January 1985

Labor and Employment

Raymond Parker  
*West Virginia University College of Law*

Follow this and additional works at: [https://researchrepository.wvu.edu/wvlr](https://researchrepository.wvu.edu/wvlr)  
Part of the Labor and Employment Law Commons

**Recommended Citation**  
Available at: [https://researchrepository.wvu.edu/wvlr/vol87/iss2/18](https://researchrepository.wvu.edu/wvlr/vol87/iss2/18)
LABOR AND EMPLOYMENT

I. DISMISSALS


Traditionally, the West Virginia Supreme Court of Appeals has demonstrated two purposes in its treatment of cases regarding employee dismissals: to protect the constitutional due process rights of public employees, and to insure that private employees will have recourse for dismissals which are contrary to public policy. Additionally, those employees under the purview of the West Virginia Civil Service Commission can only be dismissed on a showing of good cause. The cases reviewed during the survey period demonstrate a continuation of this traditional treatment.

In Blake v. Civil Service Commission, the court reviewed findings of the West Virginia Civil Service Commission to determine whether the petitioners' misconduct was so serious as to warrant their dismissal. Two employees at the Weston State Hospital were accused of taking clothing donated for patients. After an internal investigation, the employees returned the items and explained that they took the clothing to give to the patients as Christmas presents. After a ten-day suspension, the hospital officials decided to dismiss them. The employees appealed the decision to the West Virginia Civil Service Commission which upheld the dismissals, finding that good cause had been shown, that procedural due process requirements had been met, and that the suspensions and dismissals were not duplicative punishments. On appeal, the court reversed their dismissals, finding that good cause had not been shown.

The court stated the general rule that a finding of fact by the Civil Service Commission will not be reversed unless it is clearly wrong, but that a final order will be reversed if it is not supported by, or is contrary to, the evidence, or if it is based on a mistake of law. Viewing the determination of good cause as a question of law, the court independently reviewed the facts of the case and held that "petty theft of clothing donated for hospital patients is worthy of discipline, but it does not constitute good cause for dismissal."

---

1 W. Va. Const. art. III, § 10. See also U.S. Const. amend. XIV.
3 Id.
5 Id. at 473 (citing syllabus point one of Oakes v. West Virginia Dep't of Finance and Admin., 264 S.E.2d 151 (W. Va. 1981)). The court repeated:
W. Va. Code, 29-6-15, requires that the dismissal of a civil service employee be for good cause, which means misconduct of a substantial nature directly affecting the rights and interests of the public, rather than upon trivial or inconsequential matters, or mere technical violations of statute or official duty without wrongful intention.
6 Blake, 310 S.E.2d at 473-74.
The court was more restrained in reviewing the facts presented by *McDonald v. Young*.

Deputy McDonald was ordered by his sheriff to obtain the required certification for law enforcement officers by attending the police academy. The deputy left the academy after only six hours, having decided that he had taken the necessary courses and had much more experience and education than the others there. Without speaking to his sheriff, the deputy used the remaining time allotted for training as vacation. Subsequently, the sheriff sent McDonald a notice of intent to discharge, and the deputy requested a public hearing before the Civil Service Commission. The Commission later ruled that the dismissal was justified. McDonald appealed to the circuit court, which reversed the Commission's decision. The court found that the Commission acted improperly by not making findings of fact, by not recognizing that the deputy had not received proper notice of the specific regulations which he violated, and by not demonstrating legally sufficient good cause.

On appeal, the supreme court, in an opinion by Justice Harshbarger, held that a deputy sheriff's disobedience of a lawful order from a superior officer to undertake training constitutes gross misconduct warranting dismissal. The court admonished the Civil Service Commission to articulate findings of fact in their orders so that the parties and reviewing courts will know the basis of their decisions. It found that McDonald's failure to obey the order was flagrant, undisputed, and a sufficient cause for dismissal. Furthermore, although McDonald did not have formal notice of the rule under which he was discharged, the court held that there was no doubt that the deputy knew he was obliged to follow lawful orders of the sheriff. To remove the potential for due process or lack-of-notice attacks, the court recommended in dictum that all public employees should be given a copy of rules and regulations by which they are governed. Overlooking the minor errors of the Commission, the court reiterated its rule that substantial compliance with procedures may be sufficient to uphold a discharge.²

*Orteza v. Monongalia General Hospital*³ presented the court with still another employee dismissal controversy, but the issues were substantially more complex. The most interesting aspect of the case centered around a determination of whether the defendant hospital was an instrumentality of the state. A finding of "state action" would, of course, afford the plaintiff constitutional due process protection.

Josefina Orteza, a physician, was on the staff of Monongalia General Hospital. Her employment contract with the hospital provided that either party could terminate the agreement by giving one hundred twenty days written notice. The contract also contained a grievance procedure for resolving disputes between Dr. Orteza and the hospital over administrative or medical matters. The reasons given by the hospital for Dr. Orteza's termination were entirely administrative. Dr. Orteza sued

---

2. *Id.* at 448 (citing *Bones v. West Virginia Dep't of Corrections*, 163 W. Va. 253, 255 S.E.2d 219 (W. Va. 1979)).
claiming her discharge was unlawful based on two theories. She asserted that she had been denied due process under the federal and state constitutions and that the contract had been breached. The circuit court directed a verdict on the due process claim and submitted the contract claim to the jury, which returned a general verdict in favor of the plaintiff.

Writing for the West Virginia Supreme Court of Appeals, Justice Neely quickly dispensed with the breach of contract claim. He reaffirmed the rule that contract interpretation is a function of the court and not the jury. Where the terms of the contract are clear and unambiguous there is no room for construction and the court must apply the terms as written. The court noted that "agreements are not necessarily ambiguous because the parties disagree as to the meaning of the language of the agreement." The bulk of the opinion was devoted to a discussion of whether the hospital's action constituted "state action" and whether due process rights were afforded to the plaintiff. The court reviewed both the public and private attributes of Monongalia General Hospital and noted the difficulty in characterizing the institution as wholly public or private for purposes of determining due process protection. Instead, the court looked at the level of state involvement in the specific action that is the basis of the dispute.

The court continued its analysis by noting that recent case law indicated a general trend away from finding state action in cases where private institutions rely on public funds. For instance, in Blum v. Yaretsky, Justice Rehnquist pointed to three requirements for finding state action: (1) a sufficiently close nexus between the conduct of the regulated private entity and the state; (2) the exercise of coercive power or significant encouragement by the state which led the private entity to act in the challenged manner; and (3) a private entity exercising powers that are "traditionally the exclusive prerogative of the state." Similarly, in Modaber v. Culpeper Memorial Hospital, Inc., the Fourth Circuit Court of Appeals held "that a hospital was involved in state action only when it acted (1) in an exclusively state capacity; (2) for the state's direct benefit; or (3) at the state's specific behest." Viewing the record before it, the court in the instant case found no nexus between the state and the hospital's personnel decision. However, for purposes of argument, the court assumed the hospital was a public agency and proceeded to consider the property and liberty interest of the plaintiff.

