
SPOTTING EMPLOYMENT ISSUES

Prepared for the Marion County Bar
Association

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I. Introduction and Scope

- A. My background
 - 1. Licensed in West Virginia and Texas
 - 2. Focusing in employment-related litigation for about 10 years; did commercial litigation for about 10 years before that; current practice also includes commercial litigation and representation of health care professionals in licensing board issues.
 - 3. I am also a mediator, and have completed the basic and advanced mediation courses offered by the West Virginia State Bar
- B. Scope of article
 - 1. Primarily West Virginia law, in part because the federal law is more comprehensively addressed in other readily available articles and books
 - 2. Note that the recent federal Sarbanes-Oxley Act of 2002, Public Law 107-204, contains "Whistleblower" provisions (§ 806) to protect employees who lawfully provide information to their supervisors or the US Government (including Congress) regarding conduct the employees reasonably believe violates US securities or antifraud laws. An employee may be entitled to injunctive relief, reinstatement, back pay, and "special damages" including attorneys' fees. There is an administrative complaint procedure with the Secretary of Labor, and only a 90-day limitation period. The Act does *not* pre-empt other federal and state-law claims which may be available (§ 806(d)).
 - 3. Focus is on situations where the answer may not be obvious, and where there are sometimes misconceptions
- C. Broad areas where "employment issues" arise
 - 1. The "pre-dispute" level, such as
 - a. Auditing employer practices for compliance with the law
 - b. Drafting documents such as

- (1) confidentiality agreements,
 - (2) non-compete agreements,
 - (3) employment agreements and
 - (4) handbooks and policies.
2. The “pre-litigation dispute” level
- a. Employee is complaining about sexual harassment or other allegedly illegal treatment, which leads to
 - (1) Investigation, and
 - (2) (perhaps) Disciplinary action
 - b. Employee complains about pay or other issues
 - c. Employer has a problem employee to discipline or terminate, and needs help
3. The “litigation” level
- a. Administrative complaints with either the Equal Employment Opportunity Commission or the West Virginia Human Rights Commission
 - b. Litigation
 - c. Other litigation-related settings
 - (1) Bankruptcy
 - (a) Listing of assets
 - (b) *Warning:* Bankruptcy Trustee may have the power to take over control of the lawsuit
 - (2) Divorce
 - (a) Listing of assets
 - (b) Issues of whether the employment-related claim is marital or separate property
- D. When can a termination be actionable?

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1. Employment at will rule is followed in West Virginia, which allows an employer to fire an employee (or make other employment decisions) for:
 - a. "good reasons",
 - b. "bad reasons", or
 - c. "no reason at all".
 - d. *Skaggs v. Elk Run Coal Company, Inc.*, 198 W. Va. 51, 78, 479 S.E.2d 561, 588 (1996)
2. The rule has also been stated as follows: "[I]n the absence of some contractual or legal provision to the contrary, an employment relationship may be terminated, with or without cause, at the will of either the employer or the employee." *Bine v. Owens*, 208 W. Va. 679, 682, 542 S.E.2d 842, 845 (2000)
3. But an employer cannot fire an employee for a *specifically prohibited reason*. The central and critical focus is on the *employer's motivation*. Was the employer motivated by a *specifically* prohibited reason, in which case the termination may be actionable, or by any other reason, in which case the termination will not be actionable?
4. What are **specifically prohibited reasons**? The following is a *non-exclusive list*:
 - a. From the WEST VIRGINIA HUMAN RIGHTS ACT, W. VA. CODE § 5-11-9(3):
 - (1) Because of the employee's **race**
 - (2) Because of the employee's **religion**
 - (3) Because of the employee's **color**
 - (4) Because of the employee's **national origin**
 - (5) Because of the employee's **ancestry**
 - (6) Because of the employee's **sex**
 - (7) Because of the employee's **age**

- (8) Because of the employee’s **blindness or disability**
- b. From the WEST VIRGINIA WORKERS’ COMPENSATION ACT, W. VA. CODE § 23-1-1 *et seq.*
 - (1) Because the employee **received or attempted to receive benefits under the Act, § 23-5A-1**
 - (2) Because the employee is “**off work due to a compensable injury**” and “**is receiving or is eligible to receive temporary total disability benefits**”, § 23-5A-3(b)
 - c. Under the doctrine enunciated in *Harless v. First National Bank of Fairmont*, 162 W. Va. 116, 246 S.E.2d 270, 275 (1978) (emphasis added), a discharge is actionable where the “**employer’s motivation for the discharge contravenes some substantial public policy principle.**” The categories thus far of prohibited reasons under the *Harless* doctrine are:
 - (1) Because the **employer pressured the employee to break the law and the employee refused** [Example: Employer fired employee for refusing to operate vehicle with brakes in unsafe working condition in violation of specific W. Va. statutes. See, e.g., *Lilly v. Overnight Transportation Co.*, 188 W. Va. 538, 425 S.E.2d 214 (1992)].
 - (2) Because the **employee complained about the employer breaking the law (regardless of whether the complaining employee himself was pressured to break the law)** [Example: Employee complains that his employer bank is overcharging customers in violation of consumer protection law, and employer retaliates and fires the

employee, *see, e.g., Harless v. First National Bank of Fairmont*, 162 W. Va. 116, 246 S.E.2d 270, 275 (1978)].

- (3) Because the **employer insisted that employee do something which violated a right of the employee, and the employee refused** [Example: Employee refused to take a mandatory drug test and got fired; the demand for a drug test violated the employee's right of privacy, and the employer's termination of the employee was actionable, *Twigg v. Hercules Corp.*, 185 W. Va. 155, 406 S.E.2d 52 (1990)].
 - (4) Because the **employee did something which the law regards as a right** [Example: Employee in convenience store is being robbed, in self defense shoots the robber, and employer fired the employee; employee exercised *right* of self-defense and could not be fired for doing so, *Feliciano v. 7-Eleven, Inc.*, 210 W. Va. 740; 559 S.E.2d 713 (2001)].
- d. For West Virginia State employees, differential treatment amongst “similar situated employees” of covered employees is discriminatory **“regardless of the basis for the discrimination”**. *Pritt v West Virginia Division of Corrections*, 630 S.E.2d 49 (W. Va. 2006) (quoting *Board of Education of the County of Tyler v. White*, 216 W. Va. 242, 246, 605 S.E.2d 814, 818 (2004)); W. VA. CODE § 29-6A-2(d) (1988) (prohibited discrimination for State employees defined as “as differences in treatment of employees unless such differences are related to the actual job responsibilities of the employees or, agreed to in writing by the employee”); W. VA. CODE § 18-29-2(m) (1992) (same as to education employees)
- e. For West Virginia Employees working for a “public body” (W. Va. Code § 6C-1-2(b) & (e))

the “Whistle Blower Law” protects a “Whistle-blower” who “witnesses or has evidence of **wrongdoing or waste** while employees with a public body and who **makes a good faith report** of, or testifies to, the wrongdoing or waste, verbally or in writing, to one of the employee’s superiors, to an agent of the employer or to an appropriate authority” (W. Va. Code § 6C-1-2(g)).

(1) “**Wrongdoing**” means a “violation which is not of a merely technical or minimal nature of a federal or state statute or regulation, of a political subdivision ordinance or regulation or of a code of conduct or ethics designed to protect the interest of the public of the employer” (W. Va. Code § 6C-1-2(h)).

(2) “**Waste**” means “an employer or employee’s conduct or omissions which result in substantial abuse, misuse, destruction or loss of funds or resources belonging to or derived from federal, state or political subdivision resources” (W. Va. Code § 6C-1-2(f)).

II. Difference between federal and West Virginia discrimination law

A. List of procedural differences

1. All of these differences (both procedural and substantive) are between the West Virginia Human Rights Act, W. VA. CODE § 5-11-1 *et seq.*, and the federal Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e *et seq.*
2. West Virginia law requires 12 or more employees for the law to apply (W. VA. CODE § 5-11-3(d)); federal law required 15 or more employees. However, under West Virginia law, an employer having fewer than 12 employees may be vulnerable to a *Harless* claim. See *Williamson v. Greene*, 200 W. Va. 421, 430, 490 S.E.2d 23, 32 (1997) (sexual harassment and sex discrimination violate West Virginia public policy, so a *Harless* claim exists even where employer has fewer than 12 employees).

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3. West Virginia law does *not* require the filing of an administrative charge with the Human Rights Commission before filing suit (*Price v. Boone County Ambulance Authority*, 175 W. Va. 676, 337 S.E.2d 913 (1985)), whereas federal law requires the filing of a charge with the EEOC as a jurisdictional prerequisite to filing suit.
 - a. If you do not chose to file an administrative claim under the West Virginia Human Rights Act, your limitations period is 2 years. See *Price v. Boone County Ambulance Authority*, 175 W. Va. 676, 337 S.E.2d 913 (1985).
 - b. Note: Does the "limitations clock" start to run from the date the employee is *told* he will be fired, or when the employee is *actually* fired. Example: "Bob, today is January 1, 2002, and you are fired effective January 15, 2002. Report to work as usual until January 15." *McCourt v. Oneida Coal Company, Inc.*, 188 W. Va. 647, 651, 425 S.E.2d 602, 606 (1992) states that the limitation period runs from when the employee received "unequivocal notice" of the termination decision. The issue was not squarely posed in that case, but some federal courts have held that the limitations clock will start to run from the date the termination decision is communicated to the employee (January 1, 2002, in my example above), even though the employee is not *actually* terminated until later.
 - c. Danger: What if employee is sexually harassed from January 1 through June 1, 2000, and gets fired on June 2, 2000. There are potentially two sets of complaints: (a) a hostile work environment from January 1 through June 1, 2000, and (b) termination on June 2, 2000. If you file suit on June 2, 2002, your suit is timely as to the termination *but not as to the prior six months of sexual harassment*. Rule: File suit within 2 years of the *first instance of discriminatory conduct about which you are complaining*.

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4. If an employee in West Virginia chooses to file an administrative charge with the West Virginia Human Rights Commission, it must be filed within 365 days of the last act of discrimination (W. VA. CODE § 5-11-10); the federal number of days for filing the administrative charge with the EEOC is 300 (42 U.S.C. § 2000e-5(e)(1); *National Railroad Passenger Corporation v. Morgan*, 122 S. Ct. 2061(2002)).

B. List of substantive differences

1. West Virginia law may require a "reasonable accommodation" for a disabled person of a *temporary leave of absence*. In *Haynes v. Rhone-Poulenc, Inc.*, 206 W. Va. 18; 521 S.E.2d 331 (1999), the Court stated:
 - a. "We . . . hold that under the West Virginia Human Rights Act, *W. Va. Code, 5-11-1 et. seq.*, required reasonable accommodation may include a temporary leave of absence that does not impose an undue hardship upon an employer, for the purpose of recovery from or improvement of the disabling condition that gives rise to an employee's temporary inability to perform the requirements of his or her job."
 - b. The plaintiff there had a problem pregnancy and was unable to work, and the employer terminated her during her leave. The employer's policy provided for 6 months of medical leave, and the plaintiff needed an additional 2 or 3 months off. The case discussion is in part tied to the employer's medical leave policy, so it is hard to generalize from this case that an employee may be entitled to such a length leave of absence where there is no comparable policy.
 - c. The Court did not address the issue of whether the leave of absence, as a reasonable accommodation required by the West Virginia Human Rights Act, would need to be paid leave.
 - d. Generally, federal case law under the Americans With Disabilities Act has stated that, to be a "qualified person" with a "disability", a person

must be able to show up for work and perform the "essential functions" of the job. Where an employee's disability prevented the employee from coming to work, there has been generally no duty by the employer under federal law to "accommodate" the employee by giving a temporary leave of absence.

2. West Virginia law generally defines "disability" more favorably to the employee, for purposes of disability discrimination under the West Virginia Human Rights Act.

- a. *State of West Virginia ex rel Abraham Linc Corporation v. Bedell*, 602 S.E.2d 542, 561 (2004) (Starcher, J., concurring): "Moreover, without going into an in--depth discussion of this complex area of law, suffice it to say that the recent federal decisions in the standing area have been seriously questioned by many scholars. For examples of such criticism, see Mendelson, Joseph, "Should Animals Have Standing? A Review of Standing Under the Animal Welfare Act," 24 B. C. Env'tl. Aff. L. Rev. 795 (1997) (criticizing federal cases denying standing to persons seeking to prevent animal abuse); Milani, Adam, "Wheelchair Users Who Lack Standing: Another Procedural Threshold Blocking Enforcement of Titles II and III of the ADA," 39 Wake Forest L.Rev. 69, notes 61--83 (2004) (*criticizing federal cases denying standing to persons challenging disability discrimination*); Sheldon, Karin, "Steel Company v. Citizens for a Better Environment: Citizens Can't Get No Psychic Satisfaction," 12 Tul.Env'tl.L.J.1 (1998) (criticizing Supreme Court denial of standing to citizens challenging failure of company to file toxic chemical reports); King, Jason, "Standing in Garbage: Flow Control and the Problem of Consumer Standing," 32 Ga.L.Rev. 1227 (1998) (criticizing federal cases denying citizens standing to challenge garbage importation); Levy, Johnathan, "In Response to Fair Employment Council of Greater Washington, Inc.

v. BMC Marketing Corp.: Employment Testers Do Have a Leg to Stand On," 80 Minn. L. Rev. 123 (1995) (*criticizing federal cases that undercut private enforcement of fair employment laws*); Myriam E., "Representational Standing: U.S. ex rel Stevens and the Future of Public Law Litigation," 89 Cal.L.Rev. 315 (2001) (discussing the sharp cutback in public law litigation created by the Supreme Court's standing jurisprudence in the past 30 years); Kelso, Charles D. and R. Randall, "Standing to Sue: Transformations in Supreme Court Methodology, Doctrine, and Results," 28 U.Tol.L.Rev. 93 (1996) (describing the shifting and inconsistent standing rationales used by the Supreme Court in the 20th Century); Driesen, David, "Standing for Nothing: The Paradox of Demanding Concrete Context for Formalist Adjudication," 89 Cornell L.Rev. 808, 876 (2004) ("Standing doctrine has never been applied consistently, as many critics have frequently noted.")"

3. The West Virginia Human Rights Act does not contain any fixed dollar limits on emotional distress and punitive damages, whereas the federal Civil Rights Act of 1964 imposes limits of from \$50,000 to \$300,000 on those damages (depending on the size of the employer). See discussion below entitled "Discrimination claims under the West Virginia Human Rights Act are *not* statutorily limited" on page 17.
4. Under the West Virginia Human Rights Act, supervisory employees who participate in the discriminatory conduct may be held personally liable, W. VA. CODE § 5-11-9 (unlawful for any "person" and "employer" to engage in discriminatory practices); *St. Peter v. Ampak*, 199 W. Va. 365, 484 S.E.2d 481, 489 (1997); *Conrad v. Szabo*, 198 W. Va. 362, 480 S.E.2d 801, 817 n.14 (1996); whereas under the federal Civil Rights of 1964 such supervisors cannot be held personally liable.

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- C. West Virginia law is generally harmonized with federal law
1. "We have repeatedly held that we will construe the Human Rights Act to coincide with the prevailing federal application of Title VII unless there are variations in the statutory language that call for divergent applications or there are some other compelling reasons justifying a different result." *Hanlon v. Chambers*, 195 W. Va. 99, 112, 464 S.E.2d 741, 754 (1995).
 2. For the WV Virginia Human Rights Act to be interpreted differently from federal law, the WV Supreme Court will need to see either
 - a. "a variation in language" between the 2 statutes", or
 - b. "a good reason to diverge" from the interpretation of federal law. *Hanlon v. Chambers*, 195 W. Va. 99, 112, 464 S.E.2d 741, 754 (1995)
- D. However, various cases stress that West Virginia employment law is not necessarily controlled by interpretation of comparable federal law
1. *Stone v. St. Joseph's Hosp. of Parkersburg*, 208 W.Va. 91, 112, 538 S.E.2d 389, 410 (2000) (McGraw, J., concurring, in part, and dissenting, in part) (holding that West Virginia disability discrimination law "is not mechanically tied to federal disability discrimination jurisprudence.")
 2. *In re: West Virginia Rezulin Litigation (McCaffery v. Hutchinson)*, 585 S.E.2d 52, 61 (2003), the court stated: "[a] federal case interpreting a federal counterpart to a West Virginia rule of procedure may be persuasive, but it is not binding or controlling." Our reasoning for this rule is to avoid having our legal analysis of our *Rules* "amount to nothing more than Pavlovian responses to federal decisional law." (quoting *Brooks v. Isinghood*, ___ W.Va. at ___, 584 S.E.2d 531, 538, 2003 W. Va. LEXIS 86 (Slip Op. at 8) (quoting *Stone v. St. Joseph's Hosp. of Parkersburg*, 208 W.Va. 91, 112, 538 S.E.2d 389, 410 (2000) (McGraw, J., concurring, in part, and dissenting, in part) (holding that West Virginia disability

discrimination law "is not mechanically tied to federal disability discrimination jurisprudence.")))

3. *Brooks v. Isinghood*, 584 S.E.2d 531, 538-539 (W. Va. 2003): “We have previously noted that we give substantial weight to federal cases in determining the meaning and scope of our rules. See, e.g., *Williams v. Precision Coil*, 194 W.Va. 52, 58 n.6, 459 S.E.2d 329, 335 n.6 (1995); *Painter v. Peavy*, 192 W.Va. 189, 192 n.6, 451 S.E.2d 755, 761 n.6 (1994). This does not mean that our “legal analysis in this area should amount to nothing more than Pavlovian responses to federal decisional law.” *Stone v. St. Joseph’s Hosp. of Parkersburg*, 208 W.Va. 91, 112, 538 S.E.2d 389, 410 (2000) (McGraw, J., concurring, in part, and dissenting, in part) (holding that West Virginia disability discrimination law “is not mechanically tied to federal disability discrimination jurisprudence.”). Rather, a federal case interpreting a federal counterpart to a West Virginia rule of procedure may be persuasive, but it is not binding or controlling. See, e.g., *Dougan v. Gustaveson*, 108 Nev. 517, 520-21, 835 P.2d 795, 797 (1992) (“The interpretation of a federal counterpart to a Nevada Rule of Civil Procedure is not controlling, but may be persuasive.”); *Darling v. Champion Home Builders Co.*, 96 Wn. 2d 701, 706, 638 P.2d 1249, 1251 (1982) (“Although we may look to federal decisions for guidance in interpreting our civil rules . . . we are by no means bound by those decisions.”).
4. *Williamson v. Greene*, 200 W. Va. 421, 427, 490 S.E.2d 23, 29 (1997): “These cautionary principles notwithstanding, the circuit court interpolated specific federal statutory language into our Human Rights Act. We find that it was error for the circuit court to do so, as we agree with the Coalition that W. Va. Code, 5-11-3(d) [1994] is clear and unambiguous and should not be interpreted but instead, should be applied as written.”

E. Philosophical expressions of condemnation of discrimination under the WV Human Rights Act

1. “In so holding, we particularly remain mindful of the primacy that the Legislature has accorded to eliminating invidious discrimination in this State. As we stated in

Allen v. State Human Rights Commission, 174 W. Va. 139, 149, 324 S.E.2d 99, 109 (1984), "equal opportunity in this State is a fundamental principle" grounded in several provisions of our State Bill of Rights. "Every act of unlawful discrimination in employment . . . is akin to an act of *treason, undermining the very foundations of our democracy.*" 174 W. Va. at 148, 324 S.E.2d at 108. The sense of betrayal is even greater when the discriminator is, as alleged in this case, a public servant. We cannot allow the substantial protections promised by the Human Rights Act from such assaults on our personal and institutional integrities to be compromised by unthinking adherence to technical doctrines. If we permit public employers to use prior decisions rendered by a loose administrative apparatus--engaged in by unwary and often uncounseled employees and lacking important procedural rudiments--to preclude victims of discrimination from subsequently invoking the promises made by the Human Rights Act, we, thereby, would add our own breach of trust to those already committed by public discriminators. Thus, we refuse to so hold." *Vest v. Board of Educ.*, 193 W. Va. 222, 228, 455 S.E.2d 781, 787 (1995) (emphasis added).

