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**Employment**

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EMPLOYMENT

I. DUE PROCESS IN DISMISSALS


Recent developments in the area of due process in dismissals draw upon the court’s growing body of opinions illustrating the analysis and rationale employed in considering the extent of due process protection.¹ The court continues to rely upon the three-pronged test delineated in Matthews v. Eldridge.² The Matthews balancing test for determining the extent of due process protection afforded an individual when a property interest is involved requires consideration of: (1) the private interests that are affected; (2) the risk of erroneous deprivation through the procedures used, and whether there exists a more substantial procedural safeguard; and (3) the government’s interest in terms of fiscal and administrative burdens involved.³

The case of Major v. DeFrench⁴ represents the climax of a long struggle in which the City of Morgantown had thwarted at every step the efforts of Martha Major to become a permanent police officer. Morgantown had never had a female police officer. Although Major had the second highest score on her written civil service examination, the City initially refused to hire her. As a consequence of a complaint lodged by Major, a federal agency found the City’s refusal to hire her was the result of sex discrimination.⁵ The agency ordered Morgantown to hire Major. The City complied with the order but subsequently attempted to discharge Major on three separate occasions. The City made a final attempt at termination on the theory that Major’s probationary period was over. The City based its actions upon the belief that once the probationary employment period ended there was no longer any requirement to abide by West Virginia Code § 8-14-11 which sets forth procedures for probationary dismissal.⁶ Major instituted a civil action against the City of Morgantown and its officials for wrongfully terminating her employment. Major alleged that the discharge was violative of due process and was arbitrary and discriminatory. Major sought both injunctive relief and damages.

The court found that Major’s probationary period had not ended when the City made its final attempt at discharge.⁷ Therefore, Major could not be terminated without the procedural protections of notice and hearing provided pro-

² 424 U.S. 319, 335 (1976).
³ Id.
⁴ 286 S.E.2d 688 (W. Va. 1982).
⁵ Id. at 691.
⁶ Id. at 692. W. Va. Code § 8-14-11 (1976 & Supp. 1982) provides that police civil service employees shall be provided a probationary period of one year.
⁷ 286 S.E.2d at 694.
bationary employees by West Virginia Code §§ 8-14-11 and 8-14-20. The court held that the one-year probationary period of employment provided for in West Virginia Code § 8-14-11 commenced when the individual began work. Further, the probationary employee must perform work for the full probationary term. If, as a result of forces beyond her control, the probationary employee is deterred from serving the complete probationary term, the term must be extended. Major had been unable to work for the entire term because of the City of Morgantown's efforts to discharge her without cause. Thus, her probationary period had not expired and she was entitled to the procedural protections afforded by West Virginia Code §§ 8-14-11 and 8-14-20.

The court continued the analysis and stated that even if Major had been dismissed at the conclusion of her probationary period she would have been entitled to fair and reasonable procedural protections dictated by the requirements of due process. Justice McGraw, writing for the court, held "that a police civil service employee who is dismissed at the end of her probationary term is entitled, by virtue of her property and liberty interests in continued employment, to procedural protections designed to insure the rationality of the decision in continued employment." The statutory language of West Virginia Code § 8-14-11 was interpreted as creating an expectancy in the probationary employee that employment will continue if the job is adequately performed and eligibility requirements are met. The expectancy interest was determined to be a property interest of sufficient weight to demand procedural due process prior to any denial of permanent employment status.

The court acknowledged that pursuit of a lawful occupation is a liberty interest protected by procedural due process from arbitrary state interference. Major's liberty interest in continued employment as a police officer included her "good name and her prospects for future employment." These important liberty interests demand that an employee be provided notice of any charges against her and a fair hearing where the charges can be contested. The court found that under the circumstances a denial of procedural protection to Major "would be an affront to liberty and to the due process clause."
The decision in Major firmly established the active role of the court in promoting rational, nonarbitrary decision-making on the part of public employers. The court is extremely sensitive to the principle that procedural protections insure rational decision-making and reduce the risk of erroneous deprivations of public employees’ protected property and liberty interests in continued employment.

II. Bonding Requirements for New Construction and Mining Employers


In Perry v. Barker\(^2\) the court took an active role in designing procedures for the effective enforcement of West Virginia Code §§ 21-5-14 to 21-5-16, which require employers engaged in the construction business or in the mining industry who have been doing business in West Virginia for less than five years to obtain a bond payable to the State to secure payment of wages and fringe benefits to employees. Such action is an attempt to avert the social and economic problems created by workplace closings in which employers lock their gates and fail to pay wages and other fringe benefits. Posted bonds are necessary to protect the taxpaying workforce from financially irresponsible, bankrupt, or absconding employers.

The petitioners, members of the United Mine Workers of America and several employees of nonoperating, nonbonded coal companies who were not paid wages when their employers shut down, sought a writ of mandamus to compel the Commissioner of the Department of Labor to enforce the bonding requirements of West Virginia Code § 21-5-14.\(^2\) The petitioners contended that the failure of the Commissioner to enforce the bonding requirements had caused numerous employees to be deprived of the protection of the Act and the wages and benefits for which they worked.\(^3\)

In response, the Commissioner argued that he had complied with the statute and implemented a program to police the bonding requirements.\(^4\) The Commissioner pleaded that he was allocated no additional funds for the implementation of the bonding requirements.\(^5\) Only two inspectors were assigned to enforce the bonding requirements. The court found that the Commissioner's approach to policing the bonding provisions was inadequate and predestined to failure.\(^6\) The plan for enforcement was deemed to suffer from being labor-intensive, expensive and slow.\(^7\) The court noted that the cost of enforcement should be placed “upon the violators of the law, rather than on the taxpaying citizens.”\(^8\)

\(^2\) 289 S.E.2d 423 (W. Va. 1982).
\(^3\) Id. at 425.
\(^4\) Id. at 427.
\(^5\) Id.
\(^6\) Id.
\(^7\) Id. at 429.
\(^8\) Id. at 431.
The court stepped into the enforcement quagmire and suggested methods for prompt and effective enforcement of the bonding requirements. It was suggested that the Commissioner seek the aid of the Attorney General in issuing subpoenas or summonses to each of the employers who have not complied with the law. The employers would be required to show why they have not complied. Secondly, the court suggested the use of mandatory injunction proceedings. The injunction proceedings would be instituted by the Attorney General, process for all corporate or limited partnership defendants may be served on the Secretary of State, and costs of the action plus attorney fees could be assessed against the defendants. Finally, those employers who have been notified of the duty to post bond and have failed to do so should be prosecuted by the prosecuting attorneys of the various counties. Thus, the writ of mandamus was awarded and the Commissioner of the Department of Labor was ordered to go forward with a prompt and effective enforcement method consistent with the opinion of the court.

