work force. The employee should not be allowed to use his preference to select the particular position which he wants. Unfortunately, Section 3 leaves employers and employees in the dark as to their respective rights upon an employee's refusal of employment.

3. Acceptance of Other Employment

In the third and final instance, with respect to relinquishment of the right to reinstatement, the proposed model act addresses those employees who find other employment. Those employees lose their right to reinstatement after working for thirty days in full-time employment which is substantially equivalent in pay and benefits to the position the employee would have been entitled to had the employee been reinstated by his employer at the time of the injury. Although this proposal leaves room for disputes as to “substantial equivalence,”\textsuperscript{134} it is consistent with the chief purpose of rehire sta-

\textsuperscript{133} Moore v. Starcher, 280 S.E.2d 693 (W. Va. 1981) (party can lose claim by unreasonable delay in pursuing rights).

\textsuperscript{134} Specifically, the proposed model act provides that the employee loses his right to reinstatement preference if “the employee secures and performs for thirty days full-time employment with another employer which is substantially equivalent in pay and benefits to the position the employee would have been entitled to had the employee been reinstated by the employee's employer at the time
constitutes: returning injured employees to the workforce and gainful employment.\textsuperscript{135} Unfortunately, however, Section 3 once again is silent on the issue. Because Section 3 contains no statement to the contrary, it is possible that an employee covered by West Virginia’s statute could leave other employment to exercise his reinstatement preference.

C. Pay and Benefits Upon Return to Work

The proposed model act provides that the reinstated employee shall be entitled to the same salary or wage rates, benefits, and seniority as if the employee had been continuously employed in that position.\textsuperscript{136} Again, Section 3 is silent on this issue, with the exception of being subject to the seniority provisions of a collective bargaining agreement.\textsuperscript{137} Of course, the "seniority provisions" might dictate the wage rates and benefits to which an employee would be entitled upon reinstatement. Otherwise, an employer is left to speculate as to the level at which the employee is to be reinstated. The point is of the injury." Rothstein, supra note 115, at 276. This wording produces an ambiguity. It would appear to make the employee's former position the measure of equivalency. Thus, if an employee was disabled such that he could not perform a job of the same caliber as his former position, he would not lose his reinstatement preference to a lesser position with his former employer, even though he was employed elsewhere in a capacity equal to that "lesser position."

\textsuperscript{135} See, e.g., W. VA. CODE § 23-4-7b (Supp. 1991) (statement of legislative policy with respect to "trial return to work" program).

\textsuperscript{136} Because Hawaii’s statute does not contain the same conditions as the proposed model act (substantial equivalence in pay and benefits between the employee's former position and his new employment), it has been criticized as unfairly penalizing the employee who seeks interim employment while waiting for an opening at his former employer's establishment. Rothstein, supra note 115, at 271.

Obviously, the proposed model act suggested by Professor Rothstein is speaking of a resumption of benefits. Otherwise, the words "as if . . . continuously employed" could be construed to mean that an employee was entitled to benefits back to the date of the injury. As discussed, see supra note 122, however, the proposed model act does not protect an employee from having the employment relationship severed and, consequently, losing his medical coverage.

\textsuperscript{137} The proposed model act, in providing the reinstated employee entitlement "to the same salary or wage rates, benefits, and seniority," has a proviso: "unless reinstatement is otherwise controlled by a provision of a valid collective bargaining agreement." This constitutes the only reference by the proposed model act to collective bargaining agreements, and it also produces an ambiguity. Either the act is saying that the employee is reinstated pursuant to the provisions of a collective bargaining agreement, or that the reinstated employee's wages, benefits, and seniority are controlled by the collective bargaining agreement. The wording suggests the latter construction. In contrast, Section 3 is entirely subordinate to the "seniority provisions" of the collective bargaining agreement. W. VA. CODE § 23-5A-3(c) (Supp. 1991).
not insignificant in that under Section 3 an employee could be returning to his employer’s workforce after several years of absence. An employer may not be inclined to give a reinstated employee the benefit of pay increases made while the employee was “not ... learning any new job skills or keep[ing] up with current industry practices.” On the other hand, a disgruntled employee might charge the employer with intentional discrimination, pursuant to W. Va. Code § 23-5A-1, for reinstating him at a lower pay grade.

With respect to pay and benefits, the proposed model act refers to the position at which the employee is being reemployed. By analogy, the West Virginia employer should look to the pay and benefits accompanying the employee’s new position and not those related to his former position.

D. Notice to Employee of Rights

The proposed model act mandates that the employer notify the injured employee of his rights under the act, in a writing of plain English, within ten working days of receipt of notice of the employee’s compensable injury. The act does not provide any penalty for noncompliance. Conceivably, an employer failing to give notice could be barred from raising a defense of timeliness to an employee’s demand for reinstatement. Of course, West Virginia has no express

138. See supra text accompanying note 132.
139. Yoho, 336 S.E.2d at 209-10.
140. Section 1 provides that “[n]o 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 benefits under this chapter.” W. Va. Code § 23-5A-1 (1985). It would seem that an employee would have to establish that the employer selected the lower pay grade as retaliation for the employee receiving benefits, rather than because of legitimate, nondiscriminatory reasons. Powell v. Wyoming Cablevision, Inc., 403 S.E.2d 717 (W. Va. 1991) (employee must prove that filing claim was a significant factor in the employer’s decision to discriminate against the employee). But see City of Santa Barbara v. Workers’ Compensation Appeals Bd., 167 Cal. Rptr. 65 (Cal. 1980) (employee on compensation leave could not be demoted while receiving temporary total disability benefits).
141. Unlike Section 3, the proposed model act does not provide for reinstatement of a fully recovered employee to “any job.” Rather, the position must be “commensurate with the employee’s skill [and] training.” This wording suggests a floor and a ceiling; the employee cannot move, under the guise of reinstatement, either dramatically up or down in his employer’s organization. To the contrary is Section 3 which provides for reinstatement to “any job which the injured employee is capable of performing.” W. Va. Code § 23-5A-3(b) (Supp. 1991). Therefore, an employee could be placed in a station above or below his previous position.
time limitations on demands for reinstatement, and neither does the West Virginia statute place responsibility on the employer to provide notice to the injured employee of his rights under the statute. It would appear sensible, however, for the West Virginia Workers' Compensation Commission to notify employees of their rights.

E. Good Faith Reinstatement

The proposed model act contains a "good faith" provision. The employer must reinstate employees, subject to the act, with the intention of keeping them on the job. An employer may not reinstate employees, intending to meet the letter of the statute, only later to terminate them. Section 3 does not contain such a provision. Nevertheless, it does not take much vision to predict that West Virginia courts would not allow employers to engage in pro forma hirings so as to subvert the purpose of the statute. As a matter of practicality, the employer should have a well-grounded reason before discharging an employee within one year of reinstatement.

F. Reasonable Accommodation

The proposed model act requires an employer to "make reasonable accommodation" to the handicaps of a worker exercising reinstatement rights under the act. Section 3 needed no express statement of that nature. A requirement to make reasonable accommodations is grafted onto Section 3 by the handicap provisions of the West Virginia Human Rights Act, as well as the Americans with Disabilities Act. An employee can only be denied a position

142. See supra text accompanying note 132.
143. Wisconsin has a statute which provides reinstatement rights to injured employees. Accordingly, the Workers' Compensation Division of the Wisconsin Department of Industry, Labor, and Human Relations provides a pamphlet to employees entitled "Facts for Injured Workers."
144. A Wisconsin appellate court has adopted this principle:
   Thus, we interpret "rehire" to mean that the employer must reemploy the injured employee with the intention of continuing to keep this employee on the job.
   * * *
   If the employee is rehired, the rehiring cannot be a pro forma rehiring. Therefore, if there is an eventual discharge, the employer must show that there is no bad faith on its part to evade this statute and that the rehired employee was discharged with good cause.
if he cannot perform the duties with reasonable accommodations.\textsuperscript{147}

In making a reasonable accommodation, the employer may be required to expend sums of money in modifying the work place.\textsuperscript{148} At some point, such expenditure might become an "unreasonable burden" on the employer within the meaning of the West Virginia Human Rights Act and the Americans with Disabilities Act.\textsuperscript{149} As an aid to both the employee and the employer, Professor Rothstein incorporates into his proposed model act a concept borrowed from the law of Washington.\textsuperscript{150} Under this approach, the employer can be reimbursed from the compensation fund for specific job site modifications in an amount not to exceed $5,000 per work site. Section 3 makes no provision for this type of subsidy.\textsuperscript{151}

\textbf{G. Penalties and Remedies}

Professor Rothstein incorporates into his proposed model act a wide range of penalties and remedies. On the criminal side, the act makes a knowing violation of any provision a misdemeanor, punishable by fine or imprisonment, or both. To West Virginia's credit, Section 3 does not contain a criminal penalty. It is incongruous for Professor Rothstein to include at the close of his proposed model act a mandate that the act be "liberally construed," and also to make the statute penal in nature. Penal statutes, unlike remedial

\textsuperscript{147} Id.

