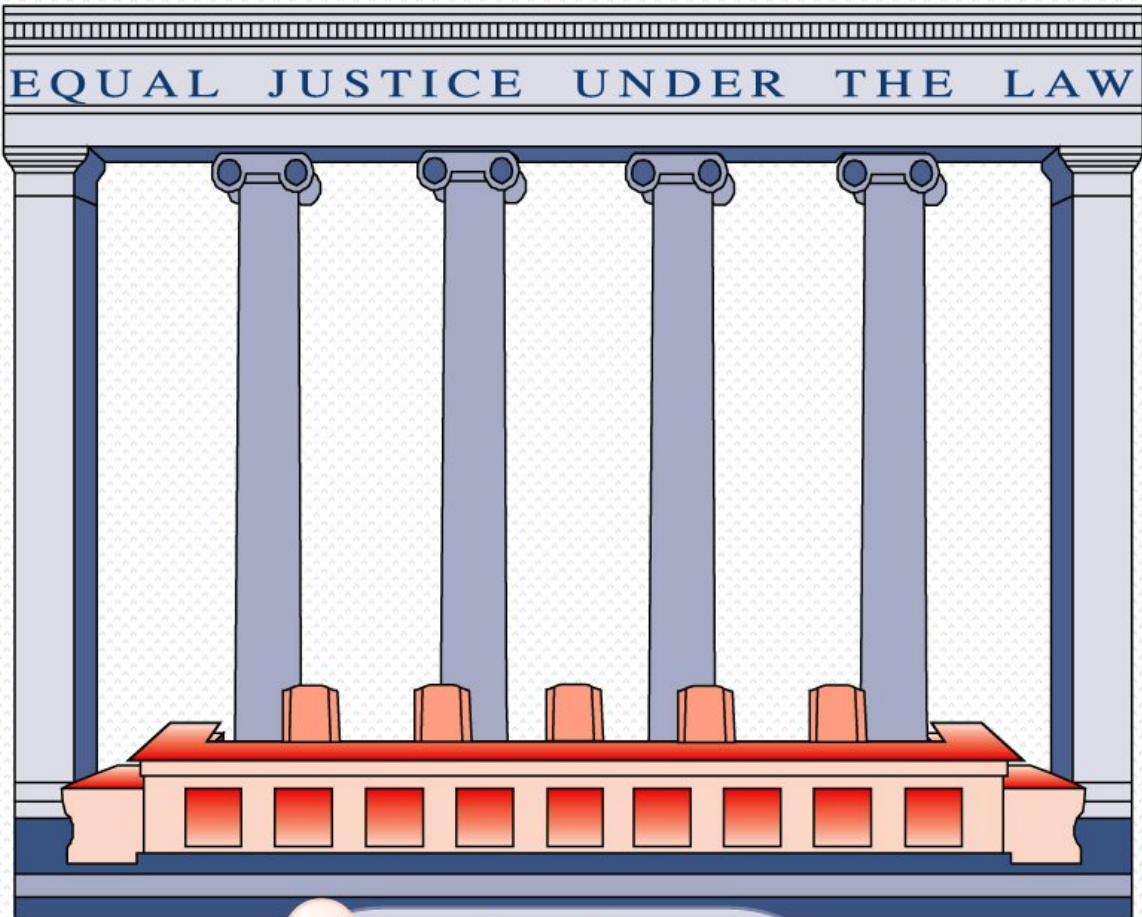


# Court Watch



The Impact Of The West Virginia Supreme Court On Our State's Economy



 [wvchamber.com](http://wvchamber.com)



*A Report Prepared For The Members Of The West Virginia Chamber Of Commerce*

## Fall-03 & Spring 04

# **The West Virginia Chamber of Commerce Legal Review Team**

**We express deep appreciation to the attorneys of our Legal Review Team who volunteered their time and expertise to review each case decided by the West Virginia Supreme Court in the Fall 2003 and Spring 2004 Terms and present this report of the impact of Court Decisions on our state's economy to Chamber members.**

# Legal Review Team

**Mark A. Carter**

Dinsmore & Shohl LLP; [mark.carter@dinslaw.com](mailto:mark.carter@dinslaw.com)

**Michael E. Caryl**

Bowles Rice McDavid Graff Love PLLC; [mcaryl@bowlesrice.com](mailto:mcaryl@bowlesrice.com)

**Bryan R. Cokeley**

Steptoe & Johnson PLLC; [cokeleb@steptoe-johnson.com](mailto:cokeleb@steptoe-johnson.com)

**T. Randolph Cox**

Spilman Thomas & Battle PLLC; [tcox@spilmanlaw.com](mailto:tcox@spilmanlaw.com)

**Lee F. Feinberg**

Spilman Thomas & Battle, PLLC; [lfeinberg@spilmanlaw.com](mailto:lfeinberg@spilmanlaw.com)

**Timothy E. Huffman**

Jackson & Kelly PLLC; [tehuffman@jacksonkelly.com](mailto:tehuffman@jacksonkelly.com)

**Patricia A. Jennings**

Jenkins Fenstermaker PLLC; [paj@jenkinsfenstermaker.com](mailto:paj@jenkinsfenstermaker.com)

## CASE DIRECTORY

### Employment

*Williams v. Charleston Area Medical Center, Inc.*  
592 S.E.2d 794 (W. Va. October 10, 2003)

*Walsh v. Jefferson Memorial Hospital*  
589 S.E.2d 527;(W. Va. November 10, 2003)

*Dailey v. Board of Review WV Bureau of Employment Programs*  
589 S.E.2d 797 (W. Va. November 10, 2003)

*Gress v. Petersburg Foods*  
592 S.E.2d 811 (W. Va. November 24, 2003)

*Yunker v. Eastern Associated Coal Corporation*  
591 S.E.2d 254 (W. Va. December 3, 2003)

*McDaniel v. West Virginia Division of Labor*  
591 S.E.2d 277 (W. Va. December 4, 2003)

*Baughman v. Wal-Mart Stores*  
592 S.E.2d 824 (W. Va. December 4, 2003)

*Toth v. Board of Parks and Recreation*  
593 S.E.2d 576 (W. Va. December 10, 2003)

*Slivka v. Camden-Clark Memorial Hospital*  
W. Va. Supreme Court of Appeals #WL 323199 (February 19, 2004)

*Benson v. AJR, Inc.*  
W. Va. Supreme Court of Appeals #WL 914968 (April 16, 2004)

*Wells v. WBOY-TV*  
W. Va. Supreme Court of Appeals #31684 (May 7, 2004)

*General Motors Corporation v. Smith*  
W. Va. Supreme Court of Appeals #31425 (June 25, 2004)

*Smith v. United Parcel Service*  
W. Va. Supreme Court of Appeals #31645 (July 2, 2004)

## **Workers' Compensation**

*Wampler Foods, Inc., v. WC Division, Tammy Pancake and Gregory Burton*  
*W. Va. Supreme Court of Appeals #31599 (July 1, 2004)*

*State of West Virginia, Ex Rel. Charles Thompson v. Gregory Burton*  
*W. Va. Supreme Court of Appeals #31600 (July 1, 2004)*

*State of West Virginia, Ex Rel. Morris Yoakum, Robert Carpenter, Gale Fraley, Alan Kiblinger, Gilbert Kuehl, Robert Meadows, Leonard Davis and Gene Martin*  
*W. Va. Supreme Court of Appeals #31653 (July 1, 2004)*

## **Taxes**

*Bluestone Paving, Inc. v. Tax Commissioner*  
*W. Va. Supreme Court of Appeals #31377 (December 5, 2003)*

## **Insurance**

*Burrows v. Nationwide*  
*W. Va. Supreme Court of Appeals #31344 (February 19, 2004)*

*WV Fire and Casualty v. Stanley*  
*W. Va. Supreme Court of Appeals #31230 (May 21, 2004)*

*Horace Mann Ins. Co. v. Adkins*  
*W. Va. Supreme Court of Appeals #31592 (June 30, 2004)*

*Rose v. St. Paul Fire and Marine Insurance Co.*  
*W. Va. Supreme Court of Appeals #31317 (June 24, 2004)*

*Barefield v. DPIC Companies, Inc.*  
*W. Va. Supreme Court of Appeals #31226 (July 2, 2004)*

*Jackson v. State Farm Mutual Auto, Inc.*  
*W. Va. Supreme Court of Appeals #31372 (July 2, 2004)*

**OVEC et. al. v. U.S. Army Corps of Engineers (Overview & Update)**

# **Employment Law**

**Williams v. Charleston Area Medical Center, Inc.**

592 S.E.2d 794

(W. Va October 10, 2003)

Justice Davis delivered the opinion of the Court (Justice Starcher concurs)

**What the Court was asked to Decide:**

The court was asked to determine whether the duty of an employer to accommodate an employee with a disability under the West Virginia Human Rights required elimination of an essential function of the employee's job.

**What the Court Decided:**

The court held that an employer's duty to accommodate an individual with a disability under the West Virginia Human Rights Act does not require the employer to eliminate an essential function of a job. An employer may refuse to hire or may discharge a qualified individual with a disability, even after reasonable accommodation, if the individual is unable to perform the essential functions of the job.

**Facts:**

The employee, Frederick Williams, was a licensed plumber and employed by Charleston Area Medical Center (CAMC) as a maintenance mechanic. Williams began experiencing health problems and was eventually diagnosed with Graves' Disease. On April 10, 1997, he presented CAMC with a release from his doctor that stated that he was not allowed to climb on ladders or be above his height. When Williams' supervisor learned about the restrictions placed upon Williams, he concluded that Williams could not perform his job as a maintenance mechanic if he was unable to work on a ladder or work overhead. Williams requested that accommodations be made so that he could return to his position as a maintenance mechanic. CAMC ultimately placed Williams into the lower paying position of central supply technician.

Williams filed suit against CAMC alleging disability discrimination. Williams claimed that CAMC failed to give him any accommodation for his disability and also failed to follow its own policies on accommodations for disabled employees. A jury trial was held in which the jury found that although Williams was a qualified person with a disability, climbing a ladder and working overhead were essential functions of his job. Consequently, the jury returned a verdict in favor of CAMC. Williams appealed the verdict to the West Virginia Supreme Court.

**Holding:**

The West Virginia Supreme Court held that an employer's duty to accommodate an individual with a disability under the West Virginia Human Rights Act does not require the employer to eliminate an essential function of a job.

The court cited the general standard for reasonable accommodation under the West Virginia Human Rights Act, noting that an employer must make reasonable accommodations to the known physical or mental impairments of qualified employees with disabilities where necessary to enable that employee with a disability to perform the essential functions of the job. The purpose of requiring reasonable accommodation is to enable a disabled individual to perform the essential functions of the job in question.

The court ultimately held that an employer is not required to eliminate an essential function of a job as a means of fulfilling its duty to provide reasonable accommodation. The law protects only qualified individuals with disabilities who, with or without reasonable accommodation, can perform the essential functions of the job.

With regard to Williams, the court noted that it was undisputed that Williams was not able to climb a ladder or work above his head. The accommodation he sought was to have these functions eliminated from his duties as a maintenance mechanic. The court concluded that once the jury determined that climbing a ladder and working overhead were essential functions of the Maintenance Mechanic II position, there was no need for its inquiry to proceed further. As a result, the court affirmed the judgment of the circuit court.

**Bottom Line:**

Reasonable accommodation may enable an employee with a disability to perform the essential functions of his job. An employer is not required, however, to accommodate a disabled worker by modifying or eliminating an essential function of the job.

## **Walsh v Jefferson Memorial Hospital**

589 S.E.2d 527

(W.Va. November 10, 2003)

This decision is a Per Curiam Opinion

(Justice McGraw dissented)

### **What the Court was asked to Decide:**

Whether the terms of employment set forth in Jefferson Memorial Hospital's personnel manual created uncertainty as to whether sick leave was a benefit subject to payment pursuant to the West Virginia Wage Payment and Collections Act when an employee left her job at the hospital.

### **What the Court Decided:**

The West Virginia Supreme Court ruled that, under a former policy, unused sick leave was not to be paid as a severance benefit. The new policy by its terms made clear that sick leave accumulated under the former policy was not added to the new system of leave. Furthermore, the new policy expressly and specifically provided that the sick leave accumulated under the former policy could only be used for employee illness.

### **Facts:**

Patricia McDowell was employed at the Jefferson Memorial Hospital from June 1978 until September 2000. At the time of her separation from employment, McDowell had accrued 976.61 hours of unused sick leave. Sydney Walsh was also employed with the hospital beginning in April of 1979 and ending in May of 2000. Walsh had accrued 774 hours of unused sick leave at the time of her departure from the hospital. When McDowell and Walsh left, the hospital requested, but were not paid for, sick pay accrued under the previous leave policy.

The hospital had a personnel manual which, among other things, delineated the leave policy of the hospital. While the manual was revised from time to time, the change having significance to this case was made effective June 11, 1999. Before that date, the leave benefits outlined in the manual as available to employees included holiday, vacation, personal days and sick leave. While accrual of sick leave was unlimited, the former manual stated that unused sick leave will not be paid as a severance benefit. The June 11, 1999, manual established a single leave benefit called annual paid leave (APL) which by its terms replaced the provisions for accrual of the former types of leave, including sick leave. Nevertheless, the hospital's new policy allowed use of the sick leave employees had accrued under the old policy in certain situations.

