Chapter 30

Labor and Employment Law[1]

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I. At-will employment and its exceptions

In West Virginia, as a general rule, employment may be terminated at any time, with or without cause, at the will of either party. This is called the employment-at-will doctrine. *See Williamson v. Sharvest Mgmt. Co.,* 415 S.E.2d 271 (W. Va. 1992). Under this doctrine, an employer can terminate an employee for a good reason, a bad reason, or no reason at all, so long as the reason is not illegal. *Williams v. Precision Coil, Inc.,* 459 S.E.2d 329, 340 (W. Va. 1995). *See also Town of Romney Housing Auth. v. West Virginia Human Rights Comm'n,* 406 S.E.2d 434, 438 (W. Va. 1991) ("the question is not whether an employment decision was essentially fair"); *Conaway v. Eastern Associated Coal Corp.,* 358 S.E.2d 423 (W. Va. 1986) ("the reason [for discharge] need not be a particularly good one"). While the employment-at-will doctrine is the default rule in West Virginia, it is subject to many exceptions.

A. Express employment contracts

Employers and employees sometimes enter into written employment agreements for a specified period of time. If such a contract exists, then the terms and conditions of employment will be dictated by it. A written employment agreement may take the form of an individual employment contract or a contract governing a group of employees. The second type will be found in unionized operations, where the employees' collective bargaining representative negotiates, on behalf of the employees, a collective bargaining agreement ("CBA") with the employer. The CBA governs the terms and conditions of employment for the employees.

B. Implied employment contracts

In addition to explicit written employment contracts, the Supreme Court of Appeals of West Virginia ("Supreme Court of Appeals") has recognized implied employment contracts

under certain circumstances. Implied contracts are those that are recognized by the Court where there is no official contract, but there is evidence of an implied contractual relationship. For example, an employee handbook may form the basis of a unilateral contract if it appears to contain a promise on the part of an employer not to terminate an employee except for specified reasons. *See Cook v. Heck's Inc.,* 342 S.E.2d 453 (W. Va. 1986); *Hogue v. Walker Machinery,* 431 S.E.2d 687 (W. Va. 1993). Additionally, past practices and customs, even if they are not in writing, may, under limited circumstances, create an implied contract.

Not every handbook will create an employment contract. For example, an employer is not bound by any statements made in an employee handbook if the handbook contains a clear and prominent disclaimer that employment is "at-will" or if the employee acknowledges in his employment application or receipt of employee handbook that his or her employment is "at-will." Syllabus points 4 and 5, *Suter v. Harsco Corp.,* 403 S.E.2d 751 (W. Va. 1991). Indeed, the Supreme Court of Appeals operates under the presumption that "every employee relationship is terminable at will" and that "any promises alleged to alter that presumptive relationship must be very definite to be enforceable." *Id.* at 754 (emphasis in original). Moreover, the employee bears the burden of showing that an employment relationship was not terminable at will. *Id.* Indeed, courts have granted summary judgment to employers when the plaintiff has been unable to identify any definite promise of job security in an employee handbook. *See, e.g., Tritle v. Crown Airways, Inc.,* 928 F.2d 81 (4th Cir. 1990).

C. Public policy exception

According to the Supreme Court of Appeals, the general principle that an employee may be discharged at any time for any reason should be tempered when the reason for that termination contravenes a substantial public policy. *Harless v. First Nat'l Bank of Fairmont,* 246

S.E.2d 270 (W. Va. 1978). In *Harless,* the plaintiff alleged that he was discharged for trying to make his employer comply with state and federal consumer protection laws, and that the employer's conduct leading up to and surrounding the discharge constituted intentional, malicious, and outrageous conduct which caused him severe emotional distress. Although the Court reaffirmed the employment-at-will doctrine, it nevertheless recognized that an employer may be liable for terminating an at-will employee when the employer intends to contravene a substantial public policy of the State:

> We conceive that the rule giving the employer the absolute right to discharge an at will employee must be tempered by the further principle that where the employer's motivation for the discharge contravenes some substantial public policy principle, then the employer may be liable to the employee for damages occasioned by the discharge.

Id. at 275. Although the *Harless* court did not exactly define what constituted a "substantial public policy," it did proclaim:

> We have no hesitation in stating that the Legislature intended to establish a clear and unequivocal public policy that consumers of credit covered by the Act were to be given protection. Such manifest public policy should not be frustrated by a holding that an employee of a lending institution covered by the Act, who seeks to ensure that compliance is being made with the Act, can be discharged without being furnished a cause of action for such discharge.