\textsuperscript{148} HENRY H. PERRITT, AMERICANS WITH DISABILITIES ACT HANDBOOK 64-65 (1991) (discussing "undue hardship" within the meaning of the ADA).

\textsuperscript{149} Id. The extent to which financial expenditures may constitute an unreasonable burden will depend in part on the size and resources of the employer.

\textsuperscript{150} WASH. REV. CODE ANN. § 51.32.250 (West 1990).

\textsuperscript{151} West Virginia does provide a subsidy of another sort. During the same special session which saw supplementation of the discriminatory practices article of the West Virginia Workers' Compensation Act, the Legislature also created a new benefit for injured employees attempting to return to work, "temporary partial rehabilitation benefits." W. VA. CODE § 23-4-9(d) (Supp. 1991). If an employee's wages, upon his return to work after injury, are less than his average weekly earnings at the time of his injury, then he can receive seventy percent (70\%) of the difference in the form of so-called "temporary partial rehabilitation benefits." Id. The employee must be enrolled simultaneously in an approved rehabilitation program. To the extent that this benefit program was to work in tandem with the reinstatement provision in Section 3, there has been incomplete drafting of the legislation. An injured employee, in need of a rehabilitation plan because not fully recovered, would not be protected by the reinstatement provision of Section 3. See supra text accompanying notes 100-05.
statutes, are generally construed strictly. Moreover, an act of this nature, especially true in the case of Section 3, is a law subject to honest disagreement or misunderstanding in its application. It is unfair to subject employers to the threat of criminal prosecution, a knowledge element notwithstanding.

With respect to civil remedies under the proposed model act, a private right of action is expressly authorized. Professor Rothstein left no stone unturned with respect to the remedies available. An employee may recover, but is not limited to, the following: reinstatement, reemployment, back pay, compensatory damages, reasonable attorneys' fees, court costs, and punitive damages not to exceed $10,000.

Section 3 contains neither an express right of action nor a list of available remedies in the event of a civil action. It must be remembered, however, that the West Virginia Legislature was not writing on a clean slate when Section 3 was drafted. The section incorporates by reference Section 1; that is, it makes terminations and failures to reinstate "discriminatory practices" within the meaning of Section 1. By incorporating Section 1, the legislature was also borrowing for Section 3 the legal precedents accompanying Section 1.

The West Virginia Supreme Court, in Shanholtz v. Monongahela Power Co., declared that a workers' compensation retaliatory discharge action sounded in tort. The court perceived Section 1 as doing no more than codifying what was already the law: "that is,
it is a contravention of public policy and actionable to discharge an employee because he filed a workmen’s compensation claim against his employer.” Accordingly, the Shanholtz court was relying greatly upon the decision in Harless v. First National Bank in Fairmont, which established the tort of retaliatory discharge in West Virginia law.

Subsequent to the Shanholtz decision, the court had occasion to revisit the Harless case in what has become known as Harless I. In the latter opinion, the court addressed the elements of recovery available in a retaliatory discharge action. The court had no problem in deciding that a plaintiff could recover lost wages. It also acknowledged the availability of emotional distress damages. The court was very cautious, however, in sanctioning the availability of punitive damages. Noting the “openendedness in the limits of recovery for emotional distress in a retaliatory discharge claim,” the court declined “to automatically allow a claim for punitive damages to be added to the damage picture.”

The plaintiff in Harless was apparently not seeking reinstatement. In any event, the court implied in dicta that such a remedy was not available: “[t]he remedy afforded [is] not reinstatement but damages occasioned by the discharge.” Likewise, the Shanholtz court noted that it was not the discharge per se which was the wrong “(the employer had that right under the alleged at-will employment contract), but the act of contravening public policy in carrying out such discharge.” Finally, there is no hint in the Harless and Shanholtz decisions, or in any subsequent decisions, that a retaliatory discharge plaintiff would be entitled to an award of attorneys’ fees.

In applying the above elements of recovery to an action under Section 3, one does not get a perfect fit. The most notable problem

159. Id. at 183.
161. 289 S.E.2d 692 (W. Va. 1982). Harless I was decided prior to a trial in the lower court. After the trial, the defendants appealed verdicts in favor of the plaintiff and Harless II came into being.
162. Id. at 703. Indeed, the court in Harless II reversed that portion of the jury’s verdict which awarded the plaintiff punitive damages. Id.
163. Id.
164. 270 S.E.2d at 182.
is found in the issue of reinstatement. If it is true, as the Shanholtz court stated, that Section 1 represents the policy that employees should not be discriminated against for pursuing workers' compensation benefits, then Section 3 surely represents a policy of returning those employees to employment. It would be incongruous to assert that an employer in violation of a "reinstatement statute" could not be required to "reinstate" an employee.

Although an employee might have the benefit of "reinstatement" under Section 3, courts should be reluctant to award either emotional distress damages or punitive damages under that section. The Harless court's admonitions with respect to punitive damages should apply with equal weight to actions under Section 3. Punitive damages should simply not be in the picture unless there is evidence that the employer's conduct was "wanton, willful or malicious." Unlike most cases brought under Section 1, an employer could be subject to liability under Section 3 for an unintentional violation. For instance, an employer could overlook an employee with a preference because of a bookkeeping error or there could exist an honest difference of opinion between an employer and an employee as to whether a particular position is "comparable" to the employee's former position.

If a violation is truly unintentional, then the court should not permit the issue of emotional distress damages to go to the jury either. The Harless II court noted that the common law did not

165. Id. at 183.
166. Reinstatement would also appear to be an appropriate remedy for an employee alleging a pro forma hiring, notwithstanding that the analysis would be made under Section 1.
167. 289 S.E.2d at 703. The Harless II court provided examples of conduct which might subject an employer to punitive damages: "where the employer circulates false or malicious rumors about the employee before or after the discharge or engages in a concerted action of harassment to induce the employee to quit or actively interferes with the employee's ability to find other employment." Id. at n.19.
168. In a retaliatory discharge action, the jury must measure the employer's subjective intent. Zaragosa v. Oneok, Inc., 700 P.2d 662, 664 (Okla. 1984). Oregon's parallel to Section 3, Or. Rev. Stat. § 659.415 (1989), requires no showing of motive on the part of the employer. Shaw v. Doyle Milling Co., Inc., 683 P.2d 82, 83 (Or. 1984); see also Palmer v. Central Oregon Irrigation Dist., 754 P.2d 601, 603 (Or. 1988) ("[a] discriminatory motive need not be proved to establish a violation of the statute; correspondingly, a violation of the statute does not ipso facto establish a discriminatory motive.")
allow for the recovery of emotional distress damages unless (1) there was a physical injury caused by impact upon the occurrence of the tort; (2) there was a physical injury manifested other than by impact; or (3) the defendant's conduct was shown to have been intentional or wanton.\(^{169}\) The *Harless II* court found the tort of retaliatory discharge to carry with it "sufficient indicia of intent" so as to warrant the award for emotional distress as a part of compensatory damages.\(^{170}\) Such will not always be the case under Section 3.