McDowell and Walsh alleged that because the previous language stating that unused sick leave would not be paid as a severance benefit was not included in the new policy, an ambiguity was created as to whether accumulated but unused sick time was subject to payment as a severance benefit. Consequently, they argued that they should be entitled to payment for the sick leave accrued but not used under the old policy.

After the hospital refused the requests for payment of sick leave which had accrued under the former policy, the employees each filed suit in the Circuit Court. The circuit court granted the hospital's motion for summary judgment and entered a final judgment in favor of the hospital in both cases. McDowell and Walsh then appealed to the West Virginia Supreme Court of Appeals.

### **Holding:**

The West Virginia Supreme Court reiterated the remedial nature of the West Virginia Wage Payment and Collection Act (WVWPCA), which was designed to protect and assist employees in the collection of wrongly withheld compensation. The WVWPCA applies to wages including compensation for labor or services rendered which may include accrued fringe benefits. The court noted that the terms of employment determine whether unused accrued fringe benefits are payable as compensation to employees upon separation from employment.

The court examined the language in Jefferson Memorial's two policies to determine whether either policy appeared to be ambiguous and agreed with the circuit court's determination that there was no ambiguity in the new policy. The court observed that the language of the hospital's new policy makes it clear that the sick leave accumulated under the former policy is not the same as APL and actually operates somewhat in tandem with APL. The new policy by its terms makes clear that sick leave accumulated under the former policy was not added to the new system of leave. Furthermore, the court concluded that the new policy expressly and specifically provides that the sick leave accumulated under the former policy can only be used for employee illness. Therefore, the court upheld the lower court's ruling in favor of the hospital.

### **Bottom Line:**

To survive a challenge by an ex-employee, a leave policy must be in writing, clear, and unambiguous. When an employer is planning to change a leave policy, it should carefully review the new policy to ensure that it is not ambiguous. If any ambiguity exists, the language should be changed to clearly reflect the intent. If a change in a leave policy is made, the employer must ensure that the new policy clearly explains how any previously accumulated benefits will be treated. The court, in this case, implied that a new policy that causes employees to forfeit accumulated benefits is not necessarily a West Virginia Wage Payment and Collection Act (WVWPCA) violation.

The WVWPCA does not necessarily stand as an impediment to changing a leave policy. At least to the extent that any leave is not subject to payment to the employee upon severance under the previous policy, the court will not (or at least in this case did not) apply the Act to make those benefits a source of severance pay for the separated employee under a new policy.

This case, however, dealt only with sick leave benefits, which are much more widely recognized as not being subject to payment upon separation from employment than are vacation, holiday, and personal leave days.

## **Dailey v. Board of Review WV Bureau of Employment Programs**

589 S.E.2d 797

(W. Va. November 10, 2003)

Justice Albright delivered the opinion of the Court

(Justices Davis and Maynard dissented)

### **What the Court was asked to Decide:**

The court was asked to decide whether an employee's deceit about having a valid driver's license was sufficient to support his total disqualification from receiving unemployment compensation benefits, i.e., a finding of "gross misconduct."

### **What the Court Decided:**

The court decided that the employee's actions did not fit under the definition of gross misconduct, but did fit under simple misconduct, which was conduct showing such willful disregard of an employer's interests as was found in deliberate violations of behavior the employer had a right to expect of the employee, or negligence showing equal culpability, wrongful intent or evil design, or intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer.

### **Facts:**

Gary Dailey was hired by Executive Air Terminal, Inc., (Executive) on May 1, 2000, as a line technician. Dailey's duties included driving gasoline trucks, driving off the airport property to obtain bulk gasoline, and transporting passengers on public roads. When Dailey was initially hired by Executive, he claimed to have a valid driver's license.

After several unsuccessful attempts to obtain a copy of the driver's license, Executive contacted the West Virginia Department of Motor Vehicles and learned that Dailey's license had been suspended in 1996. Upon realizing that he was performing his driving duties without a valid license and subjecting Executive to potential liability, Executive discharged Dailey on June 6, 2000. The Division of Employment Security concluded that Dailey had been terminated for gross misconduct and denied him unemployment compensation benefits. The circuit court affirmed that determination. Dailey then appealed to the West Virginia Supreme Court.

### **Holding:**

When an employee separates from employment in West Virginia, the state's unemployment compensation law provides varying levels of disqualification for benefits. If there is not misconduct on the employee's part, he may receive the full amount of the available benefits. For "simple misconduct," the employee is penalized by a six-week reduction in benefits. For "gross misconduct," the employee is disqualified from receiving benefits altogether.

The court undertook the task of defining “simple misconduct.” It concluded that “simple misconduct” is conduct evincing such willful and wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of its employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer.

Under West Virginia Code § 21A-6-3, an act of misconduct is considered “gross misconduct” where the underlying misconduct consists of (1) willful destruction of the employer's property; (2) assault upon the employer or another employee in certain circumstances; (3) certain instances of use of alcohol or controlled substances; (4) arson, theft, larceny, fraud, or embezzlement in connection with employment; or (5) any other gross misconduct which shall include but not be limited to instances where the employee has received prior written notice that his continued acts of misconduct may result in termination of employment.

In simply passing the statute, the court recognized three separate categories of gross misconduct: (1) conduct enumerated by the statute as gross misconduct; (2) other gross misconduct; and (3) conduct for which the employee has received a written warning that it could result in his discharge. With respect to the second category of gross misconduct, the Court declined to define “other gross misconduct” but provided that an act of misconduct can be elevated to the level of gross misconduct if the nature of the employer's business renders the act particularly dangerous, shocking, or egregious.

The Court concluded that Dailey engaged in simple misconduct by failing to indicate that his driver's license had been suspended and by permitting his employer to continue to believe that he maintained a valid driver's license from his hiring date of May 1, 2000, to his termination date of June 6, 2000. The court ruled that the conduct clearly constituted willful and wanton disregard of the employer's interests under the definition of “simple misconduct.” The court concluded, however, that Dailey's conduct did not constitute gross misconduct as that term is contemplated by the legislature.

### **Bottom Line:**

The West Virginia Supreme Court did not clearly define what is “gross misconduct.” The answer for employers seems to be that unless (1) the conduct in question clearly falls within one of the categories specified within the statute or (2) the employee has been forewarned, in writing, that he could be discharged for certain conduct, it is unlikely that any conduct will be deemed gross misconduct by the court. Given the misconduct manifested here by the employee, the court has set the bar high for a finding of “gross misconduct.”

**Gress v. Petersburg Foods**

592 S.E.2d 811

(W. VA. November 24, 2003)

The opinion of the Court was delivered Per Curiam

(Justices McGraw and Starcher dissent)

**What the Court was asked to Decide:**

The issue before the Court was whether an employee, upon termination by her employer, was entitled to (1) yield bonus pay and (2) vacation pay pursuant to the West Virginia Wage Payment and Collection Act (WVWPCA).

**What the Court Decided:**

The court found for the employer on both claims holding that the terms of the applicable employment policies determined when fringe benefits accrued and whether those benefits had to be paid upon termination. The court further stated that a consistently applied unwritten employment policy on the payment of fringe benefits could support a defense against a WVWPCA suit when the unwritten policy was known to workers.

**Facts:**

Petersburg Foods, LLC (Petersburg) owned and operated a chicken processing plant in Petersburg, West Virginia. The appellee Joyce Gress worked at the Petersburg plant from March 21, 1996 through September 18, 1998, whereupon Petersburg fired Gress. In September 1999, Gress filed a Wage Payment and Collection Act (WPCA) lawsuit against her former employer alleging two causes of action: (1) a claim for unpaid vacation wages, and (2) a claim for unpaid yield bonus pay.

Twice during Gress' two-year tenure with the appellant, she took five days of paid vacation. She then worked an additional six months before being fired. In her first cause of action, Gress claimed that she was entitled to 2.5 days of vacation pay for this six-month period. The circuit court agreed with Gress and found that the vacation policy was not sufficiently clear as to be understood by employees.

In her second cause of action, Gress alleged that she was entitled to a yield bonus for the hours that she worked in September 1998. The written yield bonus policy provided that to qualify for the bonus, employees must be active on payroll at the time of the distribution. According to Petersburg's representatives, to be active on payroll meant that an employee had to be present at work and working when the yield bonus checks were distributed. Petersburg fired Gress on September 18, 1998 -- before the end of the September 1998 yield bonus accounting period. As a result the employer refused to pay Gress a yield bonus for days that she worked in September because she was not employed on the date that the yield bonuses were distributed. In its January 4, 2002 order, the circuit court again agreed with Gress on the yield bonus issue, and ordered the employer to pay Gress the yield bonus that she earned for the days she worked in September 1998.

**Holding:**

The West Virginia court reiterated that under the WVWPCA that employers have an obligation to pay employees' wages in a timely manner. When an employer fires an employee, the employer shall pay the employee's wages in full within seventy-two hours. Further, the court noted that the WVWPCA, accrued fringe benefits are "wages." The WVWPCA defines the term "fringe benefit" as any benefit provided an employee or group of employees by an employer, or which is required by law, and includes regular vacation, graduated vacation, floating vacation, holidays, sick leave, personal leave, production incentive bonuses, sickness and accident benefits and benefits relating to medical and pension coverage.

The court cited the proposition from a previous case that, under the WVWPCA, the terms of the applicable employment policies determine when fringe benefits accrue and whether those benefits must be paid upon termination. The court noted, however, that the WVWPCA does not create a right to fringe benefits. Rather, it reserves the question of fringe benefits to the bargaining process between employers and employees.

It is axiomatic that before a fringe benefit is owed to an employee, it must have accrued or vested. In this particular case, the court found that Gress was not employed by Petersburg on the date the yield bonuses were distributed and therefore the yield bonus fringe benefit had not yet accrued to Gress.

With regard to Gress' unpaid vacation pay, the court also found in favor of the employer. The court held that there was no dispute that the employees, including Gress, were aware that the employer had a practice of only allowing workers to take vacations in five-day increments after each full year of employment. Further, Gress offered no evidence to contradict the employer's assertion that there was a consistent policy of not paying employees for partial weeks of unused vacation at the time of discharge. The court further held that when employers have a consistently applied unwritten policy, employers have protection against a claim under the Wage Payment and Collection Act.

**Bottom Line:**

This decision is favorable to employers in that it provides reassurance that a terminated employer will not have to be paid for un-accrued bonuses or vacation time. Fringe benefits are not a "right" guaranteed under the WVWPCA but rather are left to agreement between the employer and employee. Further, the Court noted that an unwritten employment policy on the payment of fringe benefits can be relied upon by employers when the policy was known by the employees.

## **Yunker v. Eastern Associated Coal Corporation**

591 S.E.2d 254

(W. Va December 3, 2003)

The opinion of the Court was delivered Per Curiam

(Justices Davis and Maynard concurred)

### **What the Court was asked to Decide:**

Did the employer, Eastern Associated Coal Corp (Eastern), upon terminating employee Forrest Yunker breach a contract created by a code of business conduct?

### **What the Court Decided:**

The court observed that Eastern's code of business conduct (CBC) did not contain a statement proclaiming that it was an employment contract. The court held that Eastern's CBC did not reach a sufficient level of specificity required to create a contract. The court opined that Eastern's CBC embodied only aspirational goals rather than contractual terms.

### **Facts:**

Yunker was a mining engineer who worked for Peabody Holding Company (Peabody). In 1987, Peabody purchased Eastern, making it a wholly owned subsidiary. In 1988, Yunker transferred from Kentucky to West Virginia as Eastern's Vice-President of Operations. On November 16, 1992, Yunker was visited at his home by a federal Internal Revenue Service agent and a West Virginia State Police trooper. These agents questioned Yunker on coalfield corruption, the subject of a federal probe. During this interview, Yunker admitted to having had a sexual encounter with a certain woman. Yunker denied that he knew that the woman had been paid to have sex with him by a vendor doing business with Eastern.

On November 19, 1992, Yunker spoke with Eastern's in-house counsel about the November 16 interview. Yunker told the counsel, "You know, . . . I'm not much of a churchgoer. And we all do things in our lives which sometimes we're ashamed of and regret doing." The in-house counsel then directed Yunker to Eastern President Peter Lilly to discuss what occurred at the November 16 interview. At that time, Yunker admitted to a sexual encounter with a woman not his wife. Yunker also informed Mr. Lilly that the agents had alleged that a vendor had paid the woman to have sex with Yunker.

That afternoon, Yunker was summoned to the in-house counsel's office where Mr. Lilly gave him a resignation memorandum and told him that he wanted him to resign. When asked why, Mr. Lilly responded, "No comment." Yunker then asked, "If I don't sign this, then are you going to fire me, discharge me?" Mr. Lilly replied, "No comment," which Yunker took to be an affirmative response. Yunker then signed the document.