The decision in the Perry case affords an excellent example of the active role of the modern court. When necessary, the court will not hesitate to act as an administrator. Indeed, in Perry the court stepped into the controversy; informed the Department of Labor that the Department's implementation efforts were grossly inadequate; demanded that the Department implement effective techniques; and finally "suggested" how implementation should be done.

III. HEALTH AND SAFETY


During the survey period, the court found that an authorized representative of miners has the right to accompany state mine inspectors for the purpose of pointing out health and safety hazards without fear of employer discrimination. The court also found that the Director of the West Virginia Department of Mines has a mandatory duty to enforce the laws of the State which require the control of respirable dust in coal mines. Finally, the court found that West Virginia Department of Mines mine inspectors have a clear statutory duty to issue notices or orders for all violations of law found during mine inspections.

*United Mine Workers of America v. Miller* was an original proceeding in mandamus. An inspector for the West Virginia Department of Mines conducted a general mine inspection. The inspector was accompanied by two management individuals and an employee representative. The inspection took eight
hours and resulted in ten notices of violation and one withdrawal order for a portion of the mine found to be dangerous. During the inspection the employee representative pointed out a number of violations to the inspector. The inspector did not issue notices on a number of the violations, but gave oral warnings instead. At the completion of the inspection the employee representative was informed that his pay would be docked for the time spent in the inspection. The inspector refused to take any action in regard to the docking of pay. The basic contention of the United Mine Workers of America was that the Director of the Department of Mines had failed to perform his statutory duty of enforcing the health and safety laws.37

The court noted that it was clear that through the procedure of individual mine inspections the Director of the Department of Mines has the duty to execute and enforce standards for the protection of mine workers.38

West Virginia Code § 22-1-13 provides that “the authorized representative of the miners at the mine at the time of such inspection shall be given an opportunity to accompany the inspector on such inspection.”39 The court found that the interplay of West Virginia Code § 22-1-13 with the West Virginia Wage Payment and Collection Act40 necessitates the conclusion that a representative assisting in a mine inspection is rendering a service for which he is entitled to be paid.41

The court employed an economic analysis to illustrate that mine safety and health is a concern not only of the State and the mine employees but of the operators as well.42 The court noted the importance of having an employee who is familiar with day-to-day operations assist the mine inspector.43 Retaliatory actions by operators against employees who assist in the mine inspection process undermines the policy of the protection of the health and safety of mine employees. Such retaliatory action is in contravention of established state public policy.44

The second issue addressed by the court in United Mine Workers of America was whether the Director of the Department of Mines had a duty to enforce the laws of the state requiring the control of respirable dust in coal mines. The court found that the Director has a duty to require operators to control dust within the allowable federal limits.45 West Virginia Code § 22-2-48 was cited by the court as setting the minimum standards for respirable dust.46 Judicial notice was taken that excessive dust is a serious health hazard which causes occupational pneumoconiosis.

37 Id. at 677.
38 Id.
41 291 S.E.2d at 678.
42 Id.
43 Id.
44 Id.
45 Id. at 680.
46 Id.
The court found a substantial difference between the federal standards for respirable dust and the state standards. The federal enforcement program places control of the sampling and reporting procedures in the hands of coal operators, whereas the state requires miner participation in the policing of all health and safety standards. Therefore, the court held that:

In determining standards for control of respirable dust the Director should look to applicable federal statutes and regulations which are generally recognized as authoritative on the subject. The procedure adopted by the Director for enforcement of these standards must include the participation of miners or their authorized representatives to insure the integrity of the monitoring process.

Finally, the court held that when a safety or health hazard is pointed out to an inspector, the inspector must make a written note of the alleged violation and then proceed to determine whether a violation exists. If the inspector declines to issue an order or citation the reasons for not doing so must be given in writing. This procedure will ensure a record exists so that the inspector’s decisions may be reviewed in order to protect against arbitrary and capricious enforcement.

The United Mine Workers of America case clearly protects mine employees from retaliatory employer actions aimed at authorized miner representatives who seek to perform their duty of enforcing West Virginia law for the purpose of protecting the health and safety of West Virginia miners. The case also requires the Director of the Department of Mines and the mine inspectors to affirmatively discharge their duties of enforcing the mine safety and health laws.

IV. WORKMEN’S COMPENSATION

Geeslin v. Workmen’s Compensation Comm’r, 294 S.E.2d 150 (W. Va. 1982)

The developments in workmen’s compensation during the past year demonstrate that the court is continuing to play an active and expansive role in the area of workmen’s compensation. The decisions of the court emphasize

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47 Id. at 682.  
50 291 S.E.2d at 682.  
51 Id. at 684.  
52 Id.  
53 Id.  
54 For a review of the developing role of the court, see Flannery, The Expanding Role of the West Virginia Supreme Court of Appeals in the Review of Workmen’s Compensation Appeals, 81 W. Va. L. Rev. 1, 33-34 (1979).
the beneficent purpose of the Workmen's Compensation Act. Additionally, the court continues to apply the liberality rule of construing evidence in a fashion most favorable to the claimant. In Bailey v. State Workmen's Compensation Commissioner the court held that time limitations for appeals under the Workmen's Compensation Act do not erect an absolute jurisdictional bar, but rather are procedural and somewhat flexible. In so holding, the court overruled prior and substantial authority to the contrary. As the court recognized, except for the State of Arizona, there is an absolute lack of authority for such a relaxation of the statutory time periods for filing notices of appeal.

The court consolidated the appeals of three cases where the appellants had all missed the statutory time requirements in the prosecution of their claims. The appellees cited considerable authority for their argument that failure to file a timely notice of appeal operates as a jurisdictional bar. In response, the court reviewed the development of the jurisdictional theory of time limits. Justice Neely, writing for the majority, asserted that the jurisdictional theory was a technique that allowed prior courts which were unsympathetic to Workmen's Compensation claimants and unconcerned with advancing the charitable purpose of the Act to put an end to litigation. The survival of the theory was viewed as a result of "judicial inertia and neglect."

Noting that orderly procedures are necessary, the court addressed the issue of how the time limitations of the Act should be applied so that both administrative efficiency and claimant needs might be taken into account. The court stated that acceptable excuses for failure to comply with time requirements include "innocent mistake, excusable neglect, unavoidable cause, any fraud, misrepresentation or other misconduct of an adverse party, or any other reason justifying relief from the running of the time period."