10 Id. at 42 (citing Stephens v. Bartlett, 118 W.Va. 421, 191 S.E. 550 (W. Va. 1937)).
11 Id. at 42 (citing Bethlehem Mines Corp. v. Haden, 172 S.E.2d 126 (W. Va. 1969)).
12 Id. at 43 (citing Richardson v. Econo-Travel Motor Hotel Corp., 553 F. Supp. 320, 323 (E.D. Va. 1982)).
13 Id. at 45 (citing Rendell-Baker v. Kohn, 457 U.S. 830 (1982); Blum v. Yaretsky, 457 U.S. 991 (1982)).
14 Blum, 457 U.S. 991.
15 Id. at 1011.
16 Modaber v. Culpeper Memorial Hosp., 674 F.2d 1023 (4th Cir. 1982).
17 Id. at 1025.
The property interest the plaintiff claimed she was deprived of arose under the contract; however, the contract was terminable at will upon one hundred twenty days written notice. Because the plaintiff had no more than a unilateral expectation of continued employment, the court found no protectable property interest.

The court also found the manner of the dismissal in no way besmirched the plaintiff’s personal or professional reputation nor was there any deprivation of Orteza’s ability to pursue her lawful occupation. The court noted that the plaintiff was a licensed medical doctor and that there existed considerable demand for her professional medical services in the private sector. Furthermore, although it was not required by her contract, the hospital afforded Dr. Orteza opportunities to use both the administrative and medical grievance procedures to challenge her discharge. In both of these hearings, it was found that the reasons for Dr. Orteza’s termination were administrative only. Therefore, the court held that the plaintiff was not deprived of any liberty interest by the hospital’s action.

Justice Neely’s discussion of the “state action” issue is the most significant aspect of the Orteza decision. Ironically, however, the court assumed “state action” and thereby rendered its argument dicta. Thus, what the court purported to provide was a useful framework of the relevant factors which practitioners will want to focus on when faced with this issue. Whether Justice Neely’s discussion of “state action” truly represents guidance to practitioners will depend on the extent to which the remaining justices will be committed to the rationale underlying the analysis.

In Cordle v. General Hugh Mercer Corp.,18 the court was asked to determine if the dismissal of two motel employees for refusing to take polygraph tests was contrary to the public policy of West Virginia. Reaffirming that a legally protected interest in privacy is recognized in this state,19 the court found that the dismissal of employees for refusing to take a polygraph test was contrary to public policy.

The relevant facts in Cordle can be briefly summarized. The plaintiffs were maids at the defendant’s motel. After reluctantly signing an agreement to take a polygraph test, the plaintiffs later refused to actually submit to the test. Subsequently, the defendant employer notified the employees by letter that their employment was terminated for failing to take the polygraph test as earlier agreed. The

19 See Roach v. Harper, 143 W. Va. 869, 105 S.E.2d 564 (1958), where the plaintiff maintained an action for “intrusion of privacy” against a landlord who had installed listening devices in her apartment. See also Sutherland v. Kroger Co., 144 W. Va. 673, 110 S.E.2d 716 (1959). The Sutherland court recognized a violation of the plaintiff’s privacy based on trespass where a store employee searched a bag carried into the store by the plaintiff. Finally, see Golden v. Board of Educ., 285 S.E.2d 665 (W. Va. 1981), where the court reinstated a teacher dismissed for “immorality” where the alleged immoral conduct had no impact upon the teacher’s fitness to teach or upon the school community.
employees challenged the dismissals in the circuit court, which denied the employer’s motion to dismiss and certified two questions to the supreme court: First, whether the termination of the maids’ employment for refusing to take the polygraph exam violated the public policy of the State; and second, whether this determination was a question of fact for a jury or a question of law for the court.

Writing for a narrow majority, Justice McHugh summarily answered the second question by stating that the determination of public policy is a question of law for the court. Neither party had contested that issue, and the balance of the opinion was devoted to a discussion of the substantive public policy considerations. In its analysis, the court took notice of recent state legislation which placed substantial limitations on employers’ use of polygraph testing on their employees. Since this legislation was promulgated subsequent to the plaintiffs’ termination, it was held not to be dispositive of the question raised; however, the court perceived the statute to be the embodiment of a “recognized facet of public policy” in this state. The court relied on its holding in Harless v. First National Bank in Fairmont that an employer’s right to discharge an “at will” employee does not extend to situations where the employer’s motivation for the discharge is to contravene some substantial public policy principle. Applying the Harless rationale, the court held “that it is contrary to the public policy of West Virginia for an employer to require or request an employee to submit to a polygraph test or similar test as a condition of employment.” However, the court noted an important qualification to this holding: consistent with West Virginia Code section 21-5-5b, under some circumstances polygraph tests may be used when other important public policy considerations provide justification.

20 Cordle, No. CC937, slip op. at 7.
21 W. Va. Code § 21-5-5b (Supp. 1984) provides as follows:
No employer may require or request either directly or indirectly, that any employee or prospective employee of such employer submit to a polygraph, lie detector or other similar test utilizing mechanical measures of physiological reactions to evaluate truthfulness, and no employer may knowingly allow the results of any such examination or test administered outside this State to be utilized for the purpose of determining whether to employ a prospective employee or to continue the employment of an employee in this State: Provided, that the provisions of this section shall not apply to employees of an employer authorized to manufacture, distribute or dispense the drugs to which article five [§ 30-5-1 et seq.], chapter thirty applies, excluding ordinary drugs as defined in section twenty-one [§ 30-5-21], article five, chapter thirty: Provided, however, that the provisions of this section shall not apply to law enforcement agencies or to military forces of the State as defined by section one [§ 15-1-1], article one, chapter fifteen of the Code: Provided, further, that the results of any such examination shall be used solely for the purpose of determining whether to employ or to continue to employ any person exempted hereunder and for no other purpose.
22 Perks v. Firestone Tire & Rubber Co., 611 F.2d 1363, 1365 (3d Cir. 1979).
24 Cordle, No. CC937, slip op. at 14.
25 See supra note 21.
II. Tenure


The constitutional issues raised in the wrongful dismissal cases surfaced in the wrongful denial of tenure cases reviewed during the survey period. The court analyzed due process considerations as they applied to employees of two colleges.

In Orr v. Crowder, a librarian at West Liberty State College was given a one-year terminal contract after having been employed for the previous five years under one-year contracts. Ms. Orr contended that she had acquired tenure rights, arising from prior oral agreements made with the defendants, and therefore she was entitled to the procedural protections afforded to dismissed tenured faculty members. Furthermore, the librarian argued that she was given the terminal contract as a result of her criticism of proposed plans for remodeling the college's library. Ms. Orr brought the action under 42 U.S.C. section 198327 claiming that defendants violated her procedural due process rights and free speech rights under the Constitution. On appeal, the defendants argued that, as a matter of law, the trial court erred in refusing to grant the defendants' motion for a directed verdict.

Writing for the majority, Justice Miller first considered Ms. Orr's claim of deprivation of procedural due process. The court noted that in a prior case, State ex rel. McLendon v. Morton,28 it stated that a teacher who had satisfied the objective eligibility standards for tenure could not be denied tenure without some procedural due process. However, in Orr, the court disagreed with the librarian that she had satisfied those objective eligibility standards. The court found that the evidence indicated a lack of any formal policy governing even the faculty status of librarians. Moreover, the court stated "that before a protected property interest, such as the right to tenure, can be found, something more than a unilateral expectation must be shown. Plaintiff[s] must demonstrate that there existed some rules or understandings governing tenure eligibility fostered by the college upon which the college employees relied."29 Since there was no showing of any general understanding or rule with respect to retroactive faculty status, Ms. Orr's procedural due process claim failed as a matter of law.