Id. at 276.

In *Cordle v. General Hugh Mercer Corp.,* 325 S.E.2d 111 (W. Va. 1984), the Court held that the existence of a public policy was a question of law for the court, rather than the jury, and that public policies are derived from such things as the federal and state constitutions, statutes, judicial decisions, and applicable principles of the common law.

In *Yoho v. Triangle PWC, Inc.,* 336 S.E.2d 204 (W. Va. 1985), the Court addressed the issue of whether a collective bargaining agreement provision which caused the termination of

the plaintiff's seniority was contrary to public policy. The Court noted that it would exercise restraint in determining public policy, stating "an issue which is fairly debatable or controversial in nature is one for the legislature and not for this Court." Similarly, in *Collins v. AAA Homebuilders, Inc.,* 333 S.E.2d 792, 793 (W. Va. 1985), a case involving denial of housing on a basis alleged to be in violation of public policy, the Court again voiced deference to legislative articulations of public policy, stating that "the legislative branch of government has the primary responsibility for translating public policy into law."

Over the years, the Supreme Court of Appeals has identified several specific instances of what qualifies as a "substantial public policy," including:

- An employee who is denied employment on the sole basis that he received services for mental illness, mental retardation, or addiction has a cause of action for wrongful discharge. *Hurley v. Allied Chem. Corp.,* 262 S.E.2d 757 (W. Va. 1980) (citing W. Va. Code § 27-5-9(a) as a source of public policy).

- Filing a claim under the Workers' Compensation Act, W. Va. Code §§ 23-5A-1, *et seq.,* is not a valid reason for firing an otherwise at-will employee. *Shanholz v. Monongahela Power Co.,* 270 S.E.2d 178 (W. Va. 1980); *Powell v. Wyoming Cablevision, Inc.,* 403 S.E.2d 717 (W. Va. 1991).

- Privacy can be covered by public policy such that firing for refusal to take a lie detector test is a violation of public policy. *Cordle v. General Hugh Mercer Corp.,* 325 S.E.2d 111 (W. Va. 1984).

- An employee has a cause of action for wrongful discharge where his employer fired him for his efforts to ensure that his employer complied with federal and state mine safety laws and for his refusal to operate unsafe equipment. *Wiggins v. Eastern Associated Coal Corp.,* 357 S.E.2d 745 (W. Va. 1987).

- Wage and hour laws under W. Va. Code § 21-5C-8 are the source of public policy making it illegal to discharge a worker for reporting violations. *McClung v. Marion County Comm'n,* 360 S.E.2d 221 (W. Va. 1987).

- The West Virginia Mine Safety Act, W. Va. Code § 22A-1A-20, is a substantial public policy. *Collins v. Elkay Mining Co.,* 371 S.E.2d 46 (W. Va. 1988).

- It is contrary to the public policy in favor of an individual's right to privacy for an

employer to require employee drug testing unless the testing is based upon reasonable suspicion or the employee's job involves public safety or the safety of others. *Twigg v. Hercules Corp.,* 406 S.E.2d 52 (W. Va. 1990).

- An employee has a cause of action for wrongful discharge where an employer discharges him in retaliation for exercising certain rights afforded to veterans. *Mace v. Charleston Area Med. Ctr. Found., Inc.,* 422 S.E.2d 624 (W. Va. 1992).

- An employee bringing improper actions by a housing authority to the attention of federal prosecutors is protected by a substantial public policy. *Slack v. Kanawha County Housing and Redev. Auth.,* 423 S.E.2d 547 (W. Va. 1992).

- Refusing to operate a vehicle with unsafe brakes under W. Va. Code §§ 17C-15-1(a), 17C-15-31, and 24A-5-5(j), is a protected exception to at-will employment. *Lilly v. Overnight Transp. Co.,* 425 S.E.2d 214 (W. Va. 1992).

- W. Va. Code § 21-5-5, making it illegal to coerce employees into purchasing goods in lieu of wages, represents a substantial public policy, and employees asserting their rights under the code cannot be discharged. *Roberts v. Adkins,* 444 SE.2d 725 (W. Va. 1994).

- It is a public policy violation to discharge an employee over concerns that the employee has or may give truthful testimony in a legal action. *Page v. Columbia Nat. Res., Inc.,* 480 S.E.2d 817 (W. Va. 1996).

- Regulations of the West Virginia Board of Health governing the licensing of hospitals protects employees who notify their superiors of violations. *Tudor v. Charleston Area Med. Ctr., Inc.,* 506 S.E.2d 554 (W. Va. 1997).