In efforts to hurdle the time limitation bar, claimants must attach to their claims an affidavit setting forth the reason for delay. The affidavit is to be reviewed by the tribunal before which the claimant seeks to be heard so that a preliminary decision can be made to determine whether the lateness was excusable. The court finds this procedure to be consistent with the spirit of both the West Virginia Rules of Civil Procedure and the Federal Rules of Civil Procedure in applying limitations to procedure in order "to do substantial jus-

57 296 S.E.2d 901 (W. Va. 1982).
58 Id. at 905.
59 Id. at 902-03.
60 Id. at 906 n.5.
61 Id. at 903.
62 Id. at 905.
63 Id.
64 Id.
65 Id. at 906.
66 Id. 
In this same vein, any legitimate reliance interest of the employer must be given consideration by the tribunal making the preliminary lateness determination. Employers should not be expected to maintain records indefinitely for purposes of potential future litigation for to do so would impose a great administrative inconvenience. Some finality is needed to achieve an efficient compensation system. Employers should be protected from claims too old to be properly investigated and defended. Indeed, compensation issues should be decided while memories are clear.

For purposes of applying the new rule, the court announced that it will follow cases arising under the civil rules because they are fairly strict in defining excusable neglect. Under the Federal Rules of Civil Procedure, excusable neglect is an elastic concept that requires good faith and a reasonable basis for noncompliance within the specified time period.

The opinion provides an admission of uncertainty as to the potential workability of the new rule. Although the court found that the “Rhadamanthine application of procedural requirements would be incongruent with the topography of today’s legal landscape outside of Workmen’s Compensation,” it nevertheless indicated a surprising willingness to return to the old jurisdiction theory if the new rule proves unworkable. The court warned practitioners that the holding is an experiment and that the liberal new rule must not be taken advantage of or a return to “an interpretation as strict as the old ‘jurisdictional’ doctrine will be inevitable.” This willingness to shift positions on the time limit issue is disturbing in that it creates the potential for uncertainty and confusion. Moreover, if the court is disenchanted with the application of the jurisdictional technique and concerned that claimants receive full and fair hearings on the merits of claims brought under the Act, how can the court possibly propose a return to the old jurisdictional rule? If a return to the stricter jurisdictional doctrine is necessitated, the court will have to reconcile the broad pronouncements in Bailey with such a change.

The court’s disenchantment with general time limitations and procedural requirements of Workmen’s Compensation was foreshadowed in Hubbard v. State Workmen’s Compensation Commissioner. In Hubbard, the court held that workmen’s compensation statutes in effect on the date of death of an injured employee control the death claims of the dependents, rather than the more restrictive statutes that were in effect when compensability was determined.

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67 Id. at 907.
68 Id.
70 296 S.E.2d at 907.
72 296 S.E.2d at 906.
73 Id. at 907-08.
74 Id.
76 Id. at 663.
In 1965, the claimant's decedent had been granted an award for total disability resulting from silicosis. The date of last exposure was determined to be in 1964. At the time this award was made, a statute was in effect providing that dependent widows of employees who died from occupational pneumoconiosis were entitled to death benefits if the employee died within six years of the date of last exposure.\textsuperscript{77} In 1967, the legislature changed the term to ten years, and in 1974 the time limitation was completely removed.\textsuperscript{78} Hubbard died of the occupational illness in 1971—seven years after the date of last exposure and four years after the 1967 amendment. The commissioner applied the 1961 version of the statute to the widow's claim and rejected her 1971 pro se application for benefits since her husband died more than six years after his last date of exposure to the work hazards. The 1961 version was the one in effect when total disability was granted. In 1977, the claimant filed a second application in which she requested that the 1971 application be made part of the record and that the commissioner set aside the previous ruling and grant benefits. Both the commissioner and the Workmen's Compensation Appeals Board rejected the application.

The reversal by the West Virginia Supreme Court of Appeals effected a continuation of the reasoning applied in \textit{Lester v. State Workmen's Compensation Commissioner}.\textsuperscript{79}

In \textit{Lester}, when the claimant was last exposed to the employment hazards of occupational pneumoconiosis, the Act required that claims for occupational pneumoconiosis be filed within three years of the date of last exposure.\textsuperscript{80} The three years had not expired when the legislature amended the statute, eliminating all time requirements on filing with the exception that a claim must be filed within three years from and after the employee's occupational pneumoconiosis was made known to him by a physician or when he should reasonably have known.\textsuperscript{81} The claimant filed his claim within three years after his disease was made known to him but over three years from his date of last exposure. The question presented to the \textit{Lester} court was whether the amendments were applicable to the claimant. The court held that the time limitations contained in West Virginia Code § 23-4-15 were procedural and remedial in nature so that amendments to the statute enlarging the limitation period should apply to

\begin{itemize}
  \item \textsuperscript{77} W. Va. Code §§ 23-4-6a, 23-4-10 (1961).
  \item \textsuperscript{78} W. Va. Code § 23-4-10 (1981).
  \item \textsuperscript{79} 242 S.E.2d at 443.
  \item \textsuperscript{80} W. Va. Code § 23-4-15 (1970) provided in pertinent part:
    \begin{quote}
      To entitle any employee to compensation for occupational pneumoconiosis . . . the application . . . must be . . . filed . . . within three years from and after the last day of the last continuous period of sixty days or more during which the employee was exposed to the hazards of occupational pneumoconiosis.
    \end{quote}
  \item \textsuperscript{81} W. Va. Code § 23-4-15 (1981) provides in pertinent part:
    \begin{quote}
      To entitle any employee to compensation for occupational pneumoconiosis . . . the application . . . must be . . . filed . . . within three years from and after the last day of the last continuous period of sixty days or more during which the employee was exposed to the hazards of occupational pneumoconiosis, or within three years from and after the employee's occupational pneumoconiosis was made known to him by a physician or which he should reasonably have known, whichever shall last occur . . . .
    \end{quote}
\end{itemize}
claims that had not yet expired under the previously existing period of limitations.\textsuperscript{82}

The \textit{Lester} court found that rigid time limitations are "contrary to the humanitarian purposes of workmen's compensation . . . ."\textsuperscript{83} Thus, the holding in \textit{Hubbard} that the death claims of employees' dependents are controlled by the statutes in effect on the date of death of the injured employee rather than those statutes in effect when the employee's injury is found compensable should not be surprising. Additionally, the holding is interconnected with the rule in West Virginia that a dependent's claim for death benefits is separate and distinct from the claim of the employee.\textsuperscript{84}

Another issue dealt with by the court in the \textit{Hubbard} case was the question whether the doctrine of res judicata applied to bar the claimant's second application. The employer argued that the initial order, correct or not, is final because the claimant did not protest within the statutory period.\textsuperscript{85} The employer contended that res judicata barred the second application.