---

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.
29 Orr, 315 S.E.2d at 600.
In addressing the plaintiff's first amendment claim, the court reviewed the relevant facts. Shortly before the librarian had received her terminal contract, she had publicly criticized the defendants' proposed plan for remodeling the library. As a result, the previously good working relationship between the librarian and the defendants rapidly deteriorated. The court then applied these facts to the standards established under *Pickering v. Board of Education*, where the United States Supreme Court held that public employees are protected from firings resulting from the exercise of free speech rights. Under *Pickering*, however, that right is not absolute and must be balanced with the state's interest in efficient and orderly operation of its affairs. Recognizing that Ms. Orr's comments concerned a matter of public interest, the design of the college library, the court deemed that the *Pickering* standard weighed in favor of the plaintiff.

In deciding whether Ms. Orr's comments were a substantial factor in motivating the defendants' decision to give her a terminal contract, the court once again turned to the guidance of the Supreme Court. *Mount Healthy City School District Board of Education v. Doyle* allocated the evidentiary burdens among parties in a first amendment claim. The plaintiff must show that her protected conduct was the motivating factor in the dismissal; the defendant can refute this showing by persuading the court it would have terminated the plaintiff in the absence of the protected conduct. Applying this to the facts of the case, the court believed that Ms. Orr had shown by a preponderance of evidence that her criticism of the remodeling plans was a substantial or motivating factor for the terminal contract. The court was clear in pointing out that a plaintiff need not show that the exercise of first amendment rights was the "sole" factor precipitating the terminal contract. However, if the employee has carried that burden, the employer may show by a preponderance of evidence that it would have reached the same decision as to the plaintiff's reemployment even in the absence of the protected speech. Furthermore, whether the employee has shown a sufficient connection between the claimed violation of first amendment rights and the ultimate discharge, or whether the employer has rebutted that charge, must be determined with reference to "the employee's job performance considered in its entirety." Tested by these standards, the evidence demonstrated that the defendant's actions substantially deprived Ms. Orr of her first amendment guarantees. The court upheld the jury's verdict awarding $26,400.00 in damages and $10,405.75 in attorney's fees.

Although not raised by either party in the case, the court perceived an interesting question that arose from its finding that only one of the librarian's two theories of recovery should be upheld. The court addressed sua sponte the question of "whether a general verdict in favor of the plaintiff can stand where one of the two theories of recovery, i.e., the violation of her procedural due process rights,

---

10 *Pickering v. Board of Educ. of Township High School Dist. 205, 391 U.S. 563 (1968).*
12 *Mazaleski v. Trusdell, 562 F.2d 701, 715 (D.C. Cir. 1977).*
has been found to be insufficient as a matter of law." This question, sometimes referred to as the two-issue rule, was one of first impression for the court. Recognizing that there is a split of authority on this point, the court reviewed numerous cases from other jurisdictions and cases within our state on related questions and held:

[T]hat where a jury returns a general verdict in a case involving two or more liability issues and its verdict is supported by the evidence on at least one issue, the verdict will not be reversed, unless the defendant has requested and been refused the right to have the jury make special findings as to his liability on each of the issues."

Finally, in response to the defendant's claim that the librarian's damage recovery should be reduced by the amount of unemployment benefits she received, the court indicated that the collateral source rule would operate in this instance to preclude the offsetting of any such benefits. Drawing an analogy to workers' compensation benefits, the court cited Jones v. Laird Foundation, Inc., where it held that under the collateral source rule, such benefits could not be used to reduce an award of damages.

In the second tenure denial case during the survey period, the petitioner in Norton v. Stone unsuccessfully brought an original proceeding in mandamus to compel an award of tenure. Although procedural due process claims comprised the crux of the petitioner's objections, they were subsumed within the mandamus application. The court unequivocally rejected the claim that tenure should be awarded by a writ of mandamus. In Norton, the petitioner was in his fifth year as chairman of the Department of Sociology and Public Service at West Liberty State College and had applied for tenure. The evaluation process provided for tenure to be awarded by action of the president of the college following the review of the recommendations submitted by a faculty committee and the academic officers of the college. Copies of these recommendations were to be given to the faculty members seeking tenure. In addition to these recommendations, however, the president considered sixteen unsolicited letters disparaging Dr. Norton's suitability for tenure, without providing the professor an opportunity to respond. After tenure was denied and Dr. Norton was offered a one year terminal contract, he appealed to the Board of Regents. The Board appointed a hearing examiner to review the decision. The examiner concluded that the president's actions effectively denied Norton due process and awarded him an additional year of employment, during which he should be properly reevaluated for tenure. Instead of appealing the hearing examiner's decision to the Board of Regents, Dr. Norton brought an original proceeding in mandamus.

Writing for a unanimous court, Justice Neely stated that based on the factual

---

33 Orr, 315 S.E.2d at 608.
circumstances presented, issuance of a writ of mandamus would be inappropriate. Further, to the extent that the president's decision to deny tenure was based on consideration of the negative letters, to which the petitioner had no opportunity to respond, that decision could be considered arbitrary, capricious or unsupported by the evidence. In so doing, the court approved the hearing examiner's decision and held that under these circumstances the petitioner's "proper remedy is an award of an additional non-terminal year of employment during which the faculty member must be afforded a proper evaluation." 

III. WORKERS' COMPENSATION


The principle that the workers' compensation statutes should be liberally construed in favor of the claimants to fulfill the statutes' remedial objective underlies the court's analysis of workers' compensation statutes. A practical reason for the court's "liberality rule" stems from an appreciation of the inefficiency of the office of the Workers' Compensation Commissioner which is often evidenced in its decisionmaking process. Thus, the court continues to vigorously protect the claimants, arguably at the expense of the employer. This was illustrated in *Butcher v. State Workers' Compensation Commissioner,* where the court addressed the question of whether a statutory repayment provision, West Virginia Code section 23-4-1c, applies only when the employer has first made a timely protest to the initial award of temporary total disability.

36 "A writ of mandamus will not issue unless three elements coexist—(1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of the respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy." McGrady v. Callaghan, 161 W. Va. 180, 244 S.E.2d 793 (1978) (syllabus point two).

37 Norton, 313 S.E.2d 456 (syllabus point one).


41 W. VA. CODE § 23-4-1c (1981) provides, in relevant part: In the event that an employer files a timely objection to any finding or order of the commissioner, as provided in section one (§ 23-5-1), article five of this chapter, with respect to the payment or continued payment of temporary total disability benefits . . . the commissioner shall continue to pay to the claimant such benefits and expenses during the period of such disability unless it is subsequently found by the commissioner that the claimant was not entitled
Jimmy Lee Butcher sustained an injury to his right knee in the course of employment as a coal miner. The Commissioner held his claim to be compensable and, based upon the treating physician's estimate of how long the disability would last, awarded him four weeks of total temporary disability benefits. The employer did not protest this initial award. Subsequently, however, the employer did protest three separate orders by the Commissioner which extended the award of temporary total disability benefits. The Commissioner granted these additional awards based upon estimates made by the treating physician of the period of total temporary disability. Twice, the Commissioner scheduled hearings on the employer's protest of extended benefits but the claimant did not appear at either hearing and failed to provide a "good cause" explanation for his second nonappearance. The Commissioner then held that the protested benefits were overpayments and, therefore, subject to collection from the claimant. After the Workers' Compensation Board affirmed the Commissioner's decision, the claimant appealed to the supreme court.