VI. PRE-EMPTION ISSUES ARISING UNDER SECTION 3

A. Why Section 3 Creates Pre-emption Issues

Because of Section 3, a unionized employer may find itself confronted with conflicts resulting from a friction between rights under a collective bargaining agreement and obligations under Section 3. To complicate matters, obstruse questions of federal pre-emption may cloud the picture.\(^{171}\) The Legislature had the opportunity to avoid these problems by making Section 3 subordinate to the collective bargaining process. That it failed to do so can be seen in the language employed in Subsection 3(c):

Any civil action brought under this section shall be subject to the seniority provisions of a valid and applicable collective bargaining agreement, or arbitrator's decision thereunder, or to any court or administrative order applying specifically to the injured employee's employer, and shall further be subject to any applicable federal statute or regulation.\(^{172}\)

\(^{169}\) *Harless II*, 289 S.E.2d at 701 (quoting Monteleone v. Co-Operative Transit Co., 36 S.E.2d 475, 478 (W. Va. 1945)).

\(^{170}\) Id. at 702.

\(^{171}\) See discussion *infra* Section VI.B.

\(^{172}\) W. VA. CODE § 23-5A-3(c) (Supp. 1991). This provision is to be compared to the treatment to be afforded collective bargaining agreements under the Massachusetts and Oregon statutes:

In the event that any right set forth in this section is inconsistent with an applicable collective bargaining agreement or chapter thirty-one, the collective bargaining agreement or said chapter thirty-one shall prevail.

MASS. GEN. LAWS ANN. ch. 152, § 75A (West 1988).

(2) Such right of reemployment shall be subject to the provisions for seniority rights and *other employment restrictions* contained in a valid collective bargaining agreement between the employer and a representative of the employer's employees.

The Legislature did defer to the seniority provisions of collective bargaining agreements, but collective bargaining agreements obviously contain restrictions on employment apart from seniority provisions.  

A critical issue in determining the scope of the conflict between Section 3 and collective bargaining agreements will turn on the construction of Subsection 3(c)'s reference to "arbitrator's decision." West Virginia courts could avoid pre-emption problems by ruling that the phrase "arbitrator's decision thereunder" modifies "valid and applicable collective bargaining agreements" rather than "seniority provisions of a valid and applicable collective bargaining agreement." Hence, the deference would extend to all arbitration decisions interpreting the collective bargaining agreement rather than just the interpretation of seniority provisions.

A construction as set forth above could be aided by the principle of statutory construction that a legislature is assumed to know the state of the law at the time of drafting a piece of legislation. Given the perils of intruding into areas of federal supremacy, it could be argued that the Legislature wished to avoid any conflict with federal law. Likewise, there is the additional principle of construction which holds that statutes should be construed in such a manner as to make them valid and to avoid constitutional infirmities.

Unfortunately, Section 3 would appear to be subject also to a "rule of liberality" which would operate in favor of the individual employee. In this vein, it must be remembered that Section 3 is a statute drafted primarily for the individual employee, and the statute reveals no particular deference to the majoritarian process of collective bargaining. Moreover, the court's first duty in constru-

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173. For example, the collective bargaining agreement could contain provisions on absence control, availability of jobs, job classifications, temporary leaves, and termination of employment all of which could clash with an individual employee's Section 3 rights.

174. See Shan Holtz, 270 S.E.2d at 183.


176. See, e.g., Estes v. Workmen's Comp. Comm'r, 147 S.E.2d 400, 403 (W. Va. 1966) (workers' compensation law is remedial in nature and must be given a liberal construction).

177. In finding no pre-emption of a state statute which required minimum health care benefits to be included in employee benefit packages, the Supreme Court stated that "[i]t would turn the
ing statutes is to look at the language of the statute. The phrase “arbitrator’s decisions” is positioned after the reference to “seniority provisions.” It is logical to conclude that the Legislature meant to expand slightly upon the deference afforded to the bare words of “seniority provisions” by incorporating the decisions of arbitrators. In essence, “arbitrator’s decisions,” would be to the collective bargaining agreement’s “seniority provisions” what case law is to statutes.

Continuing with the above theme, it should be noted that Section 3 refers to “arbitrator’s decision.” It does not express a deference to “arbitration” generally or, more significantly, to the issues under a collective bargaining agreement which are subject to arbitration. In other words, Section 3 does not contain language which would, in the first instance, grant deference to issues which would blossom into “arbitrator’s decisions,” other than the reference to seniority provisions.

Based upon the above reasoning, it is quite possible that courts interpreting Section 3 will become entangled in pre-emption issues as a result of the statute’s failure to give wholesale deference to the entire arbitration process.

B. The Pre-emption Doctrines

The principle that federal law shall control over state law is an essential part of the federalism which controls the relationship between the federal government and the various state governments. From this principle, as applied in the realm of labor law, has come

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178. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975) (Powell, J. concurring) (starting point in the construction analysis is the language of the statute itself); Hatcher v. Narcise, 375 S.E.2d 198 (W. Va. 1988) (if no ambiguity, court's duty is to apply statute, not to construe it).

179. The West Virginia court has not been inclined to show much deference to the arbitration process generally. Davis v. Kitt Energy Corp., 365 S.E.2d 82 (W. Va. 1987) (arbitrator's award against union miner did not preclude claim of discrimination filed with the Coal Mine Safety Board of Appeals).

180. It is manifested by the supremacy clause in the United States Constitution. U.S. Const. art. VI, cl. 2.
a bundle of pre-emption doctrines which work to insure that the will of Congress will not be frustrated in establishing national labor policy. Inevitably, challenges may arise as to whether Section 3 in any manner runs afoul of federal law and, consequently, falls prey to the pre-emption doctrines.\textsuperscript{181}

The labor pre-emption doctrines have been characterized as flowing from two broad areas of conflict between state law and federal law: "(1) state law conflict with the substantive rights and policies of the federal law, or (2) state law conflict with the primary jurisdiction of the federal enforcement agency, the National Labor Relations Board ("NLRB")."\textsuperscript{182} Under the National Labor Relations Act\textsuperscript{183} the state law may be pre-empted (1) if it curtails activities protected by Section 7 of the Act;\textsuperscript{184} (2) if it interferes with the primary jurisdiction of the National Labor Relations Board, the tribunal established by Congress to adjudicate issues arising under the NLRA;\textsuperscript{185} and (3) if it intrudes into areas which Congress intended to leave unregulated.\textsuperscript{186} State law can likewise be pre-empted under the Labor-Management Relations Act (LMRA)\textsuperscript{187} for intrusion into unregulated areas.\textsuperscript{188} Also, the LMRA will pre-empt state law if the state law mandates interpretation of a term in a collective bargaining

\begin{itemize}
\item \textsuperscript{181} These types of pre-emption issues will only arise in those instances where the employer's work force is unionized.
\item \textsuperscript{182} Lance C. Malina, Note, \textit{Retaliatory Discharge, Workers' Compensation and Section 301 Pre-emption}, \textit{37 Dear Paul L. Rev.} 675, 681 (1988) (citing ARCHBALD COX ET AL., CASES AND MATERIALS ON LABOR LAW, 895-96 (10th Ed. 1986)).
\item \textsuperscript{184} Hill v. Florida ex rel. Watson, 325 U.S. 538 (1945). Likewise, state law would be pre-empted if it sanctioned conduct prohibited by section 8 of the NLRA.
\item \textsuperscript{185} San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959).
\item \textsuperscript{186} Int'l Ass'n Machinists v. Wisconsin Employment Relations Comm'n, 427 U.S. 132 (1976) (state cannot penalize concerted refusal to work over-time that was neither prohibited nor protected under NLRA). The Tenth Circuit has characterized this holding as an acknowledgement "that the absence of federal regulation is indicative of a congressional determination to leave the challenged conduct available, and that to allow the states to regulate the conduct would be to upset the balance of power between labor and management expressed in national labor policy." Peabody Gallon v. Dollar, 666 F.2d 1309, 1315 (10th Cir. 1981).
\item \textsuperscript{188} Teamsters v. Morton, 377 U.S. 252 (1964).
\end{itemize}
agreement. This latter principle is the most likely to be implicated by Section 3.

Section 301 of the LMRA provides a vehicle by which employers, employees or unions may bring suit for violations of collective bargaining agreements. The Supreme Court has held that Congress intended, with the enactment of section 301, to also have the federal courts fashion a body of federal common law to be used in section 301 suits. Section 301 thus provides the exclusive manner in which to assert a claim in court under a collective bargaining agreement, and the law to be applied is federal. The purpose is "to ensure uniform interpretation of collective-bargaining agreements, and thus to promote the peaceable, consistent resolution of labor-management disputes." If state law is allowed to share in the shaping of collective bargaining agreement law, then inconsistent results would surely follow.

