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**Employment**

James B. Stoneking  
*West Virginia University College of Law*

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EMPLOYMENT

I. RESTRICTIVE COVENANTS

Reddy v. Community Health Foundation of Man, 298 S.E.2d 906 (W. Va. 1982).

Perhaps the most rapid developments in employment law during the survey period concerned the enforceability of covenants not to compete. The view taken in early cases was that such covenants were generally enforceable if the restriction was reasonably necessary to protect the employer and did not impose undue hardship on the employee. The West Virginia Supreme Court of Appeals, in seeking to strike a proper balance between the interests of employers and employees, has built upon this early rule in its most recent decisions. Accordingly, while the court has identified the range of an employer’s protectible interests, it has also recognized a tort remedy for employees injured by unreasonably oppressive covenants.

In Helms Boys, Inc. v. Brady, the court addressed the question of what employer interests may properly be protected by the use of a covenant not to compete. The defendant, Larry Brady, had entered into a written employment contract with Helms Boys, Inc., a retail furniture store. The contract contained a restrictive covenant providing that, in the event his employment was terminated, Brady could not work for a similar business within a 100-mile radius for a period of five years. Brady resigned his position and began working for another furniture store located only five miles from his former employer. Helms Boys then filed an action to enforce the terms of the covenant, and the trial court granted an appropriate injunction. On appeal, Brady contended that the covenant was unreasonable and oppressive, and was therefore void as contrary to public policy.

While reaffirming the general rule that restrictive covenants are enforceable, the court limited the kind of information and skills which could legitimately be protected by that means. A noncompetition covenant is improper where the only business assets acquired by an employee are “of a general managerial nature,” which was defined as encompassing such aspects as supervising, merchandising, purchasing, and advertising. The standard of

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1 The West Virginia Supreme Court of Appeals has defined a covenant not to compete as “a provision of an employment contract purporting to limit an employee’s power, upon leaving his contractual employment, to enter as a competitor into the market in which his former employer does business or practices a trade or profession.” Reddy v. Community Health Found. of Man, 298 S.E.2d 906, 909 n.1 (W. Va. 1982). Throughout this overview section, the terms “covenant not to compete” and “noncompetition covenant” are used interchangeably.
2 O. Hommel Co. v. Fink, 115 W. Va. 686, 177 S.E. 619 (1934) (applying the early balancing test).
3 297 S.E.2d 840 (W. Va. 1982).
4 Id. at 843.

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review adopted was very favorable to the employee: any skills or information possessed by the employee may be utilized except "under circumstances where their use adverse to [the] employer would result in irreparable injury." In this case, the employer had failed to make an adequate showing of protectible interest, and the covenant was invalid. The court's opinion also suggested that in order to be protectible an employer's interest must be "confidential or unique," in the nature of a trade secret or customer list. This narrow view of the business interests which may be protected by a restrictive covenant has been adopted, in one form or another, by a majority of jurisdictions.

The court's decision in *Helms Boys* laid the groundwork for *Reddy v. Community Health Foundation of Man.* Prior cases had been silent on the question of allocating the burden of proof when an employee challenges the reasonableness of a restrictive covenant. *Reddy* provided a suitable vehicle for treating some of the procedural and evidentiary problems raised by the *Helms Boys* standard.

In *Reddy,* a physician had entered into a contract with a non-profit health care foundation whereby he agreed to perform medical services for patients at fixed rates payable by the foundation. A clause in the agreement provided that if the employment relationship was terminated by either party, then the physician could not practice medicine within thirty miles of the facility for a period of three years. The doctor voluntarily quit his employment, and set up a private practice in violation of the covenant. The foundation brought suit to enjoin the physician from continuing to violate the covenant, and the trial court granted injunctive relief. The physician appealed, attacking the covenant as being overbroad.

The court, in an opinion by Justice Neely, recognized that the enforceability of a noncompetition covenant turns on the interplay of three factors: (1) the nature of the interest asserted by the employer, (2) the hardship visited upon the employee, and (3) the potential injury to the public. The formula offered by the court to gauge the reasonableness of a covenant accords a respectful

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5 *Id.* (quoting Slisz v. Munzenreider Corp., 411 N.E.2d 700, 704 (Ind. App. 1980)).
6 *Id.* at 842.
7 *See,* e.g., Roanoke Eng'g Sales Co. v. Rosenbaum, 223 Va. 548, 290 S.E.2d 882 (1982). The *Rosenbaum* court, in reviewing a restrictive covenant, inquired whether it was "reasonable in the sense that it [was] no greater than . . . necessary to protect the employer in some legitimate business interest." *Id.* at 552, 290 S.E.2d at 884. In upholding the covenant, the court noted that the employee had access to such confidential items as financial records, customer lists, and company pricing and bidding policies. *Id.* at 553, 290 S.E.2d at 885. *See also* Annot., 43 A.L.R.2d 94 §§ 70-79 (1955) (trade secret and confidential information as legitimate employer interests); Annot., 61 A.L.R.3d 397 §§ 37-41 (1975) (judicial modification of activities covered by restrictive covenants).
8 298 S.E.2d 906 (W. Va. 1982).
9 *Id.* at 911.
place to each factor. As a threshold matter, the court must inquire whether the covenant is "unreasonable on its face." The court stressed that this was not a rigid test, observing that it operates only to invalidate those covenants which are so oppressive as to tend "by in terrorem effect, to subjugate employees unaware of the tentative nature of such a covenant . . . ." This initial review serves a dual function. First, it fosters the public policy of protecting the interest of employees who would otherwise suffer the fate of their inferior bargaining position. Second, it promotes judicial economy. As the court remarked in this regard, "No court should trouble itself to rewrite an inherently unreasonable covenant . . . ."