In 1994, Yunker sued alleging that he was forced to resign either because of his age or because he cooperated with federal authorities on November 16, 1992. In 1996, Yunker

received permission from the circuit court to amend his complaint to add a claim that his discharge constituted a breach of contract under Eastern's code of business conduct (CBC). Younker advanced a bold and creative legal theory; he alleged that Eastern had promised not to retaliate against employees who reported wrongdoing. By reporting his own actions, Younker claimed that he was entitled to protection per the CBC and per Eastern's promise therein. Younker moved for judgment in his favor on the breach of contract claim.

On December 6, 1996, Younker moved for a partial summary judgment on the breach of contract claim which Eastern opposed. On March 7, 1997, Eastern filed its own motion for summary judgment on all of Younker's claims. On July 31, 1997, the circuit court entered partial summary judgment for Younker on his breach of contract claim. The circuit court then held a bench trial on damages. The circuit court awarded Younker \$378,649. From these rulings, Eastern filed an appeal.

### **Holding:**

The West Virginia Supreme Court restated that it has traditionally recognized that employment which is of an indefinite duration is presumed to be a hiring at will, which is terminable at any time at the pleasure of either the employer or the employee. The court also noted, however, that it has also recognized that contractual provisions relating to discharge or job security may alter the at-will status of a particular employee. The court explained that representations contained in an employee handbook or policy manual can meet the normal requirements for formation of an implied contract. Because of the at-will presumption, however, any promises alleged to alter the presumptive status must be very definite to be enforceable. The court concluded that any party asserting that employment was other than at-will bears the burden of rebutting the at-will presumption.

The court further stated that where an employee seeks to establish a permanent employment contract or other substantial employment right, either through an express promise by the employer or by implication from the employer's personnel manual, policies, or custom and practice, such claim must be established by clear and convincing evidence. The court recognized that an employee handbook may form the basis of a unilateral contract if there is a definite promise by the employer not to discharge covered employees except for specified reasons.

In this particular case, the court concluded that Eastern's CBC did not constitute an employment contract. The court also found that the CBC's disciplinary provisions were not exclusive. The court cited to a provision of the CBC that specifically states that it does not constitute a comprehensive, full or complete explanation of the laws which are applicable to the Company and its employees, nor does it contain all applicable policies and basis for discipline or discharge. The CBC further provided that each employee had a continuing obligation to be familiar with applicable law and all policies and procedures.

As a result, the court found that Eastern's CBC did not reach that very definite level of specificity required to create a contract. According to the court, Eastern's CBC embodied only

aspirational goals rather than contractual terms. The West Virginia court found that the circuit court erred by failing to grant Eastern summary judgment on the breach of contract claim.

**Bottom Line:**

The court recognized the strong public policy in favor of business codes of conduct. Thus, an employer may create a code of conduct, containing aspirational goals, without a fear that it will be construed as an employment contract affecting the at-will relationship.

**McDaniel v. West Virginia Division of Labor**

591 S.E.2d 277

(W. VA. December 4, 2003)

Justice Davis delivered the opinion of the Court

(Justices McGraw and Albright concur in part and dissent in part)

**What the Court was asked to Decide:**

Whether a state administrative agency, namely the Division of Labor (DOL), may award damages in an administrative proceeding brought under the provisions of the West Virginia Wage Payment and Collection Act (WVWPCA).

**What the Court Decided:**

The West Virginia Supreme Court ruled that the DOL does not have the authority to award damages for WVWPCA claims because there is not clear statutory authority and no implied authority that would permit the Division to determine and award damages.

**Facts:**

Three former employees of McDaniel, Inc. (MCDI) requested that the (DOL) conduct an investigation of wages and reimbursable business expenses to which they claimed to be entitled following MCDI's cessation of business on December 19, 2000. The DOL found the company owed unpaid wages, expenses, and liquidated damages and the president and the officers were personally liable under W.VA. Code § 21-5-4 as management officers of the company who knowingly permitted the company to violate the WVWPCA. Larry McDaniel served on MCDI's board of directors; as president of MCDI; L. Dean Schwartz was MCDI's senior vice-president and charged with overseeing the company's general operations; and Michael Johnston supervised residential appraisers, and served on MCDI's board of directors. Following the preliminary investigation, the DOL determined that MCDI owed its former employees \$ 27,510.68 for unpaid wages from November 9, 2000, through December 19, 2000, and \$14,229 in reimbursable business expenses for this same period. Additionally, MCDI was found to be liable for another 47,721.16 in liquidated damages resulting from its nonpayment of wages.

In accordance with its administrative procedure in such matters, the DOL contacted MCDI and requested payment of these sums on behalf of the former employees. MCDI responded by requesting a meeting with the Division to dispute the amount of compensation it allegedly owed. Because no resolution was reached during the parties' March 7, 2001, meeting, the matter was scheduled for an administrative hearing before the West Virginia Division of Labor. Following hearings on the matter, the DOL's hearing examiner determined that MCDI was liable to its employees for the wages, expenses and the liquidated damages claimed and followed the Division's earlier decision. The DOL also determined that Larry McDaniel, L. Dean Schwartz, and Michael Johnston were responsible for the wages, expenses, and liquidated damages not paid.

After this adverse decision, McDaniel, Schwartz, and Johnston appealed to the circuit court. The circuit court held that it was appropriate for the administrative agency to conduct investigations and hold hearings in order to determine whether any person has violated the Wage Payment and Collection Act. The circuit court, however, determined that the president was not personally liable and the officers, while personally liable, could not be ordered by the division to pay damages. From this decision, the DOL appealed to the West Virginia Supreme Court.

### **Holding:**

The West Virginia Supreme Court noted that it had no constitutional objection to the state legislature expressly authorizing an administrative agency to award damages. The court also noted that such authority may be implicitly recognized as an integral part of the agency's function. The court held, however, as a general rule, that an administrative agency may not determine damages and award a personal money judgment.

With regard to the Division of Labor, the court ruled that there was nothing to indicate that the Legislature intended to invest, either expressly or implicitly, the Division with the authority to award damages. The court noted that although the governing statutes expressly authorized the DOL to investigate claims, initiate proceedings and subpoena witnesses to gather evidence, and generally to administer the provisions of the Wage Payment and Collection Act, there was no indication, in either the Wage Payment and Collection Act or its regulations, that the DOL could award damages in such proceedings.

The court also affirmed the circuit court's holding that McDaniel was not an officer of MCDI and thus was not subject to liability under the Wage Payment and Collection Act. The court also affirmed the decision of the circuit court with regards to Schwartz and Johnston. The court noted that the affirmance should not be construed as relieving Schwartz and Johnston from liability as officers of MCDI who knowingly permitted that company to violate the provisions of the Wage Payment and Collection Act.

The court therefore, held, that in the absence of express statutory authority or an implicit legislative delegation of power, the West Virginia Division of Labor does not have the authority to award damages in claims it adjudicates pursuant to the West Virginia Wage Payment and Collection Act.

### **Bottom Line:**

The Division of Labor's authority has been curtailed by the court's decision. Before the decision, the division could issue damages on its own without needing court approval. Now, however, the decision on damages will be made by the circuit courts. Therefore, if the Division wishes to pursue damages against an employer for the violating the WVWPCA, it must initiate an action in circuit court.

This ruling prohibits the DOL from using its own interpretation of the Act and internal administrative processes to impose damages on an employer. Whether an employer will now be

obligated to pay damages will be based on a third party's (i.e., the circuit court's) interpretation and application of the Act.

**Baughman v. Wal-Mart Stores**

592 S.E.2d 824

(W. VA. December 4, 2003)

This decision was a per curiam opinion of the Court

**What the Court was asked to Decide:**

May an employer in West Virginia administer pre-employment drug testing of applicants?

**What the Court Decided:**

The Court decided that its earlier ruling limiting mandatory drug testing of current employees did not apply to preemployment drug testing. Private-sector employers who require across-the-board drug testing of all job applicants do not automatically violate West Virginia law.

**Facts:**

Stephanie Baughman filed suit against Wal-Mart Stores in the Circuit Court of Harrison County. Baughman complained that she was required to give a urine sample prior to her employment by a Wal-Mart store. She was offered a job by Wal-Mart, but prior to her starting work Wal-Mart required her (and allegedly all other prospective employees) to first give a urine sample that Wal-Mart would test for illegal drug use. Baughman gave the urine sample and began working at Wal-Mart; she later left her employment at Wal-Mart for reasons apparently unrelated to the drug testing.

Baughman's complaint alleged that Wal-Mart's pre-employment requirement of a urine sample for drug testing, was an invasion of her privacy and that Wal-Mart had, by requiring the sample, caused her embarrassment, indignity, humiliation, annoyance, inconvenience and other general damages.

Wal-Mart admitted that Baughman had been required to submit a urine sample for drug testing, but argued that job applicants who could pick and choose where to apply for employment, did not have the same expectation of privacy as current employees when it came to drug testing. Baughman filed a motion for judgment in her favor on the issue of liability and Wal-Mart filed a like motion. The circuit court granted Wal-Mart's motion, holding that Baughman had not shown an actionable invasion of privacy in Wal-Mart's requiring her to submit to drug testing before she began to work.

**Holding:**

The court held that the rules limiting mandatory drug testing of current employees do not apply to pre-employment drug testing. Private-sector employers who require across-the-board drug testing of all job applicants do not, without more, violate West Virginia law.

The court distinguished the facts of this case from its earlier ruling in Twigg v. Hercules, 185 W. VA.155, 406 S.E.2d 52 (1990). The court in Twigg wrestled with when a current employee could be subjected to drug testing. The court held, as a matter of West Virginia common law, that an employer invaded the privacy of its employees unless mandatory drug testing fell within one of two scenarios: (1) a random testing program for employees in safety sensitive positions or (2) testing based upon a reasonable good faith suspicion that a particular employee was using illegal drugs or abusing legal drugs.

The court, however, reasoned that in the pre-employment context -- although not necessarily true in every case -- a person has a lower expectation of privacy. The court further reasoned that employers regularly perform pre-employment background checks, seek references, and require pre-employment medical examinations, etc., that are far more intrusive than what would be considered tolerable for existing employees without special circumstances.

The court concluded that Baughman did not put forth any facts showing that her right to privacy was violated in this case simply as a result of Wal-Mart's requiring her, prior to starting work, to give a urine sample for drug testing purposes.

**Bottom Line:**

This decision draws a clear distinction between current and prospective employees. In the preemployment context, an applicant has a lower expectation of privacy than a current employee.

The court was, however, not entirely decisive in its ruling. The court made clear that its decision does not apply to public employees, who are bound by constitutional mandates that do not apply in the private sector. The court refused to rule that pre-employment drug testing by private employers can never violate a job applicant's privacy rights. The court noted that in evaluating the fairness of an employer's drug-testing policy, it would consider whether the policy provided for an employee's right to inspect the findings, request confirmatory tests, and challenge the results.

However, the decision provides enough assurance that private employers may institute or continue pre-employment drug-testing programs in West Virginia.

**Toth v. Board of Parks and Recreation**

593 S.E.2d 576

(W. VA. December 10, 2003)

Justice Davis delivered the opinion of the Court

(Justice McGraw dissented)

**What the Court was asked to Decide:**

The court was asked to decide whether a cause of action exists against a potential employer for a failure to hire allegedly based upon the applicant's history of suing a former employer for wrongful discharge.

**What the Court Decided:**

The court concluded that it did not need to reach the issue of whether a claim for failure to hire existed under West Virginia Law because the prospective employee, Toth, had not presented sufficient evidence that her bringing of the first lawsuit was a substantial or a motivating factor for the adverse hiring decision.

**Facts:**

Geraldine Toth worked for over eleven years as the Director of the Retired Senior Volunteer Program (RSVP) for Senior Monongalians, a senior center in Monongalia County. Toth's employment as RSVP director came to an end on March 19, 1997, when she was fired from that position. Toth then filed a wrongful discharge lawsuit against Senior Monongalians claiming that it had breached an implied contract and that her termination was in retaliation for communicating concerns about the operation of the RSVP to a county commissioner and the state director of the RSVP.

On January 22, 1999, a jury found that Toth had been discharged in retaliation for protected activity. She was awarded \$40,000 in lost wages and \$10,000 for emotional distress. Toth had also sought reinstatement of her old job, but such relief was not possible as the federal contract for the administration of RSVP had been transferred from Senior Monongalians to the City of Morgantown's Board of Parks and Recreation (BOPARC).

In 1998, during the course of her litigation with Senior Monongalians, Toth applied for the RSVP director position from which she had been fired, which was then being administered by BOPARC. Toth, who was fifty-eight years old at the time, was not hired for the position. Instead, BOPARC hired Anne D'Allessandri, a twenty-five year old woman whose credentials included a Certificate in Gerontology that was based upon eighteen hours of college credit. In a subsequent letter, BOPARC defended its decision to hire D'Allessandri over Toth based upon D'Allessandri's gerontology certificate and her computer skills. In their scoring of Toth's interview, BOPARC

officials gave her a zero for fiscal experience and a two for computer experience. According to Toth's resume, in 1998 when the hiring decision was made she possessed the computer skills to use Dbase, WordPerfect, Quicken, the internet, and e-mail. She also had twelve years experience owning and managing her family's business.