C. The Supreme Court Precedents

It being firmly established that state contract law had no place in section 301 analysis, the Supreme Court addressed in Allis-Chalmers Corp. v. Lueck whether section 301 pre-emption could extend beyond suits alleging state contract violations and reach state tort actions. In Lueck, the employee brought a tortious, bad-faith breach-of-contract claim under state law alleging that his employer had, in bad faith, breached a contractual duty to provide insurance coverage. Although the duty to provide such coverage was created by the collective bargaining agreement, the employee did not pursue a grievance under that contract, opting instead for a state tort action. The Supreme Court concluded that the state law tort action was pre-empted because its resolution was substantially dependent upon

190. 29 U.S.C. § 185(a) (1988): "[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties . . . ."
194. Id. at 406 ("there could be as many state-law principles as there are States").
an interpretation of the terms of the collective bargaining agreement.\footnote{196. The Court noted that the cause of action would not have been available absent the duty created by the collective bargaining agreement. Hence, \textquoteleft Lueck \textquoteright established a fairly simple initial pre-emption test: if the origin of the cause of action is the collective bargaining agreement, then pre-emption is appropriate.}

Although the \textit{Lueck} Court counselled that its holding was to be narrowly applied, confusion soon developed in the lower courts as to the effect of the Supreme Court's ruling on tort-based retaliatory discharge suits.\footnote{197. See generally Lance C. Malina, Note, \textit{Retaliatory Discharge, Workers Compensation and Section 301 Pre-emption}, 37 \textit{De Paul L. Rev.} 675 (1988).} In \textit{Lingle v. Norge Division of Magic Chef, Inc.},\footnote{198. 823 F.2d 1031 (7th Cir. 1987).} the Seventh Circuit held that section 301 pre-empted the Illinois common law action of retaliatory discharge for filing a workers' compensation claim. The Supreme Court reversed, holding that the Illinois tort action was independent of the collective bargaining agreement.\footnote{199. 486 U.S. 399 (1988).} The Court defined "independent" as meaning that "the state-law claim does not require construing the collective bargaining agreement."\footnote{200. \textit{Id.} at 407.} Prior to \textit{Lingle}, the Supreme Court of Appeals of West Virginia,\footnote{201. Yoho v. Triangle PWC, Inc., 336 S.E.2d 204 (W. Va. 1985).} as well as a federal district court,\footnote{202. Messenger v. Volkswagen of America, Inc., 585 F. Supp. 565 (S.D. W. Va. 1984).} had held that West Virginia's tort-based action for retaliatory discharge, as codified in Section 1, was not pre-empted by federal labor law. It would be simplistic, and also convenient, to conclude that Section 3 is also free of the pre-emption doctrines. The analysis, unfortunately, is not so simple.

\textbf{D. Nature of the State Law Claims}

The question of whether state law is pre-empted is controlled by principles of federal law.\footnote{203. \textit{Lueck}, 471 U.S. at 210.} On the other hand, the state is allowed to define its own tort action, and the character of that action is determined by reference to state law.\footnote{204. \textit{Id.} The \textit{Lueck} court saw the nature of the state law claim to be the crucial factor in the pre-emption analysis. \textit{Id.} at 213-14.} In referring to state law, the
reviewing court must determine the elements of the purported state-law claim. With respect to the workers’ compensation retaliatory discharge suit at issue in *Lingle*, the United States Supreme Court found the elements of the plaintiff’s theory to be as follows: (1) he was discharged or threatened with discharge and (2) the employer’s motive in discharging or threatening to discharge him was to deter him from exercising his rights under the act or to interfere with his exercise of those rights. The plaintiff’s burden in West Virginia under Section 1 would be similar, if not identical. Under Section 3, however, the nature of the inquiry is different.

The chief distinction between a suit under Section 3 and a suit under Section 1 is that the Section 3 suit does not require a showing of intent to discriminate on the part of the employer. Such intent could be present, but it is immaterial for purposes of establishing liability under the section. Moreover, it must be noted that Section 3 provides for at least two distinct causes of action: (1) unlawful termination and (2) unlawful failure to reinstate. The elements

207. In Powell v. Wyoming Cablevision, Inc., 403 S.E.2d 717 (W. Va. 1991), the West Virginia Supreme Court set forth the elements of a plaintiff’s prima facie case. The elements of a prima facie case, however, should not be confused with the general elements of the case upon which the plaintiff has the burden of persuasion. The elements of a prima facie case constitute merely the initial, minimum showing which a court requires of a plaintiff alleging discrimination before shifting the burden of going forward to the defendant. The elements of a workers’ compensation retaliatory discharge suit under West Virginia law, after sorting through the plaintiff’s prima facie case, the defendant’s legitimate non-discriminatory business reason and the question of “pretext,” essentially consists of two elements: (1) discharge and (2) an illicit motive on the part of the employer (retaliation for pursuing workers’ compensation benefits).

The *McDonnell-Douglas* burden-shifting proof scheme is probably not even appropriate for an action under Section 3. That scheme is designed to assist the employee in circumstantially demonstrating that the employer intended to discriminate. Section 3 requires no showing of intent. Hence, the more appropriate methodology would be to utilize the traditional model under which the employee has the burden of proof on the elements of the case and the employer has the burden of proof on the affirmative defenses.

209. W. Va. Code § 23-5A-3(b) (Supp. 1991). The “unlawful failure to reinstate” claim could be brought in a number of variations depending upon whether the employee was seeking his former position, a comparable position, or any job. Likewise, the nature of the suit would be influenced by whether the employer was defending based upon availability of a position, comparability of a position, or the ability of an applicant to perform the duties of the position in question.
of each cause of action, although similar in some respects, must be evaluated separately.

Although no court has announced the elements of a termination claim under Section 3, a parsing of the statute reveals the following probable elements: (1) the employee was off work due to a compensable injury; (2) the employee was receiving, or was eligible to receive, temporary total disability benefits; and (3) the employee was terminated from his employment.\textsuperscript{210} The elements of a reinstatement claim would most likely be as follows: (1) the employee had a compensable injury; (2) the employee made demand for reinstatement to a particular position; (3) the position was available; (4) the employee could perform the duties of the position; and (5) the employer failed to reinstate the employee to the position.

E. Application of the Pre-emption Doctrines

Turning first to the termination claim, the analysis mandated by the decisions in \textit{Lueck} and \textit{Lingle} yields the conclusion that such a claim would most likely not be pre-empted. First, it is quite evident that the claim does not have its origin in the collective bargaining agreement, as did the state law claim in \textit{Lueck}.\textsuperscript{211} Rather, its source is independent of the collective bargaining agreement. Second, in resolving a claim under Subsection 3(a) (for termination), a court would not be called upon to interpret or construe the terms of a collective bargaining agreement. Hence, it cannot be said that the claim is substantially dependent upon the collective bargaining agreement.

The above analysis sets aside the issue of "separate dischargeable offense." It must be assumed that this issue would have to be pled

\textsuperscript{210} In order to have a "termination" within the meaning of Section 3, the employer-employee relationship would probably have to be severed. A reassignment or demotion of the employee would not be protected under Section 3(a), but might be addressed as "discrimination" under Section 1. \textit{See} City of Santa Barbara v. Workers' Compensation Appeals Bd., 167 Cal. Rptr. 65 (Cal. Ct. App. 1980) (employer could not demote employee who was off work receiving temporary total disability benefits). Moreover, the reassignment or demotion might be voided by the employer's obligations under Subsection 3(b) to "restate" the employee.

\textsuperscript{211} \textit{See also} Int'l Bhd. of Elec. Workers v. Hechl, 481 U.S. 851 (1987) (suit against union for failing to provide a safe work place was pre-empted because it was only the collective bargaining agreement which placed that duty on the union).
The West Virginia Law Review states that the issue thus arises as to whether the employer’s burden to explain its actions would call into question provisions of the collective bargaining agreement. The Lingle Court noted, in dealing with a pure retaliatory discharge suit, that the employer’s burden was only to “show that it had a non-retaliatory reason for the discharge . . . ; this purely factual inquiry . . . does not turn on the meaning of any provision of a collective bargaining agreement.”