III. Factors bearing on the employer's exposure in employment litigation

A. List of factors in sexual harassment cases

1. MATTHEW B. SCHIFF & LINDA C. KRAMER, LITIGATING THE SEXUAL HARASSMENT CASE at 365 (American Bar Association 2000):
 - a. the amount of the plaintiff's wage loss--the more money lost, the higher the award;
 - b. whether the plaintiff received professional therapy for emotional distress--if so, the higher the award;
 - c. whether the plaintiff was touched, kissed, or sexually assaulted--if so, the higher the award;

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- d. whether, after the employer learned of the harassment, it did nothing--if so, the higher the award;
 - e. Whether the employer engaged in reprisal after receiving complaints of harassment--if so, the higher the award; and
 - f. Whether the harasser "personified" the employer--if so, the award will be very high.
2. These factors, with minor variations, are applicable to virtually all forms of employment litigation
- B. How limiting a factor is the amount of lost income?
1. Lost income is a pretty good surrogate indication of emotional distress--the more financial injury the plaintiff suffers, the more credible claims of emotional distress.
 2. However, there is a very long list of employment-related jury verdicts where a small amount of lost income does not prevent the jury from returning a very large verdict:
 - a. The *mother of all* "small lost income-big verdict" cases: *Kimzey v. Wal-Mart Stores, Inc.*, 107 F.3d 568 (8th Cir. 1997): Sexual Harassment case; Jury verdict for plaintiff:
 - (1) \$1 in lost income, \$35,000 for emotional distress, **\$50,000,000** in punitive damages [that is not a mistake!];
 - (2) *affirmed* on appeal with *reduced* punitive damages; trial judge reduced punitive damages from \$50,000,000 to \$5,000,000, and 8th Circuit reduced them to \$350,000 (dissenting judge would have reduced them to \$2,000,000). So one dollar in lost income produced a jury verdict of \$50,035,001 (plus attorneys' fees!), although the total judgment was reduced on appeal to \$385,001.
 - (3) Think about whether that much of a reduction (\$50,000,000 to \$350,000) would have occurred in West Virginia, where the West Virginia Supreme Court

affirmed the trial court's judgment in *TXO Production Corp. v. Alliance Resources Corp.*, 187 W. Va. 457, 419 S.E.2d 870 (1992), *aff'd*, 509 U.S. 443 (1993). The \$10,000,000 in punitive damages was supported by only \$19,000 of actual damages in a slander of title case.

- (4) I include the following only for entertainment value: The trial court in the *Kimzey* case reduced the punitive damages to a mere \$5,000,000 based on the speculation that the defense counsel's tactics might have "aggravat[ed]" the jury: "[D]efense counsel waved his middle finger in *Kimzey's* face and 'rudely shouted' during cross-examination, 'Ma'am, do you know that to most of us [this] means fuck you? Do you know that?'" 107 F.3d at 577. A friend of mine in Houston, who does nothing but employment discrimination defense, discussed this case in a continuing education presentation, and described the conduct of defense counsel as "clinically stupid."

- b. *Vandevender v. Sheetz, Inc.*, 200 W. Va. 591, 490 S.E.2d 678 (1999): Disability discrimination and worker's comp retaliation case; Jury verdict for plaintiff; affirmed on appeal with slightly reduced damages:

- (1) \$130,066.00 in lost income;
- (2) \$170,000.00 in emotional distress;
- (3) \$2,232,740.00 in punitive damages;
- (4) So \$130,066.00 in lost income led to a total verdict affirmed on appeal of \$2,539,006.00 (jury verdict was slightly larger, with a slight reduction on appeal); attorneys' fees were additionally awarded, but were not disclosed in the opinion.

- (5) This case led to a malpractice case by the employer, Sheetz, see *Sheetz, Inc. v. Bowles Rice McDavid Graff & Love, PLLC*, 547 S.E.2d 256 (W. Va. 2001). The two opinions taken together are worth studying from the standpoint of an employer attempting to rely upon advice of counsel as a defense to the discrimination action. The case involved disability and worker’s comp discrimination. Sheetz had fired its employee while she was off work with an injury and receiving worker’s compensation benefits. Sheetz claimed in the malpractice case that it had fired the employee upon the advice of counsel, including a policy drafted by Pennsylvania counsel. In the malpractice case, the West Virginia Supreme Court ruled reliance on advice of counsel is not an absolute defense in a discrimination case, and that it is simply one of many factors for the jury to take into account.
- c. *Richmond v. Ellenbogen*, 205 W. Va. 240, 517 S.E.2d 473 (1999): Sexual Harassment case; Jury verdict for plaintiff; affirmed on appeal:
 - (1) \$1,225.00 in lost income;
 - (2) \$40,000.00 in emotional distress;
 - (3) \$30,000.00 in punitive damages;
 - (4) So \$1,225.00 in lost income led to an affirmed jury verdict of \$71,225.00 (plus undisclosed attorneys’ fees).
 - d. *Wal-Mart Stores, Inc. v. Itz*, 21 S.W.3d 456 (Tex. App.–Austin 2000): Sexual Harassment case; Jury verdict for plaintiff; affirmed on appeal:
 - (1) \$2,765.75 in lost income;
 - (2) \$50,000.00 in emotional distress;
 - (3) \$150,000.00 in punitive damages

- (4) \$122,058.75 in attorneys’ fees
 - (5) So \$2,765.75 in lost income led to a total verdict of \$347,154.68
- C. Discrimination claims under the West Virginia Human Rights Act are *not* statutorily limited
- 1. The damages section of the West Virginia Human Rights Act, W. VA. CODE § 5-11-13(c)), is pretty vague, much like the damages section of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g)(1). The federal law was broadened by the Civil Rights Act of 1991, 42 U.S.C. § 1981a.
 - 2. Both the West Virginia and the federal discrimination laws provide for the recovery primarily of the following items of damages:
 - a. “Back pay” (lost income and benefits calculated through the date of trial);
 - b. “Front pay” (lost income and benefits calculated from the date of trial into the future);
 - c. Emotional distress, past and potentially future;
 - d. Punitive damages; and
 - e. Attorneys’ fees.
 - 3. *Federal law* limits “compensatory and punitive damages”, which primarily encompasses emotional distress and punitive damages, to a *maximum* of between \$50,000 and \$300,000, depending on the number of persons employed by the employer. 42 U.S.C. § 1981a(b)(3)(A)-(D). Compensation for lost income (past and future) is not subject to that “statutory cap.” See *Pollard V. E. I. du Pont De Nemours & Company*, 532 U.S. 843 (2001) (holding that front pay is not subject to the statutory cap, resolving split amongst the federal circuits). The dollar limits on emotional distress and punitive damages are as follows:
 - a. Up to \$50,000 where the employer has 15-100 employees, 42 U.S.C. § 1981a(b)(3)(A);
 - b. Up to \$100,000 where the employer has 101-200 employees, 42 U.S.C. § 1981a(b)(3)(B);

- c. Up to \$200,000 where the employer has 201-500 employees, 42 U.S.C. § 1981a(b)(3)©; and
 - d. Up to \$300,000 where the employer has over 500 employees, 42 U.S.C. § 1981a(b)(3)(D).
4. However, *West Virginia law* does not apply any such "statutory cap," so that compensation for emotional distress and punitive damages under the West Virginia Human Rights Act is *not* limited by any fixed dollar amount.
- D. Attorneys' fees
1. The West Virginia Human Rights Act (like Title VII of the 1964 Civil Rights Act) states that the court "in its discretion may award all or a portion of the costs of litigation, including reasonable attorneys' fees and witness fees, to the complainant". W. VA. CODE § 5-11-13(c).
 2. That language may suggest substantial discretion of the trial court to deny in whole or in part an award of attorneys' fees to a prevailing plaintiff, but West Virginia courts have followed federal case law (applying 42 U.S.C. § 2000e-5(k) (award of attorneys' fees)) which generally makes an award of fees to the prevailing plaintiff mandatory, subject to reasonableness, and subject to the potential limitation that the plaintiff may not be allowed to recover for attorneys' fees on unsuccessful causes of action (but that limitation largely disappears if the fees cannot be *segregated* between the various causes of action).
 - a. In *Hollen v. Hathway Electric, Inc.*, 584 S.E.2d 523, 527 (W. Va. 2003), the Court deal with the WV Wage Payment Act but relied significantly on federal employment discrimination and civil rights case law and on WV HRA case law (*Bishop Coal Company v. Salyers*, 181 W. Va. 71, 380 S.E.2d 238 (1989)), and concluded that "costs, including attorney fees, should be awarded as a matter of course in the absence of special circumstances which would render such an award unjust"

3. Even where the plaintiff recovers a very limited amount in actual and punitive damages, that is generally not considered to be a justification for reducing the claimed attorneys’ fees, except there might be more scrutiny applied to large fees awards under those circumstances, and it might be more likely that particular attorneys’ tasks are considered to be “unreasonable” in light of very small recovery. However, there are numerous federal employment discrimination decisions which stress that the Civil Rights Act of 1964 was intended to encourage aggrieved parties to prosecute claims for employment discrimination, even where the monetary losses are small, and that it would be inappropriate to penalize “small dollar plaintiffs” by reducing their attorneys’ fees.
 - a. There are a number of examples of federal cases in which small actual damages awards supported far larger awards of attorneys’ fees:
 - (1) Damages awarded: \$720.00; Attorneys’ fees awarded: \$129,663.60. *Rice v. Sunrise Express, Inc.*, 2002 U.S. Dist. LEXIS 22181 (N.D. Ind. 2002): Jury verdict awarded plaintiff \$720.00 in claim under Family Medical Leave Act; plaintiff had sought \$12,000 in damages; trial court awarded plaintiff \$129,663.60 in attorneys’ fees, which incorporated a 20% reduction offered by plaintiff’s counsel. The Court in *Rice* discussed the analytical framework for awarding attorneys’ fees in cases involving small monetary recovery:
 - (a) “The Supreme Court has recognized, ‘the most critical factor’ in calculating a reasonable fee award ‘is the degree of success obtained,’ and when ‘a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an

excessive amount.' *Hensley*, 461 U.S. at 436; see *Farrar v. Hobby*, 506 U.S. 103, 114-15, 113 S. Ct. 566, 574-75, 121 L. Ed. 2d 494 (1992). n12 Thus, even when an award of attorneys' fees is mandatory, as is the case here, the district court may decrease the amount of fees that might otherwise be awarded in order to account for the plaintiff's limited success. *McDonnell v. Miller Oil Co., Inc.*, 134 F.3d 638, 641 (4th Cir. 1998)." [2002 U.S. Dist. LEXIS 22181, *25]

(b) "Lack of monetary success, however, does not require a fee reduction.' *Baird v. Boies, Schiller & Flexner LLP*, 219 F. Supp. 2d 510, 2002 WL 1988198 (S.D.N.Y. August 28, 2002). Rather, the degree of monetary success (or lack thereof) is only one factor to be considered. Courts must also consider whether the plaintiff has achieved some other measure of success. 'A civil rights plaintiff may obtain important equitable or declaratory relief, or he or she may achieve some other non-monetary vindication of his or her civil rights, by, for example, establishing the violation of an important civil or constitutional right. These non-monetary measures of success must be considered as well in setting the amount of a fee award.' *Id.*" [2002 U.S. Dist. LEXIS 22181, *25 n12]

(2) *Baird v. Boies, Schiller & Flexner LLP*, 219 F. Supp. 2d 510 (S.D.N.Y. 2002), rejecting a proposed "proportionality rule"

which would limit plaintiff's attorneys' fees according to the degree of monetary success

- (3) *Hollen v. Hathway Electric, Inc.*, 584 S.E.2d 523 (W. Va. 2003); Wage Payment Act case; Does not expressly address disproportionality argument, but awarded fees are substantially larger than recovery; \$2750 settlement just before trial on Wage Payment Act claim; settlement left attorneys' fees to be resolved by court; Application for fees was \$200 per hour for 104 hours, for total of \$20,800; trial court reduced hourly rate to “local” rate of \$100 and denied recovery for substantial time spent in submitting fee application; trial court approved 67 hours at 100 per hour; Supreme Court reversed, reinstating all hours spent in preparing fee application plus awarding \$130 hourly rate; plaintiff after appeal would receive \$13,520 in attorneys fees plus the additional fees incurred on appeal, settlement was \$2750

- b. The West Virginia attorneys' fees decisions suggest that attorneys' fees will generally not be reduced simply because the plaintiff's monetary recovery is relatively small:

- (1) *Bishop Coal Company v. Salyers*, 181 W. Va. 71, 380 S.E.2d 238, 247 (1989): “The goal of the West Virginia human rights law is to protect the most basic, cherished rights and liberties of the citizens of West Virginia. Effective enforcement of the human rights law depends upon the action of private citizens who, from our observations of these matters, usually lack the resources to retain the legal counsel necessary to vindicate their rights. Full enforcement of the civil rights act requires adequate fee awards.”

- (2) In *Bishop Coal*, the Court recognized the potential legitimacy of a “contingency fee enhancement” in part where the value of potential monetary recovery is “small”: “We agree that when a plaintiff is litigating a case involving a significant issue of general application, where the likelihood of success is small and the economic value in terms either of money or of injunctive relief to the prevailing plaintiff is small, it is appropriate for a court to consider those factors in awarding attorneys' fees and allow a contingency enhancement to a prevailing party.” 380 S.E.2d at 249.
4. Attorneys' fees are available in all statutory employment claims, such as discrimination claims under the West Virginia Human Rights Act. However, attorneys' fees are not available under the common law *Harless* claim.

IV. *Harless*—firing which violates West Virginia public policy

- A. General contours of the *Harless* claim
 1. The “rule giving the employer the absolute right to discharge an employee at will” has an exception: “[W]here the *employer's motivation* for the discharge contravenes some *substantial public policy* principle, then the employer may be liable to the employee for damages occasioned by the discharge.” *Harless v. First National Bank of Fairmont*, 162 W. Va. 116, 246 S.E.2d 270, 275 (1978) (emphasis added). One of the “fundamental rights” of an employee is the “right not to be a victim of a ‘retaliatory discharge’, that is, a discharge from employment where the employer’s motivation for the discharge is in contravention of a substantial public policy.” *Mace v. Charleston Area Medical Center Foundation, Inc.*, 188 W. Va. 57, 422 S.E.2d 624, 631 (1992) (quoting *McClung v. Marion County Commission*, 178 W. Va. 444, 360 S.E.2d 221 (1987)).
 2. The employee must show that his complaints about or refusal to participate in the improper conduct of the

employer “was a substantial or a motivating factor for the discharge.” *Tiernan v. Charleston Area Medical Center, Inc.*, 203 W. Va. 135, 506 S.E.2d 578, 587 (1998); accord *Mace v. Charleston Area Medical Center Foundation, Inc.*, 188 W. Va. 57, 422 S.E.2d 624, 631 (1992). The employee need not show that the his protected conduct was the “only precipitating factor for the discharge. 506 S.E.2d at 587. The employer may “defeat the claim by showing that the employee would have been discharged even in the absence of the protected conduct.” 506 S.E.2d at 587. The employer would do this by “proving” a “legitimate, nonpretextual, and nonretaliatory reason” for the discharge. *Birthisel v. Tri-Cities Health Services Corp.*, 199 W. Va. 371, 424 S.E.2d 606, 612 (1992).

3. Most of the West Virginia wrongful discharge cases involve “violations of statutes” that are deemed by the Court to “articulate a substantial public policy”. *Birthisel v. Tri-Cities Health Services Corp.*, 199 W. Va. 371, 424 S.E.2d 606 (1992). More generally, to “identify the sources of public policy for purposes of determining whether a retaliatory discharge has occurred, we look to established precepts in our *constitution, legislative enactments, legislatively approved regulations, and judicial opinions*. Inherent in the term ‘substantial public policy’ is the concept that the policy will provide *specific guidance* to a reasonable person.” 424 S.E.2d at 612 (emphasis added). The legislative enactments must impose “specific” requirements which the employer violated, as opposed to “general standards” which a statute might create. 424 S.E.2d at 612-14. There must be a “specific statement of public policy.” 424 S.E.2d at 614.
4. A general definition of “public policy” is “that principle of law which holds that ‘no person can lawfully do that which has a tendency to be *injurious to the public or against public good*’ even though ‘no actual injury’ may have resulted therefrom in a particular case ‘to the public.’ It is a question of law which the court must decide in light of the particular circumstances of each case.” *Tiernan v. Charleston Area Medical Center, Inc.*,

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- 203 W. Va. 135, 506 S.E.2d 578, 584 (1998) (emphasis added).
5. Two year limitation period
 6. No award of attorneys' fees
 7. Participating supervisory employees may be personally liable, *Harless v. First National Bank in Fairmont*, 169 W. Va. 673, 289 S.E.2d 692 (1982) ("Harless 2")
- B. List of public policy predicates which were or are very likely to be accepted by the West Virginia courts
1. Overcharging bank customers on prepayments of loans in violation of the WV Consumer Credit and Protection Act. *Harless v. First National Bank of Fairmont*, 162 W. Va. 116, 246 S.E.2d 270, 275 (1978).
 2. Demanding that an employee testify falsely in a medical malpractice claim. *Birthisel v. Tri-Cities Health Services Corp.*, 199 W. Va. 371, 424 S.E.2d 606, 614 (1992) (citing with approval *Sides v. Duke Hospital*, 74 N.C. App. 331, 328 S.E.2d 818 (1985)).
 3. Employee was discharged over concern that employee would give truthful testimony in legal action. *Page v. Columbia Natural Resources, Inc.*, 198 W. Va. 378, 480 S.E.2d 817 (1996).
 4. Demanding that an employee alter tests on pollution control reports, where such an alteration constituted a crime. *Birthisel v. Tri-Cities Health Services Corp.*, 199 W. Va. 371, 424 S.E.2d 606, 614 (1992) (citing with approval *Trombetta v. Detroit Toledo & Ironton Railroad Co.*, 81 Mich. App. 489, 265 N.W.2d 385 (1978)).
 5. Asking an employee to "falsify the patient files." *Birthisel v. Tri-Cities Health Services Corp.*, 199 W. Va. 371, 424 S.E.2d 606, 614 (1992) (the jury found that that did not occur, but the court assumed it would have violated public policy).
 6. Demanding an employee take a lie detector test in violation of common law right of privacy. *Cordle v. General Hugh Mercer Corp.*, 174 W. Va. 321, 325 S.E.2d 111, 114 (1984).

7. Pressuring employee to lie to mine safety investigators after a mine death, and firing the employee for truthfully talking to government investigators, *Rodriguez v. Consolidation Coal Company*, 206 W. Va. 317, 524 S.E.2d 672 (1999)
8. WV Code 21-5-5 sets out criminal liability for employers who coerce employees to purchase goods in lieu of wages. *Roberts v. Adkins*, 191 W. Va. 215, 444 S.E.2d 725 (1994).
9. Violating regulation (C.S.R. § 64-12-14.2.4 (1987)) requiring medical facilities to be adequately staffed for the care of the patients. *Tudor v. Charleston Area Medical Center, Inc.*, 203 W. Va. 111, 506 S.E.2d 554, 565-66 (1997) (discussing many specific public policies that could form the basis of a wrongful discharge claim).
 - a. The *Tudor* opinion provides a good discussion of the issue of whether a regulation or statute is “specific” enough to provide a predicate for a *Harless* claim. The employer argued, unsuccessfully, that the “adequate staffing” regulations, which dealt with licensure requirements for hospitals, were “too general” to provide the *Harless* predicate. *Tudor v. Charleston Area Medical Center, Inc.*, 203 W. Va. 111, 506 S.E.2d 554, 566-67 (1997). Similar analysis was applied in *Birthisel v. Tri-Cities Health Services Corp.*, 199 W. Va. 371, 424 S.E.2d 606, 613-4 (1992), where regulations pertaining to social workers contained only “general policy language” in requiring “good care for patients”, and provided no “specific guidance” and were too general to be a *Harless* predicate.
10. Requiring an employee to take drug test in violation of common law right of privacy. *Twigg v. Hercules Corp.*, 185 W. Va. 155, 406 S.E.2d 52 (1990).
11. Employee brought to attention of prosecutors improprieties in operation of housing authority. *Slack v. Kanawha County Housing and Redevelopment Authority*, 188 W. Va. 144, 423 S.E.2d 547 (1992).

12. Firing a public employee for exercising state constitutional rights to petition for redress of grievances and to seek access to the courts of WV by filing action for overtime wages under WV Wage and Hour Act. *McClung v. Marion County Commission*, 178 W. Va. 444, 360 S.E.2d 221 (1987).
 13. Employer fired employee for refusing to operate vehicle with brakes in unsafe working condition in violation of specific WV statutes. *Lilly v. Overnight Transportation Co.*, 188 W. Va. 538, 425 S.E.2d 214 (1992).
 14. Firing public employee for exercising constitutional right to free speech. *Woodruff v. Board of Trustees of Cabell Huntington Hospital*, 173 W. Va. 604, 319 S.E.2d 372 (1984).
 15. Violations of the WV Mine Safety Act. *Collins v. Elkay Mining Co.*, 179 W. Va. 549, 371 S.E.2d 46 (1988).
 16. Violations of Worker’s Compensation Act. *Stanholtz v. Monongahela Power Co.*, 165 W. Va. 305, 270 S.E.2d 178 (1980).
 17. Violations of the West Virginia Wage Payment Law, *Love v. Georgia-Pacific Corporation*, 209 W. Va. 515, 550 S.E.2d 51 (2001)
 18. Employee at a convenience store exercises right of self defense in shooting a robber at work, and then gets fired, *Feliciano v. 7-Eleven, Inc.*, 210 W. Va. 740; 559 S.E.2d 713 (2001)
- C. From this “laundry list”, the following 4 categories of *Harless* predicates may be identified:
1. Employee complains about employer breaking the law, and employee gets fired, such as where the employee complains that his employer bank is overcharging customers in violation of law, *Harless v. First National Bank of Fairmont*, 162 W. Va. 116, 246 S.E.2d 270, 275 (1978).
 2. Employee is pressured to break the law, refuses, and gets fired, such as where Employer required employee to drive trucks with brakes in unsafe working condition in violation of specific W. Va. statutes, the employee

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refused, and employer retaliates by firing employee. See, e.g., *Lilly v. Overnight Transportation Co.*, 188 W. Va. 538, 425 S.E.2d 214 (1992).