After she was rejected for the RSVP director position, Toth filed a lawsuit against BOPARC alleging age discrimination and retaliation for her lawsuit against Senior Monongalians. Toth argued that allowing employers to refuse to hire job applicants because they had brought legal action against a previous employer for wrongful discharge would have a chilling effect on those seeking to enforce their legal rights. Toth alleged that BOPARC's failure to hire her for the RSVP director position arose from age discrimination and as retaliation against her for exercising her constitutional rights.

**Holding:**

The West Virginia Supreme Court reiterated that it is in contravention of substantial public policies for an employer to discharge an employee in retaliation for the employee's exercising his or her state constitutional rights to petition for redress of grievances and to seek access to the courts.

In the context of retaliation taking the form of a failure to hire, the court noted that the United States Supreme Court has recognized a cause of action for failure to hire that was based on the employee's exercise of First Amendment rights. The West Virginia court noted, however, that Toth had not asserted a failure to hire on constitutional grounds arising from the First Amendment. Further, the court noted that Toth did not cite any authority extending that cause of action to encompass a failure to hire claim arising from state or federal guarantees of free access to the courts and the right to petition the government for redress of grievances.

But, the court also noted that there was no need to decide whether to recognize this new cause of action because even if the cause of action was recognized, Toth's proof would be insufficient to support that claim. It was a matter of linkage. Toth could not, or did not, offer evidence that linked the failure to hire with the lawsuit against her former employer.

**Bottom Line:**

The court decided to defer to another day the question of whether an applicant denied hire can state a cause of action for retaliation based on earlier litigation.

**Slivka v. Camden-Clark Memorial Hospital**

2004 WL 323199

(W. Va February 19, 2004)

Justice Albright delivered the opinion of the Court

(Justice Maynard concurred in part and dissented in part)

**What the Court was asked to Decide:**

The question before the court was whether a gender requirement (hiring only female nurses in the obstetrical department of a hospital) was a bona fide occupational qualification (BFOQ) within the statutory exception to the West Virginia Human Rights Act's general prohibition of discrimination in hiring practices.

**What the Court Decided:**

The West Virginia Supreme Court found that the privacy concerns of patients was central to resolving whether the privacy-based BFOQ of gender qualified as an exception to the statutory mandate against discriminatory employment practices. In this particular case, the court determined that further evidence was needed before a decision was reached.

**Facts:**

Michael Slivka, a registered nurse, applied for a position in the obstetrical department of Camden-Clark Memorial Hospital. Slivka had held various nursing positions since becoming a nurse, several of which involved obstetrical duties. The hospital informed Slivka that, although male nurses were employed in other departments of the hospital, male nurses were not hired to work in the obstetrical department due to concerns for patient privacy, staffing, and quality of care.

In response to the hospital's explanation for refusing to consider him for employment in the obstetrical unit, Slivka filed suit. Following discovery, the hospital moved for judgment in its favor, after which Slivka filed a like motion. The circuit court ruled in favor of the hospital. The court found that the privacy concerns of the hospital's patients and their families, as well as evidence that the presence of male nurses in the obstetrics ward had previously caused, and would continue to cause, conflicts among patients, doctors, and hospital staff, factually established sufficient grounds for a *bona fide* occupational qualification in the hiring of female obstetrical ward nurses only. Slivka then appealed to the West Virginia Supreme Court of Appeals.

**Holding:**

The court noted that it was an unlawful employment practice for an employer to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or

national origin. The court also noted that it would not be an unlawful employment practice for an employer to hire and employ employees on the basis of their religion, sex, or national origin in those certain instances where religion, sex, or national origin is a *bona fide* occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.

The court took note that the United States Supreme Court, upon examining the BFOQ exception in Title VII of the federal Civil Rights Act, concluded that an employer asserting a BFOQ defense has a heavy burden. The United States Supreme Court observed that the BFOQ exception is meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex.

The West Virginia Supreme Court concluded that where an employer asserts gender as being a *bona fide* occupational qualification under state law, it must prove: (1) how the essence or central mission of the business would be undermined by hiring members of both sexes; (2) the factual basis for the employer's belief that all or substantially all members of one gender could not perform the essential duties of the job in question without intruding upon legitimate privacy concerns of its patrons; and (3) why alternatives to the gender-excluding policy would be impossible or impractical to achieve.

The court noted that obstetrics is a unique section of the hospital inasmuch as all obstetric patients are female. Also, the court stated that the intimate and intrusive procedures routinely performed in the obstetrics department may well raise privacy concerns in patients. Nevertheless, the court was troubled by the lack of evidence in this case, particularly from patients themselves. The court noted that the record was devoid of information about how other hospitals, having comparable patient population, staff size and level of care, reconcile patients' privacy interests in their obstetrics department with the employment rights of male nurses. Further, the court noted that the legal and factual complexities of this type of BFOQ made it particularly difficult to resolve on a summary judgment motion.

The court expressly noted that gender discrimination may be acceptable in instances where privacy interests trump the principle of equal employment opportunity. And while accommodation or balancing of both issues is the goal, it is not always practicable. The court held that to assure that gender-excluding practices are indeed essential to preserving a privacy right, the trial court must perform a detailed and thorough examination of the circumstances of each case in which gender is raised as a BFOQ.

Accordingly, the court reversed the order of summary judgment in favor of the defendant hospital and remanded the case back to the circuit court.

**Bottom Line:**

An employer will have a difficult time asserting a bona fide occupational qualification as a defense. The BFOQ exception is meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex. Yet, the court did acknowledge that it would give credence to this type of exception in certain cases when privacy interests trump the principle of equal employment opportunity. Therefore, if an employer is claiming the BFOQ defense, it is essential that the employer have strong evidence that supports the need for the exception.

**Benson v. AJR, Inc.**

2004 WL 914968

(W. VA. April 16, 2004)

The opinion of the Court was delivered Per Curiam

(Justice Maynard concurred in part and dissented in part)

**What the Court was asked to Decide:**

The court was asked to decide two issues: (1) whether an employer's limited dissemination of an employee's positive drug test could provide the employee with a claim for "false light invasion of privacy;" and (2) whether failing a drug test is an act of "dishonesty" so as to disqualify a terminated employee from severance benefits under an employment contract.

**What the Court Decided:**

The court held that minimal communication to three persons, all of whom were employees, officers, or creditors of the company did not amount to widespread publicity. As a result, the court did not find that the employee could maintain a claim for invasion of privacy. As to the second issue, the Court held that failing a drug test was not "dishonesty."

**Facts:**

Danny Benson worked for AJR as a general welder and was eventually promoted to supervisor. During the summer of 1997, the three AJR shareholders sold the company to John Rhodes. As part of the agreement, Mr. Rhodes acquiesced to an employment agreement regarding Mr. Benson. While AJR had the right to terminate Mr. Benson with one day's written notice, it was required to continue paying his salary for the balance of the eight-year term in the absence of: (a) dishonesty; (b) conviction of a felony; and (c) voluntary termination of the agreement by Mr. Benson.

On March 2, 1998, a drug test was administered to the employees of AJR and Mr. Benson tested positive. Between the time of the drug test and when the results were made available, Mr. Rhodes conducted meetings with various AJR personnel and asked whether anyone was aware of any employee drug use. Mr. Benson attended one of those meetings but did not admit his drug use. Mr. Benson was subsequently terminated on March 6, 1998.

On March 4, 1999, Mr. Benson filed a complaint in the circuit court alleging breach of contract and false light invasion of privacy. The circuit court ruled in favor of AJR on both counts granting summary judgment. With regards to the claim for false light invasion of privacy, the circuit court held:

It is not an invasion of privacy to communicate the private fact to a single

person or a small group of persons. The tort of invasion of privacy requires

widespread publicity.” *See Davis*, 627 F. Supp. at 421; *see also Crump*, 173 W.Va. at 716, [320 S.E.2d at 88] (holding “false light” privacy action requires “wide spread publicity”).

From this decision, Mr. Benson appealed to the West Virginia Supreme Court of Appeals.

## **Holding:**

### **A. Breach of Employment Contract**

Mr. Benson claimed that AJR was still required to pay his salary for eight years and that the circuit court erred in its determination that Mr. Benson was terminated for dishonesty. The WV Supreme Court ruled that the record in the case was unclear on whether AJR dismissed Mr. Benson for drug use or dishonesty. The court held that a jury should decide the issue and noted that “[i]f the jury determines that drug use, rather than dishonesty, was the basis for the dismissal, then the provisions of the employment contract with regard to continued payment of [Mr. Benson’s] salary for the duration of the contractual term are applicable.”

### **B. False Light Invasion of Privacy**

Mr. Benson also argued that AJR wrongly published and disseminated his drug test results. The circuit court determined that Mr. Rhodes told at the most three people, a former owner and creditor, his wife and corporate secretary, and an administrative assistant secretary. The circuit court held that the “minimal communication” to three individuals, “all of whom are AJR employees, officers, or creditors does not amount to widespread publicity.” The WV Supreme Court agreed and upheld the grant of summary judgment on that count.

## **Bottom Line:**

The court held that it was not an invasion of privacy to communicate a private fact, in this case drug test results, to a small group of people. The tort of invasion of privacy requires widespread publicity. In this respect, the opinion is positive for business. This count, however, was not the major thrust of the case. Moreover, the holding as to this count did not “make new law.” It merely reiterated a well-established point in West Virginia privacy law. In contrast, the ruling on the second count moved Justice Maynard to bemoan the “terrible message” being sent to business and to label the result as “appalling.” The majority of the court had enough latitude to agree with the circuit court that “drug use equals dishonesty.” The supreme court never clearly articulated why that was “over broad.” Neither did the court address a very significant public policy argument by the employer: that it was against public policy to reward an employee, a safety director no less, with a multi-year severance windfall due to his

criminal activity. In many contexts, the court has strained to give an employee what the court deemed to be an equitable result. The court, in this case, without much strain, could have given a business an equitable result. It chose not to do so.

**Wells v. WBOY-TV**

No. 31684

(W. Va. May 7, 2004)

This decision is a Per Curiam Opinion (Justice McGraw dissents)

**What the Court was asked to Decide:**

The court was asked to decide whether the trial court could force an employee to arbitrate his breach of contract and public policy claims pursuant to an arbitration clause in his employment contract.

**What the Court Decided:**

The Supreme Court of Appeals held that the arbitration provision in the employment contract was enforceable and that the employee was required to arbitrate some of his claims.

**Facts:**

On June 19, 2002, Erik Wells entered into a written employment contract with WBOY-TV to be a news anchor. The term of the contract was from July 1, 2002 through July 1, 2006. Mr. Wells' employment contract had the following arbitration provision:

Any dispute between the parties arising out of or with respect to this Agreement or any of its provisions or Employee's employment with Employer shall be resolved by the sole and exclusive remedy of binding arbitration. The arbitration shall be conducted in Charleston, West Virginia under the auspices of, and in accordance with the rules of the American Arbitration Association. Any decision issued by an arbitrator in accordance with this provision shall be final and binding on the parties thereto and not subject to appeal or civil litigation.

At the same time Mr. Wells entered into his employment contract, Mr. Wells' wife, Natalie Tennant, entered into a similar contract to be a news anchor. Mr. Wells and Ms. Tennant conditioned their employment on both of them being hired as a husband and wife news anchor team.

On August 25, 2003, Ms. Tennant commenced an unpaid leave of absence in order to campaign and run for Secretary of State. Because his wife was exploring the possibility of running for Secretary of State, WBOY-TV placed Mr. Wells on an involuntary, unpaid leave of absence.

Mr. Wells filed a lawsuit against WBOY-TV alleging breach of contract, state public policy and defamation claims. Mr. Wells also filed suit against West Virginia Media Holdings, LLC, the parent company of WBOY-TV, alleging tortious interference with business relations and defamation.

WBOY-TV and West Virginia Media filed a motion to force Mr. Wells to submit his claims to arbitration based upon the arbitration provision in his contract. The trial court ruled that the breach of contract claim and the state public policy claim were subject to arbitration. The tortious interference and defamation claims were not subject to arbitration. Mr. Wells appealed the trial court's decision. WBOY-TV did not appeal the trial court's decision that the tortious interference and defamation claims were not subject to arbitration.

On appeal, Mr. Wells argued (1) that the costs of arbitration placed an unreasonable financial burden on him; (2) that WBOY-TV grossly misrepresented the costs of arbitration during his contract negotiations; and (3) that his state public policy claim could not be arbitrated.

**Holding:**

The Supreme Court of Appeals held that Mr. Wells did not show that the cost of arbitration placed an unreasonable financial burden on him. Mr. Wells alleged that taking his case to arbitration could cost him at least \$8,500.00. The Court found that this assertion was speculative because there was no information in the Court record to support the assertion. Moreover, the Court noted that Mr. Wells' contract was not a contract of adhesion. The terms of the contract were negotiated and customized to accommodate Mr. Wells. In addition, Mr. Wells was not an unsophisticated party who was forced to sign a form contract that WBOY-TV provided. Mr. Wells and Ms. Tennant actively and jointly negotiated their contracts and had the opportunity to examine and modify the contracts.