An employer falling under Subsection 3(a) would not have to prove that it terminated the employee for “just cause” within the meaning of the collective bargaining agreement. Rather, it would have to meet the definition, vague and ambiguous as it is, set forth in Subsection 3(a). In Baldracchi v. Pratt & Whitney Aircraft Division, the employer argued that in responding to the employee’s prima facie case in a workers’ compensation retaliation suit, it would have to establish that the proffered reason for discharging the employee was legitimate — that is, that the discharge was for “just cause” under the collective bargaining agreement. The Second Circuit rejected the employer’s argument. The court noted that the right provided to the plaintiff under Connecticut law was absolute and could not be waived. That the analysis under the statute and the collective bargaining agreement might be similar is not determinative. The Lingle court provided the following analysis:

"Even if dispute resolution pursuant to a collective-bargaining agreement, on the one hand, and state law, on the other, would require addressing precisely the
same set of facts, as long as the state-law claim can be resolved without interpreting the agreement itself, the claim is 'independent' of the agreement for §301 pre-emption purposes.219

With respect to Subsection 3(a), it is quite probable that a "just cause" determination under the collective bargaining agreement would, in most instances, satisfy the "separate dischargeable offense" test of that subsection. An employer could not, however, rely upon a contractual provision which violated Subsection 3(a)'s limitations on terminations.220 Conversely, a termination might not violate Subsection 3(a) but could run afoul of "just cause" provisions in the collective bargaining agreement.221 In essence, Subsection 3(a) can be read as establishing a floor of protection for the individual employee below which the union and the employer may not negotiate.222

Turning to the reinstatement claim under Subsection 3(b), the analysis is similar to that spelled out above for termination claims. Again, the claim would not rely upon the collective bargaining agreement for its existence, and it generally would not call upon the court to construe the collective bargaining agreement. As with the termination claim, however, there is one aspect of the reinstatement claim which could implicate a pre-emption analysis. The third el-

219. 486 U.S. at 409-10.
220. The Seventh Circuit stated in Baldracchi, 814 F.2d 102, "that even if the labor agreement provided that [the employer] could discharge an employee who filed a workers' compensation claim, the provision would have no effect on [the plaintiff's] claim under the Connecticut statute [forbidding such conduct]." Id. at 105.
221. Litigants must be wary of courts looking to the collective bargaining agreement, under the guise of a Subsection 3(a) analysis, for guidance as to whether a "separate dischargeable offense" had been established. If that were to occur, pre-emption would probably be appropriate. Otherwise, the state court would be construing the contract.
222. Subsection 3(a) provides that a "separate dischargeable offense shall mean misconduct by the injured employee wholly unrelated to the injury or the absence from work resulting from the injury." Moreover, a "separate dischargeable offense shall not include absence resulting from the injury or from the inclusion or aggregation of absence due the injury with any other absence from work." Therefore, except for the indirect effects of seniority rights, see Subsection (c), an employer and union could not agree to terminate employees for reasons falling within the above-quoted restrictions. Conversely, if an employer and union negotiated a more restrictive discharge standard, an employee could not bring a cause of action under Subsection 3(a) arguing that the employer had breached its obligations under the collective bargaining agreement to discharge for limited reasons only. To do so would be merely an end run around the grievance system established to govern the collective bargaining agreement.
ement of a plaintiff's reinstatement claim would require the plaintiff to establish that the position was available. If the plaintiff relied upon the collective bargaining agreement to establish availability, then his claim might be pre-empted inasmuch as the court would be called upon to construe the collective bargaining agreement.

The Supreme Court has left the water muddy as to the extent to which a state claim, such as for reinstatement under Subsection 3(b), can co-exist with a collective bargaining agreement which must be construed with federal law. With a fair measure of enigma, the Court stated in Lueck that "not every dispute ... tangentially involving a provision of a collective bargaining agreement, is pre-empted by § 301 ...."223 As an aside, the Court added the following comment in Lingle:

Thus, as a general proposition, a state-law claim may depend for its resolution upon both the interpretation of a collective-bargaining agreement and a separate state-law analysis that does not turn on the agreement. In such a case, federal law would govern the interpretation of the agreement, but the separate state-law analysis would not be thereby pre-empted.224

The specific proposition which the Supreme Court was addressing prior to stating the "general proposition" was the situation whereby a reference was made to the collective bargaining agreement to determine the damages for an employee prevailing in a state-law suit.225 It is unclear as to the extent to which Subsection 3(b)'s potential reliance upon a collective bargaining agreement to determine "availability" would comport with the coexisting spheres described above.226

F. The Balance-of-Power Test

A state law may escape pre-emption under the principle set forth above only to be subject to attack under the nebulous balance-of-

223. Lueck, 471 U.S. at 211.
224. 486 U.S. at 413, n.12 (citing Allis-Chambers Corp. v. Lueck, 471 U.S. 202 (1985)).
225. See also Baldracchi v. Pratt & Whitney Aircraft Div., 814 F.2d 102 (2nd Cir. 1987).
226. A major contradiction in an expanded construction of the Supreme Court's hybrid cause of action (one borrowing from both state and federal principles) can be found in that element of federal labor law which requires an employee to exhaust his contractual remedies and, for the most part, to be bound by the result. See infra discussion accompanying notes 247-51. Perhaps the contradiction itself provides the answer. To the extent that the contractual provision which the state law would borrow requires arbitration, borrowing could not occur and pre-emption would attach.
THE ANTI-DISCRIMINATION PROVISION

power test. First articulated by the United States Supreme Court in Local 20 Teamsters Union v. Morton, the test is designed to preempt state laws when the reviewing court "finds that the absence of federal regulation is indicative of a congressional determination to leave the challenged conduct available, and that to allow the states to regulate the conduct would be to upset the balance of power between labor and management expressed in national labor policy." The goal of this pre-emption doctrine is to leave an unregulated sphere where industry and labor can arrive at compromises based upon the free play of economic forces.

No statute similar to Section 3 has undergone a balance-of-power pre-emption analysis. Nevertheless, principles from related factual settings suggest that Section 3 could survive such a pre-emption analysis. The Tenth Circuit, in Peabody Galion v. Dollar, subjected Oklahoma's statute prohibiting workers' compensation discrimination to the balance-of-power test and concluded that there was no pre-emption. The court noted that there is only a "small class of cases" in which this type of pre-emption would be appropriate. With respect to the workers' compensation retaliatory discharge action in question, the court observed that it was not a restriction on the type of activity which could be characterized "as an essential aspect of the economic forces which enter into the shaping of viable labor agreements." Rather, said the Tenth Circuit, the state law "regulates one aspect of the manner in which such objectives are obtained, to insure that inappropriate criteria do not motivate an employer's decision."

227. 377 U.S. 252 (1964) (pre-empting state law which imposed liability on a union engaged in a legal strike).
230. 666 F.2d 1309 (10th Cir. 1981).
231. By way of example, the Tenth Circuit cited Local 20, Teamsters v. Morton, 377 U.S. 252 (awarding damages against a union for peaceful secondary picketing) and Int'l Ass'n of Machinists v. Wisconsin Employment Relations Comm'n., 427 U.S. 132 (prohibiting a union's concerted refusal to work overtime). 666 F.2d at 1316.
232. 666 F.2d at 1316.
233. Id.
Coming down heavily on the side of no pre-emption under the balance-of-powers analysis is the recognition by the courts that "the establishment of labor standards falls within the traditional police power of the state."234 Accordingly, the power to pre-empt should be exercised lightly by the courts.235 Moreover, it is recognized that workers' compensation is pre-eminently a matter of state concern.236 Although Section 3 does not deal with workers' compensation in the traditional sense, it can be said that returning injured employees to work is an interest which is "deeply rooted in local feeling and responsibility."237

G. Arbitration

If Section 3 survives pre-emption by federal labor law, a question certain to arise under the statute is the interplay between court action under the statute and arbitration decisions construing the collective bargaining agreement. As the Lingle Court recognized, the arbitrator is charged in the first instance with interpreting the labor contract.238 Moreover, the Court acknowledged that it was essential to national labor policy that the effectiveness of arbitration be preserved.239 One commentator has noted the fear of employers "that the limited remedies and arbitration bargained for in labor contracts would be easily avoided by employees eager to obtain larger awards in state courts."240