In general, res judicata is a principle of judicial economy concerned with finality rather than justice.\textsuperscript{86} On the other hand, Workmen's Compensation is intended to provide a streamlined, quick and efficient system for reaching just decisions in the handling of claims of injured employees.\textsuperscript{87} Yet, there is a need for proper, orderly procedure and finality in order for a proper investigation of the merits to be conducted. The court acknowledged the tension between the potentially harsh effects of res judicata and the beneficent policy of Workmen's Compensation. The court quoted Professor Larson:

The question that constantly recurs in cases involving the procedural rules of workmen's compensation law is whether, in any particular cases involving the loss of benefits for procedural reasons under an otherwise meritorious claim, the indispensability of the procedural purpose so served outweighs the thwarting of the protective function of the act.\textsuperscript{88}

The court found that the only reason the claimant was denied benefits was the failure of the commissioner to apply the correct statute. The court would not apply the doctrine of res judicata and reiterated the holding of \textit{White v. State Workmen's Compensation Commissioner},\textsuperscript{89} "in light of the scope and purpose of the Workmen's Compensation Act and the quasi-judicial summary proceeding in which claims are decided, the doctrine of res judicata would not bar compensation applications where the only obvious reason for rejection of the original claim was that it was untimely filed."

\textsuperscript{82} 242 S.E.2d at 447.
\textsuperscript{83} Id.
\textsuperscript{84} 295 S.E.2d 659, 663 (W. Va. 1981).
\textsuperscript{85} Id. at 664.
\textsuperscript{86} 1B J. MOORE & T. CURRIER, MOORE'S FEDERAL PRACTICE ¶ 0.405(1) (2d ed. 1982).
\textsuperscript{87} Mitchell v. State Workmen's Compensation Comm'r, 256 S.E.2d 1, 9 (W. Va. 1979).
\textsuperscript{88} 235 S.E.2d 659, 664 (W. Va. 1981) (quoting 3 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION ¶ 78.10 (1982)).
\textsuperscript{89} White v. State Workmen's Compensation Comm'r, 262 S.E.2d 752 (W. Va. 1980).
The final issue addressed by the Hubbard court was whether the Commissioner had the jurisdiction to set aside the 1972 order denying benefits when no protest or appeal had been made by the claimant. Ordinarily, there is no jurisdiction to set aside a final order except in instances provided by statute or where the final order was made through fraud or mistake. In previous decisions, it had been held that a mistake which would justify setting aside a final order must be more than an erroneous decision of the commissioner. The court rejected prior "mistake" analysis and held that

the mistaken application by the commissioner of the wrong procedural statute, which deprives an otherwise qualified claimant of the widow's benefits to which she is entitled under the statutes in effect on the date of her husband's death, is a mistake which justifies the setting aside of a final order. In reaching its conclusion, the court noted that, "the policy of according finality to orders of the commissioner must be balanced with the protective functions of the act." Thus, a trend can be discerned which demonstrates the willingness of the court to by-step procedural requirements in the interest of protecting claimants.

In Breeden v. Workmen's Compensation Commissioner, the court dealt with whether a physical or mental disability which results from workplace stress is a compensable disability under workmen's compensation.

The claimant's position was that she had been the recipient of constant harassment, humiliation, castigation and physical and verbal abuse from her supervisor. The abusive treatment allegedly manifested itself in a depressive neurosis which has associated with it a number of physical and mental ailments. The claimant's psychiatrist testified that the claimant's symptoms included headaches, gastrointestinal difficulties, anxiety and depression. The employer's position was that the claimant was depressed as a result of marital problems. A psychiatrist testified that Breeden's predominate difficulty was within her marriage. Both the Commissioner and the Workmen's Compensation Appeal Board denied the claimant's application for benefits. Despite substantial conflicting evidence, the court found that the three necessary requirements for a compensable claim, "(1) a personal injury (2) received in the course of employment and (3) resulting from that employment," had been met by the claimant. Therefore, the court reversed the decision of the Commissioner and the Appeal Board.

In recent years, the volume of litigation pertaining to mental and nervous conditions has been growing throughout the country. Professor Larson suggests that such conditions may be broken down into three basic categories: (1)

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94 Id. at 667.
96 Id. at 400.
mental stimulus causing physical injury; (2) physical trauma causing nervous injury; and (3) mental stimulus causing nervous injury. Compensability is generally found for the first two categories. The third category is more hotly disputed although there are signs of a distinct majority position supporting compensability. With the **Breeden** decision West Virginia acknowledges compensability for all three basic categories of mental conditions.

In an extremely complex, technological and dynamic society, innumerable pressures are daily exerted upon individuals which affect both physical and mental well-being. Often, there are so many different and variable pressures affecting individuals that it is difficult to isolate the causes of mental and nervous conditions. In workmen's compensation claims, an individual who has been injured by stress, which is claimed to be rooted in the workplace, should be required to demonstrate the probable cause of his injury in order to recover. With one broad stroke of the pen, the West Virginia Supreme Court of Appeals has held that an employee, who sustains mental or emotional injury as a result of workplace stress extending over a period of time, has suffered a compensable personal injury. Yet, the court failed to provide any guidelines as to how to identify a causal link between neurosis and employment as opposed to other environmental stimuli. Such guidelines are a necessity if industry is to bear the cost of disabilities it has caused and not simply fund nervous illness caused by the everyday stress and strain of modern life. It would seem that there must necessarily be some requirement of satisfactory proof at least with regard to obscure nervous disorders as to which even medical experts may not agree. As to the cause of the claimant's suffering in **Breeden**, the decision appears to have turned on which psychiatrist was to be believed, the claimant's or the employer's. It is questionable whether the liberality rule of construing the evidence in a manner most favorable to the claimant is appropriate in the category of mental stimulus causing nervous injury.

A further question raised by the **Breeden** opinion concerns the potential for claimant abuse. Although depressive neurosis is a very real disability, common malingering and the danger of fictitious claims present a real potential danger. The danger is not insurmountable. However, the court did not address the potential problem nor did the court discuss the real nature of the injury. There is a need for the court to lay down perimeters as to what constitutes satisfactory evidence of mental distress and the causation factor.

It remains to be seen how the broad language of the court will be applied by the Commissioner and the Workmen's Compensation Appeal Board.

In **Geeslin v. Workmen's Compensation Commissioner**, West Virginia joined a growing number of jurisdictions that have rejected the availability of the aggressor rule as a defense. The court held that "[wh]ere an altercation

97 1B A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 42.20 (1982).
98 Id. at § 42.21, -.22.
99 Id. at § 42.23.
100 294 S.E.2d 150 (W. Va. 1982).
101 A number of jurisdictions have rejected the aggressor rule. See Clover v. Industrial Com-
arises out of the employment, the fact that the claimant was the aggressor does not, standing alone, bar compensation under the West Virginia Compensation Act, West Virginia Code 23-1-1 et seq., for injuries claimant sustained in the altercation.