Once the court has determined that a covenant is not unreasonable on its face, it may proceed to an analysis of the extent of the covenant's enforceability. The employer, as the scrivener, must bear the initial burden of showing that he has a protectible interest. This determination is to be guided by the criteria set forth in Helms Boys. If the employer makes a prima facie showing, the covenant becomes presumptively enforceable in its entirety. The burden then shifts to the employee to rebut the evidence offered by the employer or to "demonstrate" that the covenant, as written, is overbroad and ought to be judicially moulded. Additionally, the employee may offer evidence that the asset in question belongs to him, either because it was his when he entered the employment or because he has "paid" for it by receiving a discounted rate of pay.

It is significant to note that the Reddy decision was a cautious first step in a largely uncharted area. Consequently, the analytic model offered by the court was premised more on common sense and reason than on substantive

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10 Id. at 915.
11 Id. at 916.
12 The court recognized the legitimate interest of an employee in mobility, and suggested that a noncompetition covenant "is unenforceable if its true purpose is to repress the employee and prevent him from leaving, rather than to protect the employer's business." Id. at 912. (quoting Annot., 62 A.L.R.3d 1014, 1057 (1975)).
13 Id. at 915.
14 The analysis under Helms Boys would involve application of the definition of protectible interest and, presumably, the balancing test articulated by the Slisz court. Helms Boys, 297 S.E.2d at 843.
15 298 S.E.2d at 916.
16 Id.
17 The court explained this economic aspect of the formula as follows: In providing specialized training for employees, an employer has made an investment in what the court termed "human capital," giving rise to an interest in restraining the employees' mobility. An employee may, in effect, pay for this asset by accepting reduced wages during his novice period. A court reviewing a restrictive covenant under such circumstances must determine whether the employer has fully recouped his investment, thus making the asset in question the property of the employee. See generally id. at 912-14.
18 Id. at 912.
law. The policy considerations underlying this model were therefore simple and fundamental:

1. Courts should not sanction or enforce overly oppressive covenants;
2. Employers should bear the initial burden of showing that they have interests worthy of protection; and
3. Once an employer has proved that he has a protectible interest, the employee ought to be called upon to show why the employer should not get the full benefit of his covenant.19

These rules provide judges with fair and meaningful guidelines in reviewing noncompetition covenants. The Reddy decision will probably serve as a starting point for future discussions of this issue in other jurisdictions. Ironically, the continued utility of the Reddy analysis in this state has been called into question by the newly christened tort of interference.

In the Helms Boys and Reddy cases, the court reviewed noncompetition covenants within the framework provided by traditional contract law. Shortly thereafter, the question was addressed in terms of tort theory, and the court's focus was shifted from the employer's asserted interest to the potential for injury to the employee's business expectancy. The rule fashioned by the court is likely to have a marked impact on future employment relations.

In Torbett v. Wheeling Dollar Savings & Trust Co.,20 the plaintiff was an employee of the defendant bank. Her employment contract contained a covenant stating that she could not work for a competitor within a radius of twenty-five miles, for a period of two years after leaving her employment. Torbett voluntarily quit her job and was offered a position with another bank, provided she was not bound by the covenant in her prior contract. She brought an action for damages and for a declaratory judgment to establish that the covenant was unreasonable. The trial court, with the aid of an advisory jury, found that the employer had not made a showing of a protectible interest and awarded a sum of $35,000 for lost income.

In an opinion by Justice Harshbarger, the court first dealt with an apparent procedural hurdle. Although an action for a declaratory judgment is a proper means to test the enforceability of a restrictive covenant,21 prior cases had held that claims for other relief could not be included in the same complaint as the declaratory action.22 Citing the precedence of the West Virginia Rules of Civil Procedure, the court concluded that Rule 5723 had broadened

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19 These policy considerations are implicit in the Reddy formula. Id. at 917.
21 Torbett, No. 15594, slip op. at 10 (citing Annot., 10 A.L.R.2d 743 (1950)).
23 Rule 57 provides in pertinent part: The existence of another adequate remedy does not preclude a judgment for declaratory
the relief available in declaratory actions as fixed by statute. Accordingly, a complaint seeking a declaratory judgment may request such other relief as is deemed appropriate, and the prior cases holding otherwise were overruled.