234. Lingle, 486 U.S. at 412 (quoting Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 21 (1987)).
235. Id.
236. Peabody Galion, 666 F.2d at 1317. Pursuant to 28 U.S.C. § 1445(g), a complaint brought in state court under that state's workers' compensation laws cannot be removed to federal court. In Thomas v. Kroger Co., 583 F.Supp. 1031 (S.D. W. Va. 1984), the court interpreted an action brought pursuant to Section 1 as arising under West Virginia's workers' compensation laws.
238. 486 U.S. at 411 (quoting Lueck, 471 U.S. at 220).
239. Id.
Hence, the rule has been that arbitration under the collective bargaining agreement is the union employee's exclusive remedy and one by which he is bound.\textsuperscript{241}

The exclusivity rule for arbitration, however, has been subject to exception where individual rights, deriving from a source independent of the collective bargaining agreement, were at issue. In \textit{Alexander v. Gardner-Denver Co.},\textsuperscript{242} the Supreme Court found that the employee's Title VII statutory right to trial was not foreclosed by his earlier submission of a discrimination claim to arbitration.\textsuperscript{243}

\section*{VII. \ OTHER ISSUES ARISING UNDER SECTION 3}

As discussed previously, Section 3 provides for two distinct claims: unlawful termination and unlawful failure to reinstate. The following section of the Article discusses issues which might arise under the two claims with respect to statutes of limitation ripeness, standing, and application of the definition for "separate dischargeable offenses."

\subsection*{A. \ Statute of Limitations}

In \textit{Stanley v. Sewell Coal Co.},\textsuperscript{244} the Supreme Court of Appeals of West Virginia held that the tort-based retaliatory discharge action,

\begin{itemize}
  \item \textsuperscript{242} 415 U.S. 36, 49 (1974).
  \item \textsuperscript{243} In \textit{Gilmer v. Interstate/Johnson Lane}, 114 L. Ed. 2d 26 (1991), the Court held that a nonunion stock broker's claim under the Age Discrimination in Employment Act was subject to arbitration, notwithstanding the Court's earlier ruling in \textit{Alexander}. The \textit{Gilmer} Court distinguished \textit{Alexander} on a number of grounds: (1) the issue in \textit{Alexander} was whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims; whereas, the issue in \textit{Gilmer} concerned an agreement to arbitrate all claims; (2) the employee in \textit{Gilmer} was nonunion; he had personally entered into the agreement to arbitrate as opposed to having the agreement thrust upon him as part of the majoritarian process; and (3) the \textit{Alexander} case, unlike \textit{Gilmer}, was not decided under the Federal Arbitration Act (FAA), which evinces a liberal federal policy in favor of arbitration.

As noted, \textit{Gilmer} was decided under the FAA. That federal act, however, excludes "contracts of employment" from the type of disputes covered by the Act. The Supreme Court sidestepped this problem in \textit{Gilmer} by noting that the agreement to arbitrate was in the employee's securities registration application, and, as such, the contract with the securities exchanges rather than the employer. \textit{See}, \textit{e.g.}, \textit{Willis v. Dean Witter Reynolds, Inc.}, 948 F.2d 305 (6th Cir. 1991). (Securities representative's sexual harassment claims were subject to arbitration pursuant to the registration form she signed.) In the normal course of affairs, therefore, the nonunion employee would not be confronted with an action by his employer under the FAA to compel arbitration of a claim brought pursuant to Section 3.

\item \textsuperscript{244} 285 S.E.2d 679 (W. Va. 1981).
\end{itemize}
having its genesis in *Harless v. First National Bank in Fairmont*,245 was subject to a two-year statute of limitations.246 Such is the limitations period for Section 1247 and, because Section 3 incorporates Section 1 by reference, it most certainly is the limitations period for a claim brought under Section 3, be it for termination or failure to reinstate.

Assuming that the appropriate limitations period is two years, the question then becomes when the claim for wrongful termination arises under Section 3. In *Shanholtz v. Monongahela Power Co.*,248 the West Virginia court held that an employee's claim for wrongful discharge accrued on the date of the discharge; the employee should know at that time, said the court, whether he had a cause of action.249

An application of the *Shanholtz* holding to a termination claim under Section 3 has appeal at first blush. The nature of a "termination" under Section 3, however, places a strain on the application. When an employee is terminated in the normal course of events, he suffers a cessation of active employment. He no longer goes to the work place; he no longer performs the duties of his position. An employee terminated while on workers' compensation leave, however, may suffer no noticeable disruption in his daily routine. Admittedly, if the employer fulfills its obligation with respect to medical coverage, the employee may receive notice of his right to continue that coverage.250 All things being equal, however, an employee may sit on his rights until he is physically able to return

246. See *supra* discussion accompanying notes 32-33.
247. In *Shanholtz v. Monongahela Power Co.*, 270 S.E.2d 178 (W. Va. 1980), the West Virginia Supreme Court was confronted with an issue of timeliness in conjunction with a workers' compensation retaliatory discharge action. It implied that a two-year limitations period was appropriate, but did not have to decide the issue because the operative date was beyond either a one-year or a two-year period. The *Stanley* decision breathed life into the dicta of *Shanholtz*.
248. 270 S.E.2d 178 (W. Va. 1980).
249. *Id.* at 182. The court rejected the plaintiff's argument for application of a "discovery rule," the plaintiff argued that the limitations period did not begin to run until he discovered or should have discovered the tortious act. *Id.*
250. Consolidated Omnibus Budget Reconciliation Act of 1985, 29 U.S.C. § 1161 (1990) (an employer must provide a terminated employee with notice of his right to continue medical coverage, at the employee's expense, for a limited period subsequent to the termination).
to work. Based upon these circumstances, it is quite conceivable that a court could graft a discovery rule onto a Section 3 termination claim.

B. Accrual of the Claim

Another factor which might cause a court to engage in judicial gymnastics can be found in the damages available under a Section 3 termination claim. If an employee was terminated while receiving temporary total disability benefits, and if he was still disabled at the time of trial, then he would have no lost wages. The continued receipt of workers' compensation benefits would collaterally estop the employee from claiming that he was able to work in the period between termination and trial. Moreover, absent a showing of intent to discriminate, the employee would not be entitled to emotional distress damages or punitive damages. 251 Neither would the plaintiff be entitled to attorneys' fees. Conceivably, the employee would be entitled to the value of lost fringe benefits, specifically medical insurance. 252 If another insurance policy is applicable to the household, however, even the disruption of the employee's coverage may be a wrong without harm. The medical expenses related to the employee's injuries, of course, would be paid by the Workers' Compensation Fund.

Under the above scenario, a terminated employee may not have much incentive to sue. 253 If he does not sue, however, he will find

251. See supra discussion accompanying notes 170-79. Also, if the employee was disabled at the time of trial, he would not be entitled to reinstatement or any type of "front pay."

252. By analogy, under the federal plant closing law (29 U.S.C. § 2101), an aggrieved employee may receive the value of the premiums not paid by the employer and, in addition, the cost of any health care administered during the applicable period. This latter item could mushroom into a substantial figure if the employee or one of his dependents experienced a major health problem during the period of noncoverage.

Even medical benefits, however, may not be available to the employee. Coverage depends upon how the employer's "employee benefit plan" is written. If the plan does not provide for the continuation of coverage during periods of temporary total disability, then the employee's claim for benefits may be preempted by the Employee Income Security Act of 1974, 29 U.S.C. §§ 1001-1461 ("ERISA"). Fixx v. United Mine Workers of America, 645 F. Supp. 352 (S.D. W. Va. 1986) (W. Va. Code § 23-5A-2 provides for continuation of medical insurance during period of TTD, but statute preempted by ERISA to the extent the statute conflicts with the employer's plan).