- Providing truthful information to an investigation of the West Virginia Board of Barbers and Cosmetologists is a protected exception to the at-will employment doctrine. *Kanagy v. Fiesta Salons, Inc.,* 541 S.E.2d 616 (W. Va. 2000).

- The right to self-defense in response to a lethal imminent danger is a substantial public policy. *Feliciano v. 7-Eleven, Inc.,* 559 S.E.2d 713 (W. Va. 2001).

- A public employee subject to grievance procedures under W. Va. Code § 18-29-1 cannot be fired while the grievance procedures are ongoing. *Wounaris v. West Virginia State College,* 588 S.E.2d 406 (W. Va. 2003).

D. West Virginia statutory exceptions

There are a variety of West Virginia statutes that restrict an employer's right to discharge

an employee, including:

- No employer shall terminate an injured employee while the injured employee is unable to work due to a compensable injury, and is receiving, or is eligible to receive, temporary total disability benefits, except where the injured employee committed a separate offense warranting discharge. No employer shall fail to reinstate an employee who has sustained a compensable injury to his or her former position, if it is available and the employee is not disabled. W.Va. Code § 23-5A-3.
- No employer shall discharge an employee on the basis of race, religion, color, national origin, ancestry, sex, age (40 or older), blindness, or disability. Furthermore, no employer shall engage in any form of reprisal, or otherwise discriminate against a person who files a complaint under the West Virginia Human Rights Act, or opposes any of the forbidden practices contained in the Act. W. Va. Code §§ 5-11-3 and 5-11-9.
- No employer may threaten to discharge an employee in order to prevent him or her from freely exercising the right to vote. W. Va. Code § 3-9-20.
- An employee is entitled to reinstatement after serving on a jury. W.Va. Code § 52-3-1. An employer that threatens to discharge an employee for serving on a jury is subject o fine and/or imprisonment. W.Va. Code § 61-5-25a.
- An employer cannot threaten an employee in order to influence his or her political views. W. Va. Code § 3-8-11(b). In addition, the crime of corrupt practices includes an employer threatening an employee with loss of employment if a particular candidate is elected or defeated. W. Va. Code § 3-9-15.
- Members of the state militia are entitled to the same reemployment rights granted to members of the reserve components of the armed forces of the United States by applicable federal law. W. Va. Code § 15-1F-8. Additionally, it should be noted that each state, county, or municipal government officer or employee who has been hired for permanent employment and who is a member of the National Guard or armed forces reserve is entitled to a military leave of absence, for a maximum of 30 working days (not to exceed 240 hours) in any one calendar year, from his or her respective office or employment, without loss of pay, status, or efficiency rating, on the days during which he or she is ordered, by properly designated authority, to be engaged in drills, inactive duty training, parades, funeral details, service schools or other duty, field training, annual training, or other full-time National Guard duty pursuant to Title 10 or Title 32 of the United States Code, or active service of the State. W. Va. Code § 15-1F-1(a). All such officers and employers ordered or called to active duty for a mobilization or deployment under Title 10 of the United States Code or in support of a contingency operation, as defined in 10 U.S.C. § 101(a)(13), by the properly

designated federal authority are entitled to a military leave of absence from their respective offices or employment, without loss of pay, status, or efficiency rating, for a maximum period of 30 days (not to exceed 240 hours) for a single call to active duty. W. Va. Code § 15-1F-1(b). Those state, county, or municipal government officers or employees ordered to active duty for mobilization or deployment can add working days granted under W. Va. Code § 15-1F-1(a) from the present calendar year to the 30 working days (not to exceed 240 hours) granted under W. Va. Code § 15-1F-1(b), not to exceed 60 days for a single call to duty. W. Va. Code § 15-1F-1(b).

- An employer cannot terminate an employee for failing to take a psychophysiological detection of deception examination (formerly polygraph). W. Va. Code § 21-5-5b.

- No public employer may discharge or discriminate against an employee because he or she has filed a complaint or participated in proceedings under the West Virginia Occupational Safety and Health Act. W. Va. Code § 21-3A-13(a).

- No employer may discharge a member of a volunteer fire or ambulance department because he or she has lost time from employment in responding to an emergency. W. Va. Code § 21-5-17.

- No public employer may discharge or discriminate against an employee who has made a good faith report about instances of wrongdoing or waste (whistle-blower). W. Va. Code § 6C-1-3.