3. Employer insists that employee do something which violates a right of the employee, such as the right of privacy, the employee refuses and gets fired; such as refusing to take a mandatory drug test in *Twigg v. Hercules Corp.*, 185 W. Va. 155, 406 S.E.2d 52 (1990).
4. Employee does something which the law regards as a right, and gets fired, such as shooting a robber at work in self-defense, *Feliciano v. 7-Eleven, Inc.*, 210 W. Va. 740; 559 S.E.2d 713 (2001).
5. Comment: These categories demonstrate that *Harless* is far more than a "Whistleblower doctrine".

D. List of *Harless* cases

1. *Kanagy v. Fiesta Salons, Inc.*, 208 W. Va. 526, 541 S.E.2d 616, 619 (2000);
2. *Lilly v. Overnight Trans. Co.*, 188 W. Va. 538, 540, 425 S.E.2d 214, 216 (1992)

V. Disability discrimination

A. General principles

1. Reasonable Accommodation
 - a. *Skaggs v. Elk Run Coal Company, Inc.*, 198 W. Va. 51, 479 S.E.2d 561 (1996) contains a detailed discussion of reasonable accommodation issues, including adoption of federal principles
 - b. *Akers v. Cabell Huntington Hospital*, 599 S.E.2d 769 (W. Va. 2004) (reassignment to a vacant position)

B. Prima facie case

1. Definition of disability
 - a. WV Human Right Act and US ADA definitions
 - b. Other definitions of disability which may come into play

- (1) “Total disability” under West Virginia Worker’s Compensation Act
 - (a) The Worker’s Comp definition of “total disability” is “unique”: *Cardwell v. State Workmen’s Compensation Commissioner*, 171 W. Va. 700, 704, 301 S.E.2d 790, 794 (1983)
 - (b) But the Court’s methodology in *Cardwell* for determining whether an employee is disabled is instructive for the same determination in the context of employment discrimination: “Disability determinations are a blend of ingredients. First, there is the functional, physical or anatomical loss to the body as a whole. This is essentially a medical matter. In many instances the medical evidence standing alone will establish permanent total disability. The second major ingredient involves a determination of the extent to which the physical loss, combined with nonmedical conditions, results in loss of earnings or impairs earning capacity. This second ingredient requires consideration of the degree to which the injury has affected a person’s capability to perform or obtain work. Medical evidence must be considered along with the worker’s customary employment, his age, training, education, intelligence, and any other matter that can reasonably be expected to affect earning power and regular employment in the labor market.” *Cardwell v. State Workmen’s Compensation*

Commissioner, 171 W. Va. 700, 704, 301 S.E.2d 790, 794 (1983)

- (c) The statement of the definition of permanent total disability”
- i) “A claimant is permanently and totally disabled under our workmen’s compensation statute when he is unable to perform any remunerative work in a field of work for which he is suited by experience or training. Each case will be considered on the peculiar facts for the reason that what may be totally disabling to one person would only be slightly disabling to another of a different background and experience.” *Cardwell v. State Workmen’s Compensation Commissioner*, 171 W. Va. 700, 705, 301 S.E.2d 790, 794 (1983)
- ii) The relevant statutory provision was amended in 1970 and provided “guidance” on “future determinations of total disability”: “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.” W. VA. CODE § 23-4-6(n) (quoted in *Cardwell v. State Workmen’s Compensation Commissioner*, 171 W. Va. 700, 705, 301 S.E.2d 790, 794 (1983); *Posey v. State Workmen’s Compensation Commissioner*, 157 W. Va. 285, 293, 201 S.E.2d 102, 107 (1073)).

- (2) “Disabled” under the applicable Social Security law
 - (a) “Disability” is defined for social security purposes as the **“inability to engage in any gainful activity by reason of any medically determinable physical impairment** which can be expected to result in death or which has lasted or can be expected to last for a continuous period of . . . 12 months.” 42 U.S.C. §§ 416(l)(1) & 423(d)(1)(A).” See *Cardwell v. State Workmen’s Compensation Commissioner*, 171 W. Va. 700, 301 S.E.2d 790 (1983)
 - (b) If a plaintiff in an disability employment discrimination case has applied for Social Security Disability Insurance (SSDI) benefits under the contention that he is total “disabled,” that does not necessarily preclude the employee from asserting that he was a “qualified individual” under the federal ADA, and the same rule is likely to apply under the WV

Human Rights Act. In *Cleveland v. Policy Management Systems Corporation*, 526 U.S. 795 (1999), the US Supreme Court addressed the interaction of the social security definition of “disabled” (preclusion from “any gainful” employment) and the ADA definition of disability (substantial mental or physical impairment, but employee can still perform essential function of job with or without reasonable accommodation). In that case, the plaintiff applied for and received social security benefits, and the employer contended that the employee was estopped from asserting an employment disability discrimination claim. The employer’s argument is that the employer, by asserting an inability to obtain “any gainful” employment for social security benefits, was taking a position inconsistent with the position in the employment discrimination case that the employee was “disabled” but still capable of performing the essential functions of his job. The Court rejected that position, stating: “In our view, however, despite the appearance of conflict that arises from the language of the two statutes, the two claims do not inherently conflict to the point where courts should apply a special negative presumption like the one applied by the Court of Appeals here. That is because there are too many situations in which an SSDI claim and an ADA claim can comfortably exist side by

side.” 526 U.S. at 802-3. The principle basis for reconciling the two definitions of disability was that the ADA’s definition defines a “qualified” individual as one who can perform the “essential functions” of his job with “reasonable accommodations”; whereas the SSDI definition of disability does not take into account the possibility of reasonable accommodation.” 526 U.S. at 802-3.

- c. West Virginia Human Rights Act definition of disability
 - (1) *Skaggs v. Elk Run Coal Company, Inc.*, 198 W. Va. 51, 479 S.E.2d 561 (1996)
2. Prima face case requirements, The plaintiff must show
 - a. that he is a disabled person within the meaning of the law,
 - b. that he is qualified to perform the essential functions of the job (either with or without reasonable accommodation), and
 - c. that he has suffered an adverse employment action under circumstances from which an inference of unlawful discrimination arises.
 - d. *Skaggs v. Elk Run Coal Company, Inc.*, 198 W. Va. 51, 479 S.E.2d 561, 582 n.22 (1996)

VI. Sexual harassment under WV Human Rights Act

- A. General principles
 1. Two types of sexual harassment. *Hanlon v. Chambers*, 195 W. Va. 99, 107, 464 S.E.2d 741, 749 (1995):
 - a. “First, in quid pro quo harassment, an employer or its agent conditions an employee's job, employment benefits, or continued employment on his or her consent to participate in sex.”

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- b. "Second, in hostile environment harassment, which is alleged here, an employer "discriminates against ... [a female employee] with respect to ... conditions or privileges of employment[,]" when the workplace is infected, for example, by sexual barbs or innuendos, offensive touching, or dirty tricks aimed at the employee because of her gender. W. Va. Code, 5-11-9(1) (1992). In these cases, women are denied an equal opportunity in the workplace because, unlike their male counterparts, they must work in an atmosphere they find emotionally oppressive."

B. Prima facie case

1. Where the sexual harassment claim asserts a "hostile or abusive work environment" under the WV Human Rights Act, the plaintiff must prove the following prima facie case:
 - a. The subject conduct was unwelcome;
 - b. It was based on the sex of the plaintiff;
 - c. It was "sufficiently severe or pervasive to alter the [plaintiff's] conditions of employment and create an abusive work environment"; and
 - d. It was imputable on some factual basis to the employer.
 - e. *Hanlon v. Chambers*, 195 W. Va. 99, 106-7, 464 S.E.2d 741, 748-9 (1995) (citing *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993))
2. When the sexual harassment was a "quid pro quo" term of employment, the plaintiff must prove the following prima facie case:
 - a. that the complainant belongs to a protected class;
 - b. that the complainant was subject to an unwelcome sexual advance by an employer, or an agent of the employer who appears to have the authority to influence vital job decisions; and

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- c. the complainant's reaction to the advancement was expressly or impliedly linked by the employer or the employer's agent to tangible aspects of employment.
 - d. *Gino's Pizza of West Hamlin, Inc. v. West Virginia Human Rights Commission*, 187 W. Va. 312; 418 S.E.2d 758 (1992)
- C. Particular issues
- 1. Definition of "employee" (plaintiff)
 - a. A "supervisor" is an "employee" as defined by the Human Rights Act (W. Va. Code § 5-11-3(e) (1992)), at least where the supervisor is not a partner or co-owner, so that a supervisor can state a claim for sexual harassment, even where the harasser is a subordinate employee, *Hanlon v. Chambers*, 195 W. Va. 99, 107 & n.6, 464 S.E.2d 741, 749 & n.6 (1995).
 - b. The Court in *Hanlon* left open the issue of whether a "partner" or "co-owner" can be "employees" under the WV Human Rights Act, *Hanlon v. Chambers*, 195 W. Va. 99, 107 & n.7, 464 S.E.2d 741, 749 & n.7 (1995), citing *Hishon v. King & Spalding*, 467 U.S. 69, 79-80 (denial of partnership was discriminatory under Title VII; partnership status was a "term, condition, or privilege of employment to which Title VII applied").
 - 2. Is the alleged sexual harassment "sufficiently severe or pervasive"?
 - a. 6 W. Va. C.S.R. § 77-4-2.4. "In determining whether alleged sexual harassment in a particular case is sufficiently severe or pervasive, the Commission will consider:
 - (1) 2.4.1 Whether it involved unwelcome physical touching;
 - (2) 2.4.2 Whether it involved verbal abuse of an offensive or threatening nature;

- (3) 2.4.3 Whether it involved unwelcome and consistent sexual innuendo or physical contact; and
 - (4) 2.4.4 The frequency of the unwelcome and offensive encounters.
3. When is the sexual harassment “imputable on some factual basis to the employer”? The rule depends on whether the sexual harassment was by a supervisor or a co-worker without authority over the plaintiff.
 - a. “An employer . . . is not strictly liable, at least not in all cases, for sexual harassment and proof of a hostile environment does not automatically establish employer liability. It is at this point that the source of the harassment becomes relevant.” *Hanlon v. Chambers*, 195 W. Va. 99, 108, 464 S.E.2d 741, 750 (1995).
 - (1) **Harassment by Supervisor.** “Where an agent or supervisor of an employer has caused, contributed to, or acquiesced in the harassment, then such conduct is attributed to the employer, and it can be fairly said that the employer is strictly liable for the damages that result.” *Hanlon v. Chambers*, 195 W. Va. 99, 108, 464 S.E.2d 741, 750 (1995).
 - (2) **Harassment by Co-Worker.** “When the source of the harassment is a person's co-workers and does not include management personnel, the employer's liability is determined by its knowledge of the offending conduct, the effectiveness of its remedial procedures, and the adequacy of its response. Thus, an employer that has established clear rules forbidding sexual harassment and has provided an effective mechanism for receiving, investigating, and resolving complaints of harassment may not be liable in a case of co-worker harassment where the employer had neither

knowledge of the misconduct nor reason to know of it. In such a case, the employer has done all that it can do to prevent harassment, and the employer cannot be charged with responsibility for the victim's failure to complain.” *Hanlon v. Chambers*, 195 W. Va. 99, 108, 464 S.E.2d 741, 750 (1995).

- b. When is someone a supervisor?
- c. When is knowledge of harassment by a non-supervisory employee imputed to the employer?
 - (1) The plaintiff (complaining employee) tells the employer
 - (2) The sexual harassment is so severe that it can reasonably be inferred that the employer knew about it. “Knowledge of work place misconduct may be imputed to an employer by circumstantial evidence if the conduct is shown to be sufficiently pervasive or repetitive so that a reasonable employer, intent on complying with ... [the West Virginia Human Rights Act] would be aware of the conduct.” *Hanlon v. Chambers*, 195 W. Va. 99, 108 n.9, 464 S.E.2d 741, 750 n.9 (1995) (citing *Spicer v. Commonwealth of Virginia*, 66 F.3d 705, 710 (4th Cir. 1995) (en banc)). The issue is whether the employer “knew or should have known” of the harassment. *Hanlon v. Chambers*, 195 W. Va. 99, 110, 464 S.E.2d 741, 752 (1995).
- 4. Harassment by customers can subject an employer to liability for sexual harassment of its employees. Employers are under a duty to ensure that the workplace is free of sexual harassment “from whatever source.” *Hanlon v. Chambers*, 195 W. Va. 99, 108, 464 S.E.2d 741, 750 (1995)
- 5. Same sex harassment

- a. *Lack v. Wal-Mart Stores, Inc.*, ?? F.3d ?? (5th Cir. 2001): Jury verdict in favor of plaintiff reversed on appeal, based on failure to prove that the sexual harassment against the male plaintiff was based on his gender; under WV Human Rights Act, discussed prior WV decisions after *Oncale*.

D. List of cases

1. *Frye v. Future Inns of America-Huntington, Inc.*, 566 S.E.2d 237 (W. Va. 2002)
2. *Fairmont Specialty Services v. West Virginia Human Rights Commission*, 206 W. Va. 86, 522 S.E.2d 180 (1999) (hostile work environment ancestral discrimination case based on Mexican-American ancestry, but all analysis is based on sexual harassment case law)
3. *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995)

VII. Age Discrimination under WV Human Rights Act

A. General principles

B. Prima Facie case, generally for disparate treatment in age discrimination

1. The plaintiff must prove the following to establish a prima facie case for age discrimination:
 - a. That the plaintiff is a member of a protected class;
 - b. That the employer made an adverse decision concerning the plaintiff;
 - c. But for the plaintiff's protected status, the adverse decision would not have been made.
 - d. *Waddell v. John Q. Hammons Hotel, Inc.*, 212 W. Va. 402, 424, 572 S.E.2d 925 (2002) (affirming summary judgment in favor of employer)
2. Concerning the type of evidence required for proving the third (“but for”) element: “The first two parts of the

test are easy, but the third will cause controversy. Because discrimination is essentially an element of the mind, there will probably be very little direct proof available. Direct proof, however, is not required. What is required of the plaintiff is to show some evidence which would sufficiently link the employer's decision and the plaintiff's status as a member of a protected class so as to give rise to an inference that the employment decision was based on an illegal discriminatory criterion. This evidence could, for example, come in the form of an admission by the employer, a case of unequal or disparate treatment between members of the protected class and others by the elimination of the apparent legitimate reasons for the decision, or statistics in a large operation which show that members of the protected class received substantially worse treatment than others.” 572 S.E.2d 925 (quoting *Conaway v. Eastern Associated Coal Corp.*, 178 W. Va. 164, 170-71, 358 S.E.2d 423, 429-30 (1986)).

3. Derogatory remarks about age, when do they create evidence of age discrimination?
 - a. The comments that the plaintiff was a “nice old lady”, *Waddell v. John Q. Hammons Hotel, Inc.*, 572 S.E.2d 925 (W. Va. 2002), made by a management employee to a housekeeper at the hotel at which the plaintiff worked, was given no evidentiary significance (on a motion for summary judgment) when there was no evidence of when the statement was made and no evidence that it was made “in connection with any employment decision.”

C. Prima facie case, disparate impact age discrimination

1. In proving a prima facie case of disparate impact under the Human Rights Act ..., the plaintiff bears the burden of
 - a. (1) demonstrating that the employer uses a particular employment practice or policy and
 - b. (2) establishing that such particular employment practice or policy causes a disparate impact on a class protected by the Human Rights Act.

- c. The employer then must prove that the practice is "job related" and "consistent with business necessity."
 - d. *If the employer proves business necessity, the plaintiff may rebut the employer's defense by showing that a less burdensome alternative practice exists which the employer refuses to adopt. Such a showing would be evidence that employer's policy is a "pretext" for discrimination.*
2. *Moore v. Consolidated Coal Company*, 211 W. Va. 651, 668, 567 S.E.2d 661, 618-619 (2002)
- D. Prima facie case in RIF setting
1. Other circuit courts of appeals have utilized this general basic formula in reduction-in-force age discrimination cases, which consists of these basic elements:
 - a. (1) that the claimant was a member of the protected class (at least forty years of age);
 - b. (2) that a negative action was taken (that she was fired);
 - c. (3) that she was qualified; and
 - d. (4) that others not in the protected class were treated more favorably.
 2. *Kanawha Valley Regional Transp. Auth. v. West Va. Human Rights Comm'n*, 181 W. Va. 675, 677-678, 383 S.E.2d 857, 860 (1989)

VIII. National Origin Discrimination under WV Human Rights Act

- A. Prima facie case
1. *Wheeling-Pittsburgh Steel Corp. v. Rowing*, 205 W. Va. 286, 298-299 (W. Va. 1999)

IX. Retaliation under WV Human Rights Act

- A. General principles
1. “Retaliation” claims often “discrimination” claims. My employer discriminated against me because I was a woman, by promoting less qualified men over me. I then complained about this sex discrimination and my

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employer retaliated by firing me. A plaintiff case *lose* the discrimination case and *win* the retaliation case. It happens fairly often.

2. The WV Human Rights Act states that it is unlawful for an employer to "[e]ngage in any form of reprisal or otherwise discriminate against any person because he or she has opposed any practices or acts forbidden under this article or because he or she has filed a complaint, testified or assisted in any proceeding under this article." W. VA. CODE § 5-11-9(7)(C). This section is modeled after 42 U.S.C. § 2000e-3(a) (unlawful for an employer to discriminate against an employee "because he has opposed any practice made an unlawful employment practice by" Title VII of the Civil Rights Act of 1964).

B. Prima facie case

1. Plaintiff must prove the following prima facie case:
 - a. that the complainant engaged in protected activity, [see note below on meaning of "protected activity"]
 - b. that complainant's employer was aware of the protected activities,
 - c. that complainant was subsequently discharged and (absent other evidence tending to establish a retaliatory motivation), and
 - d. that complainant's discharge followed his or her protected activities within such period of time that the court can infer retaliatory motivation. [but see note before on "within such period of time" requirement; also see comment on "discharge not required" below]
 - e. *Hanlon v. Chambers*, 195 W. Va. 99, 111, 464 S.E.2d 741, 753 (1995); *Brammer v. Human Rights Commission*, 183 W. Va. 108, 110, 394 S.E.2d 340, 342 (1990); *Frank's Shoe Store v. West Virginia Human Rights Commission*, 179 W. Va. 53, 365 S.E.2d 251 (1986).
2. Clarifications on the prima facie case:

- a. **“Protected activity”** on the part of the plaintiff means “expressing opposition to a practice that he or she *reasonably and in good faith believes violates* the provisions of the Human Rights Act. This standard has both an objective and a subjective element. The employee's opposition must be reasonable in the sense that it must be based on a set of facts and a legal theory that are plausible. Further, the view must be honestly held and be more than a cover for troublemaking.” *Hanlon v. Chambers*, 195 W. Va. 99, 112, 464 S.E.2d 741, 754 (1995) (emphasis added). This means that the plaintiff may be *mistaken* in complaining about allegedly discriminatory conduct, and the employer may still be liable if it then retaliates.
- b. What does **“within such period of time”** mean? “[A] temporal relationship between the protected conduct and the discharge is not the only, or a required, basis for establishing a causal relationship between the two”. *Hanlon v. Chambers*, 195 W. Va. 99, 111 n.18, 464 S.E.2d 741, 753 n.18 (1995).
- c. A **discharge is not required**. “Illegal retaliation can also come in forms other than a discharge.” *Hanlon v. Chambers*, 195 W. Va. 99, 111 n.18, 464 S.E.2d 741, 753 n.18 (1995).