The Court also rejected Mr. Wells' argument that WBOY-TV misrepresented the costs of arbitration. According to Mr. Wells, WBOY-TV told him that the costs of arbitration were cheaper than litigation as a way to induce Mr. Wells to accept the contract. Because several courts, including the United States Supreme Court and the Fourth Circuit, had made express findings that the costs of arbitration were less than litigation, the Court rejected Mr. Wells' claim that WBOY-TV misrepresented the costs of arbitration.

Finally, Mr. Wells alleged that his public policy claim must be decided by a court and not by an arbitrator. Mr. Wells alleged in his complaint that WBOY-TV's conduct violated several West Virginia public policies. Mr. Wells argued that the question of what constitutes a public policy evolves on a case-by-case basis and that the decision should be made by a judge. The Court rejected Mr. Wells' argument that only judges were capable of determining whether a termination violated a state public policy. The

Court noted that arbitrators are experienced in the field of employment law and found no merit to Mr. Wells' argument.

**Bottom Line:**

This is the first West Virginia decision which upholds mandatory arbitration provisions in the employment context. While the Court found for the employer in this case, this case had a unique set of facts. Mr. Wells was a sophisticated individual who had the opportunity to negotiate and modify his individual employment contract. If Mr. Wells had simply been given a form contract which was not subject to negotiation and which Mr. Wells was required to sign if he wanted to work at WBOY-TV, the Court may have decided the case differently.

## **General Motors Corporation v. Smith**

No. 31425

(W. Va. June 25, 2004)

This decision is a Per Curiam Opinion

(Justice Maynard dissented)

### **What the Court was asked to Decide:**

The court was asked to decide whether the employee's state law disability discrimination claim was preempted by federal law. In addition, the court was asked to decide whether the employee's allegations met the statutory definition of discrimination.

### **What the Court Decided:**

The court held that the employee's state law claim was not preempted by federal law. The court also held that the employee's claim did meet the statutory definition of discrimination.

### **Facts:**

Hubert J. Smith began working for GM in 1971. For most of Mr. Smith's employment, he worked as a "Power Sweeper Operator," which essentially meant that he drove a machine up and down the warehouse aisles cleaning the floor. Mr. Smith first injured his back during his service with the United States Marine Corps, and re-injured his back several times during his employment. In 1985, Mr. Smith fell down a flight of stairs and suffered a lower back injury that required three back surgeries. Due to his condition, Mr. Smith took a total and permanent disability retirement from GM.

In 1995, Mr. Smith began the process of relinquishing his retirement and trying to return to work for GM. Mr. Smith began by submitting an authorization to return to work that was prepared by Mr. Smith's treating physician. According to the Court, Mr. Smith's efforts to return to work were impeded by GM's bureaucratic hurdles. Two years after Mr. Smith's initial request to return to work, GM scheduled a physical examination for Mr. Smith. The physician found that Mr. Smith was still too disabled to perform his old job. Therefore, GM refused to rehire Mr. Smith.

Mr. Smith filed a complaint with the West Virginia Human Rights Commission alleging that he was able to perform the essential functions of the Power Sweeper Operator position but that GM failed to reinstate him due to his disability. The ALJ ruled in Mr. Smith's favor.

On appeal to the Kanawha County Circuit Court, the trial court reversed the Commission's decision. The trial court found that Mr. Smith's claim did not meet the definition of "unlawful discrimination" and that Mr. Smith's state law discrimination claim was preempted by both the Labor Management Relations Act and ERISA.

### **Holding:**

The Supreme Court of Appeals disagreed with the trial court's holding. The Supreme Court first addressed the preemption issue and noted that federal preemption of state law claims is generally disfavored. With regard to preemption under ERISA, the

Supreme Court noted that Mr. Smith was simply trying to give up his retirement pension benefits so that he could return to work. Simply because Mr. Smith participated in an ERISA-covered pension plan did not require preemption of his state law claims. Resolving Mr. Smith's state law claims would not create the risk of conflicting state and federal law.

GM had also argued to the trial court that Mr. Smith's state law claim was preempted because there was a collective bargaining agreement which addressed how a retired employee could return to work. In determining whether a state law claim is preempted by a collective bargaining agreement, the issue is whether resolving the state law claim will require the collective bargaining agreement to be interpreted or applied.

The court found that Mr. Smith was not arguing about a term in his pension plan or a particular term of the collective bargaining agreement. Instead, Mr. Smith alleged that GM violated his state law rights in the variety of ways that it considered and rejected his request to return to his job. Therefore, the supreme court concluded that Mr. Smith's state law claim was not preempted by the LMRA.

The court then addressed whether Mr. Smith's claim met the statutory definition of discrimination under the Human Rights Act. Mr. Smith claimed that GM lied to him about not having the right to challenge GM's refusal to re-hire him and lied to him about working with him to get his job back. Mr. Smith claims that GM engaged in this conduct to prevent his re-employment because of his previous injuries. Based on these allegations, the Supreme Court held that Mr. Smith's claim met the definition of discrimination and that Mr. Smith made a *prima facie* case of disability discrimination.

### **Bottom Line:**

The supreme court was reluctant to find that Mr. Smith's state law discrimination claim was preempted by federal law. Even though GM had a collective bargaining agreement which specifically discussed how retired employees could return to work, the supreme court still found that Mr. Smith's state law claim could be resolved without referring to the collective bargaining agreement. Given the supreme court's stance that preemption of a state law claim is the exception rather than the rule, employers will have some difficulty getting the supreme court to find that a state law claim is preempted by federal law.

With regard to the finding that Mr. Smith's allegations met the definition of discrimination, the court simply noted that Mr. Smith had produced "substantial evidence" that the reason that GM refused to re-employ him was because of his former injuries. The supreme court, however, did not identify what that substantial evidence was. It appears that the supreme court based this finding simply on Mr. Smith's allegations and belief that GM's decision was based on Mr. Smith's previous injuries.

## **Smith v. United Parcel Service**

No. 31645

(W. Va. July 2, 2004)

Justice Starcher delivered the opinion of the Court

(Justice Maynard and Davis concur in part and dissent in part)

### **What the Court was asked to Decide:**

The court was asked to decide whether the Human Rights Commission improperly overturned a decision from an ALJ that the employer discriminated against a disabled employee and failed to reasonably accommodate her disability.

### **What the Court Decided:**

The court decided the Commission did improperly overturn the ALJ's

decision. **Facts:**

Patti Smith began working for UPS in 1980 and worked a variety of positions. In 1986, Ms. Smith became a full-time "package car" driver. During the early 1990s, Ms. Smith developed problems with weight loss, crying spells, insomnia, fatigue and depression. In March 1994, Ms. Smith was diagnosed with depression. In September 1994, Ms. Smith was injured in a work-related accident. Within a week, Ms. Smith attempted to return to work but physical and emotional problems kept her off work until October 1994.

After a surgery in March 1995, her doctors released her to return to work on May 2, 1995. Her doctors, however, noted that she was suffering from mood disorders, personality disorders with obsessive traits and depression. Ms. Smith's doctors recommended to UPS that Ms. Smith be placed in a structured work setting, essentially one where she was not required to drive a package truck. Apparently, Ms. Smith could not function in a job where she had to deal with the public.

On May 2, 1995, Ms. Smith specifically requested that she be provided with eight hours of work per day in a non-driving position. UPS refused, asserting that there were only six "inside" positions and that Ms. Smith did not have enough seniority to bump the individuals who currently held those positions. Ms. Smith never returned to work and was terminated on December 5, 1995.

Ms. Smith filed a complaint with the Human Right Commission alleging that UPS had violated the Human Rights Act by refusing to acknowledge her disability and to accord her reasonable accommodation. UPS' position was that she was incapable a performing the package car driver position and that no accommodation was necessary.

The ALJ held that Ms. Smith was disabled due to her depression and that UPS had discriminated against her and failed to provide her with a reasonable accommodation. The Commission reviewed the ALJ's decision and asked for further hearings to clarify the ALJ's reasoning behind its decision. After additional hearings, a new ALJ also concluded that Ms. Smith was disabled and that UPS had discriminated against her. The Commission agreed that Ms. Smith was disabled due to depression but

held that Ms. Smith failed to prove that UPS discriminated against her when it refused to reassign her to another position. Ms. Smith appealed this decision.

**Holding:**

The Supreme Court of Appeals held that the Commission applied the wrong legal standard and found that the record supported the ALJs' decisions. So long as the depression impairs a major life activity, the Supreme Court agreed that depression was a disability under the Human Rights Act. In this case, Ms. Smith's depression impaired her ability to sleep and to work. Therefore, Ms. Smith was disabled from performing her job duties as a package car driver.

The court then addressed whether the Commission used the correct legal standard. In deciding the case, the court held that the Commission used the wrong legal standard. In 1994, the Commission promulgated regulations that interpreted the phrase "reasonable accommodation." According to the regulation, reasonable accommodation included "job restructuring, part-time or modified work schedules, reassignment to a vacant position for which the person is able and competent . . . to perform[.]" The court concluded that this regulation had the force and effect of law at the time Ms. Smith requested the accommodation. Contrary to the regulation, UPS made no effort to restructure Ms. Smith's job, no effort to give Ms. Smith part-time or modified work schedules and no effort to reassign Ms. Smith to a vacant position. Based on this evidence, the supreme court could not conclude that the ALJs' decisions were incorrect.

**Bottom Line:**

The supreme court recognized that depression can be a disability so long as it impairs a major life activity for an employee. Interestingly, the regulations that the supreme court refers to were contrary to the established supreme court case law that was in effect at the time of the facts of this case. Prior to the 1996 decision in Skaggs, the supreme court had held that where a disabled employee could no longer perform the essential functions of her current position, reasonable accommodation did not require the employer to reassign the employee to another position. The court ignored this rule and used the regulation which provided Ms. Smith more protection.

# **Workers' Compensation**

**Wampler Foods, Inc., v. Workers' Compensation Division, Tammy S. Pancake, and Gregory Burton, Executive Director of Workers' Compensation Commission**

No. 31599

**and State of West Virginia, Ex Rel. Charles Thompson v. Gregory Burton, Executive Director, West Virginia Workers' Compensation Commission**

No. 31600

**and State of West Virginia Ex Rel. Morris Yoakum, Robert Carpenter, Gale Fraley, Alan Kiblinger, Gilbert Kuehl, Robert Meadows, Leonard Davis, and Gene Martin**

No. 31653

Filed July 1, 2004

The opinion of the Court was delivered per curiam.

(Chief Justice Maynard concurred in part, dissented in part, and reserved the right to file a separate opinion. Justice Davis concurred in part, dissented in part, and reserved the right to file a separate opinion. Justice McGraw concurred in part, dissented in part, and reserved the right to file a separate opinion.)

**What the Court was asked to Decide:**

Whether and to what extent the statutory changes made by the Legislature in the adoption of Senate Bill 2013 could constitutionally be retroactively applied to cases filed before July 1, 2003, the date of enactment?

**What the Court Decided:**

The interpretation given to Senate Bill 2013 by the Workers' Compensation Division (now "Commission") regarding the retroactive application of the statute meets with constitutional, substantive due process protections and was therefore upheld.

**Facts:**

In this case, the Court consolidated three separate actions, all asking the Court to consider four statutory changes to the Workers' Compensation Code made effective by the Legislature on July 1, 2003.

*A. Wampler Foods v. Workers' Compensation Division*

In this case, Wampler Foods appealed from the July 15, 2003 Order of the Workers' Compensation Appeal Board, which upheld the compensability of the claim. Wampler Foods argued that the Appeal Board's decision failed to comply with the provisions of Senate Bill 2013, which require the elimination of the rule of liberality in analyzing Workers' Compensation claims.

The Claimant argued that the claim should be processed using the law in effect on the date of injury in order to comply with constitutional substantive due process protections. Wampler Foods argued that the Senate Bill 2013 amendments apply

to any actions taken in the Workers' Compensation claims after July 1, 2003, and that the new law should be applied to the Appeal Board's July 15, 2003 decision.

*B. State ex rel. Charles Thompson v. Gregory Burton*

In this case, the Claimant filed a claim on January 27, 2003. The Commission entered a 6% PPD award on July 24, 2003, using the pre-July 1, 2003 law to calculate the amount of the Claimant's award. The Commission later recalculated the amount of the award in accordance with Senate Bill 2013. The Claimant filed a writ of prohibition against the Workers' Compensation Commissioner, contending that the Commission violated his due process rights and acted in an unconstitutional manner when it retroactively applied the provisions of Senate Bill 2013 to calculate his award. He argued that the Commissioner should calculate the amount of his award in accordance with the statute in effect on the date of his injury. The Commission argued that the law in effect on the date of an "award" controls the adjudication of that particular issue within a claim.