- An employer may not discharge an employee because a creditor has garnished or attempted to garnish his or her wages to satisfy a judgment arising from a consumer credit loan. W. Va. Code § 46A-2-131.

- An employer cannot terminate an employee solely because of the employee's mental illness, mental retardation, addiction, or receipt of mental health services. W. Va. Code § 27-5-9(a).

- An employer cannot terminate an employee for making complaints under the Equal Pay for Equal Work Act. W. Va. Code §§ 21-5B-1 through 6.

- An employer cannot terminate an employee based on his service in the Legislature W. Va. Code § 6-5-11.

- An insurance company cannot terminate or refuse to renew a written contract with an agent, which relationship existed for five years, without "good cause," as defined by statute. W. Va. Code § 33-12A-3. Furthermore, an insurance company cannot terminate or refuse to renew a written contract with an agent as a result of a loss ratio resulting from claims paid under an uninsured or underinsured motorist policy. W. Va. Code § 33-12-31.

- An employer cannot terminate an employee for use of tobacco products during nonworking hours. W. Va. Code § 21-3-19.

- An employer cannot terminate an employee who refuses to pay the costs of a medical examination. W. Va. Code § 21-3-17.

- No employer shall discharge or otherwise discriminate against a miner who has notified a supervisor or authorized official of any alleged mine safety violation or danger, has filed a proceeding under West Virginia's mine safety laws, or has testified in any mine safety proceeding. W. Va. Code § 22A-1-22.

- No nursing home shall discharge or otherwise discriminate against an employee who has filed a complaint or participated in a proceeding governed by state nursing home laws. W. Va. Code § 16-5C-8.

- No employer may discharge or discriminate against an employee who has complained to the employer or to the commissioner of labor that he or she has not been paid in accordance with the minimum wage and maximum hours laws of the state. W. Va. Code § 21-5C-7.

E. Federal statutory exceptions

There are many federal statutes that affect the employment-at-will doctrine, including:

- Title VII of the Civil Rights Act of 1964 ("Title VII") prohibits discrimination based on race, color, religion, sex, or national origin. Title VII also prohibits retaliation against anyone who has opposed a practice made unlawful under the Act.

- The Age Discrimination in Employment Act ("ADEA") prohibits discrimination based on age against a person 40 years of age or older. The Act also prohibits retaliation against anyone who has opposed a practice made unlawful under the Act.

- The Americans with Disabilities Act ("ADA") prohibits discrimination against qualified individuals with disabilities and individuals "regarded as" having disabilities. The Act also prohibits retaliation against anyone who has opposed a practice made unlawful under the Act.

- The Family and Medical Leave Act ("FMLA") prohibits discrimination and/or retaliation against employees who use FMLA leave.

- There are many federal laws that prohibit retaliation against employees who make complaints or exercise rights under those laws, *e.g.*, the Occupational Safety and Health Act, the Federal Mine Safety and Health Act, and the Clean Air Act.

II. Discrimination and harassment

A. Discrimination claims under the West Virginia Human Rights Act[2]

The West Virginia Human Rights Act prohibits discrimination in the terms or conditions of employment on the basis of race, religion, color, national origin, ancestry, sex, age (40 or older), blindness, disability, or familial status. W. Va. Code §§ 5-11-3 and 5-11-9. Furthermore, no employer shall engage in any form of reprisal, or otherwise discriminate against a person who files a complaint under the Human Rights Act or opposes any of the forbidden practices contained in the Act. W. Va. Code § 5-11-9.

A person may bring a Human Rights Act complaint before the West Virginia Human Rights Commission, an agency charged with investigating violations under the Act. The claim must be brought within 365 days "after the occurrence of the alleged unlawful discriminatory practice or act." W. Va. C.S.R. § 77-2-3.9.d.1. Upon the filing of a complaint, the Commission will conduct a preliminary investigation and the employer will be given the opportunity to file an answer/position statement, explaining its side of the case. The Commission will then either enter a "probable cause" or "no probable cause" determination. If probable cause is found, the case will proceed to a public hearing before an administrative law judge. Prior to the public hearing, the parties will exchange discovery and conduct limited depositions, subject to approval from the presiding administrative law judge. Prevailing complainants may potentially obtain reinstatement, back pay, up to $5,000 in

incidental damages, and attorney fees and costs. Punitive damages are not available in proceedings before the Commission.