X. Privacy Issues

- A. Zones of employee privacy in the workplace
 1. In some states, employee lockers, where only the employee has a key, are private
 2. Personal belongings of the employee, like wallets, purses
 3. Probably freedom from involuntary searches, and it is an unresolved issues as to whether “we’ll fire you unless you let us search you” situations will give rise to either invasion of privacy claims or *Harless* claims based on invasion of privacy

4. Freedom from mandatory random drug tests. See *Twigg v. Hercules Corp.*, 185 W. Va. 155, 158, 406 S.E.2d 52, 55 (1990) ("it is contrary to public policy in West Virginia for an employer to require an employee to submit to drug testing, since such testing portends an invasion of an individual's right to privacy").
 - a. In *Twigg*, the Court outlined two exceptions to the employee's right to refuse a drug test. There are 2 situations where mandatory drug tests are permissible:
 - (1) The employer has a good faith objective suspicion of an employee's drug usage (see *Legg v. Felinton*, 637 S.E.2d 576, 582 (W. Va. 2006) ("reasonable suspicion" existed to require fire fighter to submit to drug test, where position involved "public safety"; and "exigent circumstances existed to allow termination before the customary hearing); or
 - (2) An employee's job responsibility involved public safety or the safety of others.
 - b. There may be additional exceptions to the employee's right of privacy, because causes of action arising out of that right may be pre-empted by federal law in certain situations.
 - (1) Congress passed the Omnibus Transportation Employee Testing Act of 1991, 49 U.S.C. § 45101 *et seq.*, and the Federal Aviation Administration has promulgated detailed regulations under that act, 14 C.F.R, pt. 121, app. I.
 - (a) The Act sets out a program for drug testing of *domestic and foreign air carriers*, 49 U.S.C. § 45102.
 - (b) The FAA regulations require employers to notify the FAA of an employee's refusal to submit to the

drug test, and the regulations govern the release of drug-testing results to third parties, 14 C.F.R. pt. 121, app. I § VI.D-E.

- (2) A Fifth Circuit decision has ruled that the Omnibus Transportation Employee Testing Act completely pre-empted a covered employee's common law right of privacy concerning the drug testing, *Frank v. Delta Airlines Inc.*, ___ F.3d ___ (5th Cir. December 3, 2002). The Fifth Circuit also ruled that *all* other common law claims relating to the drug testing were pre-empted, including defamation, negligence, and intentional infliction of emotional distress. The Fifth Circuit ruled that the Act and regulations *explicitly* preempted state law, 49 U.S.C. § 45106(a); 14 C.F.R. pt. 121, app. I § XI.A & B (1989).
 - (3) In light of “September 11,” the U.S. Congress may legislate more broadly in connection with drug testing of various travel industry and security-sensitive industry employees, so be careful about keeping track of federal statutes and regulations which may be deemed to preempt state common law privacy (and other) claims.
5. Freedom from mandatory lie detector tests, see *Cordle v. General Hugh Mercer Corp.*, 174 W. Va. 321, 325 S.E.2d 111, 114 & 117 (1984) (“it is contrary to the public policy of West Virginia for an employer to require or request that an employee submit to a polygraph test or similar test as a condition of employment”); W. VA. CODE § 21-5-5b (1983) (“No employer may require or request either directly or indirectly, that any employee or prospective employee of such employer submit to a polygraph, lie detector or other such similar test utilizing mechanical measures of physiological reactions to evaluate truthfulness, and no employer may knowingly

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allow the results of any such examination or test administered outside this State to be utilized for the purpose of determining whether to employ a prospective employee or to continue the employment of an employee in this State").

a. The exceptions to the employee's right to refuse a lie detector test arise out of the exceptions to the privacy right stated in § 21-5-5b:

(1) *Certain drug industry employees.* The right to refuse to take a lie detector test "shall not apply to employees of an employer authorized to manufacture, distribute or dispense the drugs to which article five [§ 30-5-1 et seq.], chapter thirty applies, excluding ordinary drugs as defined in section twenty-one [§ 30-5-21], article five, chapter thirty".

(a) Section 21-5-5b is part of Article 5 of Chapter 30 of the West Virginia Code, and Article 5 deals with pharmacists and employees working under them.

(b) So pharmacists and defined employees working under them may be subjected to lie detector tests under § 21-5-5b if they are involved in the manufacture, distribution, or dispensing of prescription drugs under § 30-5-1.

(c) But such employee's may not be subjected to lie detector tests if they are involved in the "sale of non-narcotic nonprescription drugs which may be lawfully sold without a prescription" in accordance with applicable federal and state law, § 30-5-1

(2) *Certain law enforcement and military employees.* The right to refuse to take a lie detector test "shall not apply to law

enforcement agencies or to military forces of the State as defined by section one [§ 15-1-1], article one, chapter fifteen of the Code: Provided further, that the results of any such examination shall be used solely for the purpose of determining whether to employ or to continue to employ any person exempted hereunder and for no other purpose."

6. Computers at work almost certainly will *not* give rise to any right of privacy for the employee using the computer.

B. Causes of action concerning privacy

1. West Virginia law recognizes four types of privacy causes of action:
 - a. unreasonable intrusion upon the seclusion of another;
 - b. appropriation of another's name or likeness;
 - c. unreasonable publicity given to another's private life; and
 - d. publicity that unreasonably places another in a false light before the public. *Rohrbaugh v. Wal-Mart Stores, Inc.*, 2002 W. Va. LEXIS 166 (W. Va. 2002); *Crump v. Beckley Newspapers, Inc.*, 173 W. Va. 699, 712, 320 S.E.2d 70, 83 (1983); RESTATEMENT (SECOND) OF TORTS §§ 652A - 652E (1977).
2. "Unreasonable intrusion" claims sometimes arise in an employment setting, *see Rohrbaugh v. Wal-Mart Stores, Inc.*, 2002 W. Va. LEXIS 166 (W. Va. 2002) (employer required drug test in violation of right to privacy; Wal-Mart's policy was to require all injured employees to take drug and alcohol tests); *Twigg v. Hercules Corp.*, 185 W. Va. 155, 406 S.E.2d 52 (1990) (employer's termination of employee for refusing to take a drug test violated employee's right of privacy).
3. "False light" privacy claims sometimes arise in an employment setting, *see Bines v. Owens*, 208 W. Va.

679, 684, 542 S.E.2d 842, 847 (2000). The essence of the claim is “publicity which unreasonably places another in a false light before the public,” and the false light must be “highly offensive to a reasonable person.” 173 W. Va. at 712, 320 S.E.2d at 83 (quoting *Crump v. Beckley Newspapers, Inc.*, 173 W. Va. 699, 712, 320 S.E.2d 70, 83 (1983)).

- a. The RESTATEMENT sets out the elements of the claim as follows: “One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if
 - (1) the false light in which the other was placed would be highly offensive to a reasonable person, and
 - (2) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed. RESTATEMENT (SECOND) OF TORTS § 652E (1977).
- b. In *Benson v. AJR, Inc.*, W. Va. (April 16, 2004), the Court described the claim as “false light invasion of privacy”, but in stating the elements of the claim, described elements for a convention invasion of privacy claim, as opposed to false light. The Court then discussed two decisions (including *Crump*) which held that in a false light invasion of privacy claim, the publicizing had to be “widespread.” The Court affirmed the trial court’s summary judgment by noting that the defendant employer had disclosed the facts in issue (drug test results) to only three employees, and that was not “widespread publicity.” This case may fuel the argument that in defamation cases it is not a “publication” where the defendant employer only tells other employees the statements in issue.
- c. False light claims and defamation claims have substantial similarities. *Crump v. Beckley*

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Newspapers, Inc., 173 W. Va. 699, 716, 320 S.E.2d 70, 87 (1983).

- d. However, there are important differences, 173 W. Va. at 716, 320 S.E.2d at 87-88 (quotation marks omitted):
 - (1) [E]ach action protects different interests: privacy actions involve injuries to emotions and mental suffering, while defamation actions involve injury to reputation.
 - (2) [T]he false light need not be defamatory, although it often is, but it must be such as to be offensive to a reasonable person.
 - (3) [A]lthough widespread publicity is not necessarily required for recovery under a defamation cause of action, it is an essential ingredient to any false light invasion of privacy claim.
4. *Harless* cause of action, so far, where employer violates employee's right of privacy by:
 - a. Requiring a mandatory drug test and firing the employee who refuses to take the test, *Twigg v. Hercules Corp.*, 185 W. Va. 155, 406 S.E.2d 52 (1990); and
 - b. Requiring a mandatory lie detector test and firing the employee who refuses to take the test, *Cordle v. General Hugh Mercer Corp.*, 174 W. Va. 321, 325 S.E.2d 111, 114 (1984).
5. For common law privacy claims, in *Rohrbaugh v. Wal-Mart Stores, Inc.*, 2002 W. Va. LEXIS 166 (W. Va. 2002), the Court explained the availability of the following damages:
 - a. the harm to his/her interest in privacy resulting from the invasion;
 - b. his/her mental distress proved to have been suffered if it is of a kind that normally results from such an invasion;

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- c. special damages of which the invasion is a legal cause;
- d. if none of the former damages is proven, nominal compensatory damages are to be awarded; and
- e. punitive damages.
- f. Note that in *Rohrbaugh*, the plaintiff lost on disability discrimination and worker's comp discrimination, and won on invasion of privacy (drug test), and the jury answered the appropriate question to lead to an assessment of punitive damages. The case is being remanded because the trial court refused to allow the plaintiff to proceed to the punitive damages phase because the jury did not award any actual damages. The Supreme Court reversed and remanded, holding that the liability finding on the privacy claim should have led to an award of at least nominal damages, which would have then allowed the plaintiff to proceed to the punitive damages phase.

XI. Intentional Infliction of Emotional Distress (also called "Tort of Outrage")

A. Elements

1. that the defendant's conduct was atrocious, intolerable, and so extreme and outrageous as to exceed the bounds of decency;
2. that the defendant acted with the intent to inflict emotional distress, or acted recklessly when it was certain or substantially certain emotional distress would result from his conduct;
3. that the actions of the defendant caused the plaintiff to suffer emotional distress; and
4. that the emotional distress suffered by the plaintiff was so severe that no reasonable person could be expected to endure it.
5. *Love v. Georgia-Pacific Corporation*, 550 S.E.2d 51 (2001)

XII. Defamation in the workplace

- A. Elements of a defamation claim by a "private" individual in West Virginia:
1. Defamatory statements [see discussion below on "fact/opinion distinction"];
 2. A non-privileged communication to a third party [see discussion below on good faith privilege in the workplace];
 3. Falsity [see discussion below on defense that statement is "substantially true"];
 4. Reference to the plaintiff;
 5. At least negligence on the part of the publisher [this is primarily what changes when the person suing is a "public figure"]; and
 6. Resulting injury.
 7. *Hupp v. Sasser*, 200 W. Va. 791, 490 S.E.2d 880, 884 (1997); *Crump v. Beckley Newspapers, Inc.*, 173 W. Va. 699, 320 S.E.2d 70 (1983)
- B. Is there a "publication" between employees of the defendant company (the "intra-corporate communications" issue)?
1. Majority view is yes; minority view holds that there is no "publication" between employees off the defendant company
 2. Defamation (libel and slander) requires the "publication" of the defamatory statement to a "third party".
 3. *Majority View*. The majority view follows the Restatement in treating "intra-corporate" statements as "publications." See RESTATEMENT (SECOND) OF TORTS § 577(1), comment I (1977) (Communication by one agent to another agent of the same principal. The communication within the scope of his employment by one agent to another agent of the same principal is a publication not only by the first agent but also by the principal and this is true whether the principal is an individual, a partnership or a corporation.").

4. *Minority View.* Some courts have treated all employees of the defendant employer as the same party, so when Employee A talks to Employee B, there is no “publication” for defamation purposes.
 5. There are a few (including some non-published) federal district court opinions which have adopted the “no-publication rule”, in some instances as an alternative ruling. See *Mutafis v. Erie Insurance Exchange*, 561 F. Supp 192 (N.D. W. Va. 1983). Note that *Mutafis* has a fairly complicated appellate history, and it is difficult to assess its eventual impact: *Mutafis v. Erie Insurance Exchange*, 728 F.2d 672 (4th Circuit 1984) (certifying questions to the W. Va. Supreme Court); *Mutafis v. Erie Insurance Exchange*, 174 W. Va. 660, 328 S.E.2d 675, 665 (1985) (addressing certified questions); *Mutafis v. Erie Insurance Exchange*, 775 F.2d 593, 594 (4th Cir. 1985) (final federal appellate opinion).
 6. I am not aware of any West Virginia Supreme Court squarely addressing the issue, but my prediction is that it would follow the majority view. Some workplace defamation opinions by the West Virginia Supreme Court have assumed (without squarely deciding) employee-to-employee communications to be publications, and applied the standard “good faith privilege” analysis to see whether the employer is protected. See *Rohrbaugh v. Wal-Mart Stores, Inc.*, 2002 W. Va. LEXIS 166 (W. Va. 2002). In other words, the statements amongst the employees are “publications”, but the employee and the employees may be protected from liability through “good faith privilege” analysis.
- C. Is it a statement of fact or opinion?
1. Only statements of fact can be the basis for defamation claims; statements of opinion cannot be
 2. Some West Virginia Courts have been surprisingly holding disputed statements to be “opinions,” so that they cannot form the basis of a defamation claim. Here is the analysis:
 - a. To be defamatory, a statement must contain a “provably false assertion of fact,” and a mere

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- "statement of opinion" cannot be defamatory. *Hupp v. Sasser*, 490 S.E.2d at 886; *Maynard v. Daily Gazette Co.*, 191 W. Va. 601, 447 S.E.2d 293, 296 (1994).
- b. The truth or falsity of the statement must not depend on "subjective values or indefinite terms." *Hupp v. Sasser*, 490 S.E.2d at 887 (citing *Potomac Valve & Fitting Inc. v. Crawford Fitting Co.*, 829 F.2d 1280, 1289 (4th Cir. 1987)). The challenged statements cannot be defamatory if they are "not provably false," and if they are "inherently impossible to prove or disprove." 490 S.E.2d at 887 (citing *Potomac Valve & Fitting*, 829 F.2d at 1288).
- c. This doctrine (fact/opinion distinction) arose in the context of defamation claims against media defendants where the challenged statement "relat[es] to matters of public concern," and the West Virginia Supreme Court applied this principle in that context in *Maynard v. Daily Gazette Co.*, 447 S.E.2d at 296 (citing *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986)). However, the Court in *Hupp v. Sasser*, 490 S.E.2d at 886-87 applied the opinion/fact decision aggressively where the issue was a defamation claim by a graduate assistant (employee) against WVU, 490 S.E.2d at 883, and the Court discussed the principle without limiting it to media or "public issue" situations and cited a number of out-of-state cases that applied the principle in purely private settings (including some employment settings), 490 S.E.2d at 888. It appears to be reasonably certain that the opinion/fact distinction will be application to an employment-termination defamation setting.
- d. In *Hupp v. Sasser*, 490 S.E.2d at 887-88, the following fact/opinion distinctions were discussed:
- (1) Plaintiff was a "bully" and he "tried to bully me." The statements lacked a "provably

- false assertion of fact,” and the opinion as to whether the plaintiff was a “bully” was “totally subjective.” 490 S.E.2d at 887.
- (2) Plaintiff engaged in “unprofessional behavior” and “unacceptable behavior.” These statements, by a dean about the graduate assistant, were “statements of non-fact,” and they were “subjective conclusions.” 490 S.E.2d at 887.
 - (3) Where an employee had been terminated, and the employer stated that the employee “screwed up the company” and we “had to let [him] go,” the statements were the employer’s “opinions” about the employee’s “work performance” and were therefore not actionable. 490 S.E.2d at 888 (citing *Sandler v. Marconi Circuit Technology Corp.*, 814 F. Supp. 263, 268 (E.D.N.Y. 1993); and *McDowell v. Dart*, 201 A.D.2d 895, 607 N.Y.S.2d 755 (1994)).
 - (4) Statements that an attorney had been “uncooperative, abrasive and dilatory” were “expressions of opinion regarding manner in which [the] individual conducted himself and not actionable.” 490 S.E.2d at 888 (citing *Goldberg v. Coldwell Banker, Inc.*, 159 A.D.2d 684, 553 N.Y.S.2d 432, 433 (N.Y. App. Div. 1990)).
 - (5) Statement by a medical school professor about a colleague’s “unethical research practices” was a “statement of opinion and not actionable.” 490 S.E.2d at 888 (citing *Dong v. Board of Trustees*, 191 Cal. App. 3d 1572, 236 Cal. Rptr. 912, 921 (1987), cert. denied, 484 U.S. 1019 (1988)).

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- D. Employer has a "good faith privilege" to repeat defamatory statements to those who need to know in the court of investigations and disciplinary proceedings
1. A "qualified privilege exists when a person publishes a statement in good faith about a subject in which he has an interest or duty and limits the publication of the statement to those persons who have a legitimate interest in the subject matter." *Crump v. Beckley Newspapers, Inc.*, 173 W. Va. 699, 320 S.E.2d 70, 78 (1983).
 2. The important issues to focus on in an employment context, for purposes of this privilege, are:
 - a. Are repetitions of the allegedly defamatory statements made in "good faith"
 - b. Are the repetitions being made to people who "need to know"
 - c. Are the repetitions being made as needed in the course of, where applicable, investigative and disciplinary proceedings with the employer
- E. A statement does not need to be "totally true" to disprove a defamation claim, it need only be "substantially true"
1. The challenged statement is not defamatory if it is "substantially true." *State of West Virginia v. Gaughan*, 198 W. Va. 339, 480 S.E.2d 548, 561 (1996).
 2. Common law libel "overlooks minor inaccuracies and concentrates upon substantial truth;" "minor inaccuracies do not amount to falsity so long as 'the substance, the gist, the sting, if the libelous charge be justified.'" *State of West Virginia v. Gaughan*, 480 S.E.2d at 561 (quoting *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 516-17 (1991)).
 3. The issue is then whether the challenged statement "would have a different effect on the mind of the reader from that which the pleaded truth would have produced." *State of West Virginia v. Gaughan*, 480 S.E.2d at 562 (quoting *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991)). The best way to address this issue is then to compare the actual

challenged statement with a statement that would, according to the plaintiff, conform to the truth, and determine whether a reasonable person would have formed a “different opinion” of the plaintiff. *State of West Virginia v. Gaughan*, 480 S.E.2d at 562.

XIII. The West Virginia Wage Payment and Collection Act

A. Pay requirements

1. Employer must pay discharged employee all “wages in full” within 72 hours, W. VA. CODE § 21-5-4(b); “Wages” include “fringe benefits,” which include vacation pay, *Robertson v. Opequon Motors, Inc.*, 519 S.E.2d 843 (W. Va. 1999)
2. Employee who resigns must be paid by next regular pay day, § 21-5-4(c)
3. “Wages” includes “commissions”, § 21-5-1(c)
4. Employer is severely limited on what “deductions” can be made from an employee’s pay check, § 21-5-3. Permissible “deductions” are those “required by law to be withheld” and amounts “authorized” by the employee for “union or club dues, pension plans, payroll savings plans, credit unions, charities and hospitalization and medical insurance.” § 21-5-1(g). The Act also severely limits “assignments” of “future wages”, and requires a notarized agreement of the assignment (signed by the employee). See *Clendenin Lumber and Supply Company, Inc. v. Carpenter*, 172 W. Va. 375, 305 S.E.2d 332 (1983).

B. Remedies

1. If employer fails to pay an employee’s “wages” as required in 21-5-4(b), then employer must pay as “liquidated damages” until employee “is paid in full” the amount of wages at the “regular rate of pay” for “each day the employer is in default,” up to 30 days. § 21-5-4(e)
2. Employee may file suit to collect unpaid amounts and may recover “costs of the action” (such as court costs, like filing fees) and “reasonable attorney fees”, § 21-5-12(a) & (b)

XIV. Worker’s compensation discrimination

- A. General provisions protecting employees under the West Virginia Workers’ Compensation Act, W. Va. Code § 23-1-1 *et seq.*
1. **Employer may not discriminate.** § 23-5A-1: Employer cannot “discriminate in any manner” because of a “present or former employee’s receipt of or attempt to receive benefits” under this chapter.
 2. **Employer may not terminate employee.** § 23-5A-3(b): It shall be a “discriminatory practice” under 23-5A-1 to “terminate an injured employee while the injured employee is off work due to a compensable injury” and “is receiving or is eligible to receive temporary total disability benefits, unless the injured employee has committed a separate dischargeable offense” (which means “wholly unrelated to the injury or the absence from work resulting from the injury. A separate dischargeable offense shall not include absence resulting from the injury or from the inclusion or aggregation of absence due to the injury with any other absence from work.”).
 3. **Employer must reinstate employee to same position.** § 23-5A-3(b): It shall be a “discriminatory practice” to “fail to reinstate an employee who has sustained a compensable injury to the employee’s former position of employment upon a demand for such reinstatement provided that the position is available and the employee is not disabled from performing the duties of such position.”
 4. **Employer must reinstate employee to other comparable available positions for which employee is qualified.** § 23-5A-3(b): “If the former position is not available, the employee shall be reinstated to another comparable position which is available and which the employee is capable of performing.” A “comparable position” means a position which is “comparable as to wages, working conditions and, to the extent reasonably practicable, duties to the position held at the time of injury.”