253. A California court noted that an employee unable to return to work at the time she was
his claim for wrongful termination barred by the two-year limitations period. In this vein, it should be noted that an employee can be on temporary total disability for twice as long as the limitations period.\textsuperscript{254} An employee not bringing a termination claim would have to wait until such time as he could establish the elements for a reinstatement claim. Such a claim, assuming the employer’s refusal to reinstate, would require proof that a position was available and that the employee was able to perform the duties of the position. Of course, an employee bringing a termination claim would also have to establish those elements in order to obtain (1) lost wages from the date of demand for reinstatement to trial and (2) reinstatement to a position. Thus, an employee failing to bring a termination claim, for whatever reason, would essentially have a second bite at the apple.\textsuperscript{255}

The above discussion reveals that Section 3 creates a very strange right with respect to termination, the right to remain on the rolls of the employer as an “employee.” Most of the rehire statutes protect the right to return to employment.\textsuperscript{256} For example, Hawaii’s statute forbids an employer to discharge an employee who has suffered a work-related injury, unless the employer establishes that the employee is incapable of performing his work and there is no other available work which the employee can perform.\textsuperscript{257} In contrast, Subsection 3 (a) presumes that the employee who is promised continued “employment” will be unable to perform his duties.

\textsuperscript{254} W. VA. CODE § 23-4-6 (Supp. 1991) (208 weeks).

\textsuperscript{255} This interplay between the termination claim and reinstatement claim can produce some unusual permutations: an employee could combine a termination claim and a reinstatement claim and seek damages applicable to both; an employee could file a termination claim and later amend to add a reinstatement claim; an employee could file a termination claim and forego the reinstatement claim because of personal reasons or weakness of proof; an employee could file a reinstatement claim and forego damages under a termination claim. Moreover, a terminated employee could be reinstated or a nonterminated employee could be refused reinstatement. In any event, due to the distinct characteristics of the two claims and the different damages available, an employee should be required to plead each claim under which he is proceeding.

\textsuperscript{256} See supra note 59.

\textsuperscript{257} HAW. REV. STAT. § 386-142 (1985).
Under Hawaii’s statutory scheme, an employee discriminatorily discharged, but still unable to return to work, is deemed to have been discharged as of the day he is able to return to work. The employee must file his administrative complaint within thirty days of his actual discharge or, as the case may be, the presumed date of his discharge under the statute. The Hawaii Supreme Court has held that an employee may file his claim prior to being able to return to work and the administrative agency would hold the suit in abeyance until such time as the employee is able to return. Section 3 does not face similar complaints of prematurity because the right to be free of “termination” is independent of the right to be reinstated.

C. Employees Protected from Termination

Subsection 3(a) protects from termination an “injured employee . . . off work due to a compensable injury [who] is receiving or is eligible to receive temporary total disability benefits . . .” Several common sense observations can be made with respect to this language. First, the employee must have been injured in the course of employment. Otherwise, the injury is not compensable. Second, the injury must have produced an absence from work. A “no lost time” accident, although perhaps compensable, would not bring the employee within the purview of the statute. Third, the cessation of work must have been “due to” the injury. If an employee was injured on the job and subsequently discharged for another reason.

258. It seems incongruous that a Hawaii employer could be entitled to discharge an employee unable to perform his duties due to injury and yet be sued for discriminatory discharge by an employee who, because he is unable to return to work, receives the assistance of a statutory fiction as to when he was discharged. The only way to reconcile this internal inconsistency is to assume that the statute is aimed at those employers who discriminatorily reject injured employees for future employment consideration.

259. Puchert v. Agsalud, 677 P.2d 449 (Haw. 1984); see also Jordan v. Workers’ Compensation Appeals Bd., 220 Cal. Rptr. 554 (Cal. App. 1985) (suit of employee, unable to return to work after her termination, was premature).


prior to missing work, then there would be no nexus between the injury and the absence within the meaning of the statute. 263

Perhaps one of the most troubling clauses in Subsection 3(a) is the one which restricts protection to the employee “while [he] is receiving or is eligible to receive temporary total disability benefits.” Under the West Virginia Workers’ Compensation Act, an employee is not entitled to temporary total disability benefits until he has been off work for three days. 264 Not being entitled to benefits during those three days, the employee could not be characterized as being “eligible.” 265 Accordingly, the question arises as to the treatment of employees during this three-day grace period. Could an employee be terminated for any reason prior to the eligibility for benefits? The Legislature has provided, perhaps unwittingly, an answer to this question.

A meticulous reading of Subsection 3(b) (reinstatement) will find it broader than Subsection 3(a) (termination). To be eligible for reinstatement under Subsection 3(b), an employee need only to have suffered “a compensable injury.” Accordingly, even if an employee was discharged during the three day “grace period” and, consequently, perhaps fell outside the letter of Subsection 3(a), he would still have a claim under Subsection 3(b). An unusual case from Wisconsin drives this point home.

In Link Industries, Inc. v. Labor & Industry Rev. Comm’n, 266 the employee was slightly injured on the job. He missed work, without prior approval, for a doctor’s appointment. He was discharged for missing the one day of work. Wisconsin does not have a termination statute in the nature of Subsection 3(a). Rather, its statute prohibits an employer from refusing to reinstate without reasonable

263. It is not unheard of for employees to file for workers’ compensation benefits after leaving employment. For instance, an employee subject to a gradually worsening condition, such as pneumoconiosis, might be prompted to seek benefits only in the wake of a layoff or disciplinary discharge. If the employee was terminated before the condition caused him to be “off work,” then he is not protected by Subsection 3(a).
265. Note, however, that if the employee is off work for more than seven days as a result of the injury, then he receives benefits for the first three days of the disability. Hence, it is possible that such an employee could be considered “eligible” within the meaning of Subsection 3(a).
266. 415 N.W.2d 574 (Wis. App. 1987).
cause an employee injured in the course of work. The Wisconsin court held that the employee's attempt to return to work on the day he was terminated implicated the protection of the statute.

We conclude that "rehire" under sec. 102.35(3) means that if an employee is absent from work because of an injury suffered in the course of employment, the employee must be allowed the opportunity to return to work if there are positions available and the previously injured employee can do the work.267

Yet another troublesome issue destined to arise from the unique wording of Subsection 3(a) concerns the employee who is terminated by his employer while his entitlement to temporary total disability benefits is being litigated. With the recent amendments to the Act, a claim can now be litigated at four different levels: commissioner, administrative law judge, appeals board, and supreme court.268 Claims can take months, if not years, to be fully resolved. What of the employee who was terminated during the litigation process, eventually prevails on the benefits issue, and then claims that he was unlawfully terminated within the meaning of Subsection 3(a)?

As to this last scenario, it is first obvious that the employee was not "receiving temporary total disability benefits" at the time of termination. It would be foolish, however, for an employer to argue that the employee was not "eligible" to receive benefits. Indeed, it was the issue of eligibility which the employer litigated and lost. The employee's benefits would be retroactive to the date of the injury.269 Although it might be argued that the employer assumed the risk of liability by terminating an employee while in the middle of litigating the benefits issue, the possibility of injustice to the employer is real.

267. Id. at 576-77.
269. Note that the employee does not necessarily have to receive a retroactive award of benefits. The question is whether he was "eligible" at the time of termination. If there are no changed circumstances between the time of the termination and the time of the award, then, presumably, the employee was "eligible."

On the other hand, the employer should receive the benefit of a decision at some point during the process that the employee was not entitled to benefits in the first instance. In that event, the employee has received an "overpayment" and the commission can collect those monies paid to the employee. W. VA. CODE § 23-4-1c (Supp. 1991). Hence, an argument can be made that the employee, having wrongfully received benefits, was not "eligible" within the meaning of Section 3.
An employer may have had a reasonable good faith belief that the employee was not "eligible" for benefits. For instance, the employer may have believed that the injury did not occur in the course of employment. Believing that it was entitled to terminate an employee who made himself unavailable for work due to a nonwork related accident, the employer takes action. Thus, the workers' compensation adjudicatory process could conclude, and even begin, subsequent to the employee's termination. In sum, an employer may find itself liable for an unlawful termination because of events occurring after the termination.

Ameliorating the above scenario would be the employee's measure of damages. As discussed previously, the employee would be entitled to lost fringe benefits only. Limited damages would be especially appropriate in light of the ability of Section 3 to transform an administrative finding, litigated under a "rule of liberality," into automatic civil liability. Moreover, the employee would not be entitled to the expanded damages potentially available under Section 3(b) until he had made an express demand for reinstatement and established entitlement to his former position, a comparable position or "any job."