Writing for the majority, Justice Miller reversed the Commissioner's decision because it did not comport with the statutory requirements of the Act or the prior decisions of the court. Specifically, the court found the procedures followed by the Commissioner to be erroneous in light of Mitchell v. State Workmen's Compensation Commissioner. In "clarifying" Mitchell, the court's decision has added a gloss to our state's workers' compensation laws.

Applying the court's rationale in Mitchell to the facts in Butcher, the court held that it was inappropriate for the Commissioner to have granted the employer's request for an evidentiary hearing to protest the award extending the claimant's benefits. Instead, the court stated that the employer should have filed a petition for modification, pursuant to West Virginia Code section 23-5-1c. Under this section to receive the temporary total disability benefits and the expenses . . . in which event the commissioner shall . . . credit said employer's account with the amount of the overpayment. . . . If the final decision in any case determines that a claimant was not lawfully entitled to benefits paid to him pursuant to a prior decision, such amount of benefits so paid shall be deemed overpaid. The commissioner may recover such amounts by civil action or . . . shall withhold, in whole or in part, as determined by the commissioner, any future benefits payable to the individual and credit such amount against the overpayment until it is repaid in full.

42 After each nonappearance at a scheduled hearing, the commissioner sends a "fifteen-day" letter, which indicates that the nonappearing party has fifteen days to provide a "good cause" explanation for his nonappearance.


44 W. Va. Code § 23-5-1c (1981) provides:
In any case wherein an employer makes application in writing for modification of any award previously made to an employee of said employer, and such application discloses cause for a further adjustment thereof, the commissioner shall, after due notice to the employer, make such modifications or changes with respect to former findings or orders in such form as may be justified, and any party dissatisfied with any such modification or change so made by the commissioner shall, upon proper and timely objection, be entitled to a hearing as provided in section one [§ 23-5-1] of this article.
tion, the Commissioner may, based upon credible evidence, terminate a claimant's extended benefits, after having first given the claimant an opportunity to provide additional supporting evidence. Furthermore, evidentiary hearings are not to be held by the Commissioner until a timely objection is made to the order terminating or continuing the extended benefits. Should the Commissioner decide to terminate benefits, the proper date for termination is the date of the Commissioner's termination order. Thus, in no way may the employer seek repayment of benefits pursuant to a petition for modification (West Virginia Code section 23-5-1c) because the payments are effectively deemed proper until the termination order is entered.

It is only when the employer protests the initial award of temporary total disability, by challenging its jurisdictional basis within thirty days of the award, that he can invoke the repayment provisions of West Virginia Code section 23-4-1c by proving that the claimant was not lawfully entitled to benefits initially.

Justice Neely, dissenting, claimed essentially that rather than clarifying Mitchell, the majority perverted the meaning of the Act. The crux of the majority's argument in Butcher as well as in Mitchell turned on the use of the terms "jurisdictional" and "medical" to distinguish between initial and extended awards of total temporary disability. To the extent that some explanation of these "talismanic" terms is needed, it is submitted that "jurisdictional" refers to the kind of injury (that is, an injury sustained in the course of employment versus an injury sustained outside of employment), while "medical" refers to the degree of injury (that is, whether or not a claimant's compensable injury has reached its maximum degree of improvement). The majority indicated that once a claimant jurisdictionally qualifies, constitutional due process prevents retroactive termination of total temporary disability benefits. To this, the dissent responded by claiming that an interpretation of the Act which forces an employer to pay extended benefits which may be ultimately found improper ignored the plain meaning of the statutory language and "is blatantly inequitable."

Although one might conclude that Butcher effectively required an employer to make spurious jurisdictional protests in order to reserve the right to later make a proper medical protest, the court's holding in Mitchell, clearly indicated that only when the Commissioner determined that a claimant was not initially entitled to benefits can the repayment provisions under West Virginia Code section 24-4-1c apply. The court in Butcher effectively restated its policy of liberality. In an effort to streamline the inefficiencies inherent in the workers' compensation decisionmaking.
process, once a claimant jurisdictionally qualifies for total temporary disability benefits, the only issue contestable by the employer is the date upon which he can cease paying benefits.

The court's mission in the Butcher case, to clarify the workers' compensation statutes, continued in Allen v. Workers' Compensation Commissioner.\(^5\) Ostensibly, the question raised in Allen involved the application of procedural due process requirements recognized in Mitchell. The more important aspect of Allen, however, may be the court's imprimatur to the concept of interim employment by the claimant during the period of total temporary disability. Specifically, the court addressed the issue of whether the Commissioner must provide to a claimant who is engaged in interim employment advance notice of the reasons his employer seeks modification in benefits, even though the Commissioner finds no cause for modification.

Richard P. Allen had twice injured his back while working in a coal mine. After receiving six months of total temporary disability benefits, his claim was closed for lack of medical evidence. Nearly six months later, Allen petitioned the Commissioner to reopen his claim and was granted an additional six months of benefits on the basis of a doctor's report. To this final award, his employer protested the reopening of the claim and filed a petition for modification.\(^5\) In this bifurcated process, the employer's petition for modification had been denied, and while an appeal of that decision was pending, a hearing was held on the employer's protest to the reopening of the claim. The employer supported his petition for modification with a detective's report, which indicated that Allen had purchased a restaurant and was operating it on a full-time basis. Allen was questioned regarding the substance of this report at the protest hearing, but not until the appeal hearing on the denied petition for modification did Allen have formal notice of the detective's report.\(^5\) It was on the basis of the detective's report that the Appeal Board found just cause for modification, thereby reversing the Commissioner's prior decision.

On appeal, the supreme court reversed the Appeal Board's decision, holding that "Allen's due process rights were denied when he was not notified about the modification application and its supporting documents."\(^5\) Justice Harshbarger,

---


\(^5\) As discussed above (see supra notes 41 and 45, the employer may request a hearing under W. Va. Code § 23-5-1 to challenge the issue of the compensability of the claimant's injury on jurisdictional grounds. At the same time, the employer may petition for modification under W. Va. Code § 23-5-1c to challenge the medical basis of the period for which benefits have been awarded. The employer's purpose in pursuing both of these procedures concurrently is to terminate benefits on a medical basis until he can challenge their jurisdictional basis, assuming he contends impropriety on both bases.

\(^4\) In reviewing a petition for modification under W. Va. Code § 23-5-1c, the Commissioner need not provide notice to a claimant unless he finds good cause for adjustment. See supra note 44. Since the Commissioner denied the employer's petition, Allen's first formal notice of the petition for modification came after the employer requested an appeal hearing under W. Va. Code § 23-5-1d.