Recognizing that the prayer for damages in the plaintiff’s complaint failed to allege a breach of contract or to specify any tort committed, the supreme court volunteered to identify the tort which may have been suffered and to baptize it with a name. Placing reliance on several scholarly sources, the court formally adopted the tort of intentional interference with prospective business relations into the common law of the state. The constituent elements of the tort, as set forth by the court, include:

1. The existence of a contractual or business relationship or expectancy;
2. An intentional act of interference by a party outside that relationship or expectancy;
3. Proof that the interference caused the harm sustained; and
4. Damages.

Briefly addressing the defense bar, the court noted that either justification or privilege may be raised as an affirmative defense.

The future ramifications of this decision in the area of employment relations will undoubtedly be pronounced. As the court calmly observed: “We understand that this opinion will severely curb [the] use of restrictive covenants in employment contracts. A scrivener must ascertain whether his covenant is sufficiently narrow to protect only legitimate business interests in a reasonable fashion.” The import of the decision is clear: An employer may include a restrictive covenant in an employment contract only at the risk of exposing himself to potential liability.

But the decision has done more than that. It has left critical questions unanswered. Is an employer subject to liability if his covenant, while protecting a legitimate business interest, is overbroad? What is the proper role, if any, of the doctrine of avoidable consequences? May an employer assert con-
sent as an affirmative defense? The absence of any treatment of these related issues suggests that the court, uncertain of the impact of its decision, purposely reserved the right to monitor and reshape its infant rule on a case by case basis. Another pressing question is to what extent has Torbett gutted the carefully drawn analysis set out in Reddy? And lastly, what will be the socio-economic effects of the decision? While it is clear that the tort of interference spawned by Torbett will have a serious impact, it is impossible to say with certainty how it will affect the bargaining process or employee mobility in the job market.

II. WORKERS' COMPENSATION


In deciding workers’ compensation cases, the supreme court is guided by the principle that our compensation statute should be liberally construed in favor of claimants. Recent decisions by the court have tended to demonstrate the continued vitality of this rule. As a result of the reign of the “liberality rule,” the court has expanded the available bases of recovery for workers and their dependents, and has attempted to ease the burden of proof in establishing a worker’s permanent disability.

In determining whether a claimant is entitled to an award for permanent total disability, our workers’ compensation law allows the commissioner to consider the impact of the claimant’s injury on his future employability. The issues raised in Cardwell v. State Workmen’s Compensation Comm’r focused on a variety of evidentiary problems involved in proving a claimant’s inability to obtain work.

20 In Torbett, the court cites syllabus points 1 through 5 of Reddy, including the analysis for determining the enforceability of a noncompetition covenant. However, there are no guidelines offered regarding the limits on this test which are necessitated by recognition of the tort of interference.


31 “Workmen’s compensation statutes, being remedial, should be liberally construed in favor of [the] claimants for workmen’s compensation benefits.” Johnson v. State Workmen’s Compensation Comm’r, 155 W. Va. 624, 186 S.E.2d 771 (1972) (syllabus point 1 by the court).

22 W. Va. Code § 23-4-6(n) (1981) provides:
A disability which renders the injured employee unable to engage in substantial gainful activity requiring skills or abilities comparable to those of any gainful activity in which he has previously engaged with some regularity and over a substantial period of time shall be considered in determining the issue of total disability.

23 301 S.E.2d 790 (W. Va. 1983).
Jerry Cardwell suffered the loss of his right eye as a result of an explosion in a coal mine. After an extensive investigation, the commissioner awarded Cardwell a thirty-eight percent permanent partial disability—the thirty-three percent statutory minimum for total loss of sight in one eye, plus an additional five percent for the residual effects of the injury. Cardwell appealed this decision, claiming that his employer's refusal to rehire him following the injury was persuasive evidence of his inability to get work.

Justice Harshbarger, writing for the majority, noted that a determination of disability involves a "blend of ingredients" including not only the extent of physical loss, but also the degree to which the injury impairs the claimant's ability to obtain work in the future. The general rule articulated by the court stated that "when permanent partial disability in the medical sense combines with other factors such as age, education, and intelligence, to make a person unemployable, he is entitled to a permanent total disability award."36

The adoption of this standard has given rise to complex evidentiary problems. A question of first impression presented by the Cardwell case involved who should bear the burden of proof regarding the availability of work to the claimant. In this regard, the court relied heavily upon the able discussion of this issue by Professor Larson. The rule set out by Larson, and quoted approvingly by the court, may be summarized as follows. Where a claimant's physical impairment combines with other factors to place him prima facie in the "odd-lot" category, the employer bears the burden of showing that suitable work is available to the claimant on a regular basis. Conversely, where the physical injuries are not such as to render him obviously unemployable, the claimant must bear the burden of proving that work is unavailable.