5. **Authorization from doctor to return to work.** § 23-5A-3(b): “A written statement from a duly licensed physician that the physician approved the injured employee’s return to his or her regular employment shall be prima facie evidence that the worker is able to perform such duties.”
 6. **Preferential recall for one year.** § 23-5A-3(b): “In the event that neither the former position nor a comparable position is available, the employee shall have a right to preferential recall to any job which the injured employee is capable of performing which becomes open after the injured employee notifies the employer that he or she desired reinstatement. Said right of preferential recall shall be in effect for one year from the day the injured employee notifies the employer that he or she desires reinstatement”.
 7. **Employer may discharge during absence if “economically unfeasible” to keep the job open.** Employer is entitled to show that it is economically unfeasible to keep the job open or to hire a temporary substitute. The employer may also consider the prospect of when the employee will be able to return to his prior job. *Powell v. Wyoming Cablevision, Inc.*, 184 W. Va. 700, 403 S.E.2d 717 (1991). Some doubt as to whether this holding is still viable, in light of more recent statutory language: “A separate dischargeable offense shall not include absence resulting from the injury or from the inclusion or aggregation of absence due to the injury with any other absence from work.” § 23-5A-3(b)
- B. Requirements of worker’s comp discrimination & retaliation claims
1. *Nestor v. Bruce Hardwood Floors, L.P.*, 210 W. Va. 692, 694, 558 S.E.2d 691 (2001). “In order to make a prima facie case of discrimination under W. Va. Code, 23-5A-1, the employee must prove that: (1) an on-the-job injury was sustained; (2) proceedings were instituted under the Workers’ Compensation Act, W. Va. Code, 23-1-1, et seq.; and (3) the filing of a workers’ compensation claim was a significant factor in the employer’s decision to discharge or otherwise discriminate against the employee.”

2. Syllabus Point 1, *Powell v. Wyoming Cablevision, Inc.*, 184 W. Va. 700, 403 S.E.2d 717 (1991)

XV. Handbooks-when do they limit an employer's options

- A. Several West Virginia cases have address the "handbook issue"

1. *Tiernan v. Charleston Area Medical Center, Inc.*, 2002 W. Va. LEXIS 225 (W. Va. December 2, 2002)

- a. "[T]o prevail on such a claim in the instant case, Ms. Tiernan would have to persuade a fact-finder:

- (1) by clear and convincing evidence, that CAMC made an express promise to its employees that they would suffer no retaliation or adverse action for speaking out and/or talking to newspaper reporters in connection with the campaign in opposition to nurse staffing and employment policies; and that CAMC intended or reasonably should have expected that such a promise would be relied and/or acted upon by an employee like Ms. Tiernan; and

- (2) by a preponderance of the evidence, that Ms. Tiernan, being without fault herself, reasonably relied on that promise by CAMC, which reliance led to her discharge; and that in discharging Ms. Tiernan, CAMC breached that promise."

- b. Trial court granted summary judgment on plaintiff's contract claim, and the Supreme Court reversed and remanded for trial.

2. *Bine v. Owens*, 208 W. Va. 679, 542 S.E.2d 842 (2000)
3. *Lipscomb v. Tucker County Commission*, 206 W. Va. 627, 527 S.E.2d 171 (1999)
4. *Pleasant v. Elk Run Coal Company, Inc.*, 199 W. Va. 629, 486 S.E.2d 798 (1997)

5. *Eaton v. City of Parkersburg*, 198 W. Va. 615, 482 S.E.2d 232 (1996)
6. *Williams V. Precision Coil*, 194 W. Va. 52, 459 S.E.2d 329 (1995)
7. *Bowe v. Charleston Area Medical Center, Inc.*, 189 W. Va. 145, 428 S.E.2d 773 (1993)
8. *Suter v. Harsco Corporation*, 184 W. Va. 734, 403 S.E.2d 751 (1991)
9. *Cook v. Heck's, Inc.*, 176 W. Va. 368, 374, 342 S.E.2d 453, 459 (1986)
10. *Yunker v. Eastern Consolidated Coal Corp.*, 591 S.E.2d 254 (2003) (code of ethics of company protected employees who reported code violations, but that provision did not create a contract modifying employment at will rule; summary judgment and judgment in favor of employee was reversed)
11. *Minshall v. Health Care & Retirement Corp. of Am.*, 208 W. Va. 4, 537 S.W.2d 320, 325 (2000) (“[A]n employee handbook may form the basis of a unilateral contract if there is a definite promise therein by the employer not to discharge covered employees except for specified reasons.”) (quoting *Cook v. Heck's Inc.*, 176 W. Va. 368, 342 S.E.2d 453 (1986) (syllabus point 6))

B. Discussion of handbooks

1. X

XVI. Breach of Contract and Related Issues

A. No implied covenant of good faith and fair dealing in the context of at-will employment contracts

1. *Harless v. CSX Hotels, Inc.*, 265 F. Supp. 2d 640 (S.D. W. Va. 2003)
2. *Miller v. Massachusetts Mutual Life Insurance Co.*, 193 W. Va. 240, 244, 455 S.E.2d 799, 803 (1995)

B. Oral promises by an employer, when are they contracts?

1. *Ways v. Imation Enterprises Corporation*, 589 S.E.2d 36, 44-45 (W. Va. 2003) (promise of continued employment must include “terms of the alleged

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contract" which "were ascertainable and definitive in nature". There must be "mutuality of assent" on those terms.)

2. *Sayres v. Bauman*, 188 W. Va. 550, 425 S.E.2d 226 (1992) (oral promise in employment setting sufficient to alter employment at will relationship "must contain terms that are both ascertainable and definitive in nature to be enforceable")

C. Written employment contract

1. *Benson v. AJR, Inc.*, 215 W. Va. 324, 599 S.E.2d 747 (2004) (trial court granted summary judgment in favor of employer; Supreme Court reversed, holding there was a fact issue as to whether employee had committed the "dishonest" act as defined in the written employment contract)

XVII. Spoliation of Evidence

- A. West Virginia recognizes certain "stand-alone" causes of action concerning spoliation of evidence. *Hannah v. Heeter*, 2003 W. Va. LEXIS 82 (W. Va. Sup. Ct. June 30, 2003)

XVIII. Constructive discharge

- A. Several West Virginia cases have address the issue of when a "resignation" was a "constructive discharge"
 1. *Love v. Georgia-Pacific Corporation*, 209 W. Va. 515, 550 S.E.2d 51 (2001)
 - a. "A constructive discharge cause of action arises when the employee claims that because of age, race, sexual, or other unlawful discrimination, the employer has created a hostile working climate which was so intolerable that the employee was forced to leave his or her employment."
 - b. "Where a constructive discharge is claimed by an employee in a retaliatory discharge case, the employee must prove sufficient facts to establish the retaliatory discharge. In addition, the employee must prove that the intolerable conditions that caused the employee to quit were created by the employer and were related to

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those facts that gave rise to the retaliatory discharge."

- c. "In order to prove a constructive discharge, a plaintiff must establish that working conditions created by or known to the employer were so intolerable that a reasonable person would be compelled to quit. It is not necessary, however, that a plaintiff prove that the employer's actions were taken with a specific intent to cause the plaintiff to quit."

2. *Slack v. Kanawha County Housing and Redevelopment Authority*, 188 W. Va. 144, 423 S.E.2d 547 (1992)

- a. "Typically, in these federal cases, the constructive discharge cause of action arises when the employee claims that because of age, race, sexual, or other unlawful discrimination, the employer has created a hostile working climate which was so intolerable that the employee was forced to leave his or her employment. "
- b. "There appears to be no disagreement that one of the essential elements of any constructive discharge claim is that the adverse working conditions must be so intolerable that any reasonable employee would resign rather than endure such conditions."
- c. "A typical recital of this principle is found in *Calhoun v. Acme Cleveland Corp.*, 798 F.2d at 561, where the court quoted from its earlier decision in *Alicea Rosado v. Garcia Santiago*, 562 F.2d 114, 119 (1st Cir. 1977): "'The trier of fact must be satisfied that the new working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign.'" Proof of this element may be determinative of the case: If the working conditions are not found to be intolerable, then there is no need for the court to consider the constructive discharge claim any further."

- d. “Where intolerable working conditions are shown, there is some disagreement as to whether the employee must show that the employer created or allowed the intolerable conditions with the specific intent to force the employee to leave. The Court of Appeals for the Fourth Circuit appears to have adopted the view that such a showing is required. In *Bristow v. Daily Press, Inc.*, 770 F.2d 1251, 1255 (4th Cir. 1985), cert. denied, 475 U.S. 1082, 106 S. Ct. 1461, 89 L. Ed. 2d 718 (1986), the court stated: “Our decisions require proof of the employer’s specific intent to force an employee to leave. ¶ This is not, however, the view of the majority of the federal Courts of Appeals and of state courts that have addressed the specific intent requirement in constructive discharge cases.”
- e. “Where a constructive discharge is claimed by an employee in a retaliatory discharge case, the employee must prove sufficient facts to establish the retaliatory discharge. In addition, the employee must prove that the intolerable conditions that caused the employee to quit were created by the employer and were related to those facts that gave rise to the retaliatory discharge.”
- f. “With regard to the constructive discharge aspect of this case, we adopt the majority view that in order to prove a constructive discharge, a plaintiff must establish that working conditions created by or known to the employer were so intolerable that a reasonable person would be compelled to quit. It is not necessary, however, that a plaintiff prove that the employer’s actions were taken with a specific intent to cause the plaintiff to quit.”

XIX. Damages issues

- A. Damages available under the WV Human Rights Act
 1. WEST VIRGINIA HUMAN RIGHTS ACT, W. VA. CODE § 5-11-13(c): “In any action filed under this section, if the court

finds that the respondent has engaged in or is engaging in an unlawful discriminatory practice charged in the complaint, the court shall enjoin the respondent from engaging in such unlawful discriminatory practice and order affirmative action which may include, but is not limited to, reinstatement or hiring of employees, granting of back pay or any other legal or equitable relief as the court deems appropriate. In actions brought under this section, the court in its discretion may award all or a portion of the costs of litigation, including reasonable attorney fees and witness fees, to the complainant.”

2. Front pay has been held to be authorized under § 5-11-13(c).
 - a. In *Casteel v. Consolidation Coal Co.*, 181 W. Va. 501, 383 S.E.2d 305 (1989), the employer argued that the lower court erred in awarding front pay because § 5-11-10 did not specifically authorize such damages. The WV Supreme Court recognized that such damages are available within the statute’s broad grant of remedial authority.
 - b. In *Dobson v. Eastern Associated Coal Corp.*, 188 W. Va. 17, 24, 422 S.E.2d 494, 501 (1992), the WV Supreme Court examined the remedial provisions of § 5-11-13(c). The employer argued that since the statute contains no express provision for an award of front pay, this remedy is unavailable. However, the WV Supreme Court stated that the phrase “or any other legal or equitable relief as the court deems appropriate” means that damages for loss of future earning power are allowable where such an injury is shown.
3. Punitive damages are authorized under § 5-11-13(c)
 - a. *Haynes v. Rhone-Poulenc, Inc.*, 206 W. Va. 18; 521 S.E.2d 331 (1999) held that punitive damages are authorized by § 5-11-13(c)

B. Malice eliminates the duty to mitigate damages

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1. Generally, an employee has a duty to mitigate damages. There are two aspects of that duty:
 - a. The employee must exercise reasonable diligence to *find* employment after being fired; and
 - b. The employee must exercise reasonable diligence to *retain* post-termination employment.
2. The effect of that duty on calculation of past lost income ("back pay") is to *reduce* the damages by either (a) the amount the employee in fact earned since being fired by the defendant, or, (b) where there has been a failure to mitigate, the amount the employee *could have earned* after being fired by the defendant, had the employee exercised reasonable diligence in attempting to mitigate.
3. However, if the jury finds that the termination was "malicious", then two things follow:
 - a. The employee has no duty to mitigate; and
 - b. The employee's compensation for lost income is not reduced by the actual post-termination income. This second consequence has potentially enormous significance on past lost income awards.
4. In *Paxton v. Crabtree*, 184 W. Va. 237, 242-43, 400 S.E.2d 245, 250-51 (1990) (emphasis added), the Court stated the rule this way: "*Unless a wrongful discharge is malicious, the wrongfully discharged employee has a duty to mitigate damages by accepting similar employment to that contemplated by his or her contract if it is available in the local area, and the actual wages received, or the wages the employee could have received at comparable employment where it is locally available, will be deducted from any back pay award; however, the burden of raising the issue of mitigation is on the employer.*"
5. In *Seymour v. Pendleton Community Care*, 209 W. Va. 468, 549 S.E.2d 662, 665 n.1 (2001) (emphasis added), the Court approved the following jury charge on

mitigation of damages and the impact of a "malice" finding by the jury:

- a. "The amount of lost earnings awarded must be *reduced by an amount equal to any income the plaintiff has received or could have received from other employment or business following her termination. . . .* On the other hand, *if you believe that Mrs. Seymour was discharged out of malice, by which I mean that Pendleton Community Care willfully and deliberately violated Mrs. Seymour's rights under circumstances where Pendleton Community Care knew, or with reasonable diligence should have known, of Mrs. Seymour's rights to be free from retaliatory discharge then Barbara Seymour is entitled to a flat back pay award by which I mean back pay from the date of discharge to the date of trial together with interest.*"
 - b. The Court, in observing that the instruction "tracked what is the law in West Virginia," stated that an act is done "maliciously" only if it is "prompted or accompanied by ill will, or spite, or grudge." 549 S.E.2d at 666.
6. Other cases adopting the position that malice eliminates the duty to mitigate
- a. *Mason County Board of Education v. State Superintendent of Schools*, 170 W. Va. 632, 637-38, 295 S.E.2d 719, 725 (1982) ("Unless a wrongful discharge is malicious, the wrongfully discharged employee has a duty to mitigate damages by accepting similar employment to that contemplated by his or her contract if it is available in the local area, and the actual wages received, or the wages the employee could have received at comparable employment where it is locally available, will be deducted from any back pay award; however, the burden of raising the issue of mitigation is on the employer.")
- C. Duty to mitigate includes using reasonable diligence to seek comparable post-termination employment

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1. An employee potentially fails to mitigate if he or she
 - a. Goes back to school, thereby taking himself voluntarily out of the workplace
 - b. Opens his own business, which is seen as meaning that his income will probably be less than if the employee found comparable employment
 - c. Fails to use reasonable diligence in finding comparable employment
2. The employer has the burden to prove a failure to mitigate, and must prove the following (*Paxton v. Crabtree*, 184 W. Va. 237, 243, 400 S.E.2d 245, 251 (1990))
 - a. there were substantially equivalent positions which were available; and
 - b. the claimant failed to use reasonable care and diligence in seeking such positions
3. ***What is comparable employment?***
 - a. The Court in *Paxton* (*Paxton v. Crabtree*, 184 W. Va. 237, 243, 400 S.E.2d 245, 251 (1990)) did not address in detail what constituted "substantially equivalent positions," but cited *Sellers v. Delgado Community College*, 839 F.2d 1132, 1138 (5th Cir. 1988) (emphasis added; some citations omitted), which discussed the issue in more detail:
 - (1) "Substantially equivalent employment' for purposes of Title VII mitigation has been defined as employment which affords *virtually identical promotional opportunities, compensation, job responsibilities, working conditions, and status* as the position from which the Title VII claimant has been discriminatorily terminated. In addition, the new position should provide comparable hours to the previous position. In *Rutherford v. American Bank of Commerce*, 12 Fair

Empl.Prac.Cas. (BNA), 1184, 1190 (D.N.M.1976) [Available on WESTLAW, 1976 WL 542], *aff'd*, 565 F.2d 1162 (10th Cir.1977), the court determined that the claimant did not fail to mitigate her damages when she refused an offer of employment because it failed to take account of her years of experience and offered only remote possibilities for comparable advancement. Furthermore, in seeking to define what is suitable interim employment for an unlawfully discharged employee, the Circuit for the District of Columbia stated “[a] discriminatee need not seek or accept employment which is 'dangerous, distasteful or essentially different' from his regular job" or "accept employment which is located an unreasonable distance from his home." *NLRB v. Madison Courier, Inc.*, 153 U.S. App. D.C. 232, 472 F.2d 1307, 1319 (D.C. Cir.1971) (emphasis in original). Finally, in assessing whether two positions are substantially comparable, at least one court has focused on comparability in status, rather than comparability in pay, determining that comparability in salary, although important, is not the sole test of a reasonable offer of alternative employment. *Williams v. Albemarle City Board of Education*, 508 F.2d 1242, 1243 (4th Cir.1974).”

4. **What is reasonable diligence?**
 - a. The Court in *Seymour v. Pendleton Community Care*, 209 W. Va. 468, 549 S.E.2d 662, 664, 667 (2001) reversed the trial court’s decision to reduce the jury award for lost income. The trial court had decided that Seymour failed to use reasonable diligence in seeking new employment, and the WV Supreme Court reviewed the evidence and found that Seymour’s

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job search was sufficient to satisfy her duty to mitigate damages.

- D. Duty to mitigate includes using reasonable diligence to *retain* post-termination employment
1. An employee can fail to satisfy that duty by either:
 - a. Getting fired from a job through some significant fault of the employee; or
 - b. Failure to adequately perform the job so as to reduce the mitigating wages below what they could have been.
 2. In *Rohrbaugh v. Wal-Mart Stores, Inc.*, 2002 W. Va. LEXIS 166 (2002), Wal-Mart was entitled to introduced evidence that the plaintiff had a lousy employment record at a subsequent job, and that lousy employment record reduced the mitigating wages. The mitigating wages that the employee *could have earned* with reasonable diligence in performing that job will be subtracted from the lost income damages.
 3. If a plaintiff loses a subsequent (mitigating) job, there are three sets of circumstances that have arisen that raise mitigation of damages issues:^{1/}
 - a. *What if the employee voluntarily resigns from the subsequent employer?* If there is no good reason (what some courts call an "unjustified quit", then the court will treat the plaintiff as continuing to earn that employer's salary

^{1/} All of these questions are essentially part of the overriding issue of whether the plaintiff has satisfied his or her duty to mitigate damages. The Courts frequently ask whether the plaintiff caused a "willful loss of earnings." This principal was developed in *Phelps Dodge Corporation v. NLRB*, 313 U.S. 177, 198 (1941) ("Since only actual losses should be made good, it seems fair that deductions should be made not only for actual earnings by the worker but also for losses which he willfully incurred."). The result of that principal were stated in *NLRB v. Hopcroft Art & Staines Glass Works*, 692 F.2d 63, 64 (8th Cir. 1982) (quoting *NLRB v. Mastro Plastics Corporation*, 354 F.2d 170, 174 n.3 (2d Cir. 1965)): "It is accepted by the [NLRB] and reviewing courts that a discriminatee is not entitled to backpay to the extent that he fails to remain in the labor market, refuses to accept substantially equivalent employment, fails diligently to search for alternative work, or voluntarily quits alternative employment without good reason." These are decisions under the National Labor Relations Act, but the damages decisions under the NLRA have been invoked and applied in federal and state discrimination decisions.

throughout the remainder of the relevant back pay period. If the plaintiff quits justifiably (and what constitutes justification is discussed below), the resignation has no effect on the calculation of back pay--the ensuing period of unemployment or lesser employment^{2/} will be included in the back pay calculation.

- (1) One Court stated the damages-related consequence of an “unjustified quit” by the plaintiff as follows: The plaintiff “shall be deemed to have earned for the remainder of the period for which each is awarded backpay the hourly wage being earned at the time such quitting occurred [at the subsequent job]. Therefore, an offset computed on the appropriate rate per hour will be deducted as interim earnings from the gross backpay This offset shall be made applicable from the date of the unjustified quitting throughout the remainder of the backpay period for each particular claimant.” *NLRB v. Hopcroft Art & Staines Glass Works*, 692 F.2d 63, 65 (8th Cir. 1982) (quoting *Knickerbocker Plastic Company, Inc.*, 211 NLRB 555 (1974)).
- b. *What if the plaintiff is terminated from the subsequent job?* If the plaintiff is terminated for significant misconduct (and that will be discussed below), then the plaintiff will be treated as having failed to mitigate damages, and the income from the employer will be assumed to continue after the termination for purposes of calculating back pay. If the employer is *not* terminated for significant misconduct, then the ensuing unemployment or lesser employment will be included in the back pay calculations, so that the defendant-employer suffers the

^{2/} I use the phrase “lesser employer” to simply mean that the job pays less than the final compensation level of the defendant-employer, prior to the termination of the plaintiff’s employment with the defendant.

consequence of the plaintiff losing the subsequent job through no significant fault of the plaintiff.