\(^5\) Allen, 314 S.E.2d at 404.
writing for the majority, explained that in addition to the notice requirements of West Virginia Code section 23-5-1c, the court's prior holding in *Mitchell* requires "that the Commissioner give the claimant advance notification of the reasons why his temporary total disability benefits are being considered for termination and a reasonable opportunity to supply the relevant information on the issue, except where the claimant has voluntarily returned to work." In rejecting the employer's contention that the requirements of *Mitchell* do not apply since Allen had "voluntarily returned to work," the court circumscribed the "Mitchell exception" by stating that it "is for the clear cut case where the claimant returned to full-time work at his same job for the same employer." Finally, in providing additional guidance to the Commissioner as to when a claimant "returns to work," the court stated the following definition of temporary total disability: An "inability to return to substantially gainful employment requiring skills or activities comparable to those of one's previous gainful employment during the healing or recovery period after injury."  

The procedural protection which *Allen* crystallizes for the workers' compensation claimant is not without its cost. As Justice Neely noted in dissent, "there is no such thing as a minor adjustment" when dealing with a bureaucracy of mammoth proportions. Realistically, could it be said that Allen was without notice that his owning and operating a restaurant would be an issue at the hearing before the Appeal Board, especially since he had answered several questions related to that issue at the protest hearing? Under these circumstances, was Allen not given the process he was due? The Workers' Compensation Fund is an entitlement program; indeed, its provisions should be liberally construed in favor of the claimant. Where, however, should the line be drawn?

Implicit within the court's discussion in *Allen* is an approval of interim employment during the temporary total disability healing period. Moreover, *Allen* can be read as encouraging interim employment: "A claimant who seeks alternative employment during his healing period before he is medically certified to return to work or has reached his maximum level of improvement, should not be penalized." Admittedly, the court's emphasis in *Allen* is to protect claimants' due process rights, but by encouraging "totally disabled" claimants to engage in employment during the healing period, the court may have stretched the "remedial objectives" of the Act. The *Allen* decision creates some interesting questions; for example, if the claimant engages in interim employment while receiving temporary total disability benefits and thereby aggravates his injury, may the employer contest subsequent extensions of benefits on a jurisdictional basis? In *Wilson v. Workers*

---

56 Id. at 403-04 (citing Mitchell 256 S.E.2d 1 (syllabus point one) (emphasis in the original)).
57 Id. at 406.
58 Id. at 405.
59 Id. at 406 (Neely, J., dissenting).
60 Id.
61 Id. at 405.
Compensation Commissioner, the court addressed a similar question and gave an interesting answer.

In Wilson, the important question addressed by the court was twofold: When a claimant suffers a subsequent progression of aggravation of a compensable injury, what procedures should govern his petition to reopen the claim; and, what standards should be applied in determining the compensability of subsequent progressions or aggravations flowing from the original injury? On its own motion, the court in Wilson consolidated three cases which contained similar legal issues but differed strikingly in their factual circumstances.

In Wilson, each claimant filed a petition and was awarded additional temporary total disability benefits. The employers objected to the awards and, after hearings, the claimants were ordered to repay the benefits under West Virginia Code section 23-4-1c. The factual dissimilarity among the claimants lies in the cause of their aggravated injuries. To briefly summarize, claimant Wilson's injury was aggravated by playing with his child, while claimant Cook aggravated her injury when she was involved in an automobile accident, and, finally, claimant Jeffrey contended that a bone spur on his left ankle resulted from his initial injury, a sprained right ankle.

The wealth of protection which Mitchell provides the claimant is great, but not endless, for the court rejected the contention that Mitchell barred the Commissioner from either granting the employer a protest hearing or ordering the claimants to repay benefits. Since the claimants must produce new evidence in order to reopen a claim, fairness dictates that the employer have an opportunity to challenge that evidence. Thus, an employer's decision not to contest an initial award of temporary total disability does not preclude the employer from contesting a subsequent application to reopen under West Virginia Code section 23-5-1a. In this ruling, however, the court clearly excluded those situations where, although the claimant's disability continues, his benefits have been discontinued due to a mere hiatus in his doctor's filing of medical reports.

In formulating a standard to determine the compensability of subsequent pro-

---

63 The claimants petitioned for the reopening of their claims under W. VA. Code § 23-5-1a (1976).
64 This section provides in part: "any party dissatisfied with any . . . change so made by the commissioner shall, upon proper and timely objection, be entitled to a hearing, as provided in section one [§ 23-5-1] of this article."
65 Mitchell, 256 S.E.2d 1.
66 For the purposes of obtaining a reopening of a Workmen's Compensation claim under the provisions of W. VA. Code, 23-5-1a and -1b, the claimant must show a prima facie cause, which means nothing more than any evidence which would tend to justify, but not compel, the inference that there has been a progression or aggravation of the former injury.
68 Wilson, No. 15990, slip op. at n.4.
gressions or aggravations which flow from an initial injury, the court relied, in part, upon the teachings of Professor Larson. Larson recognizes that every natural consequence which flows from an initially compensable injury is likewise compensable but excludes an injury which results from "an independent intervening cause attributable to the claimant's own intentional conduct." Using this statement as a base, the court molded a less restrictive standard in holding:

If a workers' compensation claimant shows that he received an initial injury which arose out of and in the course of his employment, then every normal consequence that flows from the injury likewise arises out of the employment. If, however, a subsequent aggravation of the initial injury arises from an independent intervening cause not attributable to the claimant's customary activity in light of his condition, then such aggravation is not compensable.

Illustrating what kinds of activities may be customary in light of the condition, the court cited cases from other jurisdictions in which benefit claims were reopened after the claimant reinjured his back by lifting boxes and pipe while at home. Applying the standard to the claimants in the present case, the court held that an aggravation caused by playing with one's child (Wilson) is compensable, but that an aggravation caused by an automobile accident (Cook) is not compensable.

The difficulty with the Wilson standard lies in its lack of precision and its subjective nature. Further, the striking factual differences among the claimants in Wilson provided no real test of the standard adopted. Indeed, the line drawn by the court is hard to apply. For example, given that chopping wood is certainly customary for many, under what conditions would the court find this activity objectionable? It cannot be argued that the temporarily disabled worker is entitled to live a full life. However, the court may have advanced the benign purposes of the Act at the cost of stoking the adversarial fire.

IV. UNEMPLOYMENT COMPENSATION


Like the Workers' Compensation Act, unemployment compensation legislation is remedial in nature. Accordingly, the court will liberally construe a statutory ambiguity in favor of the claimant. However, when the meaning of a statute is

---

68 Id. at 3-137.
69 Wilson, No. 15990, slip op. at 8.
70 Id. (citing Schaefer v. Williamston Community Schools, 117 Mich. App. 26, 323 N.W.2d 577 (1982)).
71 Id. at 9 (citing Grable v. Weyerhauser, 55 Or. App. 627, 639 P.2d 677 (1981)).
72 In regard to the third claimant, Jeffrey, the court concluded that his subsequent injury was unrelated to the initial (compensable) injury.
74 Id.
clear, it must be applied. Two cases reviewed during the survey period illustrate these principles in the context of eligibility requirements. In the first case, Osburn v. Cole, the court rejected the assertion that eligibility requirements must be read in light of a claimant's constitutional guarantees.