Additionally, the court accepted Cardwell's contention that his employer's failure to rehire him was admissible as evidence of his inability to obtain regular employment. Pointing to the existence of statutory incentives to rehire injured employees, the court concluded that an employer's failure to do so "may weigh heavily as proof of the [un]availability of work."41

35 301 S.E.2d at 794.
36 Id. at 796.
38 The term "odd-lot" is used by Professor Larson and the court to refer to an employee whose physical debility has rendered him unemployable.
39 301 S.E.2d at 795-96 (quoting A. Larson, supra note 36, § 57.61).
40 Specifically, the court cited the special "second injury fund," which encourages the hiring of employees with pre-existing injuries by charging employers only for compensation resulting from subsequent injuries. See infra notes 52 & 55 and accompanying text.
41 301 S.E.2d at 797.
The Cardwell decision indicated the court's willingness to develop flexible rules to deal with a vast array of factual situations. Moreover, the court appeared to be sympathetic to the difficulty faced by a claimant in seeking to prove the effects of an injury on his ability to compete in the labor market. If similar evidentiary issues arise, the court will likely act to further ease the claimant's burden of proof.

An employee's death resulting from self-inflicted injury is not compensable under our workers' compensation law. As early as 1969, however, the supreme court had indicated that a suicide may not always be embraced by the term "self-inflicted injury" within the meaning of the statute. The question which remained unanswered by the case law was what standard should be applied in determining when a suicide is properly compensable.

In Hall v. State Workmen's Compensation Comm'r, the court was squarely confronted with this issue. Jessie Hall, an employee with more than thirty years of service at a coke facility, filed a claim for occupational pneumoconiosis benefits. Only six days after the claim was filed Hall committed suicide. The claimant's widow thereafter filed a claim for dependent benefits, which was denied by the commissioner. On appeal, Ms. Hall asserted that there was sufficient causal relationship between the decedent's injury and suicide to warrant compensation.

In its discussion, the court outlined three recognized standards used in determining the compensability of a worker's suicide: (1) the Sponatski rule, (2) the New York rule, and (3) the chain of causation rule. The Sponatski rule, deriving its name from Sponatski's Case, states that a suicide is compensable only if it is the product of "an uncontrollable impulse or . . . a delirium of frenzy 'without conscious volition to produce death . . .' " The so-called New York rule originated in the case of Delinoishe v. National Biscuit Company, and allows death benefits if a suicide results from a condition of "brain derangement," or actual physical injury to the brain. The chain of causation rule, presently adopted by a majority of jurisdictions, permits an award of benefits if the suicide "was merely an act intervening between the

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43 In Staubs v. State Workmen's Compensation Comm'r, 153 W. Va. 337, 168 S.E.2d 730 (1969), an orchard worker committed suicide after prolonged exposure to various chemicals used in spraying. The court reversed a compensation award made to the decedent's widow, holding that the record made it clear that the death did not "occur in the course of and as the result of his employment . . . ." 153 W. Va. at 347, 168 S.E.2d at 735. For this reason, the court did not reach the issue of the applicable standard of review.
44 303 S.E.2d 726 (W. Va. 1983).
45 Id. at 728.
47 220 Mass. at 530, 108 N.E. at 468.
48 248 N.Y. 93, 161 N.E. 431 (1928).
injury and the death, and part of an unbroken chain of events from the injury to the death . . . ."\(^49\)

Conceding that terms such as "delirium of frenzy" and "brain derangement" are imprecise and outmoded, the court adopted the chain of causation rule. The court also stated that this rule was more in accord with the remedial purposes of the workers' compensation law.\(^50\) As delineated by the court, an employee's suicide is compensable under West Virginia Code Section 23-4-1 if:

1. the employee sustained an injury which arose in the course of and resulted from covered employment;
2. the employee would not have developed a mental disorder without the prior injury;
3. the employee would not have committed suicide without the mental disorder.\(^51\)

Although prior case law had impliedly recognized the compensability of some worker suicides, the lack of an authoritative standard to be applied had resulted in much uncertainty. The Hall decision spoke directly to this issue, and the rule adopted by the court was clearly the least demanding of the recognized standards. The potential reach of the rule may be broader when viewed in the context of cases recognizing psychological harm as "injury" covered by the compensation statute.\(^52\) Even so, there is a counterweight present in the Hall compensability test: The suicide must ultimately be traced to an on-the-job injury, and the causal nexus between injury and death must meet the rigorous "but for" test.

The second injury statute\(^53\) provides that where an employee is permanently disabled as a result of successive injuries, the employer is liable only for compensation attributable to the second injury. The sole issue raised in Estep v. State Workmen's Compensation Comm'r\(^54\) was whether this statutory provision applied where the employee had suffered both injuries while working for the same employer.