- c. *What if the plaintiff is hurt at a subsequent job and cannot continue the job and suffers a period of unemployment from the ensuing period of injury or disability?* If the subsequent job was comparable in its physical demands to the job with the defendant-employer, then the court will probably conclude that it is likely that the plaintiff would have been injured as well at the job with the defendant-employer, so that the ensuing period of unemployment (caused by the injury or disability) will not be included in the back pay calculations (in other words, the defendant-employer does not have to pay for the resulting period of unemployment). However, if the plaintiff's subsequent job is more physically demanding than the job with the defendant-employer, then the jury can conclude that the discrimination by the defendant put plaintiff into a more physically difficult job, and the defendant-employer will be responsible for paying for the resulting period of unemployment (so that the period of unemployment will be included in the back pay calculations).

- (1) In *NLRB v. Hopcroft Art & Staines Glass Works*, 692 F.2d 63, 64 (8th Cir. 1982), the plaintiff (Stratton) had been improperly discharged because of unionizing activities under the National Labor Relations Act.^{3/} After being discharged, plaintiff went to work for another company named “Alton Box” and experienced a foot injury causing torn ligaments. Plaintiff was placed on light duty briefly but he then found that upon resuming his regular job his foot injury

^{3/} The back pay and remedial provisions of Title VII were modeled after comparable provisions in the National Labor Relations Act. See *Albemarle Paper Company v. Moody*, 422 U.S. 405, 419 n.11 (1975).

prevented him from doing the job, so he resigned. 692 F.2d at 64. The Eighth Circuit agreed with the ALJ in concluding that when the plaintiff “voluntarily left his employment” with Alton Box, his conduct “did not rise to the level of conduct sufficient to toll backpay.” 692 F.2d at 65. The Eight Circuit did not find the voluntary resignation of the plaintiff to be problematic, likening it to the situation in another case where the plaintiff “lost an interim job because he was physically incapable of performance,” and that did not constitute a “willful loss of employment”. 692 F.2d at 65 (quoting *My Stores, Inc.*, 181 N.L.R.B. 321, 337 (1970) (plaintiff took subsequent job but could not physically perform the work, which was more demanding than his job with defendant; plaintiff informed subsequently employer that plaintiff could not physically perform the work; and subsequent employer than terminated the plaintiff)).

- (2) In *Whatley v. Skaggs Companies, Inc.*, 508 F. Supp. 302 (D. Colo. 1981), *aff'd in pertinent part*, 707 F.2d 1129 (10th), *cert. Denied*, 464 U.S. 938 (1983), the plaintiff (Whatley) was terminated by Skaggs from his management job (lobby manager), and the termination was discriminatory under the federal employment discrimination law (Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e). Plaintiff then went *back* to work for Skaggs working in a warehouse, where he suffered an injury causing him to be disabled and unemployed for 5 years. 508 F. Supp at 503. The Court concluded (and this finding was specifically affirmed on appeal, 707 F.2d at 1138 & n.8) that Defendant was

responsible for the lost income during the disability period, under the following rationale: “Whatley would not have suffered his disabling back injury had Skaggs not terminated him as lobby manager. Skaggs’ act of discrimination forced Whatley from his management position into blue-collar jobs that required strenuous physical labor resulting in injury to his back.”

- (3) In *Wells v. North Carolina Board of Alcohol Control*, 714 F.2d 340 (4th Cir. 1983), the Plaintiff prevailed in a race discrimination claim under Title VII. The defendant failed to promote the plaintiff from a stock clerk position to a sales clerk position. After the plaintiff was not promoted, he sustained a back injury. Plaintiff returned to work with Defendant and asked for a light duty assignment, but that assignment was refused so plaintiff resumed his prior position as stock clerk. Plaintiff’s doctor then requested, while plaintiff was off in September 1975 for further back treatment, that plaintiff not be required to do certain types of heavy lifting, but defendant refused that request and responded to a further request for light duty by suggesting that plaintiff either take a leave of absence or “find yourself another job.” 714 F.2d at 341-42. Plaintiff then did not return to work with defendant, and defendant later argued that there was no constructive discharge. Plaintiff claimed back pay for his period of unemployment after he refused to return to work in September 1975. The Fourth Circuit ruled that plaintiff was entitled to back pay for his unemployment period after September 1975, *regardless* of whether the refusal of light duty constituted a constructive discharge. The

Court reasoned: "Had he not been wrongfully denied that promotion to relatively light work, it may reasonably be inferred that he would not have suffered an injury to his back or that any back problem would have been less severe. There was testimony indicating that the back injury was a result of strain from lifting, not of any degenerative or chronic disease. Wells reasonably ended his employment for reasons beyond his control, reasons which were causally linked to the defendant's wrongful denial of a promotion." 714 F.2d at 342.

- (4) In *Mason v. Association for Independent Growth*, 817 F. Supp. 550 (E.D. Pa. 1993), plaintiff asserted a race and age discrimination under federal law, 42 U.S.C. § 1981; 29 U.S.C. § 621 *et seq.*) Plaintiff alleged that she should have been promoted from "Project Director" to "Assistant Residential Director." Defendant failed to promote her to the higher position. Plaintiff was then traveling by car from one field site to another in her regular position (Project Director) and was injured in an automobile accident. 817 F. Supp. at 552-53. For the next 2 and ½ years plaintiff was disabled and out of work except for about 5 months during that time. 817 F. Supp. at 553. Plaintiff (Mason) argued that "she would not have sustained the income-reducing injury had she been promoted to a job that required significantly less driving; therefore, on Mason's view, to be made whole she must be awarded full back pay for the periods of work she missed due to disability." 817 F. Supp. at 554. In response to the argument that it was excessively speculative to determine

whether Plaintiff would not have been hurt driving to work had she received the promotion she sought, the Court stated: "back pay determinations inevitably involve recreating the conditions that would have existed absent the unlawful discrimination, and 'this process of recreating the past will necessarily involve a degree of approximation and imprecision.'" 817 F. Supp. at 555 (quoting *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 372 (1972)). The Court further stated that the "risk of lack of certainty with respect to projections of lost income must be borne by the wrongdoer, not the victim." 817 F. Supp. at 555 (quoting *Goss v. Exxon Office Sys. Co.*, 747 F.2d 885, 889 (3d Cir. 1984)), and any "ambiguity in what the claimant would have received but for discrimination should be resolved against the discriminating employer." 817 F. Supp. at 555 (quoting *Rasimas v. Michigan Dep't of Mental Health*, 714 F.2d 614, 628 (6th Cir. 1983), *cert. denied*, 466 U.S. 950 (1984)). The Court, in the context of the pending summary judgment motion, held as follows: "Given the important reasons of statutory policy for resolving doubts relating to damages in favor of the innocent employee, it would be permissible to infer that Mason [Plaintiff] would not have suffered the disabling injuries had she been promoted and that she therefore should be reimbursed for salary lost due to the accident, provided that (1) Mason's injury was sustained during the course of her employment, and (2) the Project Director job entailed significantly more driving than the Assistant Residential Director position. Because these two provisos are

essentially questions of fact, it will be up to the jury, if it finds that TAIG [Defendant] discriminatorily denied Mason a promotion, to determine whether plaintiff has proven by a preponderance of the evidence that (1) Mason's injury was sustained during the course of her employment and (2) the Project Director job entailed significantly more driving than the Assistant Residential Director position. If the jury finds that these conditions are met, then the back pay award will not be offset by the stated Project Director salary that Mason never received due to the automobile accident. Only by taking account of such losses will the back pay award serve its purpose of 'completely redressing the economic injury the claimant has suffered as a result of discrimination.'" 817 F. Supp. at 555-56 (quoting *Rasimas v. Michigan Dep't of Mental Health*, 714 F.2d 614, 626 (6th Cir. 1983), *cert. denied*, 466 U.S. 950 (1984)).

- (5) In *Grundman v. Trans World Airlines, Inc.* 1990 U.S. Dist. LEXIS 13940; 54 F.E.P. 224 (S.D.N.Y. 1990), the jury found TWA liable for age discrimination and the damages were tried to the Judge. 1990 U.S. Dist. LEXIS at *1. Plaintiff (a pilot) left Defendant TWA, went to work for Eastern Airlines, and fell asleep driving home from work at Eastern. The resulting auto accident left Plaintiff unable to work as of the time of trial (from 1986 to 1990). 1990 U.S. Dist. LEXIS at *2. TWA argued that it could not be responsible for the disability and unemployment period following the accident: "TWA argues that since this accident disabled plaintiff from further employment it must be assumed that plaintiff would have been unable to

continue his work for TWA after that accident. TWA contends that back pay should be cut off as of July 17, 1986.” 1990 U.S. Dist. LEXIS at *2-3. The Court observed that TWA’s argument would be valid if the accident was from a purely personal auto ride, like going to a movie: “Certainly, if plaintiff had experienced an accident of the kind which could have occurred whether he was working for TWA or Eastern and anyone else - for instance, on the way to a party or a movie - then it might well be found that this kind of an accident would have put a stop to his work at TWA just as it did to the work at Eastern.” 1990 U.S. Dist. LEXIS at *3. However, the Court held that the accident was work-related (from driving home) and that the circumstances were that the subsequent job at Eastern substantially increased the risk of such an accident: “the accident was not of the kind referred to above. The evidence indicates that the accident occurred when plaintiff was returning home from his work at Eastern. Plaintiff has testified that his hours at Eastern were different from what they had been at TWA, and that, due to these different working hours, he fell asleep on the road and thus experienced the serious accident. The court accepts this testimony and finds that the accident was associated with his change of employment from TWA to Eastern. There is no indication that there would have been such an accident had plaintiff remained with TWA.” 1990 U.S. Dist. LEXIS at *3. The Court then set out the consequences of this finding for calculating back pay: “It must therefore be assumed, for purposes of calculating damages, that if plaintiff had not suffered the discrimination found by the jury, he

would have continued working at TWA past the time of the accident of July 1986, and would have continued such work at least until he reached the age of 65 in 1994.” 1990 U.S. Dist. LEXIS at *3-4.

- (6) In *Martin v. Department of the Air Force*, 72 M.S.P.R. 88 (1996), the plaintiff was wrongfully discharged from his position as Aircraft Mechanic at Warner Robins Air Logistics Center. The Merit Systems Protection Board (“MSPB”) applied the federal Back Pay Act of 1966, 5 U.S.C. § 5596(b)(1), the language of which was consistent with the National Labor Relations Act, Title VII of the Civil Rights Act of 1964, and the Age Discrimination in Employment Act. 72 M.S.P.R. at *7. After plaintiff was removed from his Air Force job, we took a series of non-governmental jobs, and was injured on the last job, and suffered a disability period because of his injury. 72 M.S.P.R. at *1-2. The question was whether his back pay award should include the lost income from his injury-related disability period. The MSPB stated the general rule that “where an employee is incapable of performing work for the period for which back pay is sought, it generally follows that the employee would not be entitled to back pay because he has not lost anything which he would have earned but for the wrongful separation.” 72 M.S.P.R. at *5. However, the MSPB distinguished the general rule from the situation where an inability to work is caused by an interim job: “where, as here, the employee was injured in the course of interim employment which he would not have taken but for the wrongful separation, and where he receives less in state workers' compensation payments

than he would have earned in his former position, he has in fact lost something he would otherwise have earned." 72 M.S.P.R. at *5. Accordingly, "to fully effect the make-whole remedy of the Back Pay Act, we find that the appellant is entitled to back pay for the period he was disabled due to an on-the-job injury at his replacement employment." 72 M.S.P.R. at *6. The MSPB discussed *American Manufacturing Company of Texas*, 167 NLRB 520, 66 L.L.R.M. 1122 (1967), in which the NLRB "awarded back pay to an improperly separated employee for a period of disability resulting from an accident incident to his interim employment." 72 M.S.P.R. at *7. The MSPB explained the logic of the NLRB's decision: "The NLRB noted the general rule that employees are not allowed back pay for periods of disability but determined that the nature of the disability may require deviation from the general rule. The NLRB explained that where the inability to work is attributable to an illness, such as influenza, disallowance of back pay is reasonable because the origin of the illness is not usually known and the illness is likely to have occurred even in the absence of improper employer actions. In contrast, the causes of ailments suffered in industrial accidents, are known and are attributable to events which most likely would not have taken place had the employer not improperly separated the employee. Thus, the NLRB determined that an award of back pay would be appropriate where the interim disability is closely related to the nature of the interim employment or arises from the unlawful discharge and is not a usual incident of the hazards of living generally. 72

M.S.P.R. at *7-8 (discussing *American Manufacturing Company of Texas*, 167 NLRB 520, 522, 66 L.L.R.M. 1122 (1967)).

- (7) In *American Manufacturing Company of Texas*, 167 N.L.R.B. 520 (1967), the plaintiff was wrongfully terminated and went to work for another company. At the new job, the plaintiff suffered an injury and experienced a period of disability. The NLRB concluded that American Manufacturing was liable for the lost income suffered during the disability period caused by the injury at the subsequent job. The plaintiff (CR Wallace) was wrongfully terminated and obtained interim employment, but then was “unable to work because of an industrial accident” at the interim employer. 167 NLRB at 522. The Defendant (American Manufacturing Company) contended that it could not be held responsible for the lost income period resulting from an injury during interim employment. The NLRB rejected that argument, holding: “Where an interim disability is closely related to the nature of the interim employment or arises from the unlawful discharge and is not a usual incident of the hazards of living generally, the period of disability will not be excluded from backpay.” 167 NLRB at 522. The NLRB noted disability periods resulting from *illnesses* which are not tied to a specific employer will not be included in back pay periods assessed against the employer. However: “The same underlying reasoning does not . . . apply to periods of illness which occur because of industrial accidents suffered during the course of interim employment or are otherwise attributable to the unlawful

conduct of the Respondent. The causes of such ailments are known and attributable to events which would not have taken place, or to environmental factors which would not have been present, had the employee not been unlawfully removed from his employment in the Respondent's plant. Although other extended disabilities might have occurred absent discharge, this is not a normal expectancy, and hence a discriminatee would not reasonably have been expected to suffer the industrially caused ailment and the consequent pay loss if he had retained his former employment.” 167 NLRB at 522.

- E. What is “mitigating income” which will be subtracted from back pay compensation?
1. Definition of “mitigating income”; what is included and not included
 - a. In *Mace v. Charleston Area Medical Center Foundation, Inc.*, 188 W. Va. 57, 66, 422 S.E.2d 624, 633 (1992) (emphasis added), the Court gave this somewhat indirect definition of mitigating income: “Actual wages received, regardless of their source, are always an offset to damages *unless they were earned in a job entirely compatible with continued employment under the contract.*”
 - b. **Don’t count “surplus” earnings from a subsequent, better-paying job.** As is discussed below, sometimes the plaintiff gets a better-paying, post-defendant job. Does the employer, in effect, get a “credit” against other lost income for what some courts call the “surplus” earnings? The answer appears to be consistently no. In
 - c. Furthermore, as is discussed elsewhere in this article, **mitigating income is *not* used to reduce the plaintiff’s lost income damages where the termination was malicious.** *Mace v.*

Charleston Area Medical Center Foundation, Inc., 188 W. Va. 57, 66, 422 S.E.2d 624, 633 (1992) (“we also emphasized that “in those cases where an employee has been wrongfully discharged out of malice, by which we mean that the discharging agency or official willfully and deliberately violated the employee's rights under circumstances where the agency or individual knew or with reasonable diligence should have known of the employee's rights, then the employee is entitled to a flat back pay award.”)

2. “Moonlighting” job

a. A plaintiff’s “moonlighting” earnings “will be offset against his backpay award if he would have been unable to hold the ‘moonlighting’ job simultaneously with the job he lost because of discrimination.” In *Whatley v. Skaggs Companies, Inc.*, 508 F. Supp. 302, 303 (D. Colo. 1981), *aff’d in pertinent part*, 707 F.2d 1129 (10th), *cert. denied*, 464 U.S. 938 (1983).

(1) In *Whatley*, the Court found that Plaintiff’s management job would involved long hours, effectively preventing him from “moonlighting.” Therefore, the Plaintiff’s subsequent moonlighting income was treated as an offset against his back pay damages. However, Defendant was no entitled to an offset for Plaintiff’s subsequent “self-employment earnings” in helping his wife operate a family business, because Plaintiff “could easily have performed” that work in his “spare time.” 508 F. Supp at 303-304.

b. In *Mace v. Charleston Area Medical Center Foundation, Inc.*, 188 W. Va. 57, 66, 422 S.E.2d 624, 633 (1992) (emphasis added), the Court stated that post-defendant wages are counted as mitigating income “unless they were earned in a job entirely compatible with continued employment under the contract.”

3. The better paying job. What happens when, for part of the post-termination period, plaintiff earns more than at defendant-employer?
 - a. Let's say a plaintiff is suing for sex discrimination, based on being terminated. What if plaintiff earns less than the defendant-employer compensation for one year, and then she gets a new job and for the next year makes substantially more than then wages at the defendant-employer. *Does the "surplus" at the second job operate to reduce the plaintiff's damages? The answer is "no".*
 - b. Some cases have addressed this issue with the following terminology in the situation where, for part of the post-defendant employment history, the plaintiff earns *more* than she earned at the defendant-employer:
 - (1) A "**periodic**" method of calculating back pay takes the mitigation time period where the plaintiff earned *less* at the mitigating jobs, and subtracts during those periods the lesser mitigating income from the estimate of what plaintiff *would have earned* for the defendant employer had she stayed working for the defendant-employer. For those periods in which the plaintiff earned *more* than with the defendant-employer, she does not accrue any lost income, and the "surplus" that the plaintiff earned may not be used as a "credit" against the loss of earnings the plaintiff suffered during the lower income periods--in other words, the "surplus" drops out of the picture and is irrelevant to the calculation of damages.
 - (2) An "**aggregate**" method of calculating back pay takes, for the entire time period from the termination until the date of trial, all of the income plaintiff earned from mitigating jobs, and subtracts that from the estimate of what plaintiff would have

earned from the defendant-employee had she continued to work there. This method would apply the “surplus” from a job paying more than defendant-employer and would reduce the plaintiff’s recoverable damages.

- (3) I have been unable to find any decision which adopts the “aggregate” method. In a few instances where a trial court applied the aggregate method, the decision was reversed by a court of appeals. I cannot find any published decision which adopts the aggregate method.
- (4) Cases discussing and rejecting the “aggregate” back pay methodology:
 - (a) *Wirtz v. Kansas Farm Bureau Services, Inc.*, 311 F. Supp. 2d 1197; 2004 U.S. Dist. LEXIS 5393 (D. Kan. 2004) (trial court rejected employer’s proposed aggregate methodology, stating that employer presented no authority supporting that methodology)
 - (b) *Godinet v. Management and Training Corporation*, 56 Fed. Appx. 865, 2003 U.S. App. LEXIS 184 (10th Cir. 2003) (affirming trial court’s rejection of aggregate method)
 - i) P.871: “Defendant would have applied an aggregate approach to calculation of back pay, allowing earnings in mitigating employment in one period (a year) to reduce wages in other years. Accordingly, in this case, the excess amount earned by Plaintiff at Oceanside subsequent to

June 1, 1994, would have offset the back pay award for the prior period of July, 1993, through May, 1994, thereby decreasing Plaintiff's award to zero. Defendant offered no direct authority applying the aggregate mitigation method; it merely cited *Wulf v. City of Wichita*, 883 F.2d 842, 871 (10th Cir. 1989), where, in a footnote, we stated "the relevant time period for calculating an award of back pay begins with wrongful termination and ends at the time of trial" (internal quotations omitted)."

- ii) P.872: "Calculating lost wages by the periodic mitigation method is well supported in case law. See, e.g., *Darnell v. City of Jasper, Alabama*, 730 F.2d 653, 656-57 (11th Cir. 1984) (applying periodic basis under Title VII); *Eichenwald v. Krigel's, Inc.*, 908 F. Supp. 1531, 1567 (D. Kan. 1995) (same); *Hartman v. Duffey*, 8 F. Supp. 2d 1, 6 (D. D.C. 1998) (noting "periodic mitigation is the preferred method for determining back pay liability in discrimination cases"). Given the district court's careful comparison of the two methods and final

calculation (and assuming, arguendo, the jury instructions on back pay are subject to our review), the district court acted within the scope of its equitable discretion in awarding Plaintiff \$ 21,251 in back pay."

- (c) *Darnell v. City of Jasper, Alabama*, 730 F.2d 653, 656-657, 1984 U.S. App. LEXIS 23301 (11th Cir. 1984) (reversing the district court's denial of back pay and rejecting the "aggregate" method adopted by the trial court). There is a twist to the decision in *Darnell* that may complicate the picture. The *Darnell* court stated that the Title VII damage provisions are modeled after the NLRB damage provisions, and that courts applying the NLRB used a "quarterly" approach which added all interim earned per quarter and subtracted them from that quarter's estimate of earnings with the defendant, and the interim earnings from *other quarters* would have no effect on the earnings for the quarter in question. The *Darnell* court also said that an annualized basis for performing the calculations could also be appropriate, and it further said that there is no particular period that is required by the court's holding. Under this period approach, using a quarter for illustration, "surplus" earnings for a particular quarter would reduce the compensable back pay for *that quarter*, but

would not reduce the back pay attributable to *other quarters*.