In Osburn, the court addressed an interesting question touching on the interface between eligibility requirements and the fifth amendment privilege against self-incrimination. Rhonda L. Osburn had been receiving unemployment compensation benefits for nine months when her activities outside the State became the subject of a police investigation. Pursuant to a statutory requirement, Ms. Osburn was required to report the name and location of any casual employer, as well as the amount of wages earned. Although Ms. Osburn reported a four-day period of employment during which she earned eighty dollars, she declined to reveal the name or location of the employer, as she perceived that information to be potentially incriminating in regard to the police investigation. As a result of this gap in data, her benefits were indefinitely suspended by the Department of Employment Security. After a series of administrative and judicial decisions affirmed this suspension, Ms. Osburn sought relief in the supreme court.

Osburn's argument, simply stated, was that an exception should be made to "the general rule that the claimant has the burden of proving eligibility for benefits" when her privilege against self-incrimination would have to be sacrificed to meet that burden. In rejecting this argument, the court denied the petitioner's claim that she was being penalized for exercising her constitutional rights. To support its point, the court relied upon two lines of United States Supreme Court cases which dealt with similar issues.

In one line of cases, the government sought to compel inherently incriminating information, usually under a statute which provides a penalty for nondisclosure. When it could be shown that if the information was disclosed it would provide a prosecutor with a key element of a crime, the fifth amendment privilege rendered the information requirement unenforceable. In the other line of cases, which the court likened to Osburn's claim, the government sought neutral information as part of an essentially noncriminal, regulatory scheme. In these cases, the reporting requirement was upheld and the fifth amendment argument was rejected as an extravagant application of the privilege.

---

76 W. VA. CODE § 21A-7-1 (1981) provides: "Claims for benefits shall be made in accordance with rules and regulations prescribed by the commissioner."
77 Osburn, 319 S.E.2d at 366 (citing Thomas v. Rutledge, 280 S.E.2d 123 (W. Va. 1981)).
78 See Grosso v. United States, 390 U.S. 62 (1963), where Grosso successfully argued that the government could not force him to pay an excise tax imposed upon wagering for such payment would effectively vitiate his fifth amendment privilege with respect to violation of gambling laws.
79 See United States v. Sullivan, 274 U.S. 259 (1927), where the defendant was ordered to file income tax returns stating the amount of his earnings. Although the fifth amendment privilege did not enable one to refuse to file an income tax return, it did provide a basis for objecting to certain questions.
After reviewing these cases, the court concluded that Osburn's claim was unpersuasive. There was no element of compulsion in the statutory information requirement; the Department of Employment Security was not seeking to secure incriminating evidence but merely required the "information to warrant the continued payment of benefits." The West Virginia Supreme Court synthesized several tests used in the United States Supreme Court cases and adopted the following:

The Fifth Amendment privilege against self-incrimination is not violated by information required to be furnished under State mandatory self-reporting systems which are essential to the fulfillment of a regulatory statute where (1) the information sought is facially neutral; (2) the information required is directed at the public at large and not to a selective group inherently suspect of criminal activities; (3) the area of inquiry is essentially noncriminal and regulatory and not permeated with criminal statutes; and (4) the possibility of incrimination is not substantial.

The Osburn test appears fair and reasonable since the information needed for the orderly and efficient operation of the state's regulatory programs is balanced against the individual's claim to constitutional protection. Although the test adopted will probably play a role in West Virginia jurisprudence generally, its impact upon future cases within the realm of unemployment compensation is likely to be limited. Of potentially greater impact, however, is the court's decision in Lough v. Cole, the second decision reviewed during the survey period.

The question presented in Lough was whether an employee, who left his employment to seek other work because the employer was in the process of going out of business, is disqualified from receiving unemployment compensation benefits under the provisions of the West Virginia Code. The claimant, Douglas Lough, left his employment anticipating that his employer would soon cease doing business. Less than thirty days later, Lough's previous employer did in fact go out of business. Subsequently, Lough sought benefits for which he was ruled eligible but disqualified because his separation from employment was considered a "voluntary act of the claimant" and one which did not "involve any fault on the part of the employer."

The decision deeming the claimant disqualified for benefits was based on an inter-

---

80 Osburn, 319 S.E.2d at 369.
82 Osburn, 319 S.E.2d at 371.
84 Id. W. Va. Code § 21A-6-3 (1981) provides, in pertinent part, that:
85 Lough, 310 S.E.2d at 493. The initial decision to disqualify the claimant was made by a deputy of the Department of Employment Security.
86 Id. at 493 n.4. The quoted passages are excerpts of the administrative law judge's decision, which was affirmed by the board of review and the circuit court.
pretation of West Virginia Code section 21A-6-3(1). On appeal, the claimant requested the court's interpretation of this statute.

Reversing the decision disqualifying the claimant, the court predicated its holding on two familiar principles: The court can set aside mistaken conclusions of law made by the Department of Employment Security; and unemployment compensation statutes should be liberally construed in favor of the claimants. In its analysis, the court drew upon decisions from other jurisdictions which held that an employee cannot be considered to have terminated his employment voluntarily when his reason for quitting is that his employer is about to go out of business. An important factual question in these cases was whether the job remained open after the employee quit. The court applied this reasoning in construing the statute governing disqualification and concluded that Lough "did not leave his employment . . . voluntarily without good cause."

By applying the "liberality rule" the court in Lough expanded the right of claimants to receive benefits under the provisions of the Compensation Act. Although any advantage is susceptible to abuse, the court has advanced the purpose of the Act in the Lough decision. For instance, an employee, whose employer is about to go out of business, is now able to seek alternative employment before his job is finally terminated and perhaps take advantage of favorable conditions in the labor market.

V. COLLECTIVE BARGAINING AGREEMENTS


Woodruff v. Board of Trustees of Cabell Huntington Hospital, 319 S.E.2d 372 (W. Va. 1984).

Recently, the court dealt with two cases regarding the enforceability of collective bargaining agreements in the public sector. In the first of these cases, a union requested the court's vindication of its agreement, while in the second case, another
union group raised a more involved constitutional question. In each case, the court accepted the unions' arguments with alacrity.

In *Local 598, Council 58, American Federation of State, County and Municipal Employees v. City of Huntington,* the court addressed the question of whether a municipality is empowered to enter into a collective bargaining agreement under its statutory power to contract. In this case, three hundred sanitation workers were represented by the union which had entered into the agreement with the city. When the union workers demanded a pay increase pursuant to a parity clause in the collective bargaining agreement, the city refused, claiming that "the agreement was not legally binding." In *Local 598, Council 58, American Federation of State, County and Municipal Employees v. City of Huntington,* the court addressed the question of whether a municipality is empowered to enter into a collective bargaining agreement under its statutory power to contract. In this case, three hundred sanitation workers were represented by the union which had entered into the agreement with the city. When the union workers demanded a pay increase pursuant to a parity clause in the collective bargaining agreement, the city refused, claiming that "the agreement was not legally binding." In a brief opinion by Justice Neely, the court upheld the agreement as "binding and enforceable." In so doing, the court flatly rejected the contention that the statute empowering the city to contract did not include the authority to enter into a collective bargaining agreement. Further, the court found unpersuasive the argument that because the legislature had been unable to adopt a proposal specifically allowing for such bargaining agreements, its inaction indicated disapproval. Moreover, the court bolstered its conclusion by pointing to the home rule statute, which the court interpreted as providing municipalities with the necessary power to incur such obligations. Additionally, the court noted similar conclusions reached by another jurisdiction when faced with this question. Finally, the court was not persuaded by an attorney general's opinion which indicated that such agreements, on behalf of a city, represented unlawful delegation of authority. If there was any doubt regarding whether a municipality is empowered to enter into a collective bargaining agreement, it should be removed after Local 598.