Virgil Estep was awarded a forty-five percent partial disability for occupational pneumoconiosis. When combined with a previous award, his total percentage of disability equalled the statutory minimum for permanent total disability.\(^55\) The claimant appealed from an order of the Workmen's Compens-

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\(^{50}\) 303 S.E.2d at 730.
\(^{51}\) Id. at 730-31.
\(^{54}\) 298 S.E.2d 142 (W. Va. 1982).
\(^{55}\) W. VA. CODE § 23-4-6(d) (1981) provides that "[a] permanent disability of eighty-five percent or more shall be deemed a permanent total disability . . . ." for purposes of compensation under that section.
In a brief opinion, the supreme court held that the second injury statute applied in cases where both of the claimant's injuries were suffered at the same place of employment. Justice McGraw, writing for the court, stated that the purpose of the statute was to provide incentive to employers to hire injured workers by charging them only for compensation resulting from the second injury. The balance of the compensation would then be charged against the special second injury fund. McGraw noted that this salutary policy would be frustrated if the statute did not apply in circumstances such as those in the *Estep* case. As the court commented: "Application of the second injury statute here places all injured worker on the same footing regarding the employer's compensation liability for subsequent injury resulting in permanent total disability."

### III. DISMISSALS


Recently, the court has dealt with an increasing number of cases regarding the guidelines for employee dismissals and suspensions, especially in light of the constitutional guarantee of due process of law. Two cases during the survey period dealt with an additional factor not extensively treated in prior analyses: society's interest in promoting the health and safety of employees and the public-at-large.

The due process clause of both the federal and West Virginia constitutions provides that no person shall "be deprived of... property, without due process of law..." Both federal and state courts have construed this constitutional mandate to require, at a minimum, notice and an opportunity for a hearing before the deprivation. The question presented in *State ex rel. Perry v. Miller* was whether the due process notice and hearing re-

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5 This policy was recognized by the court in *McClanahan v. State Workmen's Compensation Comm'r*, 207 S.E.2d 184, 186 (W. Va. 1974): "The basic intent of the second injury statute is to encourage the hiring of the handicapped by not charging an employer for preexisting disabilities...."


58 W. VA. CONST. art. III, § 10. See also U.S. CONST. amend. XIV.

59 See, e.g., *Simpson v. Stanton*, 119 W. Va. 235, 193 S.E. 64 (1934), where the court states: "The office of notice is to afford an opportunity for hearing, and the two must necessarily go together. There can be no due process of law without a fair and reasonable opportunity for a hearing." 119 W. Va. at 240, 193 S.E. at 67. See also *Fuentes v. Shevin*, 407 U.S. 67 (1972) (applying notice and hearing requirements to pre-judgment seizure of property).

60 300 S.E.2d 622 (W. Va. 1983).
quirements applied to the temporary suspension of mine employees pending an investigation of alleged mine safety violations.

The *Perry* case arose out of a mine disaster in which five coal miners were killed as a result of an explosion. After an investigation by safety officials, five mine and assistant foremen were charged with violation of provisions of the West Virginia Coal Mine Safety Laws. Jack Perry, a member of the Board of Appeals of the State Department of Mines, brought this action for a writ of mandamus to compel the department's director to suspend the foremen pending the outcome of a formal hearing. The Director questioned the propriety of the mandamus since he has no express statutory authority to suspend employees. The mine foremen were permitted to intervene, and contended that the requested suspension was violative of their procedural due process rights.

In an opinion penned by Justice Miller, the court recognized an exception to the general prehearing rule where overriding public safety concerns are present. In support of its conclusion, the court cited a number of cases dealing with analogous situations, such as the cessation of operations for violation of surface mining legislation and the revocation of a driver's license for refusal to submit to a blood-alcohol test. The connecting thread in these cases, according to the court, is the government's interest in protecting public health and safety, which serves to justify the use of summary administrative action. The West Virginia Legislature has specifically established as the primary purpose of the Department of Mines "the protection of the safety and health of persons employed within or at the mines of this state." The suspensions were thus proper, concluded the court, since the employees' property rights yielded to the paramount government interest.

The court also determined that the Director of the Department of Mines possessed an implied power to suspend a mine official which stemmed from his express authority to license. The foregoing findings were then synthesized to create the following rule:

> Where an administrative agency is given the power to license in an area that has a direct impact on the health or safety of the members of the public in-

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64 Administrative action often assures the swiftness necessary to protect the public well-being. See Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264 (1981) (permitting administrative mining cessation orders as a legitimate means to promote the safety of mine employees).


66 300 S.E.2d at 627. In recognizing the Director's licensing authority, the court relied on W. VA. CODE §§ 22-2-7 (1981); 22-1-23 (1981); 22-1-26 (1981); 22-2-28 (1981); and 22-6A-6 (1981).
cluding employees of a given industry, such agency possesses the power to temporarily suspend such license without the necessity of holding a presuspension hearing when such suspension is necessary for health or safety reasons.67

As a final matter, the court considered the appropriateness of a mandamus as remedy in the case. Since the case raised issues "of a substantial public policy nature," the court ruled that a mandamus was a proper mode of relief.68 However, since a suspension was found to be a discretionary act, the court issued a moulded writ directing the Department of Mines to promulgate a regulation relating to temporary suspensions.69

The Perry decision is an important addition to West Virginia's due process jurisprudence. It serves to establish an informal balancing test to be used in determining when presuspension hearings are constitutionally required. Moreover, the Perry court intimated in dictum that the same kind of analysis would be employed where suspensions are based on the existence of "emergency conditions" or other compelling public policy.70

The court's decision in the Perry case provided a springboard for State ex rel. Ash v. Randall.71 The questions raised in Ash involved statutory, rather than constitutional, requirements for employee dismissals where public health and safety concerns are present. At issue was whether a public employee, entrusted with tasks affecting health and safety, may be dismissed for receipt of psychiatric treatment if his condition poses a risk of harm to the public.