- (d) The *Darnell* Court explained this methodology by citing one of the NLRB cases: "Loss of pay shall be determined by deducting from a sum equal to that which [the employee] would normally have earned for each such quarter or portion thereof, [his] net earnings, if any, in other employment during that period. Earnings in one particular quarter shall have no effect upon the back-pay liability for any other quarter." *Darnell v. City of Jasper, Alabama*, 730 F.2d 653, 657 (11th Cir. 1984) (quoting *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 345 (1953) (quoting *F.W. Woolworth Co.*, 90 N.L.R.B. 289, 292-93 (1950))).
- (e) *Eichenwald v. Krigel's, Inc.*, 908 F. Supp. 1531, 1567 (D. Kan. 1995) (applying periodic calculation method in Title VII cases, rejecting employer's proposed aggregate method) [although this decision is not particularly clear from the opinion; there is a companion opinion, also at *Eichenwald v. Krigel's, Inc.*, 908 F. Supp. 1531, 1564 (D. Kan. 1995), and at ¶ 30, and in the paragraphs leading up to it, the methodology is clear that the trial court used an annual periodic methodology]
- (f) *Hartman v. Duffey*, 8 F. Supp. 2d 1, 6 (D. D.C. 1998) (noting "periodic mitigation is the preferred method for determining back pay liability in discrimination cases").

P.6: "The Special Master's conclusion [rejecting the aggregate method] is solidly grounded in the case law and in the public policy underlying Title VII. Title VII's back pay provision was expressly modeled after that of the National Labor Relations Act, see *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 419, 45 L. Ed. 2d 280, 95 S. Ct. 2362 (1975). The Supreme Court upheld the periodic approach to mitigation, *NLRB v. Seven-up Bottling Co. of Miami, Inc.*, 344 U.S. 344, 97 L. Ed. 377, 73 S. Ct. 287 (1953), reasoning that aggregation would give employers the incentive to delay reinstatement for as long as possible, "since every day the employee put in on the better paying job [would] reduce[] back pay liability." *Id.* at 347. Because timely reinstatement is an important remedy under Title VII, periodic mitigation is the preferred method for determining back pay liability in discrimination cases. See *Darnell v. City of Jasper, Alabama*, 730 F.2d 653, 656-57 (11th Cir. 1984) (district court erred in using aggregate rather than quarter-by-quarter approach); *Berger v. Iron Workers*, 1994 U.S. Dist. LEXIS 5342, 1994 WL 151292, *8 (D. D.C. Apr. 14, 1994) (adopting year-by-year approach); *Green v. United States Steel Corp.*, 640 F. Supp. 1521, 1553 (E.D. Pa. 1986) (same), *aff'd in part, rev'd in part*, 843 F.2d 1511 (3rd Cir. 1988), vacated on other grounds, 490 U.S. 1103 (1989);

see also *Leftwich v. Harris-Stowe State College*, 702 F.2d 686, 693 (8th Cir. 1983) (ADEA case); *Dyer v. Hinky Dinky, Inc.*, 710 F.2d 1348, 1350-52 (8th Cir. 1983) (Vietnam Era Veterans Act case)."

- (g) *Matthews v. A-1, Inc.*, 748 F.2d 975, 978-979 (1984) (affirming trial court's refusal to deduct higher earnings from interim period from lost income damages)
- (h) *Taddeo v. Ruggiero Farenga, Inc.*, 102 F. Supp. 2d 197 (S.D.N.Y. 2000)
 - i) The court refined the definition of "interim earnings" to make it clear that the "surplus" earnings do not get counted as mitigating income: "The word 'interim', although frequently used, is less than fully clear. It denotes the period during which injury is sustained by the plaintiff, and thus requires two components: (1) the time period between the firing and another event (e.g., court judgment, offer of reinstatement, or better employment), during which he obtained (2) lower earnings than he did while employed by defendant. Accordingly, "interim" earnings are by definition less than those previously paid, and are applied to mitigate a continuing injury. If (despite reasonable

efforts) plaintiff has no earnings in that period, nothing mitigates his damages. The "interim" period ends and damages for back pay cease to accrue once the employee obtains comparable or better paying employment or if the employer makes an unconditional offer to reinstate the employee." 102 F. Supp. 2d at 198.

ii) Once the Plaintiff, took a higher paying job (after leaving defendant-employer), that terminated the back pay period, but the higher earnings did not reduce the awardable back pay: "Plaintiff's acceptance of more favorable employment acted to terminate the accrual of further back pay damages, not to eliminate those already suffered during the nineteen months that he was unemployed and had no earnings." 102 F. Supp. 2d at 198.

(i) *Sims v. Mme. Paulette Dry Cleaners*, 638 F. Supp. 224 (S.D.N.Y. 1986): The plaintiff sought back pay for the period from May 1, 1982, to mid-July 1983, when she secured employment elsewhere. The defendant argued that she was not entitled to back pay for any of 1983, because the salary she earned during the last six months

of 1983 exceeded what she would have earned during an entire year with the defendant. The court rejected this argument and held that the subsequent earnings did not constitute “interim earnings” under the statute. Furthermore, the court noted that such an argument is inconsistent with Title VII's goal of barring future discrimination and ignores the hardship suffered by the plaintiff during the six months she was unemployed in 1983.

- F. Do unemployment, worker's compensation, and disability insurance benefits reduce plaintiff's damages? No.
1. **Unemployment compensation benefits** in West Virginia do not reduce the plaintiff's lost income damages.
 - a. In *Powell v Wyoming Cablevision, Inc.*, 184 W. Va. 700, 403 S.E.2d 717, 725 (1991), the Court reasoned: “Benefits of this character are intended to alleviate the distress of unemployment and not to diminish the amount which an employer must pay as damages for the wrongful discharge of an employee.” 403 S.E.2d at 725 (quoting *Billetter v. Posell*, 94 Cal. App. 2d 858, 860, 211 P.2d 621, 623 (1949)).
 - b. *Orr v. Crowder*, 173 W. Va. 335, 351, 315 S.E.2d 593, 610 (1983) (trial court did not err in holding that, under the collateral source rule, unemployment benefits could not be used to reduce plaintiff's damages). *Orr* deals with a college president suing under 42 U.S.C. § 1983 in connection with a claim of retaliation for exercise of First Amendment rights, but it is likely that its damage principles would be applied to other West Virginia employment law.
 2. **Worker's compensation benefits** in West Virginia so not reduce the plaintiff's lost income damages

- a. Orr v. Crowder, 173 W. Va. 335, 351, 315 S.W.2d 593, 610 (1983) (“We held in Jones v. Laird Foundation, Inc., 156 W. Va. 479, 195 S.E.2d 821 (1973), that HN23the collateral source rule applies to workmen’s compensation benefits and cannot be used to reduce damages. See also Ilosky v. Michelin Tire Corp., 172 W. Va. 435, 307 S.E.2d 603 (1983); Ellard v. Harvey, 159 W. Va. 871, 231 S.E.2d 339 (1976). We conclude that the trial court did not commit error in holding that unemployment benefits may not be used to reduce an award of damages under the collateral source rule. See generally 22 Am. Jur. 2d Damages § 209 (1965); Annot., 4 A.L.R.3d 535 (1965).”)
 - b. In other jurisdictions, however, worker’s compensation benefits have been ruled to be an offset against plaintiff’s lost income damages. In other words, they reduce the plaintiff’s damages.
 - (1) *Marinelli v City of Erie*, 25 F. Supp 2d 674, 679 (W.D. Pa. 1998) (worker’s compensation benefits reduced plaintiff’s damages)
 - (2) *Mason v. Association for Independent Growth*, 817 F. Supp. 550 (E.D. Pa. 1993) (worker’s compensation benefits distinguished from unemployment compensation and social security benefits, and reduced plaintiff’s damages)
3. **Private disability insurance benefits** probably do not reduce the plaintiff’s damages.
- a. Orr v. Crowder, 173 W. Va. 335, 351, 315 S.W.2d 593, 610 (1983) (“The collateral source rule normally operates to preclude the offsetting of payments made by health and accident insurance companies or other collateral sources as against the damages claimed by the injured party.”) (quoting *Ratlief v. Yokum*, 167 W. Va. 779, 280 S.E.2d 584, 589-90 [syllabus point 7] (1981)). While this discussion was specifically on

- “health and accident insurance,” the Court’s broad discussion of the collateral source rule would very likely apply to disability insurance benefits.
- b. Courts in other jurisdictions in employment discrimination cases have held that such benefits are from a collateral source and should therefore not be subtracted from the plaintiff’s damages. See *Whatley v. Skaggs Companies, Inc.*, 707 F.2d 1129, 1138-39 (10th Cir.), *cert. denied*, 464 U.S. 938 (1983)
- G. Uncertainties and ambiguities involved in calculating lost income must be resolved against the wrongdoer
1. “The risk of lack of certainty with respect to projections of lost income must be borne by the wrongdoer, not the victim,” *Goss v. Exxon Office Sys. Co.*, 747 F.2d 885, 889 (3d Cir. 1984);
 2. “[A]ny ambiguity in what the claimant would have received but for discrimination should be resolved against the discriminating employer,” *Rasimas v. Michigan Dep’t of Mental Health*, 714 F.2d 614, 628 (6th Cir. 1983), *cert. denied*, 466 U.S. 950 (1984);
 3. “‘Backpay should be awarded even where the precise amount of the award cannot be determined,’ with any ambiguities being resolved against the discriminating employer.” *Wooldridge v. Marlene Indus. Corp.*, 875 F.2d 540, 549 (6th Cir. 1989) (quoting *Rasimas v. Michigan Dep’t of Mental Health*, 714 F.2d 614, 628 (6th Cir. 1983), *cert. denied*, 466 U.S. 950 (1984));
 4. *McKenzie v. Sawyer*, 684 F.2d 62, 77 (D.C. Cir. 1982) (all doubts in calculating damages “are to be resolved against the proven discrimination rather than the innocent employee”);
 5. *EEOC v. Blue and White Serv. Corp.*, 674 F. Supp. 1579, 1580 (D. Minn. 1987) (“Doubts about plaintiff’s entitlement to back pay and its amount should be resolved against the employer”).
- H. Both emotional distress and punitive damages are potentially recoverable in employment discrimination cases

NOVEMBER 21, 2002 (REV. 3/10/08) "SPOTTING EMPLOYMENT ISSUES" FOR THE MCBA

1. The West Virginia Supreme Court had ruled that emotional distress and punitive damages may not *both* be recoverable, absent proof of physical injury or testimony by mental health professional, in cases based on intentional infliction of emotional distress. *See Tudor v. Charleston Area Medical Center*, 203 W. Va. 111, 506 S.E.2d 554 (1997).
 2. The question was whether that rule applied beyond the cause of action of intentional infliction of emotional distress.
 3. The West Virginia Supreme Court said "no" in *Sheetz*, see *Sheetz, Inc. v. Bowles Rice McDavid Graff & Love, PLLC*, 547 S.E.2d 256 (W. Va. 2001). That case dealt with employment discrimination, and physical injury is *not* necessary for the plaintiff to be entitled to *both* emotional distress compensation and punitive damages; and neither is it necessary to have proof by a mental health professional.
- I. Punitive damages ratios
1. History of largely ineffective constitutional challenges to large punitive damages awards
 - a. *TXO Production Corp. v. Alliance Resources Corp.*, 187 W. Va. 457, 419 S.E.2d 870 (1992), *aff'd*, 509 U.S. 443 (1993). The \$10,000,000 in punitive damages was supported by only \$19,000 of actual damages in a slander of title case.
 2. The landscape significantly changes with *State Farm Mutual Automobile Insurance Company v. Campbell*, 123 S. Ct. 1513 (2003). Potential changes of the law in the State Farm decision:
 - a. **Can net worth be considered?** "*TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 462, n. 8, 125 L. Ed. 2d 366, 113 S. Ct. 2711 (1993), noted that "under well-settled law," a defendant's "wrongdoing in other parts of the country" and its "impressive net worth" are factors "typically considered in assessing punitive damages." It remains to be seen

whether, or the extent to which, today's decision will unsettle that law."

- b. **Four to one, or nine to one ratios, may be the limit generally.** "Turning to the second *Gore* guidepost, we have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. *Gore, supra*, at 582 ("We have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual *and potential* damages to the punitive award"); *TXO, supra*, at 458. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. *Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.* In *Haslip*, in upholding a punitive damages award, we concluded that an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety. *499 U.S.*, at 23-24. We cited that 4-to-1 ratio again in *Gore*. *517 U.S.*, at 581. The Court further referenced a long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish. *Id.*, at 581, and n. 33. While *these ratios are not binding*, they are instructive. They demonstrate what should be obvious: *Single-digit multipliers are more likely to comport with due process*, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1, *id.*, at 582, or, in this case, of 145 to 1." (Emphasis added)
- c. **Higher ratios may be OK in limited circumstances.** "Nonetheless, because there are *no rigid benchmarks* that a punitive damages

award may not surpass, *ratios greater than those we have previously upheld may comport with due process where "a particularly egregious act has resulted in only a small amount of economic damages."* *Ibid.*; see also *ibid.* (positing that a higher ratio *might* be necessary where "the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine"). *The converse is also true, however. When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.* The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." (Emphasis added)

- d. **Perhaps only two to one on remand.** "An application of the *Gore* guideposts to the facts of this case, especially in light of the substantial compensatory damages awarded (a portion of which contained a punitive element), likely would justify a punitive damages award *at or near the amount of compensatory damages*. The punitive award of \$ 145 million, therefore, was neither reasonable nor proportionate to the wrong committed, and it was an irrational and arbitrary deprivation of the property of the defendant. The proper calculation of punitive damages under the principles we have discussed should be resolved, in the first instance, by the Utah courts." (Emphasis added)
- e. **Prior acts in recidivist theory must be very similar.** "The same reasons lead us to conclude the Utah Supreme Court's decision cannot be justified on the grounds that State Farm was a recidivist. Although "our holdings that a recidivist may be punished more severely than a first offender recognize that repeated misconduct is more reprehensible than an individual instance of malfeasance," *Gore, supra*, at 577, in the context of civil actions courts *must ensure the*

conduct in question replicates the prior transgressions. TXO, 509 U.S., at 462, n. 28 (noting that courts should look to “the existence and frequency of similar past conduct”) (quoting *Haslip, 499 U.S., at 21- 2*.)”

3. Cases applying *State Farm*
 - a. The Utah Supreme Court decided *Smith v. Fairfax Realty, Inc.*, 2003 UT 41, 483 Utah Adv. Rep. 15, 2003 Utah LEXIS 103 (Utah October 3, 2003) after the US Supreme Court’s decision in *State Farm*, and continued to consider net worth information, without any real consideration of whether that practice is thrown into question by *State Farm*. The ratio affirmed by the Utah Court was about 5 to 1. Around \$410,000 in actuals plus about \$600,000 in prejudgment interest, and \$5.5m in punitives. The Utah SC affirmed the punitives but remitted the pre-judgment interest, so that the punitive to actual ratio will end up being higher on remand.
 - b. *Romo v. Ford Motor Company*, 113 Cal. App. 4th 738, * (Court of Appeals, 5th Appellate District 2003) applied *Campbell* to reduce punitive damages from \$290,000,000 to \$23.7 million, with a roughly 5 to 1 ratio.
 - c. *Williams v. Philip Morris, Inc.*, 193 Ore. App. 527, 92 P.3d 126 (Or. Ct. App. 2004). In a products liability case filed by a smoker, the jury awarded \$821,485 in compensatory damages, and \$79.5 million in punitive damages. The lower Oregon appellate court affirmed the punitive damages award, and the Oregon Supreme Court refused to hear the case. The Supreme Court on an application for certiorari ordered the lower court to reconsider the matter in light of *State Farm*, and the Oregon Court of Appeals restored the \$79.5 million punitive damage award.

XX. Procedural issues and other issues

A. Bifurcation of punitive damages

1. Earlier West Virginia Supreme Court decisions were not particularly sympathetic to defense efforts to bifurcate punitive damages. See *State of West Virginia v. Hott*, 188 W. Va. 349, 424 S.E.2d 584 (1992) (sexual harassment; bifurcation of punitive damages was not appropriate where most of the prejudicial evidence came out on liability, and only punitive-specific evidence was net worth and prior acts of harassment); *Barlow v. Hester Industries, Inc.*, 198 W. Va. 118, 479 S.E.2d 628 (1996) (trial court’s refusal to bifurcate affirmed on appeal; suggests party seeking bifurcation must show “compelling prejudice” with “unitary” trial)
 2. However, in the recent decision of *Rohrbaugh v. Wal-Mart Stores, Inc.*, 2002 W. Va. LEXIS 166 (2002), the Supreme Court applied a more receptive analysis to bifurcation:
 - a. “Generally, trial courts are permitted broad discretion in managing their cases and deciding bifurcation matters. Rule 42(c) of the West Virginia Rules of Civil Procedure provides that “the court, in furtherance of convenience or to avoid prejudice ... may order a separate trial of any ... separate issue[.] That is not to say, however, that bifurcation is appropriate in every instance. Rather, a showing must be made that a separation of litigation is warranted under the circumstances of the particular case.” The bifurcation must “promote the recognized goals of judicial economy, convenience of the parties, and the avoidance of prejudice, the overriding concern being the provision of a fair and impartial trial to all litigants.”
 - b. The Supreme Court then applied an abuse of discretion standard.
- B. All portions of employment litigation damages are taxable, and plaintiff must pay taxes on the percentage paid to his or her attorneys
1. In *Young v. Commissioner of Internal Revenue*, 240 F.3d 369 (4th Cir. 2001), the 4th Circuit ruled that the plaintiff in an employment discrimination case must pay

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- taxes on 100% of the recovery, even if 40% (or whatever) was assigned to his attorneys as a fee
2. The taxpayer can deduct most but not all of the attorneys' fees as a "miscellaneous deduction" on Schedule C
- C. Employers are increasing contending that they must withhold (FICA etc) from at least a portion of any settlement
1. Traditionally, settlement funds were not treated as something from which employers had to deduct the standard federal withholding amounts
 2. However, in recent years employers have contended that the IRS may come after them for failure to withhold, and charge the employer interest and penalties for amounts which were not withheld
 3. What sometimes happens is that a certain part of the settlement is allocable to lost income (as opposed to emotional distress), and the FICA and other amounts are withheld from that portion

XXI. Jury charges

- A. Jury charges under the WV Human Rights Act
1. *Haynes v. Rhone-Poulenc, Inc.*, 206 W. Va. 18; 521 S.E.2d 331, 339 n11 (1999) contains a complete set of questions submitted to the jury on liability and damages

XXII. Various employment litigation issues

- A. Eleventh Amendment
1. *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000) (Application of ADEA to state governments was not a permissible use of Congress' powers under § 5 of the 14th Amendment; therefore ADEA did not abrogate state's immunity; Commerce Clause power does not empower Congress to subject states to suits by private individuals)
 2. *Nevada Department of Human Resources v. Hibbs*, (S. Ct. June 2003) (11th Amendment does not bar suits against stated under FMLA)
- B. Bankruptcy Issues

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1. Discharge issues
 - a. Most debts can be discharged in bankruptcy. However, 11 U.S.C. § 523(a)(6) says that an individual is not discharged for any debt for a "willful and malicious injury".
 - b. *Kawaauhau v. Geiger*, 523 U.S. 57 (1998) held that a *medical malpractice claim* was dischargeable in bankruptcy where it was based on negligent and reckless conduct.
 - c. Several courts have addressed and split over the issue of whether sexual harassment claims are necessarily based on willful and malicious conduct, so that they are not dischargeable in bankruptcy.
 - (1) Some courts concluded that a Title VII finding of sexual harassment automatically fulfills the "willful and malicious" standard (see *In re Clifford F. Smith*, 270 B.R. 544 [Bankr. D. Mass 2001]; *In re Kelly*, 238 B.R. 156 [Bankr. E.D. Mo 1999]; and *In re Tompkins*, 290 B.R. 194 [Bankr. W.D.N.Y., 2003]). Therefore, they found, damages arising from Title VII violations are not dischargeable in bankruptcy.
 - (2) On the other hand, one court has held to the contrary, so that a sexual harassment judgment was dischargeable. In *In re Busch*, 311 B.R. 657 (Bankr. N.D.N.Y. 2004), the Judge held that sexual harassment necessarily involves *malice*, but does not necessarily involve an *intent to injure*.
 - d. On claims other than sexual harassment, it is much more likely that the bankruptcy court will conclude that the judgment is dischargeable [get cites]
 - e. Settlements and discharge issues
2. Disclosure issues

- a. If a debtor has a claim that he has been the victim of discrimination or some other wrongful discharge, then that claim is a contingent claim in bankruptcy and must be disclosed in the schedule of assets. This is true even if no lawsuit has been filed, and even if no administrative charge has been filed. In fact, this is true even if the plaintiff/debtor has made no public assertion of the claim of any sort. The consequence of failing to disclose the claim, to begin with, is a potential accusation of a criminal filing of false schedules of assets [get cites]
3. Standing issues
 - a. Any personal bankruptcy in which a trustee is appointed divests ownership of a discrimination claim from the original plaintiff, and places title and standing over the discrimination claim in the hands of the trustee. If the plaintiff upon filing bankruptcy does not have a trustee appointed, then the plaintiff retains standing in and ownership over the discrimination claim. As a result of this situation, a plaintiff who files bankruptcy may see his bankruptcy trustee take over prosecution of the discrimination case [get cases]
- C. Preemption issues
1. Section 301 of the Labor Management Relations Act (LMRA)
 - a. Any claim based on state law involving the interpretation of a collective bargaining agreement, including breach of contract claims, are pre-empted by Section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185(a), *Harless v. CSX Hotels, Inc.*, 265 F. Supp. 2d 640 (S.D. W. Va. 2003); this includes claims for alleged breach of duty of good faith and fair dealing because that claim under WV law required existence of employment contract and breach; preemption included a common law fraud claim that asserted employer

misrepresented terms of the collective bargaining agreement

- b. Claims which are *not* preempted by Section 301 include claims which are “nonnegotiable rights conferred on individual employees as a matter of state law.” *Livadas v. Bradshaw*, 512 U.S. 107, 123 (1994); *Owen v. Carpenters’ District Council*, 161 F.3d 767, 773 (4th Cir. 1998); *Harless v. CSX Hotels, Inc.*, 265 F. Supp. 2d 640 (S.D. W. Va. 2003). This is because Section 301 preempts “only those actions requiring an interpretation of the collective bargaining agreement.” *Owen v. Carpenters’ District Council*, 161 F.3d 767, 773 (4th Cir. 1998).