D. "Separate Dischargeable Offense"

The provision in Section 3 which is prone to generate the most controversy, and consequently the most litigation, is that which provides that an employer can discharge an employee on temporary total disability if the employee "has committed a separate dischargeable offense." What the Legislature gave the employer with that clause, however, it took away with the following two sentences:

A separate dischargeable offense shall mean misconduct by the injured employee wholly unrelated to the injury or the absence from work resulting from the injury.

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270. See supra discussion accompanying notes 251-52.
271. See, e.g., Dunlap v. State Workmen's Compensation Commissioner, 232 S.E.2d 343, 345 (W. Va. 1977). Not only is the compensation issue subject to a rule of liberality, but the termination issue under Section 3 may also be subject to a rule of liberality. See Link Industries, Inc. v. Labor & Indus. Rev. Comm'n, 415 N.W.2d 574, 576 (Wis. App. 1987) (rehire statute given same liberal construction as that afforded to the rest of the workers' compensation act). In essence then, the employer is faced with "liberality squared."
A separate dischargeable offense shall not include absence resulting from the injury or from the inclusion or aggregation of absence due to the injury with any other absence from work.

Reflection upon the first sentence reveals that the phrase "wholly unrelated" has the potential to wreak havoc on areas traditionally within management's prerogative.

1. "Wholly Unrelated to the Injury"

All employers believe themselves possessed of the ability to discipline employees who violate safety or work rules. Of course, the ultimate discipline is discharge. The definition of "separate dischargeable offense," however, puts in doubt an employer's ability to levy the ultimate sanction against an employee if the violation of the rule results in a compensable injury.\(^{272}\) The wording of the statute does not allow for much maneuvering on this point. With the words used, the drafters acknowledge that an employee may be guilty of "misconduct," but that misconduct, say the drafters, must be "wholly unrelated to the injury." Clearly, misconduct can cause injury. Even clearer is the proposition that the cause of an injury such as misconduct, cannot be "wholly unrelated" to that injury. Hence, the employer's hands are tied. It cannot levy the ultimate sanction against an employee if the misconduct is related to a compensable injury.

Although unstated, it would appear that the intent was to erect prophylactic barriers with respect to the workers' compensation-related absence. Evidently fearful that employers might use violation of work rules as a pretext to discriminate against those filing for

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272. Of course, an employee is protected from discharge only while he is receiving or eligible to receive temporary total disability benefits. Moreover, there is no "separate dischargeable offense" component to Subsection (b). Theoretically, therefore, an employer could take steps to discharge the employee after he had exhausted his benefits. Most likely, however, the courts reading Subsections 3(a) and 3(b) in pari materia, will find a legislative intent to require employers to provide employees protected by Subsection 3(a) the rights available under Subsection 3(b). In other words, if an employee is saved by the "separate dischargeable offense" clause of Subsection 3(a), then he will receive the benefit of Subsection 3(b). On the other hand, however, an employee guilty of a "separate dischargeable offense" so as to be subject to termination under Subsection 3(a) should not be entitled to reinstatement under Subsection 3(b). To hold otherwise would be to render the statute an absurdity. A terminated employee could render the right afforded the employer in Subsection 3(a) a nullity simply by applying for reinstatement under Subsection 3(b).
workers' compensation benefits, the drafters just simply put those considerations out of bounds.

As with any overly broad restriction, which the above clause most certainly is, the potential for abuse and injustice is great. For instance, an employee may see a severe disciplinary action coming and file a lost time claim to receive immunity. Moreover, the following anomaly could occur: an employee could be slightly injured in an accident which caused greater injury to others and, yet, be protected from discharge.

2. "Wholly Unrelated to the Absence"

Likewise, the mandate that the misconduct must be "wholly unrelated to ... the absence from work" could cause mischief. There is a common belief, especially in the employer community, that some employees are prone to malinger while on temporary total disability benefits. Also, it is not unheard of for employees to defraud the system simply by misrepresenting the status of their injuries. Understandably, employers want to take action against such misconduct. Subsection 3(a), however, casts doubt upon the rights of an employer under such circumstances.

As with the case of "injury," the Legislature would appear to have placed a very broad shield around the employee's absence. Accordingly, can an employer assume with confidence that a court would find fraud in the procurement or continuance of benefits to be misconduct "wholly unrelated" to the absence? That it may be folly for the employer to do so can be seen in the Act's provision

273. The same thinking would be applicable to the clause "wholly unrelated to ... the absence from work."

274. Admittedly, the frequency of this type of abuse would be low.

275. The issue is not one of compensability for the injury. Port Neches Indep. School Dist. v. Soignier, 702 S.W.2d 756 (Tex. App. 1986) (employee entitled to compensation benefits notwithstanding that the injury resulted from an alleged safety violation). The Wisconsin court has acknowledged that discipline for rule violations can live in harmony with the protection afforded by rehire statutes. West Allis School Dist. v. Department of Indus., Labor and Human Relations, 342 N.W.2d 415, 424 (Wis. 1984) ("the violation of the work rule or statute could be of such a nature that it would furnish 'reasonable cause' to refuse to rehire even though the original compensation was not deniable ... ").

of an avenue for the employer to challenge the employee's perceived abuse. Under the Act, an employer may file a petition to modify an award previously made. That petition may contain allegations and supporting evidence that the employee is engaging in conduct which is inconsistent with his claimed injuries. One commentator has noted the policy considerations in having the administrative agency evaluate claims of abuse:

"The determination of the validity of a claim has been vested in the administrative tribunal, not in the employer, and discharge or the threat thereof, for the purpose of discouraging filings which management, or its insurer, believes to be fictitious or unjustified, substitutes financial cautiousness for administrative impartiality."

The above thinking is certainly valid when merely dealing with honest differences of opinion as to an employee's medical condition. What of the situation, however, where the employee has been shown conclusively to have committed fraud? Again, Subsection 3(a) can be read as ignoring misconduct related to the absence. Moreover, it is probable that a court would find misconduct immunized under Subsection 3(a) to be irrelevant to the reinstatement process contemplated in Subsection 3(b). Such a result cries out for legislative reform. An employer should not be forced to take back an employee adjudged guilty of fraud.

3. Economic Slow Downs or Reductions in Force

The peculiar wording of Subsection 3(a) would not appear to allow for termination of employees on temporary total disability for reasons unrelated to misconduct of the employee. For instance, an employer could suffer an economic slow down and be forced to have general layoffs. Such a reason for terminating an employee would pass muster as a defense to a claim of intentional discrim-

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279. Supra note 278, at 739; see also Cozzy v. Movers, Inc., 550 N.Y.S.2d 167 (N.Y. 1990) (employer could not terminate an employee because that employee's injury "took too long to heal").
280. See supra note 272. If the fraud was such that it could be established that the employee did not suffer a "compensable injury," then the employee would not be eligible for reinstatement rights afforded under Subsection 3(b).
A reduction in force, however, is not an "offense," and it is not "misconduct." Neither is it "committed" by the employee. These words suggest that factors aside from ones related to the employee will not be considered.

One school of thought may advocate that it is insensitive to discharge an employee who is already "down on his luck" with an injury. Also, goes this thinking, an employer is not harmed by having an inactive, unpaid employee on his rolls. These points are not without merit, but it should also be noted that an inequity can develop from this situation. An employee on temporary total disability benefits could have less seniority than those employees laid off in the reduction in force. Because of Section 3, however, the employee could ride out the economic slump on temporary total disability benefits and then be positioned to return to the work force based upon a statutory preference. This artificial "seniority" is contrary to the West Virginia Supreme Court's statement in Yoho v. Triangle PWC, Inc. that it would not "give an advantage to the injured employee over the other employees."

VIII. CONCLUSION

Although the Legislature and the backers of Section 3 may have had the best of intentions in drafting and enacting Section 3, poor selection of language has produced a statute which unnecessarily causes both employers and employees to guess at their rights. In some instances Section 3 is underinclusive; in others it is overinclusive. If the Legislature is of a mind to keep this statute on the books, it would do well to redraft it with an eye to the issues discussed herein. Otherwise, it is predicted that piecemeal litigation will ensue, and eventually employers and employees will be left with "a
judicial oak which was grown from little more than a legislative acorn." 285