The plaintiff, William Ash, was a plant operator at the municipal water treatment facility in St. Albans, West Virginia. Ash was hospitalized for a period of three weeks for psychiatric treatment. After his release, he was dismissed from his position by the mayor who, after conducting a thorough investigation, concluded that Ash could not responsibly carry out his duties. When the mayor denied Ash's request to be reinstated, he instituted a mandamus action to compel his reinstatement with back-pay. The trial court found that Ash's dismissal was in violation of the state statutes protecting the mentally ill,72 but refused to order the payment of back-wages. The par-

67 Id. at 628.
69 300 S.E.2d at 628-29.
70 The supreme court had held in North v. Board of Regents, 233 S.E.2d 411, 417 (W. Va. 1977), that "due process must generally be given before the deprivation occurs unless a compelling public policy dictates otherwise." (emphasis supplied). In discussing this case in Perry, the court construed "compelling public policy" to include both overriding public health and safety concerns and emergency conditions. 300 S.E.2d at 626.
71 301 S.E.2d 832 (W. Va. 1983).
72 W. VA. CODE § 27-5-9(a) (1980).
ties filed cross appeals, and the cases were consolidated for oral argument and decision.

In an opinion by Justice McHugh, the court qualified the cause of action for discriminatory discharge originally recognized in *Hurley v. Allied Chemical Corp.* The rule established by *Hurley* was that an employee has a valid cause of action if he is dismissed "solely by reason of his receipt of services for mental illness." But the court, acknowledging that this rule was inadequate, added a new component to the *Hurley* test. In order to recover for discriminatory discharge, the employee must make a sufficient showing that he is otherwise qualified for the employment. In the language of the court, he must demonstrate to the factfinder "that the mental illness would not impair his or her ability to perform the duties of that employment."

Turning to the facts of the *Ash* case, the court concluded that the plaintiff had failed to make a showing that he was "otherwise qualified" to perform his job responsibilities. A municipal official is authorized by statute to discharge an employee whose physical or mental illness compromises his ability to fulfill his obligations without injury to the public. Although the court was "mindful of the need to protect a person who has a mental illness and who seeks treatment for that illness," the rights of the public must also be weighed in the balance. Since the record revealed that Ash's duties were related to the public health and that his mental condition could adversely affect his work performance, the court refused to second-guess the mayor's decision to dismiss him.

The *Ash* decision is essentially an extension of the analysis adopted by the court in *Perry*. The court appeared to apply a modified version of its balancing test in weighing the rights of those afflicted with mental disorders against the general welfare of society. Additionally, the adoption of the "otherwise qualified" standard ensures that the factfinder will have at its disposal adequate guidelines in deciding future discriminatory discharge suits.

IV. ARBITRATION


In recent years, the supreme court has adopted a policy of encouraging binding arbitration as a means of resolving disputes between sophisticated,
commercial parties. As a consequence of this policy, the court has expressed a reluctance to review arbitration awards in the absence of an allegation of fraud on the part of the arbitrator. The case of Barber v. Union Carbide Corp. permitted the court to address two major issues in the area of arbitration law: the definition of "fraud," and the proper scope of judicial review in arbitration cases.

Thomas Barber, an employee of Union Carbide Corporation, filed a claim for total disability benefits under the terms of a pension agreement between the corporation and Barber's union. When his claim was denied, Barber invoked the arbitration provision which provided for a physical examination of the claimant by doctors chosen by each of the parties. The decision of the physicians was that Barber did not meet the total disability requirements of the plan. Barber then filed a civil action against the corporation alleging "constructive fraud" in the arbitration proceedings. The trial court granted Union Carbide's motion for summary judgment, and Barber appealed.

Justice Neely, in the opinion for the court, rejected Barber's invitation to broaden the scope of review of arbitration awards. The policy favoring the use of bargained-for arbitration provisions fosters such goals as expediency, economy, and flexibility. To permit judicial intrusion in the arbitration process necessarily detracts from each of these objectives, and results in increased litigation. As the court remarked: "[W]here it [arbitration] is a mere shadow-play prefiguring eventual court litigation it is a positive curse." Thus, where it appears to the trial court that the litigants are commercial parties who knowingly bargained for an arbitration clause, no further inquiry should be made as to the correctness of the arbitrator's decision in the absence of fraud.