*C. Morris Yoakum, et al. v. Gregory Burton*

In this case, eight claimants challenged the retroactive application of Senate Bill 2013. In seven of the cases, the claimants were examined by a physician and the physician submitted a report to the Commission prior to July 1, 2003. In each case, the Commission did not act on the report until after July 1, 2003 and benefits were calculated under the new law.

The eighth case involved an occupational pneumoconiosis claim, wherein the Occupational Pneumoconiosis Board diagnosed OP by X-ray with no evidence of breathing impairment on June 5, 2003. Under the pre-July 1, 2003 law, the findings would have resulted in a 5% PPD award, which the Board recommended. The Commission issued an Order granting the Claimant a 5% PPD award on July 21, 2003, then later rescinded the Order due to the provisions of Senate Bill 2013. The new law requires a claimant whose award was issued after July 1, 2003 to show evidence of measurable pulmonary impairment before receiving an award. The Claimant petitioned for writ of mandamus seeking payment for OP under the pre-July 1, 2003 statute.

**Holding:**

The majority opinion upheld the application of the various amendments to the Workers' Compensation statutes as they applied to the parties before the Court in the consolidated actions. The Court analyzed the cases in accordance with case law that stands for the principle that when the constitutionality of a statute is questioned, every reasonable construction must be considered in order to sustain constitutionality, and any doubt resolved in favor of the constitutionality of the legislative enactment.

Applying this principle, the Court agreed with the position taken by the Workers' Compensation Commission, and held that the law in effect on the date of an "award" controls the adjudication of that particular issue within a claim. The Court accepted the

Commission's definition of the term "award" to mean any decision by the Commission upon an issue submitted for resolution. Therefore, only cases where the Commission had issued a ruling on a particular issue prior to July 1, 2003 can be processed under the pre-July 2003 law because in these cases the Commission had issued an award. Cases filed after July 1, 2003 and cases where the Claimant had filed an application or sought relief, but no ruling had been issued by the Commission by July 1, 2003, must be processed under post-July 1, 2003 law.

Specifically, in *Wampler Foods*, the Court rejected the Employer's argument that the post-July 1, 2003 law should control the Appeal Board's disposition of the claim because the date of the "award" by the Commission was prior to July 1, 2003. The Court therefore upheld the Appeal Board's decision.

In *Thompson*, the Court deferred to the Legislature and held that because the Claimant's award calculating his PPD was issued after July 1, 2003, the new benefit rate of pay set forth in Senate Bill 2013 applied. The Claimant's writ of prohibition was declined.

In *Yoakum*, the Court again reasoned that the Claimants had failed to meet their burden of establishing that the Legislature or the Commission acted in an arbitrary or irrational way. The Court further rejected the Claimants' argument that the Commission violated their due process rights by failing to issue an "award" expeditiously and prior to July 1, 2003. The Court therefore denied the writ.

### **Impact on Business:**

The outcome of the long-awaited *Thompson* decision must be seen as a victory for the business community on several levels. First, for both self-insured and subscribing employers, the Senate Bill 2013 amendments apply to "awards" issued after July 1, 2003. These amendments include elimination of the rule of liberality, elimination of the 5% statutory award for OP, reduced benefit rates and other cost savers. The savings afforded by these changes will result in a significant reduction in future premiums, and should enable West Virginia companies to do business and to compete with out of state businesses with the benefit of controlled Workers' Compensation costs.

In addition, by upholding the legislative reforms to the Workers Compensation statute, the Court has enabled the Workers' Compensation Commission to move forward with its plan to address the enormous deficit in the Workers' Compensation system. These legislative changes have been predicted to save the Workers' Compensation Fund one billion dollars. Though the Commission, the Legislature and West Virginia businesses still have challenges to meet in order to save this troubled system, the *Thompson* case has now guaranteed a level of stability. Economic stability of this kind attracts new business and allows existing businesses to function with greater security.

Had the Court not upheld the changes to the Workers' Compensation Code, it is impossible to predict the disastrous effects such a ruling would have created. The Fund

would undoubtedly have been forced into receivership, with all the uncertainty such a situation would have involved. The predicted costs to businesses would have been staggering and the ripple effect unimaginable.

To its credit, the Court grappled with tough issues in this case and ultimately rendered the right decision in the face of considerable political pressure. Though it could have gone further by accepting the position of *Wampler Foods*, the decision is still pro-business and an indication that the Court may finally realize the significance of the Workers' Compensation problem West Virginia faces.

# Taxes

**Bluestone Paving, Inc. v. Tax Commissioner**

No. 31377 (December 5, 2003)

3-2 decision; majority opinion by Justice Davis

**What the Court was asked to Decide:**

Whether a paving contractor is entitled to a credit against use tax imposed on the use of asphalt in West Virginia for sales tax the contractor paid in Virginia on its purchase of the raw materials it used to produce the asphalt.

**What the Court Decided:**

The Court held that the contractor was not entitled to the credit because the raw materials on which the Virginia sales tax was paid were not the exact, same or identical items on which the West Virginia use tax was imposed.

**Facts:**

Bluestone Paving, Inc. (Bluestone) is a paving contractor based in Princeton, West Virginia. A primary function of its business was to pave West Virginia public roads using asphalt. In order to meet applicable specifications for the gravel that is a key component of the asphalt, Bluestone purchased gravel in Virginia. It then used that gravel to produce the asphalt it, in turn, used to perform its public paving projects in West Virginia.

Under West Virginia use tax law, an integrated manufacturer-contractor such as Bluestone is required to pay tax on the value of the manufactured materials used to perform its paving contracts. Another provision of the use tax law provides a credit, against the tax imposed on the use of items of tangible personal property, for sales tax paid to another state upon the purchase of those same items. The Circuit Court found that, because the gravel was incorporated into the asphalt, Bluestone was entitled to the credit and reversed the Tax Commissioner's administrative earlier decision denying it.

**Holding:**

In a split decision, a majority of the Court agreed with the Tax Commissioner's ruling and reversed the lower court. In explaining its holding, the Court applied the common, ordinary and accepted meaning of the term "that" which, in the applicable statute, referred to the items the purchase of which had to be subject to both the out-of-state sales tax and the West Virginia use tax in order for the credit to apply. According to the majority, that meaning required the things, to which "that" referred, to be the exact, same or identical items and not just component parts of one or the other.

The dissenting opinion of Justice Albright (joined by Justice McGraw) was based on a number of both technical and policy considerations. The technical consideration highlighted the awkwardness of the interplay among the applicable sales and use tax law provisions. The policy considerations, cited by the dissent as being implicated by the majority opinion, ranged from difficulty of administration to the unintended imposition of double taxation against West Virginia's manufacturing industry.

**Impact on Business:**

On its face, the majority's ruling does narrow an important (indeed, constitutionally required) avenue for relief from multiple taxation for business purchases. However, the impact of the ruling should not be as wide-ranging as the dissent suggests because, under other provisions of the sales and use tax laws, West Virginia manufacturers, selling their products at wholesale, are exempt from either tax both on materials purchased or produced for use in manufacturing and on those subsequent sales. Moreover, in at least one case applying the Bluestone decision, a lower court had no trouble distinguishing the facts before it to hold that the use tax paid on duct work installed by an HVAC contractor in West Virginia was subject to the credit for Pennsylvania sales tax

paid on the sheet metal used to make that duct work. See Scalise Industries, Corp. v. Tax Commissioner, CA No. 03-C-AP-15, Cir. Ct. Mon. Co. (Judge Stone), April 15, 2004.

Beyond the specifics, perhaps the most significant implication of Bluestone is the continued role of Justice Albright (albeit here joined by Justice McGraw in a dissent) to carefully, objectively and independently apply the tax laws in a manner that is fair to business taxpayers challenging the actions of the State Tax Commissioner. Indeed, that approach has consistently characterized the manner in which the Court, as a whole, has addressed state tax cases over the last several terms.

# **Insurance**

**Burrows v. Nationwide**

Slip Opinion No. 31344, February 19, 2004

West Virginia Supreme Court of Appeals

Justice Albright delivered the opinion of the Court. Justice McGraw dissents.

**What the Court was asked to Decide:**

Whether the death of the named insured who executes a waiver of optional underinsured motorist coverage or the removal of such person from the policy terminates the otherwise binding effect of that waiver, and whether policy changes made by the insured, which concern the types of coverage but do not involve any alteration of the actual liability limits, can trigger the statutory requirements that require the offering of underinsured motorist coverage.

**What the Court Decided:**

That the death of the named insured who executes a waiver of optional underinsured motorist coverage or the removal of such person from the policy terminates the otherwise binding effect of that waiver. Additionally, that statutory requirements do not trigger the offering of underinsured motorist coverage when policy changes are made by the insured concerning the types of coverage but not involving any alteration of the actual liability limits

**Facts:**

The Court combined its analysis of two similar cases. In each case, the plaintiffs were covered under insurance policies, and were given the option to accept or to waive additional underinsured motorist coverage as a part of their policies. Later changes in their policies arose, but there was nothing in the changes that altered the level of coverage that was offered to the insureds. In one case, a driver was removed from the policy due to a serious illness. In another case, while the insured increased their bodily injury liability coverage, they did not add or increase any underinsured motorist coverage. In each case, due to an accident, both motorists found that they did not have enough underinsured motorist coverage after the event. They each asked to Court to determine whether they should have had some greater level of coverage, despite their own refusal to accept the underinsured motorists coverage that was initially offered to them by Nationwide.

**Holding:**

The Court held that the language contained in the West Virginia Code requiring insurers to offer underinsured motorist coverage to insureds upon a request for "different coverage limits" refers to a request for different liability coverage limits and does not refer to a request for changes in other types of coverage such as collision, comprehension, loss of use, or towing. The Court found that only changes that are requested by insureds to alter their actual liability coverage will invoke the statutory duty imposed on insurers to make

underinsured motorist coverage available within the meaning of the West Virginia Code.

**Dissenting Opinion:**

(Justice McGraw)

Justice McGraw reserved the right to file a dissenting opinion, but has not done so.

**Impact on Business:**

The impact of this decision on business, and on the insurance industry is positive. The Court refused to read additional requirements for insurance coverage that was not in the insurance contract, thereby increasing the predictability of results in underinsured motorist coverage cases.

**WV Fire and Casualty v. Stanley**  
Slip Opinion No. 31230, May 21, 2004  
West Virginia Supreme Court of Appeals

Chief Justice Maynard delivered the opinion of the Court. Justice Starcher filed a concurring opinion.

**What the Court was asked to Decide:**

Whether an insurance company has a duty to its insureds in an action arising from the alleged sexual misconduct of an insured minor when coverage is clearly precluded by the "accident" requirement and "intentional-injury" exclusion in the pertinent insurance policy.

**What the Court Decided:**

The Court affirmed the lower court's decision in finding that an insurance company has no duty to its insureds in an action arising from the alleged sexual misconduct of an insured minor because coverage is precluded by the "accident" requirement and "intentional-injury" exclusion in the pertinent insurance policy.

**Facts:**

Glen and Helen Stanley, defendants below in the underlying sexual abuse lawsuit, purchased a homeowner's insurance policy issued by West Virginia Fire & Casualty Company (hereafter "W.Va. Fire & Casualty") with an effective policy period of February 7, 1987, to February 7, 1994. They also purchased a Personal Catastrophe Liability Supplement which was in effect from February 7, 1987, to February 7, 1992.

The primary policy contained the following provisions in the Liability Coverage section:

“We will pay any amount up to your Limit of Coverage for which a Covered Person becomes legally liable as a result of bodily injury or property damage that is caused by an accident. Continuous or repeated exposure to the same conditions is considered a single accident. We will not cover bodily injury or property damage that is expected or intended by a Covered Person.”

By amendment effective February 7, 1993, specifically excluded from coverage was liability:

"[a]rising out of any sexual molestation, corporal punishment, or physical or mental abuse." Finally, the Personal Catastrophe Liability Supplement incorporated all of the above-stated provisions of the primary policy and added exclusions from coverage "for any fines, penalties, punitive or exemplary damages."

On or about December 30, 1998, Cass-Sandra Marko Gene Stanley (hereafter "Cass-Sandra Stanley") and her mother, Sandra Stanley, filed a complaint against Glen and Helen

Stanley and their son Jesse Stanley. Glen and Helen Stanley are the paternal grandparents of Cass-Sandra, and Jesse Stanley is her uncle. The complaint alleges that Cass-Sandra Stanley was "sexually abused and sexually exploited" by Jesse Stanley from the time she was seven years of age until she was sixteen years of age with the full knowledge of Glen and Helen Stanley who intentionally failed to disclose the acts to Cass-Sandra Stanley's parents or law enforcement authorities.

Based on its insurance policy with Glen and Helen Stanley, W.Va. Fire & Casualty initially assumed the defense of Glen, Helen, and Jesse Stanley subject to a reservation of its rights. However, it thereafter became the position of W.Va. Fire & Casualty that the claims set forth in the sexual abuse complaint are not covered by its policy, and that it therefore had no duty to indemnify or further defend. Accordingly, it filed a complaint for declaratory judgment in the Circuit Court of Mason County seeking a declaration of its rights, liabilities, and obligations in the sexual abuse action. It also filed a motion for declaratory and summary judgment alleging that it had no duty to defend nor indemnify the defendants. The circuit court granted W.Va. Fire & Casualty's motion for summary judgment .