(1) A claim involving West Virginia-law *Harless* allegations of wrongful discharge in violation of public policy were not preempted by Section 301 where the claims did not involve and interpretation of the collection bargaining agreement. *Harless v. CSX Hotels, Inc.*, 265 F. Supp. 2d 640 (S.D. W. Va. 2003). This result follows even where the employer’s defense may argue that the discharge was in compliance with a “just cause” provision in the collective bargaining agreement. *Harless v. CSX Hotels, Inc.*, 265 F. Supp. 2d at ? (citing *Owen v. Carpenters’ District Council*, 161 F.3d 767, 775 (4th Cir. 1998))

(2) A similar result was reached in connection with Maryland’s wrongful discharge claim where the termination allegedly violated a Maryland public policy. *Owen v. Carpenters’ District Council*, 161 F.3d 767, 773 (4th Cir. 1998)

D. Prima facie case issues

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1. General comments about the prima facie case framework first set out in *McDonnell Douglas Corp. V. Green*, 411 U.S. 792 (1973)
 - a. In *Conaway v. Eastern Associated Coal Corporation*, 178 W. Va. 164, 358 S.E.2d 423, 428 (1986), the Court cited the McDonnell Douglas statement of the prima facie case for race discrimination, and stated that is "is a fairly workable test for certain kinds of discrimination in hiring practices, but does not adapt well to other areas of discrimination. Unfortunately, many courts have attempted to adapt the *McDonnell Douglas* test t/o situations unforeseen by its drafters."
 - (1) The WV Supreme Court rejected a proposed prima facie test for age discrimination that would have required the plaintiff to prove that he did his job "well enough to rule out inadequate job performance as a reason for discharge." The Court stated that the test "places a heavy burden on the plaintiff. . . . Very few employees can point to such a perfect record that it would 'rule out the possibility' of being discharged for inadequate performance. Everyone has some black marks on the record. Further, it is the burden of the employer to show a nondiscriminatory reason for discharge, not the burden of the employee to prove that there was no legitimate reason for the discharge." 358 S.E.2d at 428-429.
 - (2) The Court in *Conaway* was also critical of any prima facie case test that would uniformly require the plaintiff to prove that he was "replaced" by someone outside of the protected class: "In a situation such as Mr. Conaway's where there are many employees performing essentially the same task, it is impossible to point to one person who replaced Mr. Conaway."

Therefore, a plaintiff could almost never make a prima facie case of discrimination in such a situation.” 358 S.E.2d at 429.

2. *Hanlon v. Chambers*, 195 W. Va. 99,106, 464 S.E.2d 741, 748 (1995)
 - a. General contours of prima facie case framework: “In general, a plaintiff asserting an employment harassment or **discrimination** claim has the burden at the outset of presenting evidence sufficient to establish a prima facie case of harassment or **discrimination**. See *Barefoot v. Sundale Nursing Home*, 193 W. Va. 475, 457 S.E.2d 152(1995); *St. Mary's Honor Center v. Hicks*, U.S. , , 113 S. Ct. 2742, 2746-47, 125 L. Ed. 2d 407, 415-16 (1993) (“Hicks”). Once the plaintiff has adduced evidence sufficient to establish a prima facie case, the employer must then come forward with reasons justifying a finding that unlawful discrimination was not the cause of the employment action. If the employer succeeds, the presumption of discrimination raised by the plaintiff's prima facie case showing “drops out of the picture.” *Hicks*, U.S. at , 113 S. Ct. at 2749, 125 L. Ed. 2d at 418. Although the plaintiff has the ultimate burden of persuasion to demonstrate that the challenged employment discrimination was the result of illegal conduct by the employer, the plaintiff is not required to show that the employer's proffered reasons were false or played no role in the employment decision. The plaintiff is only required to show that the reasons were not the only factors and that the prohibited factor was at least one of the motivating factors. See e.g. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 247-49, 109 S. Ct. 1775, 1788-90, 104 L. Ed. 2d 268, 285-87 (1989), superseded by statute as stated in *Stender v. Lucky Stores, Inc.*, 780 F. Supp. 1302 (N.D. Cal. 1992).”
3. “Generic” Prima Facie Case for discrimination case. In *Smith v. Sears, Roebuck and Co.*, 205 W. Va. 64, 516

S.E.2d 275, 279 (1999), The Court set out the following "generic" prima facie case statement for all types of discrimination and for potentially all forms of adverse action by the employer. The "plaintiff must offer proof of the following"

- a. "That the plaintiff is a member of a protected class."
 - b. "That the employer made an adverse decision concerning the plaintiff."
 - c. "But for the plaintiff's protected status, the adverse decision would not have been made."
 - d. Concerning the type of evidence required for proving the third ("but for") element: "The first two parts of the test are easy, but the third will cause controversy. Because discrimination is essentially an element of the mind, there will probably be very little direct proof available. Direct proof, however, is not required. What is required of the plaintiff is to show some evidence which would sufficiently link the employer's decision and the plaintiff's status as a member of a protected class so as to give rise to an inference that the employment decision was based on an illegal discriminatory criterion. This evidence could, for example, come in the form of an admission by the employer, a case of unequal or disparate treatment between members of the protected class and others by the elimination of the apparent legitimate reasons for the decision, or statistics in a large operation which show that members of the protected class received substantially worse treatment than others." 516 S.E.2d at 279 (quoting *Conaway v. Eastern Associated Coal Corp.*, 178 W. Va. 164, 170-71, 358 S.E.2d 423, 429-30 (1986))
4. Criticisms of the McDonnell-Douglas prima facie case framework
- a. "The confusion on this point, we think, points to a larger problem in this area of the law and that

- is the extent to which courts (including this one) and litigants often have been so preoccupied by the trees of prima facie case, pretext, shifting burdens, and other labels, that they have not seen the forest of discrimination.” *Skaggs v. Elk Run Coal Company, Inc.*, 198 W. Va. 51, 479 S.E.2d 561, 584 (1996)
- b. “The crux of disparate treatment is, of course, discriminatory motive; the doctrine aims squarely at intentional acts. The McDonnell Douglas/Barefoot regime of prima facie case/explanation/pretext was intended to give plaintiffs easy leverage to force employers to come forward and supply both litigants and courts with a mechanism for arguing and deciding dispositive motions. It was not, however, necessarily designed to facilitate jury analysis. That framework also tends to invite a somewhat oversimplified version of motive, at least as it applies in the employment context. Although there certainly are plenty of cases in which an employer acts solely out of an antipathy against the protected class (which is the model Defendant's Instruction No. 9 depicts), it is also true that in many other cases an employer's motive is a complex amalgam of several different forces. The pervasiveness of subconscious prejudices and stereotypes makes any analysis of that amalgam all the more difficult. Thus, to the extent that the McDonnell Douglas analysis operates on the assumption that the employer has acted out of either a purely illegal motive or a purely legal one, it renders itself inapplicable to a large number of employment discrimination cases.” *Skaggs v. Elk Run Coal Company, Inc.*, 198 W. Va. 51, 479 S.E.2d 561, 584-585 (1996)
5. Rejection of prima facie case framework from employment discrimination laws in other settings:
- a. W. Va. education statutes: *Bd. of Educ. v. White*, 605 S.E.2d 814 (W. Va. 2004): “We find that the

circuit court erred as a matter of law in ruling that once a grievant establishes a prima facie case of lack of uniformity, discrimination and favoritism under W.Va. Code § 18A-4-5b and W.Va. Code §§ 18-29-2(m) and (o), the employer may then escape liability by offering a legitimate reason to justify its different treatment of the grievant. n3 Specifically, the circuit court found that the BOE showed "by a preponderance of the evidence that it had a legitimate, nondiscriminatory reason to substantiate its actions" and Ms. White "offered no evidence to show that the reasons given by the [the BOE] were pretextual." For the reasons set forth below, we conclude that the circuit court improperly applied the law applicable to discrimination claims under the State's Human Rights Act to Ms. White's discrimination and favoritism claims brought under W.Va. Code §§ 18-29-2(m) and (o).”

E. Causation and motive

1. Single motive cases

- a. “We believe that the purposes of the Human Rights Act would be best served by adopting that federal standard, as set forth in the 1991 Civil Rights Act. Thus, **a plaintiff states a claim under the Act if he or she proves by a preponderance of the evidence that a forbidden intent was a *motivating factor* in an employment action. Liability will then be imposed on a defendant unless it proves by a preponderance of the evidence that the same result would have occurred even in the absence of the unlawful motive.** We believe this shift of the risk of nonpersuasion is appropriate. First, in a case where the plaintiff proves that the defendant harbored an unlawful motive, it is only fair that the defendant bear the burden of persuasion in sorting through the difficult issue of causation when the evidence shows there have been multiple contributing factors. In so doing, we merely adopt the well-

established approach used in other contexts. Our motivating factor standard specifically rejects any requirement that some additional threshold, such as the substantial factor test, must be met before the burden shifts. Even if we could describe (and we cannot) what a substantial factor means in this context, we would reject it as unwarranted. If the evidence shows that discriminatory motive entered into the decision making to any degree, then the employer engaged in wrongdoing and should bear the burden on causation. Moreover, and generally speaking, the less that discriminatory intent was a factor, the easier it is for the defendant to meet its burden.” *Skaggs v. Elk Run Coal Company, Inc.*, 198 W. Va. 51, 479 S.E.2d 561, 585-586 (1996)

2. Mixed motive cases

- a. *Skaggs v. Elk Run Coal Company, Inc.*, 198 W. Va. 51, 479 S.E.2d 561 (1996)

F. Summary Judgment review in employment litigation

1. *Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995) (sexual harassment and retaliation case; discussing general standards and application of prima facie case concepts to summary judgment process; reversing trial court’s summary judgment)
2. *Tiernan v. Charleston Area Medical Center, Inc.*, 2002 W. Va. LEXIS 225 (W. Va. December 2, 2002) (Harless case; reversing trial court’s summary judgment)

G. Direct and circumstantial proof, and types of evidence supporting improper motive

1. “[E]mployers are rarely so cooperative as to include a notation in the personnel file” that their actions were motivated by factors expressly forbidden by law. . . . As a result, a victim of discrimination is seldom able to prove a claim by direct evidence and is usually constrained to rely on circumstantial evidence.” *Hanlon v. Chambers*, 195 W. Va. 99, 106 n.4, 464 S.E.2d 741, 748 n.4 (1995)

2. “This evidence could, for example, come in the form of an admission by the employer, a case of unequal or disparate treatment between members of the protected class and others by the elimination of the apparent legitimate reasons for the decision, or statistics in a large operation which show that members of the protected class received substantially worse treatment than others.” *Waddell v. John Q. Hammons Hotel, Inc.*, 572 S.E.2d 925 (W. Va. 2002) (quoting *Conaway v. Eastern Associated Coal Corp.*, 178 W. Va. 164, 170-71, 358 S.E.2d 423, 429-30 (1986)). Thus, the *Waddell* case sets out these “categories” or “types” of circumstantial proof for proving discriminatory motive:
 - a. Admission by the employer
 - b. Unequal treatment between members of the protected class and others
 - c. By the elimination of the apparent legitimate reason for the decision
 - d. Statistics in a large operation which shows that members of the protected class received substantially worse treatment than others

XXIII. Recent cases

- A. United State Supreme Court decisions
 1. Plaintiff may use discrete, untimely incidents of discrimination to help support his claim concerning the timely, actionable events, *National Railroad Passenger Corporation v. Morgan*, 122 S. Ct. 2061 (2002)
 2. *Nevada Department of Human Resources v. Hibbs*, (S. Ct. June 2003) (11th Amendment does not bar suits against states under FMLA)
 3. *Desert Palace, Inc. v. Costa*, 2003 U.S. LEXIS 4422 (June 9, 2003) (no heightened evidentiary burden needed to obtain mixed motive jury instruction)
 4. *Pennsylvania State Police v. Suders*, 124 S. Ct. 2342, 2004 U.S. LEXIS 4176, * (June 14, 2004) (employer may be vicariously liable for constructive discharge in sexual harassment case; employer retains *Ellerth/Faragher* affirmative defense)

- B. West Virginia Supreme Court decisions
1. Slivka, BFOQ, males nurses in delivery room of hospital
 2. Deskins v. S.W. Jack Drilling Co., Mandolidis claim
 3. *Toth v Board of Parks and Recreation Commissioners*, 2003 W. Va. LEXIS 170 (W. Va. December 10, 2003) (Harless claim, Court did not reach issue of whether Harless claim existed for *failure to hire* in retaliation for applicant suing a former employer, although Court arguably assumed there would be such a Harless claim for a *termination* motivated by the same reason)
 4. *Baughman v. Wal-Mart Stores, Inc.*, 2003 W. Va. LEXIS 154, * (W. Va. December 4, 2003) (summary judgment granted and affirmed in favor of employer on invasion of privacy claim arising out of pre-hiring drug test; decision in part based on pre-employment drug test, in which context employee has lower less of an expectation of privacy)
 5. *McDaniel v. W. Va. Division of Labor*, 2003 W. Va. LEXIS 156, * (W. Va. December 4, 2003) (Wage Payment and Collection Act claim, authority of agency to enforce it, some discussion of substance of Act)
 6. *Williams v. Charleston Area Medical Center, Inc.*, 2003 W. Va. LEXIS 109, * (W. Va. October 10, 2003) (WV HRA does not require as a reasonable Accommodation the elimination of an essential job function; noting that HRA was amended to make disability provisions conform to ADA)
 7. *Williams v. Charleston Area Medical Center, Inc.*, 2003 W. Va. LEXIS 109, * (W. Va. October 10, 2003) (affirmed denial of class certification; case involved different types of discrimination and contract claims)
 8. *In re: West Virginia Rezulin Litigation (McCaffery v. Hutchinson)*, 585 S.E.2d 52, * (W. Va. 2003) (class certification issues in product liability case, but stresses that West Virginia rules of civil procedure should not be interpreted a "pavlovian" responses to the federal rules, and cited case stressing that WV HRA should not necessarily be interpreted identically to comparable federal laws) (quoting *Stone v. St. Joseph's Hosp. of*

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- Parkersburg*, 208 W.Va. 91, 112, 538 S.E.2d 389, 410 (2000) (McGraw, J., concurring, in part, and dissenting, in part) (holding that West Virginia disability discrimination law "is not mechanically tied to federal disability discrimination jurisprudence."))
9. *Wounaris v. West Virginia State College*, 588 S.E.2d 406 (W. Va. May 7, 2003) (Harless claim; College violated substantial public policy in terminating employee who filed grievance proceeding)
 10. *Camden-Clark Memorial Hospital Corporation v. Turner*, 2002 W. Va. LEXIS 240 (Dec. 6. 2002). Employer fired employee, who sued for wrongful discharge. Employer obtained a temporary and then permanent injunction against the employee entering the premises, based on an alleged threat the employee made against others. The Supreme Court reversed and vacated the injunction against the employee based on incorrect legal standards being used by the trial judge, but also stated that the trial court "must" allow a jury to hear the legal claim for wrongful discharge before granting the employer's claim for injunctive relief. 2002 W. Va. LEXIS 240, *28-29.
 11. *Rohrbaugh v. Wal-Mart Stores, Inc.*, 2002 W. Va. LEXIS 166 (W. Va. October 11, 2002) (disability discrimination, worker's compensation discrimination, invasion of privacy; plaintiff prevailed at trial only on privacy of claim)
 - a. In an invasion of privacy claim, where no actual damages were awarded by the jury, nominal damages are to be awarded, which would allow, assuming the jury answers questions appropriate, recovery of punitive damages
 - b. Trial court did not abuse its discretion in allowing employer to introduce evidence of other similarly situated employees (with back injuries) who were not treated adversely; this holding in part was premised on the fact that plaintiff "opened the door" in alleging that other employees with back injuries had not been fired

- c. Trial court did not abuse its discretion in allowing employer to introduce evidence that plaintiff did not have a driver’s license when he was required to mitigate damages by seeking other employment; employer argued successfully that the loss of plaintiff’s driver’s license would inhibit his ability to seek other employment
 - d. Trial court did not abuse its discretion in allowing employer to introduce evidence that plaintiff at a subsequent employer had a poor attendance record which reduced plaintiff’s mitigating wages, even though plaintiff was not fired from that job; plaintiff’s back pay damages, in light of duty to mitigate, will be reduced by what plaintiff *could have* received at a comparable subsequent job
 - e. Trial court did not abuse its discretion in bifurcating the amount of punitive damages; trial court apparently believe that the jury in determining liability and actual damages should not be influenced by the “enormous wealth” of Wal-Mart, and that was consistent with the trial court’s discretion
12. *Skaggs v. Eastern Associated Coal Corp.*, 198 W. Va. 51, 569 S.E.2d 769 (2002) (worker’s compensation discrimination; reversing trial court’s grant of summary judgment): there was sufficient summary judgment evidence that employer used its “rehabilitation program” as a pretext for terminating the employment of injured employees, thus summary judgment was reversed
13. *Tiernan v. Charleston Area Medical Center, Inc.*, 2002 W. Va. LEXIS 225 (W. Va. December 2, 2002)
- a. W. Va. C.S.R. § 64-12-14.2.4 (1987) states a substantial public policy in requiring that a hospital unit be properly staffed to ensure adequate medical care in hospitals; this may provide a predicate for a *Harless* claim to the extent that the employee complained about “patient safety” or “unsafe staffing practices”
 - b. “[O]bvious temporal proximity” of “several weeks” between campaign against new CAMC staffing

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- policies and termination meant that "plaintiff stated a prima facie case"
- c. Discussion of summary judgment standards in context of employment litigation. Courts should be "particularly careful" in granting summary judgment in employment discrimination cases, *quoting Hanlon v. Chambers*, 195 W. Va. 99, 464 S.E.2d 741 (1995)
 - d. Detailed discussion of whether evidence created summary judgment fact question on whether plaintiff complained about "issues of patient safety"; plaintiff complained about "unsafe" staffing practices, and policy of assigning only 1 nurse to a unit; concluded that reasonable inference was that plaintiff complained about patient safety, so summary judgment was inappropriate
 - e. "[T]o prevail on such a claim in the instant case, Ms. Tiernan would have to persuade a fact-finder:
 - (1) by clear and convincing evidence, that CAMC made an express promise to its employees that they would suffer no retaliation or adverse action for speaking out and/or talking to newspaper reporters in connection with the campaign in opposition to nurse staffing and employment policies; and that CAMC intended or reasonably should have expected that such a promise would be relied and/or acted upon by an employee like Ms. Tiernan; and
 - (2) by a preponderance of the evidence, that Ms. Tiernan, being without fault herself, reasonably relied on that promise by CAMC, which reliance led to her discharge; and that in discharging Ms. Tiernan, CAMC breached that promise."
 - (3) Summary judgment in favor of the employer was reversed on handbook

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claim, although the Supreme Court did not discuss the evidence

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