Having ruled that collective bargaining agreements are generally valid, the court next addressed questions touching on contractual limitations of employees' con-
stitutional rights. In *Woodruff v. Board of Trustees of Cabell Huntington Hospital*, the issue presented was whether a municipality may restrain its employees from exercising their first amendment rights through restrictive provisions in its collective bargaining agreement. The management of Cabell Huntington Hospital discharged fourteen of its union employees for distributing leaflets on the hospital premises. These leaflets expressed concern regarding the management's proposal to eliminate forty-three positions at the hospital. The hospital contended that this activity was in violation of their collective bargaining agreement, which specifically prohibited "any picketing or patrolling," and therefore the discharges were justified. The employees claimed that the group distribution of leaflets was a protected activity under state and federal constitutions, and therefore their discharges represented state deprivation of these constitutional guarantees. Under the court's original jurisdiction, the employees sought to compel their reinstatement through an action in mandamus.

In an opinion by Justice McGraw, the court initially dispensed with several procedural questions. Since the Cabell Huntington Hospital was created by the legislature in 1945 and its administration and management is vested in a Board of Trustees appointed by the County Commission, the court concluded that the hospital should be considered a public institution. The court deemed that under applicable state and federal labor management relation statutes, it should retain jurisdiction over the dispute. Although the collective bargaining agreement provided for a nonbinding grievance procedure, the court considered the grievance process inadequate and found that the extraordinary relief of mandamus was appropriate. With these procedural hurdles behind, the court moved on to the constitutional questions posed.

The court relied on specific United States Supreme Court cases which held that the group distribution of leaflets was a protected activity under constitutional

---

107 Id. at 377.
108 W. VA. CONST. art. III, §§ 7, 16.
109 U.S. CONST. amend. I.
110 Neither Justice Neely nor Justice Harshbarger participated in this decision.
111 Compare with Justice Neely's rather extensive analysis of whether a county hospital should be considered a public institution in *Orteza v. Monongalia County Gen. Hosp.*, 318 S.E.2d 40 (W. Va. 1984), supra notes 13-17 and accompanying text.
112 The statutes referred to by the court in reaching its conclusion were the Labor Management Relations Act, 29 U.S.C. §§ 141-187 (1982), and the West Virginia Labor-Management Relations Act, W. VA. CODE §§ 21-1A-1 to -8 (1981).
113 Supporting the court's conclusion is *Cooper v. Gwinn*, 298 S.E.2d 781 (W. Va. 1981) (syllabus point four): "While it is true that mandamus is not available where another specific and adequate remedy exists, if such other remedy is not equally as beneficial, convenient and effective, mandamus will lie." See also *United Mine Workers of Am. v. Miller*, 291 S.E.2d 673, 677 (W. Va. 1982). As to what elements must generally coexist for an award of mandamus, see supra note 36.
114 *Woodruff*, 319 S.E.2d at 377 (citing Lovell v. City of Griffin, 303 U.S. 444, 458 (1938)).
free speech guarantees. The court emphasized that public employees, as citizens, are entitled "to comment on matters of public interest in connection with the operation of the public [institutions] in which they work." Although the leaflets contained comments regarding the relationship between the hospital and the union, they also contained information regarding the quality of health care as affected by the proposed job eliminations, a public issue; therefore, the activity remained constitutionally protected.

After describing the relevant dimensions of constitutional protection, the court turned to the crux of the hospital's argument. It argued since the collective bargaining agreement prohibited picketing and patrolling, the union members had thereby waived their free speech rights. In response, the court cogently rejected this claim of waiver as it applied to either the state or federal constitution. With regard to the United States Constitution, the court stated that the test for determining the existence of a waiver in the free speech context turns on whether the words indicating waiver are "clear and compelling." Recognizing that the terms "picketing or patrolling" were not defined in the agreement, the court found such terms inherently vague and insufficient to constitute a clear and compelling waiver of petitioners' right to distribute leaflets. Furthermore, the court believed that any prohibitions against picketing or patrolling were in reference to activities associated with a strike or slowdown.

Importantly, the court read the state constitution as providing more extensive protection of fundamental rights than does the federal constitution. Pointing to article III, section 1 of the West Virginia Constitution, the court concluded that the alleged waiver was improper since "members of society may not by contract divest themselves" of fundamental rights. The court emphasized that even if the agreement had contained a sufficiently precise waiver of fundamental rights, it would remain unconstitutional unless the hospital could "show a substantial relationship...

---

115 Id. (citing Pickering v. Board of Educ., 391 U.S. 563 (1968)).
116 Id. (quoting Pickering, 391 U.S. at 568).
119 Woodruff, 319 S.E.2d at 380.
120 See Thornhill, 310 U.S. at 100-01.
121 Woodruff, 319 S.E.2d at 381.
122 Id.
123 Article III, § 1 of the West Virginia Constitution provides:
All men are, by nature, equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity, namely: the enjoyment of life and liberty, with the means of acquiring and possessing property, and of pursuing and obtaining happiness and safety.
124 Woodruff, 319 S.E.2d at 379.
to a compelling state interest under” the West Virginia Constitution. Thus, the court held: “[U]nder article III, [sections one, seven, and sixteen] of the West Virginia Constitution, collective bargaining agreements in the public sector may not contain provisions abrogating employees’ fundamental constitutional rights, including the rights of expression, assembly, association, and petition.” In so doing, the court found that the discharged workers had been impermissibly terminated and ordered their reinstatement with back pay by granting the writ of mandamus.

The court’s Local 598 decision sanctions the use of collective bargaining agreements in the public sector generally, while the Woodruff decision represents a limitation on a particular use of such an agreement. Although these cases seem to be well within the court’s traditional function of determining each party’s respective rights, the court might be embarking on a new path. As the court noted in Local 598, the legislature has not spoken in regard to the use of public collective bargaining agreements. In the absence of legislation the court can substantially reshape the terms of such agreements as long as a colorable constitutional argument can be made. Had the employees in Woodruff raised a procedural due process argument regarding their dismissal rather than their persuasive first amendment argument, the court may have found itself tangled in questions better left to the democratic process. For it is by now axiomatic that the question of how much process is due is answered by a balancing of costs. Moreover, one would reasonably expect public collective bargaining legislation to answer which of the many quasi-state agencies should be covered by such agreements. For the time being, the answer will depend, in some part, on the court’s discretion in determining when “state action” stems from the use of collective bargaining agreements.