Geeslin sustained injuries as a result of a fight with the supervisor. Geeslin was subsequently denied the claim on the grounds that his injuries were due to his willful misconduct. On appeal, the employer argued that Geeslin was barred from recovery under the aggressor rule. The court recognized that the aggressor rule had been abolished in a number of jurisdictions.

The difficulties in finding fault among parties whose actions are not easily distinguished as aggressor or victim in work environment altercations were discussed by the court. Additionally, the court noted that use of the aggressor rule analysis imports tort based notions into the workmen's compensation decisions. The court cited language to the effect that the rule ignores the reality that humans, not robots, are the workers in an industrial setting and they bring all their human frailties to the workplace. Thus, the workplace does not exist in a vacuum and "course of employment" is not a static concept.

Because of the employer's position that Geeslin was barred from benefits as a result of willful misconduct, the court also analyzed the willful misconduct provision of the West Virginia Code. The court's prior hesitancy to deny compensation because of such conduct was cited. The rule of Billings v. State Compensation Commissioner that "[u]nder Code, 23-4-2, willful misconduct will not bar compensation unless the injury is the result thereof" was relied upon to find that Geeslin was entitled to benefits since his supervisor's retaliatory attack went far beyond what could have been reasonably expected. Therefore, Geeslin's misconduct was not the cause of his injuries.

In summary, during the survey period, the court has abolished the aggressor defense; found mental or physical disability resulting from workplace stress to be a compensable injury; determined that the statutes in effect on the date of death of an injured employee control the death claims of the employee's dependents; and held that time limitations under the Workmen's Compensation Act are not jurisdictional, but rather procedural.

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mission, 21 Ariz. App. 409, 520 P.2d 322 (1974); Hall v. Clark, 360 S.W.2d 140 (Ky. 1962); Dillon's Case, 324 Mass. 102, 85 N.E.2d 69 (1949).

102 294 S.E.2d at 155.
103 Id. at 155 n.2.
104 Id. at 154-55.
105 123 W. Va. 498, 16 S.E.2d 804 (1941).
106 Geeslin, 294 S.E.2d at 156 (quoting Billings, 123 W. Va. 498, 16 S.E.2d 804 at syl. pt. 2).
107 294 S.E.2d at 157.
V. BOARD OF EDUCATION EMPLOYEES


The cases involving decisions relating to school board employees demonstrate the continuing attempt of the West Virginia Supreme Court of Appeals to establish orderly procedures by which evaluation of personnel can be accomplished without violating due process rights.

In Higgins v. Board of Education, the court considered the applicability of Policy No. 5300(6)(a) of the Policies, Rules and Regulations of the West Virginia Board of Education to the selection of personnel for voluntary transfer and promotion. Policy No. 5300(6)(a) provides that decisions of promotion, demotion, transfer and termination should be based upon prior, open and regular evaluations which are made known to the employee.

Higgins contended she was denied a promotion that was awarded to a less qualified applicant who, unlike Higgins, did not possess a master's degree. The position required an individual qualified to teach high school English and coach the cheerleading team. The selected applicant had experience in both areas in addition to serving as the yearbook sponsor at another high school. Higgins' experience was in teaching junior high. The primary factors for selecting the other applicant over Higgins were the other applicant's personality and enthusiasm for extracurricular activities. Evaluations demonstrated that both teachers were performing their duties well, although Higgins' numerical score was slightly higher. Apparently, Higgins desired that the quantified subjective evaluations be mechanically applied so as to warrant the conclusion that Higgins was the superior teacher. The court refused to do this, noting the problems associated with comparisons of subjective evaluations. Additionally, the court noted that possession of a master's degree is only one of the factors to be considered in evaluating teachers.

The court held that, although Policy No. 5300 is applicable to voluntary transfers, it is not the purpose of the policy to make all personnel decisions dependent upon the mechanical application of such criteria as seniority, evaluations, or degrees because there are many important human qualities that can

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112 286 S.E.2d 682 (W. Va. 1982).
113 § 5300(6)(a) states:
Every employee is entitled to know how well he is performing his job, and should be offered the opportunity of open and honest evaluation of his performance on a regular basis. Any decision concerning promotion, demotion, transfer, or termination of employment should be based upon such evaluation, and not upon factors extraneous thereto. Every employee is entitled to the opportunity of improving his job performance prior to the termination or transferring of his services, and can only do so with assistance of regular evaluation.
114 288 S.E.2d at 524.
115 Id.
only be judged subjectively through personal contact.\textsuperscript{116}

The decision in \textit{Higgins} is important because it announces the judicially perceived purpose of Policy No. 5300. The court stated, "the primary purpose of Policy 5300 is to prevent discriminatory or retaliatory transfers or demonstrations which would cause bad morale, insecurity and poor performance on the part of school employees."\textsuperscript{117} Thus, the court held that it would not intervene in administrative decisions involving voluntary transfers and promotions unless there is evidence of abuse.\textsuperscript{118} The court offers no guidelines for determining at what point the use of very subjective qualities may be abused and the rational merit promotion system effectively discarded. The dissent of Justices McHugh and McGraw expresses grave concern with the broad latitude given by the majority to administrators in the transfer and promotion of teachers.

In \textit{Board of Education v. State Superintendent of Schools},\textsuperscript{119} the Mason County Board of Education appealed a circuit court decision that ordered a principal reinstated and awarded $148,362.36 in back pay for the years 1973 through 1981. The Board argued that because the principal had been employed under a three-year probationary contract that would have expired in 1975, the damages should be limited to the years of the contract. The court did not accept the Board's argument because of the special due process protection afforded probationary teachers by Policy No. 5300.\textsuperscript{120}

The court decided that a wrongfully terminated employee has a duty to mitigate damages. The rule of measuring damages as the total of the employee's back pay from the date of discharge to the date of reinstatement was rejected.\textsuperscript{121} The court noted that the public should not be saddled with enormous damage awards merely because a governmental agency makes a technical violation of due process. The court concluded that unless a wrongful discharge is malicious, the discharged employee has an obligation in certain circumstances to mitigate his damages by seeking other employment.\textsuperscript{122}