As to the definition of fraud, the court stressed that sanctioning review of anything more than actual fraud would embroil judges in matters outside the judiciary's limited role. The term "fraud," the court remarked poignantly, "means fraud, not constructive fraud, quasi-fraud or anything else fraud-like." For the purpose of attacking an arbitration award, fraud was defined narrowly as "willful, deliberate, malicious corruption emanating from an intentional desire to defeat a known, legitimate claim." Since the plaintiff had failed to make a showing of actual fraud, the trial court was correct in awarding a summary judgment in favor of the corporation.

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79 See, e.g., the explanation offered in Board of Educ. v. Miller, 236 S.E.2d 439 (W. Va. 1977).
80 Id.
82 Id. at 356.
83 Id.
84 Id. at 357.
85 Id.
86 Id.
While appearing at first blush to severely limit judicial review, the Barber decision likewise points to several matters into which the court is willing to inquire. Among these collateral inquiries, the most important is perhaps whether the parties to the agreement are "knowledgeable commercial parties," since the opinion suggests that they alone are immune from judicial scrutiny. Additionally, the court indicated its willingness to review the procedure utilized by the arbitrator to determine whether it conforms with the terms of the arbitration agreement. Finally, the relative bargaining positions of the parties may also be considered in reviewing an arbitrator's decision. The trial court is presumably authorized to set aside an award if the arbitration clause was part of a contract of adhesion, or if use of binding arbitration was not "proper under the totality of the commercial circumstances." In view of these caveats, it may be fair to say that the Barber "rule" was effectively swallowed up by its exceptions.

V. UNEMPLOYMENT COMPENSATION

Gibson v. Rutledge, 298 S.E.2d 137 (W. Va. 1982).

The supreme court has repeatedly held that "[u]nemployment compensation statutes, being remedial in nature, should be liberally construed to achieve the benign purposes intended to the full extent thereof." In three cases during the survey period, the court has dealt with questions touching on the range of eligibility requirements. In each case, the right of claimants to receive benefits under the provisions of the compensation statute has been expanded.

Among the prerequisites for receiving unemployment compensation benefits, a claimant must show that he has been "totally or partially unemployed" for a waiting period of one week prior to the week for which he claims benefits. The supreme court had previously held that a striking worker is ineligible for benefits because he has not severed his employment relationship. Belt v. Cole consisted of three cases consolidated on appeal to allow the court to reassess its eligibility rule.

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81 Id. (citing Board of Educ. v. Miller, 236 S.E.2d 439 (W. Va. 1977)).
82 Id.
83 Id.
85 W. VA. CODE § 21A-6-1(d) (1981).
88 The remaining cases were Pennington v. Cole, No. 15675, and Gordon v. Cole, No. 15866.
BELT involved a question of statutory construction which did not require a recitation of the underlying facts. In each of the three cases, the trial court had denied benefits to striking employees in reliance on the case of Pickens v. Kinder. The Pickens court had observed:

Employees who go on strike do not sever their employer-employee relationship, and such relationship continues during the entire time they are on strike and until such time as they quit or obtain employment elsewhere, and striking employees who intend to return to their jobs are not totally unemployed where there is no showing of a separation from employment.

In overruling the Pickens case, the court relied extensively on the presumption that the legislature will not enact a meaningless statute. In so doing, they attempted to show that the per se rule set forth in Pickens was inconsistent with the disqualification provisions in West Virginia Code section 21A-6-3(4). This subsection disqualifies a claimant whose "total or partial unemployment is due to a stoppage of work which exists because of a labor dispute . . . ," unless he meets specified criteria. The court noted that if striking workers cannot be considered totally or partially unemployed, then subsection 4 would be rendered "pure surplusage." Subsection 4 represented the product of careful legislative policy-making whereby certain striking workers—particularly those compelled to strike because of inadequate wages and conditions—were found to be deserving of preferential treatment. As the court concluded: "The legislature, representatives of our citizens, made these public policy decisions about unemployment benefits for striking workers and implemented those decisions in this section. *We cannot read this section out of the act by denying eligibility to all striking workers.*"  


Id. (syllabus point 3 by the court).


W. VA. CODE § 21A-6-3 (1981) reads in part:

[A claimant is disqualified for] a week in which his total or partial unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment or other premises at which he was last employed, unless the commissioner is satisfied that he was not (one) participating, financing, or directly interested in such dispute, and (two) did not belong to a grade or class of workers who were participating, financing, or directly interested in the labor dispute which resulted in the stoppage of work. No disqualification under this subdivision shall be imposed if the employees are required to accept wages, hours or conditions of employment substantially less favorable than those prevailing for similar work in the locality, or if the employees are denied the right of collective bargaining under generally prevailing conditions, or if an employer shuts down his plant or operation or dismisses his employees in order to force wage reduction, changes in hours or working conditions.