VI. DISCRIMINATION


In Shepardstown Volunteer Fire Department v. State ex rel. West Virginia Human Rights Commission, the West Virginia Supreme Court of Appeals provided guidance in the application of “Title VII analysis” to actions involving discriminatory treatment of individuals. The Shepardstown decision represents not only a choice of what law will apply, but a pattern of how it should be applied. This decision liberally construed the provisions of the West Virginia Human Rights

---

125 Id. at 381 n.4.
126 Id. at 379.
127 See supra note 101 and accompanying text.
128 See supra notes 13-17 and accompanying text.
130 “Title VII analysis” refers to the body of case law which has arisen in the federal court system since the adoption of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1983).
Act, and strictly defined the standard of judicial review of administrative agency decisions.

The Shepardstown decision arose from the consolidation of two separate but factually similar cases in which groups of women, after being denied membership in their local volunteer fire departments (hereinafter "Departments"), asserted that they had been unlawfully discriminated against on the basis of their gender. In both cases, the women filed charges with the West Virginia Human Rights Commission (hereinafter "Commission"), claiming that the Departments were "place[s] of public accommodations," and were thereby subject to the provisions of the state Human Rights Act. The Commission, after hearings, agreed with these claims and, as part of a remedial action, ordered the Department to install the female applicants as full members. Pursuant to statute, the Departments sought judicial review of the Commission's orders, and in both cases the circuit courts held that the Departments were not "place[s] of public accommodations," and therefore not subject to the provisions of the Act. On appeal, the court reversed the circuit court decisions and reinstated the orders of the Commission.

Justice McHugh, writing for a unanimous court, first addressed the question of the statutory definition of a "place of public accommodation." The appellees argued that the West Virginia Human Rights Act was patterned after the Civil Rights Act of 1964 and that the definition of places of public accommodation should therefore be limited to inns, hotels, motels, restaurants, theaters, and other such establishments. The court reaffirmed its commitment to broadly and liberally construe the meaning of the Act so as to best fulfill its humanitarian purposes. Noting that this precise issue appeared to be one of first impression, the court reviewed cases outside our jurisdiction and gleaned the critical factors relevant in determining whether a volunteer fire department should be subject to civil rights legislation. The court utilized the following factors in determining whether the Departments should be properly considered "place[s] of public accommodations": statutory and municipal regulation; public funding; public solicitation of funds; the holding of events open to the public; and nominal membership dues in comparison to annual expenditures. Recognizing that both Departments possessed

132 W. VA. CODE § 5-11-3(j) (1979) provides the following definition: "The term 'place of public accommodations' means any establishment or person, as defined herein, including the State, or any political or civil subdivision thereof, which offers its services, goods, facilities or accommodations to the general public, but shall not include any accommodations which are in their nature private . . . ."
133 The Commission further ordered the Departments to cease and desist further discriminatory practices and to implement a specified "affirmative action program." Additionally, each town's mayor or council, as well as the Departments' officers, were required to file periodic sworn statements of compliance with the Commission for two years following the date of the order.
134 See W. VA. CODE § 29A-5-4(a) (1980).
137 Shepardstown, 309 S.E.2d at 349-50.
many of these attributes, the court concluded that they were "quasi-governmental bodies" and, therefore, within the statutory definition.

Troubled by the bases upon which the circuit courts had reversed the Human Rights Commission's orders, the court quoted the proper standards of judicial review of a contested case under the West Virginia Administrative Procedure Act. The court then emphasized that should a circuit court perceive defects not within the statutory standards for reversal, vacation, or modification, it may either "affirm the order or decision of the agency or remand the case for further proceedings." By circumscribing narrow grounds for reversal, the court has left with the Commission the determination of whether an unlawful discriminatory practice has occurred.

In the Shepardstown opinion, the court has enabled litigants to better focus upon the discriminatory treatment issue by adopting the evidentiary framework outlined by the United States Supreme Court in McDonnell Douglas Corp. v. Green and its progeny. This framework provides a method by which the evidence can be organized so as to simplify the burden of proof in discrimination lawsuits. Accordingly, in actions "to redress unlawful discriminatory practices in employment [as well as] access to 'places[s] of public accommodations'" our court has held:

[T]he burden is upon the complainant to prove by a preponderance of the evidence a prima facie case of discrimination, which burden may be carried by showing

---

138 Id. at 350.
139 Id. at 351.
140 In both instances the circuit courts determined that the Departments were not "place[s] of public accommodations" and thereby not subject to the Act; therefore, the female applicants were not victims of unlawful discrimination.
141 W. VA. CODE § 29A-5-4(g) (1980) provides:
The circuit court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:
(1) In violation of constitutional or statutory provisions; or
(2) In excess of the statutory authority or jurisdiction of the agency; or
(3) Made upon unlawful procedures; or
(4) Affected by other error of law; or
(5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.
142 Shepardstown, 309 S.E.2d at 351.
145 Shepardstown, 309 S.E.2d at 352.
(1) that the complainant belongs to a protected group under the statute; (2) that he or she applied and was qualified for the position or opening; (3) that he or she was rejected despite his or her qualifications; and (4) that after the rejection, respondent continued to accept the applications of similarly qualified persons. If the complainant is successful in creating this rebuttable presumption of discrimination, the burden then shifts to the respondent to offer some legitimate and non-discriminatory reason for the rejection. Should the respondent succeed in rebutting the presumption of discrimination, then the complainant has the opportunity to prove by a preponderance of the evidence that the reasons offered by the respondent were merely a pretext for the unlawful discrimination.146

Several aspects of this evidentiary relationship warrant comment. First, the nature of the rebuttable presumption created by the prima facie case is one which "[i]f the trier of fact believes the [complainant's] evidence, and if the [respondent] is silent in the face of the presumption, the court must enter judgment for the [complainant] because no issue of fact remains in the case."147 However, as the court aptly noted, the burden of persuasion never shifts but remains with the complainant at all times.148 The intermediate burden which the respondent must carry to rebut the prima facie case is merely one of producing legally sufficient evidence. This evidence need only raise "a genuine issue of fact as to whether [the respondent] discriminated against [the complainant]."149 Although the respondent need only articulate some legitimate nondiscriminatory explanation to rebut the presumption, there exists a strong incentive for him to persuade the trier of fact that his proffered reasons did, in fact, motivate the rejection. If the prima facie case is rebutted, the legally mandatory, rebuttable presumption "drops from the case,"150 "and the factual inquiry proceeds to a new level of specificity."151

At this new level, the complainant must show that the reasons proffered by the respondent were not the true reasons for her rejection. To succeed, the complainant must persuade the trier of fact "that she had been the victim of an intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence."152

The Shepardstown decision warrants recognition for it furnished the state's civil rights practitioners the wealth of federal precedential guidance surrounding Title VII. As regards discrimination claims involving a "place of public accommodation," the court's broad statutory interpretation of that phrase provides the state litigant more protection than under existing federal law.153 By rejecting the

146 Id.
147 Burdine, 450 U.S. at 254.
148 Shepardstown, 309 S.E.2d at 352.
149 Burdine, 450 U.S. at 254-55.
150 Id. at 255 n.10.
151 Id. at 255.
152 Id. at 256.
153 See supra notes 132-39 and accompanying text.
rigid and compartmentalized federal definition of "place[s] of public accommodation," the court should be commended for giving credence to the benign policies supporting the West Virginia Human Rights Act.

*Raymond Parker*