With respect to mitigation of damages, the court adopted the general rule\textsuperscript{123} enunciated by Professor McCormick with an exception as to the term of

\begin{itemize}
\item \textsuperscript{116} Id.
\item \textsuperscript{117} Id.
\item \textsuperscript{118} Id.
\item \textsuperscript{119} 295 S.E.2d 719 (W. Va. 1982).
\item \textsuperscript{120} Id. at 722.
\item \textsuperscript{121} Id. at 723.
\item \textsuperscript{122} Id. at 725.
\item \textsuperscript{123} The general principles enunciated by McCormick applicable to the issue of mitigation of damages are as follows:
\begin{quote}
The plaintiff suing for wrongful discharge need only prove the amount he was to earn under the contract for the remainder of the term of the employment, and the defendant has the burden of proving what the plaintiff did earn, or could by reasonable diligence have earned, in other employment during that period.
\end{quote}
\begin{quote}
If the plaintiff has actually secured other employment of whatever kind, the amount earned will be deducted from the total earnings which would have accrued under the contract with the defendant, in measuring damages, but, in ascertaining whether he
employment of a state employed teacher.\textsuperscript{124}

The court instructed that if similar employment is locally available to a wrongfully discharged employee, he will be charged, in mitigation, the amount that would have been earned if accepted.\textsuperscript{125} Any actual wages received in another job are an offset to damages unless the job was “compatible” with the former job.\textsuperscript{126} By the term “compatible,” the court means to inquire whether the job could have been performed concurrently with the former employment. As an affirmative defense, mitigation of damages must be raised and proved by the employer, but the employee who has not secured employment must show that he or she used reasonable and diligent efforts to secure acceptable employment.\textsuperscript{127}

Lastly, if the wrongfully discharged employee secures employment so that the offset of mitigation reduced the damage award to a mere nominal amount, the employee is still entitled to reasonable attorney fees and expenses.\textsuperscript{128}

In \textit{Golden v. Board of Education},\textsuperscript{129} the court considered whether a shoplifting incident and the resulting fine constituted a serious act of immorality under West Virginia Code § 18A-2-8\textsuperscript{130} so as to cause the dismissal of Golden, a high school guidance counselor. The court ordered the reinstatement of Golden with back pay and found that, by itself, a misdemeanor conviction does not constitute immorality.\textsuperscript{131}

The court noted that when confronted with an immorality question, it must be determined whether a “rational nexus” exists between the “immoral” behavior and the responsibilities of employment so that the behavior indicates unfitness to teach.\textsuperscript{132} In designing this requirement, the court was concerned with two issues. First, the court noted that examination of only the conduct would violate substantive due process rights.\textsuperscript{133} Second, the court was interested in preserving the teacher’s right to privacy.\textsuperscript{134}

Although the holding in \textit{Golden} is extremely important for teachers, the court provided no definitional standards for determining when a teacher’s con-

\begin{thebibliography}{9}
\bibitem{124} C. \textsc{McCormick}, \textbf{Handbook on the Law of Damages} §§ 159-60, at 627, 629 (1935).
\bibitem{125} 285 \textsc{s.e.2d} at 724.
\bibitem{126} \textit{Id}.
\bibitem{127} \textit{Id} at 725.
\bibitem{128} \textit{Id} at 725-26.
\bibitem{129} \textit{Id} at 726.
\bibitem{130} 285 \textsc{s.e.2d} 665 (W. Va. 1981).
\bibitem{131} \textit{Golden}, 285 \textsc{s.e.2d} at 669.
\bibitem{132} \textit{Id} at 668.
\bibitem{133} \textit{Id} at 669.
\bibitem{134} \textit{Id}.
\end{thebibliography}
duct outside the classroom will affect in class fitness so as to reasonably justify discharge. Justice Neely, in a vigorous dissent, argued that stealing is a crime of moral turpitude and, since teachers are authority figures and role models, children should not be subjected to a teacher who has by example supported crime. The decision of the court in Board of Education v. Hunley demonstrates the adamant requirement of the court that the board comply strictly with applicable procedures set forth in the West Virginia Code. The case involved the change in position of three employees from full-time secretaries who, by virtue of length of service had continuing contract status, to the position of half-time secretaries. The change was necessitated by financial problems uncommunicated to the three employees. The Board attempted to characterize the change as a transfer. However, the court found that the Board actually terminated, without notice, the contracts with the employees and supplanted them with new ones. The court concluded that the Board should have followed the statutory requirements for termination. Thus, the Board was found to have subverted the requirements of notice and right to hearing and was ordered to reinstate the three employees at full salary and workdays retroactively.

VI. UNEMPLOYMENT COMPENSATION

Cooper v. Rutledge, 286 S.E.2d 920 (W. Va. 1982)

In two recent cases, the court has considered the meaning of the term "misconduct" as it is used in disqualifying individuals from unemployment compensation benefits. The opinions reflect the court's concern with furthering the purpose of the Unemployment Compensation Act to provide "reasonable and effective means for the promotion of social and economic security by reducing as far as practicable the hazards of unemployment." The court continues to apply the rule that the Unemployment Compensation Act should be liberally construed so as to advance the remedial propose of the Act.

In Cooper v. Rutledge, the court considered whether claimants should be ineligible to receive benefits for six weeks as a consequence of their participation in unauthorized but peaceful picketing. The Board of Review of the West Virginia Department of Employment Security had held that the claimants were discharged for misconduct within the meaning of W. Va. Code §
Thus, the claimants were found to be disqualified from receiving benefits for a period of six weeks. The circuit court affirmed the disqualification for benefits.

The West Virginia Supreme Court of Appeals found the factual context of the case to be unique in that evidence indicated the claimants had been fired prior to the commencement of picketing. Therefore, the employer-employee relationship had terminated prior to the alleged misconduct. The statute contemplates that there exists a master-servant relationship at the time of the misconduct. The court concluded that "employees who are fired and subsequently engage in demonstrations against their former employer are not guilty of misconduct within the meaning of W. Va. Code § 21A-6-3(2) so as to be disqualified from receiving unemployment compensation benefits."146

What is significant about the Cooper decision is that the court went much further in its holdings than the specific facts of the case necessitated. The court stated that even if the employees had not been terminated prior to the picketing, the activities of the employees during the period of work stoppage would not have constituted misconduct within W. Va. Code § 21A-6-3(2). The court adopted the analysis of In re Heitzenrater in which a New York court concluded that "mere participation in a strike, which may be in breach of a no-strike clause, or otherwise impermissible or proscribed, does not constitute 'misconduct'." The Heitzenrater court cautioned that if there were violence or sabotage then the strike participants may be guilty of misconduct so as to deny them unemployment benefits. The West Virginia Supreme Court of Appeals did not specifically adopt the Heitzenrater warnings. However, it is clear from the discussion that had there been evidence of destruction of property or violence the court may have denied benefits to the claimants.