**Holding:**

The Court concluded that W.Va. Fire & Casualty's insurance policy provides no coverage for the claims presented in the complaint because intentional sexual abuse claims are not within the meaning of "accident" provided in the policy. The claims are precluded by the policy's intentional acts exclusion. The essential allegations in the complaint are of deliberate, intentional, and malicious conduct. Therefore, W.Va. Fire & Casualty had no duty to defend against or indemnify their insureds for these claims.

**Impact on Business:**

The impact of this decision on insurance companies and on businesses in West Virginia is positive. This case clears up an issue that was raised in *Tackett v. American Motorists Insurance Company* over whether an insurance company must defend its insured in the case of an intentional tort related to sexual misconduct. The Court's decision makes it clear that language in policies that exclude such claims is valid.

**Horace Mann Ins. Co. v. Adkins**  
Slip Opinion No. 31592, June 30, 2004  
West Virginia Supreme Court of Appeals

Justice Davis delivered the opinion of the Court. Chief Justice Maynard filed a dissenting opinion.

**What the Court was asked to Decide:**

Whether an insurance company was obligated to pay underinsured motorist benefits (“UIM benefits”) to a plaintiff because the plaintiff did not, in settling his underlying claim, exhaust the available limits of liability coverage.

**What the Court Decided:**

The Court decided that the “doctrine of constructive exhaustion” meant that the insurer could allow an insured to collect UIM benefits under its own policy for damages that exceed the available limits of the liability policy.

**Facts:**

On July 22, 2000, Mr. and Ms. Adkins' son, Joseph Cory Adkins, was killed in an automobile accident on U.S. Route 19 in Fayette County, West Virginia. The accident occurred when the vehicle in which Mr. and Ms. Adkins' son was riding, which was driven by minor Holly Jeffries, attempted to enter U.S. Route 19 and pulled into the path of oncoming traffic, namely a vehicle driven by Dr. James P. Brown. The collision was fatal to all four minor occupants of the Jeffries vehicle, while Dr. Brown and his wife, Lynn Brown sustained various non-life threatening injuries.

Miss Jeffries' motor vehicle insurer, Newark Insurance Company, filed a claim against the estates of the four minor occupants of the Jeffries' vehicle and tendered its policy limits of \$100,000. In that proceeding, Mr. Adkins, as administrator of his son's estate, filed a cross-claim against the insurers of Dr. Brown and Mrs. Brown. At the time of the accident, Dr. Brown had policies of insurance with Shelby Insurance Company with \$300,000 liability limits under a policy of motor vehicle insurance and \$1,000,000 limits under a policy of umbrella insurance. Similarly, Mrs. Brown had a policy of motor vehicle insurance with Allstate Insurance Company with liability limits of \$300,000. Upon filing his cross-claim, Adkins also provided notice of a potential claim for UIM benefits to Horace Mann Insurance Company, with whom he and Ms. Adkins maintained separate policies of motor vehicle insurance.

Ultimately, the Browns' insurers settled with the four estates. Dr. Brown's insurer, Shelby Insurance Company, tendered \$500,000, and Mrs. Brown's insurer tendered \$255,000. The Adkins' insurer, Horace Mann, consented to the settlements and waived its right of subrogation, but reserved its right to assert defenses to the Adkins' UIM claim. Following these settlements, Horace Mann filed a declaratory judgment proceeding against Mr. and Ms.

Adkins to determine its duty to pay UIM benefits under their policies of insurance.

In support of its contention that it was not obligated to pay such benefits, Horace Mann relied upon a provision contained in the Adkins' policies which states that:

“[t]here is no [UIM bodily injury] coverage until the insured's damages exceed the limits of all bodily injury liability insurance policies or bonds applicable to the accident and those limits of liability that apply to the bodily injury have been used up by payments of judgments or settlements.

Horace Mann moved for summary judgment, contending that because the Adkins had settled for less than the full amount of liability limits provided by the Browns' insurers, they had not sufficiently exhausted all applicable liability coverages so as to activate their UIM coverage under their Horace Mann policies. The circuit court awarded summary judgment to Horace Mann, concluding that “[t]he policies issued by Horace Mann to Mr. and Mrs. Adkins include a provision requiring that all liability policies be exhausted before any UIM coverage is triggered.”

**Holding:**

The Court found that Horace Mann could still be liable to the Adkins up to its policy limits, even though the Adkins had settled with the other insurers for less than the limits of their policies. Using the “doctrine of constructive exhaustion,” the Court will allow an injured insured to collect underinsured motorist benefits under their own insurance policy for damages that exceed the available limits of a tortfeasor's liability policy when (1) the injured insured's underinsured motorist coverage requires exhaustion of a tortfeasor's applicable liability limits as a prerequisite to his/her recovery of underinsured motorist benefits; (2) the injured insured settles with the tortfeasor's insurer for less than the tortfeasor's full liability limits that are available to the insured, but is treated as having received said full liability limits for purposes of recovering underinsured motorist benefits under his/her own policy of insurance; and (3) the injured insured's recovery of underinsured motorist benefits is limited to those damages that exceed the amount of the tortfeasor's full liability limits available to the insured

**Dissent:**

(Chief Justice Maynard)

The Chief Justice stated that he would affirm the ruling of the circuit court that Horace Mann was not obligated to pay UIM benefits to Mr. Adkins. The Justice stated that Adkins did not, in settling his underlying claim, exhaust the available limits of liability coverage. Unlike the majority opinion, Justice Maynard states that the language in the policy did not violate public policy, and believes that the court adopted a new-fangled and confusing legal doctrine to get around the policy's plain language.

**Impact on Business:**

The impact of this decision on the insurance business is negative. The holding means that insurance companies may still be liable up to the amount of their UIM coverage, despite the existence of a settlement that might not extend to the limit of the policy's coverage. This has a negative impact on business in West Virginia. This type of decision sends a strong message that the insurance business has to pay more to do business in West Virginia than in other states, and this negatively impacts the availability and affordability of insurance for all businesses in West Virginia.

**Rose v. St. Paul Fire and Marine Insurance Co.**

Slip Opinion No. 31317, June 24, 2004

West Virginia Supreme Court of Appeals

Justice Starcher delivered the opinion of the Court. Justice Davis concurs. Chief Justice Maynard concurs in part, and dissents in part.

**What the Court was asked to Decide:**

Whether the acts of an insured's defense attorney while litigating a case are subject to the provisions of the West Virginia Unfair Trade Practices Act (UTPA).

**What the Court Decided:**

That, while the acts of the defense counsel are not subject to the UTPA, an insurer may be held liable for the actions of their counsel if the insurer is directing the actions of their attorney.

**Facts:**

This case grew out of a malpractice action by Linn Rose against her doctor, who was insured by St. Paul Fire and Marine. Rose's shoulder was allegedly injured by her doctor. As a result of her injury, Rose sued the physician. In defending the case, the defense attorneys allegedly covered up the fact that the hospital privileges of Rose's treating physician had been suspended. Though the negligence case against her doctor settled, Rose alleged that the case would have settled for a much higher amount if this, and other facts, had come to light and not been hidden by defense counsel. Seven months after settling, Rose brought suit under the UTPA against St. Paul, alleging that the insurance company should be liable for the litigation misconduct of their defense attorneys.

**Holding:**

The Court held that a defense attorney employed by an insurance company to represent an insured in a liability matter is not engaged in the business of insurance, therefore the defense attorney is not directly subject to the provisions of the West Virginia Unfair Trade Practices Act. The Court makes it clear, however, that the holding does not absolve insurance companies and attorneys from all potential responsibility under the UTPA. While attorneys and other individuals who are not in the business of insurance are not directly bound by the UTPA, an insurance company and its employees who are in the business of insurance must continue to comply with the UTPA, even if a defense attorney has been hired by the insurance company to defend a claim against an insured. A claimant can establish a violation of the UTPA by showing that an insurance company, through its own actions, breached its duties under the Act by knowingly encouraging, directing, participating in, relying upon, or ratifying the wrongful litigation conduct of a defense attorney hired by the insurance company to represent an insured. The Court also defines actionable "wrongful litigation conduct" by a

defense attorney, as conduct that, if it were committed by a person or entity in the business of insurance, would constitute a violation of the UTPA.

**Concurring and Dissenting Opinion:**

(Chief Justice Maynard)

The Chief Justice makes clear in his dissent that he believes that the majority opinion effectively hobbles an insurance company's ability to defend itself in an action brought under the UTPA. His dissent lies with the holding that the conduct of an insurer during the course of a lawsuit may support a cause of action under the UTPA. During a lawsuit, the UTPA places an insurance company in the position of owing a duty to the plaintiff to settle for an appropriate amount, and to the defendant, to vigorously defend any claim against its insured. The Judge also makes clear that this case is "third-party bad faith" claim under the UTPA, and states that he is against the use of such "third-party claims."

**Impact on Business:**

This decision, like the decision in Barefield, is bad for insurance companies doing business in West Virginia. Chief Justice Maynard's dissent points out the problem by using a quote from Luke 16:13, that no servant can serve two masters. This decision places insurance companies in a bind that divides their loyalties between their insured and the injured plaintiff. If the Insurance company is not able to zealously defend its insured, then the company is doomed to repeated negative court findings, or higher settlements. This decision is bad for businesses in West Virginia. The impact of the decision will be the reduction of both the availability and affordability of insurance in the state because insurers will be less likely to accept insurance risks when they are unable to fully and zealously defend an insured.

**Barefield v. DPIC Companies, Inc.**  
Slip Opinion No. 31226, July 2, 2004  
West Virginia Supreme Court of Appeals

Justice Starcher delivered the opinion of the Court. Justices Davis and Albright concurred and reserved the right to file a concurring opinion. Justice Maynard Concurred and reserved the right to file a separate opinion.

**What the Court was asked to Decide:**

Whether an insurance company may be held liable under the West Virginia Unfair Trade Practices Act (“UTPA”) for the conduct of a defense attorney hired to represent the interests of an insured in a liability action, and whether an insurance company can be held liable for violations of the Unfair Trade Practices Act that occur after a lawsuit has been filed against an insured.

**What the Court Decided:**

The Court answered the first question in the negative, stating that an insurance company cannot be held liable under the UTPA for violations of its defense attorney, but that the company was liable for violations of the act that occurred after the lawsuit was filed against an insured.

**Facts:**

In 1994, Mr. Hubert Barefield met with a West Virginia attorney about whether he should file a malpractice action in Virginia against a Virginia doctor. Barefield signed a contract with the attorney after she established that the facts existed to allow for filing of a malpractice suit against Barefield’s doctor. Barefield’s attorney never filed a claim against the Virginia doctor, and missed the statute of limitation deadline for doing so.

Barefield later retained the services of a second attorney to sue his first attorney for missing the statute of limitations. It was at this point that the first attorney’s malpractice insurer, DPIC, became involved. Barefield filed suit against his first attorney, and presented a variety of settlement demands to DPIC, up to the amount of \$2 million. DPIC did, however, agree to enter into a “high-low” agreement, by which it paid \$25,000 to Mr. Barefield in exchange for a cap on DPIC’s liability at \$250,000. Eventually, DPIC paid \$5,000, and Barefield agreed to settle his claim for \$250,000. Barefield later claimed that he agreed to settle for less than the claim was worth due to his poor physical health and financial situation.

A year after the settlement, Barefield filed suit against DPIC, for violation of the West Virginia Unfair Trade Practices Act. Barefield claimed that DPIC’s attorney delayed settlement with Barefield in order to take advantage of his poor physical and fiscal health, even though it was clear that his first attorney was liable for failing to file suit against Barefield’s original physician.

## **Holding:**

The Court held that a defense attorney employed by an insurance company to represent the interests of an insured against a lawsuit seeking to impose civil liability for legal malpractice is not engaged in the business of insurance. Therefore, the defense attorney was not subject to the provisions of the UTPA, and his actions, standing alone, could not form the basis of an action against the insurance company. The insurance company may still be liable for its own actions if they violate the UTPA, and must follow the provisions of the UTPA while defending itself against a lawsuit.

On the question whether an insurance company can be held liable for violations of the UTPA after the filing of a case against the insurance company, the Court held that the conduct of an insurance company or other person in the business of insurance during the pendency of a lawsuit may support a cause of action under the West Virginia Unfair Trade Practices Act. The Court changed the District Court's previous ruling in McDaniel, which held that the word "claim" in the UTPA precludes the application of the UTPA to "litigation" conduct by an insurance company or other person in the business of insurance.

However, the Court also held that an insurance company cannot be held liable under the West Virginia Unfair Trade Practices Act, for the actions of a defense attorney retained to defend an insured. When the defense attorney's strategy and tactics are a result of the attorney's independent, professional discretion with regard to the representation of the client-insured, and are not otherwise relied upon or ratified by the insurance company in a manner contrary to the UTPA, then the insurance company will not be liable for violations of the UTPA.