305 S.E.2d at 343.

Id. (emphasis in original).
The Belt court cannot be said to have accorded Pickens a respectful burial. However, the plain language of Section 21A-6-3(4) indicates that the rule established in Pickens—disqualifying all striking workers—was overbroad and ran contrary to the intent of the Legislature. The impact of the Belt decision is difficult to gauge at this point. Suffice it to say that the revitalization of subsection 4 will allow the courts to determine what strikers meet the statutory requirements for compensation.

The narrow question presented by Farmer v. Cole was whether an employee suspended from work, with reinstatement conditioned on work being available, is unemployed within the meaning of the West Virginia Code. The claimant, Raymond Farmer, was suspended by his employer, with intent to discharge, for failure to comply with a management order. Farmer filed a grievance objecting to the attempted discharge and the matter was ultimately submitted to arbitration. The arbitrator found that good cause did not exist for the dismissal and directed Farmer be returned to work three months hence, without pay during the suspension period. Farmer then filed for unemployment compensation benefits for the remainder of the suspension period. His claim was denied on the ground that he was not “totally or partially unemployed” as defined by the compensation statute.

In a brief per curiam opinion, the supreme court reversed the ruling against the claimant as being “plainly wrong.” The court’s analysis centered exclusively on Kisamore v. Rutledge, which was factually almost identical to the Farmer case. In Kisamore, an employee was discharged for disciplinary reasons, and his reinstatement was made conditional on work being available and his ability to pass a physical examination. The Farmer court held that Kisamore was controlling: “The crux of the Kisamore ruling was that reinstatement be conditional and that during the suspension period the employee perform no services and that no wages be payable to him from the suspending employer.” Since Farmer’s reinstatement was expressly conditional on “work available,” it came within the purview of Kisamore, and the claimant was entitled to compensation during the suspension period.

104 300 S.E.2d at 639. The standard of review regarding unemployment cases is as follows: “Findings of fact by the Board of Review of the West Virginia Department of Employment Security, in an unemployment compensation case, should not be set aside unless such findings are plainly wrong . . . .” Kisamore v. Rutledge, 276 S.E.2d 821 (W. Va. 1981) syllabus point 1 by the court.
106 300 S.E.2d at 639.
107 Id.
The *Farmer* decision did not signal an abrupt break with the precedents. It did, however, clarify the case law regarding eligibility for unemployment benefits during suspensions, resolving any uncertainty that existed in favor of claimants.

The state's unemployment compensation statute formerly provided that where an employee left work "voluntarily" without fault on the part of the employer, he would be disqualified from receiving benefits for a period of six successive weeks. The court had previously held that one who ceases work because of health-related problems has done so voluntarily, thereby coming under the statute's disqualification provision. In *Gibson v. Rutlege*, this question of statutory construction was addressed anew.

The claimant, Scott Gibson, was seriously injured while working as a general laborer. He was forced to quit work and recuperate for a period of seven months under orders from his physician. After he received his physician's permission to return to work, he learned that he had been relieved by his employer. Gibson filed a claim for unemployment compensation benefits, which was approved, but he was found ineligible for six weeks because he had left his employment voluntarily. Gibson then appealed from that portion of the ruling denying him benefits during the six weeks.

In *State v. Hix*, the supreme court had defined the word "voluntarily" as used in the statute to mean "the free exercise of the will." Regarding the eligibility of claimants who quit work due to health-related problems, the *Hix* court had held: "[A]n employee who ceases work on account of illness, or fear of illness, or for any cause not involving fault on the part of his employer, is not entitled to unemployment benefits for the week following his cessation of work, and the six weeks immediately following such week." In support of this finding, the court suggested that the legislature had intended to "guard against the abuses which might arise from permitting employees to voluntarily quit work on account of real or fancied ailments, and still be in [a] position to apply for and receive benefits . . . ."

The rule adopted in *Hix*—that one compelled to terminate his employment for reasons of health has voluntarily quit his job—was expressly overruled in *Gibson*. The *Hix* rationale, the court opined, does not do justice to

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106 298 S.E.2d 137 (W. Va. 1982).
112 132 W. Va. at 522, 54 S.E.2d at 201.
114 132 W. Va. at 523, 54 S.E.2d at 201.
the beneficient purpose of unemployment compensation. Moreover, Hix promoted marked inconsistency in eligibility requirements. The commissioner is required to consider an employee’s health and fitness in determining whether available work is suitable for him.\textsuperscript{15} There would be gross inequity in allowing an unemployed individual to \textit{refuse} work because of debilitating health problems, while denying full compensation to one who must \textit{quit} work for similar reasons.\textsuperscript{16} In light of these factors, the court adopted a more lenient view of the term “voluntary,” bringing West Virginia in line with the majority of jurisdictions on this matter.

\textit{Gibson} fits neatly into the panoply of cases further increasing access to compensation benefits and reinforcing the viability of the “liberality rule.” While the impact of the decision itself may be slight, its importance lies in the court’s willingness to decide compensation cases with an eye to aiding future claimants.

\textit{James B. Stoneking}

\textsuperscript{15} W. VA. CODE § 21A-6-5 (1981).

\textsuperscript{16} 298 S.E.2d at 141.