The court, in its discussion, seems to ignore W. Va. Code 21A-6-3(4) which provides that a person is disqualified from participating in the benefits of the Unemployment Compensation Act for any week in which the employment is

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143 W. Va. Code § 21A-6-3(2) (1981) defines misconduct as follows:
Misconduct consisting of willful destruction of his employer's property, assault upon the person of his employer or any employee of his employer, if such assault is committed at such individual's place of employment or in the course of employment; reporting to work in an intoxicated condition, or being intoxicated while at work; arson, theft, larceny, fraud or embezzlement in connection with his work; or any other gross misconduct; he shall be and remain disqualified for benefits until he has thereafter worked for at least thirty days in covered employment: Provided, that for the purpose of this subdivision the words "any other gross misconduct" shall include, but not be limited to, any act or acts of misconduct where the individual has received prior written warning that termination of employment may result from such act or acts.

144 286 S.E.2d at 923.
145 Id.
146 Id.
147 Id.
149 286 S.E.2d at 924 (quoting In re Heitzenrater, 277 N.Y.S.2d at 637, 224 N.E.2d at 75).
150 Heitzenrater, 277 N.Y.S.2d at 639, 224 N.E.2d at 76.
due to a work stoppage. Moreover, the court has confused the issue. If there has been a work stoppage there is no need to enter into a misconduct analysis. The purpose of the disqualification is to prevent strikes from being financed by state funds because the position of the state in labor disputes is one of neutrality. Although it appears that the public policy objective of maintaining industrial peace collides with the objective of providing financial assistance to the unemployed, the court made no attempt in *Cooper* to balance the two. A conceivable result of this decision may be a weakening of the incentive of encouraging union employees to comply with no-strike clauses of collective bargaining agreements. To allow an individual who has been fired because of participation in an improper strike to receive benefits would be a “reward” for breaching his contractual agreement not to strike. On the other hand, there are situations such as hazardous and unsafe working conditions which may warrant a violation of a no-strike clause. The two situations are dissimilar, and to afford equal benefits to both the justified and the unjustified striker may encourage illegal and irresponsible work stoppages in violation of contract. Rather than simply adopting the holding of *Heitzenrater*, the court should have entered into its own analysis and distinguished between those who breach no-strike contracts with justification as opposed to those who breach irresponsibly.

A similar issue was dealt with in *Lee-Norse Company v. Rutledge* in which the court confronted the issue of whether the labor dispute disqualification for unemployment benefits found in West Virginia Code § 21A-6-3(4) applied to a company lockout which was based solely on business and economic motivations. The employees were locked out during collective bargaining for a new contract even though negotiations were continuing and had not reached an impasse. Lee-Norse contended that the lockout was a protective one; since the contract had expired, there was uncertainty as to whether there would be a strike. The locked-out workers were denied benefits under West Virginia Code § 21A-6-3(4) by the Board of Review and the Kanawha County Circuit Court reversed.

The court held that such a work stoppage was not a result of a labor dispute so as to deny benefits. Previously, West Virginia adhered to the view that a lockout constituted a disqualifying labor dispute within the meaning of the labor dispute disqualification provision of the unemployment compensation statute. Therefore, the court overruled the inconsistent language of *Cumberland & Allegheny Gas Co. v. Hatcher* and *Miners In General Group v. Hix*.

The court adopted the view that work stoppages resulting from manage-
ment fears during collective bargaining negotiations are not the result of labor
disputes so as fall within the West Virginia Code § 21A-6-3(4) disqualification.
In order to reach this result the court relied heavily upon the stated legislative
purposes of the Unemployment Compensation Act.\textsuperscript{157} When individuals have
been locked out and are ready and willing to work they are involuntarily unem-
ployed and the Act is designed to assist them.\textsuperscript{158}

The underlying rationale of the court is that the disqualification should
not be used by an employer as leverage to effectuate and enforce a lockout. The rationale is founded on the beneficent objectives of the Unemployment
Compensation Act in promoting social and economic stability through reducing
the hazards of unemployment.

In \textit{Kirk v. Cole} the court held that absence from work as a result of illness
does not \textit{per se} constitute misconduct so as to disqualify claimants from re-
ceiving benefits for a six-week period.\textsuperscript{159} The record was clear in \textit{Kirk}
that there had been a considerable number of absences due to sickness. However, the court could find no misconduct on the part of the appellant.

The court's analysis began with an acknowledgment of a general definition
of misconduct used in other jurisdictions.\textsuperscript{160} The suggestion was that miscon-
duct consists of actions which demonstrate an intentional or willful disregard
of the needs of the employer. Although the court held that absence due to
sickness does not alone constitute misconduct, the court cautioned that where
there are reasonable rules regarding proper notice of verification of illness one
must adhere to such rules.\textsuperscript{161} Failure to follow the employer’s rules relating to
absence procedures can constitute misconduct so as to deprive the employee of
unemployment benefits for a six-week period.\textsuperscript{162} The holding in \textit{Kirk}
adopts what appears to be the general rule.\textsuperscript{163}

Thus, during the survey period the court has consistently applied a liberal
construction to the West Virginia unemployment statutes.

\textsuperscript{157} 291 S.E.2d at 481.
\textsuperscript{158} Id. at 482-83.
\textsuperscript{159} 288 S.E.2d 547 (W. Va. 1982).
\textsuperscript{160} [M]isconduct is:
conduct evincing such willful and wanton disregard of an employer's interest as is found
in deliberate violations or disregard of standards of behavior which the employer has the
right to expect of his employee, or in carelessness or negligence of such degree or recur-
rence as to manifest equal culpability, wrongful intent or evil design, or to show an in-
tentional and substantial disregard of the employer's interests or of the employee's du-
ties and obligations to his employer. On the other hand mere inefficiency, unsatisfactory
conduct, failure in good performance as the result of inability or incapacity, inadverten-
cies or ordinary negligence in isolated instances, or good faith errors or judgment or dis-
cretion are not to be deemed 'misconduct' within the meaning of the statute.
541, 111 N.W.2d 817, 819 (1961).
\textsuperscript{161} 288 S.E.2d at 550.
\textsuperscript{162} Id.
\textsuperscript{163} 1B \textsc{Unempl. Ins. Rep. (CCH)} 1970 at 4454.
V. RETALIATORY DISCHARGE


The significance of Harless v. First National Bank in Fairmont\(^{164}\) (hereinafter referred to as Harless-II) is that it provides guidelines pertaining to what damages can be sought and under what legal theory when litigating a retaliatory discharge action.