## **Concurring and Dissenting Opinion:**

(Chief Justice Maynard)

The Chief Justice states that he concurs with the part of the opinion that states that an insurer cannot be held liable for the actions of a defense attorney when the attorney is using their own independent and professional discretion. His dissent lies with the holding that the conduct of an insurer during the course of a lawsuit may support a cause of action under the UTPA. The Justice believes that this ruling will unfairly limit the ability of an insurance company to mount a strong defense for fear of UTPA suits. The Judge also makes clear that this case, and Rose, involve "third-party bad faith" claims under the UTPA. Justice Maynard states that he is against the use of such "third-party claims."

## **Impact on Business:**

This decision is bad for insurance companies doing business in West Virginia. The decision itself states that insurance companies are "not like the average citizen or business defending their assets against a lawsuit; an insurance company exists to pay valid claims..." As Chief Justice Maynard points out in his dissent, the effect of this case is that parties in litigation have a right to zealous representation, unless they are insurers or insureds. This decision is also negative for businesses in West Virginia because the chilling effect that this

decision has on an insurer's ability to defend its insured means that the availability and affordability of insurance in the state are reduced.

**Jackson v. State Farm Mutual Auto, Inc.**

No. 31372, (July 2, 2004)

West Virginia Supreme Court of Appeals

Justice Starcher delivered the opinion of the court. Justice McGraw concurred.

Chief Justice Maynard concurred in part, dissented in part. Justice Davis Concurred.

**What the Court was asked to Decide:**

How a Court should define the term "reasonably clear" when assessing a party's liability for a claim. Also, the Court was asked to determine whether the Circuit Court should have granted State Farm's Motion for a new trial based on improper testimony from a plaintiff's expert witness.

**What the Court Decided:**

The Court that the trial court had used the wrong definition of "reasonably clear" when assessing liability to State Farm for the Plaintiff's claim. The Court also determined that the testimony of the plaintiff's expert witness was improper, therefore State Farm's motion for a new trial should have been granted. On both issues, the case was remanded to the lower court for further proceedings.

**Facts:**

Plaintiff, David Jackson stopped in his car to offer a ride to a friend on the side of the road. Soon after, Jackson's car was struck from behind by Teri Smoot, State Farm's insured. Mr. Jackson filed a claim with State Farm, but a State Farm representative looked at the accident scene, and determined that the accident had been Mr. Jackson's fault, because his car was not visible to Ms. Smoot as she approached.

When Jackson's claim was denied, he filed suit against Ms. Smoot for negligence and simultaneously filed a claim against State Farm for violation of the West Virginia Unfair Trade Practices Act, allegedly for failing to act in good faith in settling his claim. Following filing of the suit, State Farm's internal assessment of responsibility to Smoot went as high as 49%. Still later, another State Farm assessment put Smoot's responsibility as high as 60%. Jackson offered to settle his claims for \$35,000.00. Eventually, State Farm offered to settle with Mr. Jackson for \$10,500.00 and then \$15,000.00. Both offers were rejected by Jackson. Jackson's case was then tried before a jury, and the jury awarded him \$73,288.36 in damages.

Following the award in the negligence case against Smoot, Jackson amended his complaint against State Farm to include additional unfair claim settlement practices, specifically alleging that State Farm refused to pay a claim without conducting a reasonable investigation based upon all available information.

The Circuit Court granted a motion for summary judgment by Jackson on several of the issues that were presented by Jackson. The remaining questions went to trial, namely, whether State Farm's violations constituted a general business practice, and whether punitive

damages should be awarded. Based in part on the testimony and interpretations of the UTPA law by an expert witness for the plaintiff, the jury found against State Farm on both questions. The jury awarded Jackson \$39,000.00 in damages and costs for attorneys fees, \$50,000 for annoyance and inconvenience, and \$1,250,000.00 in punitive damages. State Farm moved for a new trial, but their motion was denied. The appeal to the Supreme Court focused on the Circuit Court's order granting summary judgment, and on the court's refusal to grant State Farm's post-trial motions.

**Holding:**

The Supreme Court analyzed the meaning of the term "reasonably clear" as relates to liability in the Unfair Trade Practices Statute, and determined that the circuit court had used the wrong standard in its determination that the liability of Smoot was reasonably clear. Rather than a legal question that could be determined by the judge, the Court determined that the question was one for the jury, because a reasonable jury could draw different conclusions on the issue of whether State Farm's insured's liability was reasonably clear. For the same reason, the Court found that the circuit court was incorrect in ruling as a matter of law that State Farm failed to conduct a reasonable investigation as the Unfair Trade Practices Act requires. The reasonableness of an insurer's investigation is a jury question because jurors can often draw different conclusions from the evidence. Another important aspect of the ruling is that the trial court's determination of Smoot's negligence does not automatically indicate that the insurer was unreasonable in failing to settle the underlying claim. Therefore, the Supreme Court determined that the issues should be set for trial, rather than be decided by the judge as a summary judgment issue.

On the issue of State Farm's request for a new trial, the Court also ruled in favor of State Farm. State Farm complained that one of Jackson's witnesses was allowed to testify about questions of law, which should have been explained to the jury by the judge. The Court held that it was improper for Jackson's witness to testify about the law of Unfair Trade Practice. State Farm also argued that the witness described State Farm's business practice as unfair, but could not cite to statistics to demonstrate that the practice was systematic. The Supreme Court held that it was not necessary to produce statistical analyses in order to show a "general business practice," stating that proof of several incidents could establish a general business practice. The Supreme Court also allowed the admission of several other cases over State Farm's objections, deferring to the judgment of the trial court on their admission. Finally, State Farm objected to the admission of evidence as to the conduct of the insured's lawyer representing an insured. The Court, as it has in several recent decisions, held that the conduct of a defense attorney is not subject to the Unfair Trade Practices Act, because the attorney is not in the business of insurance. This is a narrow exception, however, because the conduct of an insurance company in connection with a lawsuit may still be actionable against the company, if it is directing the wrongful conduct of an attorney hired to represent an insured.

The Court refused to address the issue of punitive damages, and therefore remanded the case to the lower court on the basis of State Farm's objection to the testimony of the Plaintiff's

witness on the law, and on the presentation of defense counsel's behavior as evidence against the insurance company.

### **Concurring Opinion:**

(Justice McGraw)

Justice McGraw paradoxically states in his concurrence, that he would have voted to affirm the lower court, but did not do so, because he lacked the support of his fellow justices. The Justice then goes on to discuss the details of another case involving State Farm, this one in Utah, State Farm v. Campbell, 538 U.S. 408 (2003) that was decided in 2003 by the United States Supreme Court. Quoting from Justice Ginsberg's dissent in Campbell, Justice McGraw enumerates the egregious conduct of State Farm in that particular case, using these facts to justify a large punishment for State Farm in this case.

### **Concurring and Dissenting Opinion:**

(Chief Justice Maynard)

The chief Justice wrote to express his disagreement with the term "reasonably clear" as defined by the majority. Instead of stating that reasonably clear means a "preponderance of the evidence" or simply "clear," the justice urges a higher standard, as is found in the statute, that reasonably clear means that liability is so plain that reasonable people with knowledge of the facts could not honestly differ on the conclusion that the defendant is liable to the plaintiff. The justice also dissented with the majority on the issue of punitive damages, concluding that out-of-state conduct should not be used to determine punitive damages, and that any punitive damages should be consistent with the level of the act that causes them to be awarded in order for due process to be protected.

### **Impact on Business:**

The Court in this case determined that many matters related to Unfair Trade Practices Litigation are questions for a jury and not for a judge to decide. On the whole, this result is positive for insurance companies, because the decision attempts to lay out a standard for determining liability on the part of a company's insured. The decision also makes it clear that an expert cannot testify at trial on the law relating to Unfair Trade Practices Act violations, and that such explanations should be left to the judge.

**OVEC & et. al.**

**v.**

**U.S. Army Corps  
of Engineers**

**(Overview & Update)**

**Ohio Valley Environmental Coalition, Coal River Mountain Watch and Natural Resources Defense Council v. Bulen and Flowers (U.S. Army Corps of Engineers)**

Civil Action No. 3:03-2281

United States District Court for the Southern District of West Virginia

(July 8, 2004 and August 13, 2004).

**What the Court was asked to Decide:**

Whether Nationwide Permit No. 21 (“NWP 21”), issued by the U.S. Army Corps of Engineers (“Corps”) pursuant to Section 404 of the Clean Water Act, 33 U.S.C. § 1344(a) (governing "dredge and fill" permitting) is facially invalid under that Act, and whether individual authorizations issued under NWP 21 for valley fills associated with coal mining operations in the Southern District of West Virginia should be revoked?

**What the Court Decided:**

NWP 21 violates the Clean Water Act and in issuing it the Corps exceeded its authority. No additional NWP 21 authorizations may be issued for mining operations in the Southern District of West Virginia, and all existing authorizations for valley fills and surface impoundments on which construction had not commenced as of July 8, 2004 are to be suspended by the Corps.

**Facts:**

One of two types of permits available under the Clean Water Act is the so-called 'dredge and fill permit' issued by the U.S. Army Corps of Engineers pursuant to § 404 of the Act. Specifically, that provision allows the Secretary of the Army to issue permits “for the discharge of dredged or fill material into the navigable waters at specified disposal sites.” As a result of the swell factor, disposal of excess spoil or “overburden” is regularly required as part of all types of surface coal mining operations (especially those involving removal of entire mountaintops, where a variance from SMCRA's "approximate original contour" regrading requirement has been granted). Because it is impossible to safely locate excess spoil disposal sites on the tops of mountain, in the mountainous terrain in Appalachia spoil is normally placed in valley or 'hollow' fills adjacent to the mining operation. If such disposal areas contain any type of a stream -- including ephemeral streams, where an ordinary high water mark can be identified -- then a § 404 permit is required before such material may be placed there.

The Clean Water Act anticipates that many of these permits may be subject to costly and prolonged permitting processes involving the development of comprehensive Environmental Impact Statements, and public comment and debate over the environmental effects of proposed filling operations. As an alternative to this complicated process, the Army Corps is statutorily empowered by 33 USC § 1344 (e) to issue “nationwide permits” (“NWPs”) for categories of similar activities, where the activities at issue will cause only minimal adverse environmental effects when performed separately, and have only minimal

cumulative adverse effect on the environment. It is expected that such NWP's will generally involve activities that are non-controversial, and would result in little or no public or resource agency comment if they were reviewed through the standard (individual) permit process. Pursuant to that authority, the Corps issued its latest version of "Nationwide Permit No. 21" on January 15, 2002, authorizing discharges of "fill" at surface coal mining operations, provided that the proposed mining operation has been granted a mining permit and any other permits required by relevant federal and state agencies. Under NWP 21, permit applicants must file a Pre-Construction Notice and typically enter into a mitigation agreement with the Corps to address impacts to waters of the United States associated with their proposed fills and any in-stream sediment ponds associated with them.

The plaintiffs challenged NWP 21 on a number of grounds, including claims that such fill projects do not have "minimal" adverse effect on the environment, individually or cumulatively. Plaintiffs also challenged the Corps' practice of conducting case-by-case determinations (without public review) of environmental effects of individual projects, and allowing the use of mitigation agreements as a means of ensuring that a project that will have minimal effects where the project would otherwise not qualify for NWP coverage.

### **Holding:**

On July 8, 2004, the court issued a sweeping ruling, granting plaintiffs' motion for summary judgment and effectively invalidating NWP 21 and prohibiting its use for fill projects in the 23 counties comprising the Southern District of West Virginia. In addition, the court ruled that "with regard to the eleven specific mining sites challenged by the Plaintiffs, the Corps is **ORDERED** to suspend those authorizations for valley fills and surface impoundments on which construction has not commenced as of today, July 8, 2004."

In response to a subsequent motion filed by Plaintiffs, on August 13, 2004 the Court issued a supplemental Order that enjoined "all existing NWP 21 authorizations for valley fills and surface impoundments in the Southern District of West Virginia on which construction had not commenced as of *July 8, 2004*."

### **Impact on Business:**

Since virtually all mining operations in the southern part of our State require § 404 permits (including underground mines, for disposal of processing refuse), the effect of Judge Goodwin's decision will be to require that all mining companies proceed through the more costly and prolonged individual § 404 permitting process before it can begin (or, in some cases, continue) operating. In addition to the greater commitment of resources associated with obtaining such an individual § 404 permit for these repetitive, similar activities, virtually every individual permit that is issued is subject to challenge directly in federal district court, should an entity with standing claim that the environmental review that preceded its issuance was inadequate. Coal operators will thus be required to determine whether to invest huge amounts of capital in this risky venture in West Virginia, or invest in a more rapid and certain outcome in other states unaffected by the court's determination. At a minimum, the injunction will encourage coal operators to make their investments in other states. The

impact, sadly, is obvious. A diminished presence of business in West Virginia; a diminished revenue for the state in lucrative mining tax revenue; and, most importantly, a diminished level of high-paying coal mining jobs in areas of the state in the most desperate need of them.