The Harless-II decision is a sequel to the court's opinion in Harless v. First National Bank in Fairmont\(^{165}\) (hereinafter referred to as Harless-I) which authorized the retaliatory discharge cause of action in West Virginia. The rule and underlying rationale of Harless-I was expressed in the single syllabus of the court:

The rule that an employer has an absolute right to discharge an at-will employee must be tempered by the principle that where the employer's motivation for the discharge is to contravene some substantial public policy principle, then the employer may be liable to the employee for damages occasioned by this discharge.\(^{166}\)

Harless-II stands for the proposition that there can only be one recovery of damages for one injury.\(^{167}\) In the trial court the case had been presented to the jury on three distinct theories for recovery: (1) the action of retaliatory discharge; (2) the tort of outrageous conduct; and (3) the claim of blackballing and blacklisting.\(^{168}\)

Special interrogatories were presented to the jury on the issue of damages.\(^{169}\) The jury verdict awarded Harless both compensatory and punitive damages against the bank and against Wilson, a supervisor, for both the tort of retaliatory discharge and the tort of outrageous conduct.\(^{170}\) The jury additionally awarded compensatory and punitive damages against Wilson for blackballing and blacklisting.\(^{171}\)

The trial court struck the award for blackballing on the grounds that there was insufficient evidence.\(^{172}\) The judge struck the retaliatory discharge damages awarded against Wilson on the theory that Wilson did not directly discharge Harless.\(^{173}\) Finally, the compensatory and punitive damages rendered against the bank on the theory of outrageous conduct were removed by the trial court because of insufficient evidence.\(^{174}\) Both parties appealed the final

\(^{164}\) 289 S.E.2d 692 (W. Va. 1982).
\(^{165}\) 246 S.E.2d 270 (W. Va. 1978).
\(^{166}\) Id. at 271.
\(^{167}\) 289 S.E.2d at 705.
\(^{168}\) Id. at 695.
\(^{169}\) Id.
\(^{170}\) Id.
\(^{171}\) Id.
\(^{172}\) Id.
\(^{173}\) Id.
\(^{174}\) Id.
order of the court.

The West Virginia Supreme Court of Appeals held that the trial court erred when it determined that Wilson could not be found liable for the retaliatory discharge.\textsuperscript{176} The court found that the evidence demonstrated that Wilson was directly involved in the bank’s unlawful practices. Further, as the plaintiff’s immediate supervisor, Wilson was hostile to the plaintiff’s efforts to correct the unlawful practices. The court stated that “[t]he fact that Wilson did not directly fire the plaintiff does not relieve him of liability” because the relationship of the employer bank and the employee Wilson is similar to that of joint tortfeasors.\textsuperscript{178}

In discussing the issue of whether the plaintiff should have been permitted to recover for emotional distress as a part of the compensatory damages, the court noted that the law regarding the measure of damages that may be recovered for the tort of retaliatory discharge is rather sparse.\textsuperscript{177} In analyzing the problem the court relied on tort damage law and noted that \textit{Monteleone v. Co-Operative Transit Co.}\textsuperscript{178} held that a plaintiff could recover compensatory damages for emotional distress arising from the wrongful acts of another. Because retaliatory discharge actions are premised on the wrongful and deliberate discharge of an employee who chooses to exercise a public policy right, the court held that damages for emotional distress may be recovered as part of compensatory damages.\textsuperscript{179} The court explicitly acknowledged that the role of the jury in assessing damages for emotional distress will be governed only by common sense.\textsuperscript{180}

The third issue of damages addressed by the court was whether there is a right to punitive damages in a retaliatory discharge action. The court held that there is no automatic right to punitive damages.\textsuperscript{181} The holding was premised upon the “open-endedness in the limits of recovery for emotional distress in a retaliatory discharge claim.”\textsuperscript{182} If the actions of the employer are shown to be willful, wanton or malicious then punitive damages may be appropriate.\textsuperscript{183} The court concluded that the circumstances of the case did not demonstrate that an award of punitive damages would be appropriate.\textsuperscript{184}

The final issue confronting the court was whether recovery should have been permitted on the claim of the tort of outrageous conduct. The court noted that a great degree of similarity exists in the character of outrageous conduct and the action of retaliatory discharge.\textsuperscript{185} Further, there is a considerable de-

\begin{footnotesize}
\begin{enumerate}
\item Id. at 699.
\item Id. at 689-99.
\item Id. at 700.
\item 128 W. Va. 340, 36 S.E.2d 475 (1945).
\item 289 S.E.2d at 702.
\item Id.
\item Id. at 703.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id. at 705.
\end{enumerate}
\end{footnotesize}
gree of congruence in the damages recoverable. Because there can be only one recovery for one injury, the court held that a claim of outrageous conduct is duplicitous to a claim for retaliatory discharge. Thus, the court dismissed the outrageous conduct cause of action.

The actions of the West Virginia Supreme Court of Appeals reduced plaintiff's award from $125,000 to $25,000. The court recognized that if only the retaliatory discharge theory of damages had been given to the jury the award may have been greater. Thus, the case was remanded for retrial of the damages. However, the plaintiff was given the option of remittitur due to the protracted nature of the case.

Harless-II provides guidance as to the proper award of damages in the plethora of lawsuits which have been spawned by Harless-I.

In Stanley v. Sewell Coal Co. the cause of action for retaliatory discharge was found to be sufficiently related to an action for fraud or deceit so as to extend the time in which the action may be brought. The plaintiff, Stanley, was an employee at will who claimed he was discharged by the defendant so that the defendant could prevent discovery of its false reporting of accidents to the Mine Enforcement Safety Administration. The defendant claimed the discharge was a result of excessive absenteeism. Stanley's action for retaliatory discharge was dismissed by the circuit court on the ground that it was time-barred by the one-year limitation period of W. Va. Code § 55-2-12(c).

On appeal, the court accepted Stanley's argument that the action should be considered as one for fraud and deceit which is governed by the two-year statute of limitations. The court defined constructive fraud as a "breach of a legal or equitable duty, which, irrespective of moral guilt of the fraudfeasor, the law declares fraudulent, because of its tendency to deceive others, to violate public or private confidence, or to injure public interests." Wrongful discharge was found to parallel constructive fraud in that no proof of fraudulent intent is required.

The survival statute was liberally construed so that the two-year statute of limitations applied under W. Va. Code § 55-2-12 and W. Va. Code § 55-7-8a.
As a word of caution, the court noted that the standards of Harless-I still govern a retaliatory discharge action and that it does not follow that an act constituting fraud and deceit will automatically be retaliatory discharge.\textsuperscript{197}

The court appears to be expanding Harless-I. Indeed, Justice Neely in a vigorous dissent chastised the court for its willingness not only to permit the "Harless cause of action to continue its morbid, Grendel-like rampage through our economic system, the majority has given the monster even greater strength by extending the time in which the action may be brought."\textsuperscript{198} The decision of the court to extend the period of limitations may be criticized as creating the potential for nuisance lawsuits.

\textit{Deborah McHenry Woodburn}

\textsuperscript{197} 285 S.E.2d at 683.

\textsuperscript{198} Id. at 684.