Instead of filing a claim with the Human Rights Commission, a complainant may file directly in court, subject to a two year statute of limitations. Syllabus point 1, *McCourt v. Oneida Coal Co.,* 425 S.E.2d 602 (W. Va. 1992). There is no requirement that an HRC claim be filed prior to filing a court claim. Prevailing plaintiffs may potentially recover "back pay or any other legal or equitable relief" and the trial court, "in its discretion, may award all or a portion of the costs of the litigation, including reasonable attorney fees and witness fees, to the complainant." W.Va. Code § 5-11-13. The Supreme Court of Appeals has interpreted "other legal or equitable relief" to include typical tort damages, including emotional distress, front pay, and punitive damages. *See Dobson v. Eastern Associated Coal Corp.,* 422 S.E.2d 494 (W. Va. 1992) (holding that recovery of typical tort damages is permitted by the statutory language and that, specifically, front pay is available); *Akers v. Cabell Huntington Hosp., Inc.,* 599 S.E.2d 769, 777 (W. Va. 2004) (holding that emotional distress damages are available under the Act); Syllabus point 4, *Haynes v. Rhone-Poulenc, Inc.,* 521 S.E.2d 331 (W. Va. 1999) (holding that punitive damages are available under the Act).

In order to make a *prima facie* case of discrimination under the Act, a plaintiff must offer proof of the following:

(1) That the plaintiff is a member of a protected class;

(2) That the employer made an adverse decision concerning the plaintiff; and

(3) But for the plaintiff's protected status, the adverse decision would not have been made.

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[2] The Human Rights Act is the state law equivalent of federal anti-discrimination laws, which include Title VII, the ADA, and the ADEA.

Syllabus point 2, *Conaway v. Eastern Associated Coal Corp.,* 358 S.E.2d 423 (W. Va. 1986); Syllabus point 4, *Mayflower Vehicle Sys., Inc. v. Cheeks,* 629 S.E.2d 762 (W. Va. 2006). According to the Supreme Court of Appeals in *Conaway:*

> The first two parts of the test are easy, but the third will cause controversy. Because discrimination is essentially an element of the mind, there will probably be very little direct proof available. Direct proof, however, is not required. What is required of the plaintiff is to show some evidence which would sufficiently link the employer's decision and the plaintiff's status as a member of a protected class so as to give rise to an inference that the employment decision was based on an illegal discriminatory criterion. The evidence could, for example, come in the form of an admission by the employer, a case of unequal or disparate treatment between members of the protected class and others by the elimination of the apparent legitimate reasons for the decision, or statistics in a large operation which show that members of the protected class received substantially worse treatment than others.

Conaway, 358 S.E.2d at 429-430. Under no circumstances may a plaintiff rely simply on her own speculative accusations to support her case. *See Hanlon v. Chambers,* 464 S.E.2d 741, 748 n.2 (W. Va. 1995); *Williams v. Precision Coil, Inc.,* 459 S.E.2d 329, 337 (W. Va. 1995); *Johnson v. Killmer,* 633 S.E.2d 265, 266-68 (W. Va. 2006). And, when attempting to prove the *prima facie* case through comparators, the individuals used for comparison must have been similarly situated. *Mayflower,* 629 S.E.2d at 774. The burden of proving that similarity rests with the plaintiff. *See, e.g., Smith v. Allen Health Sys., Inc.,* 302 F.3d 827, 835 (8th Cir. 2002) ("It is the employee's burden . . . to prove that the compared employees were similarly situated in all relevant aspects"); *Smith v. Stratus Computer, Inc.,* 40 F.3d 11, 16 (1st Cir. 1994); *Mitchell v. Toledo Hosp.,* 964 F.2d 577, 583 (6th Cir. 1992).

An employer responding to the *prima facie* case has only a burden of production, and the employer meets that burden when it articulates a legitimate, nondiscriminatory reason for its

actions. *Texas Dep't of Cmty. Affairs v. Burdine,* 450 U.S. 248, 254-55 (1981); *Barefoot v. Sundale Nursing Home,* 457 S.E.2d 152, 160 (W. Va. 1995). Once the employer introduces a legitimate, nondiscriminatory reason for the discharge, it becomes incumbent on a plaintiff to then prove pretext. *Conaway,* 358 S.E.2d at 430; *Tom's Convenient Food Mart, Inc. v. West Virginia Human Rights Comm'n,* 527 S.E.2d 155, 159 (W. Va. 1999). The ultimate burden of proving discrimination always rests with the plaintiff. *Skaggs v. Elk Run Coal Co.,* 479 S.E.2d 561, 582 (W. Va. 1996).

B. Sexual and other forms of harassment

Harassment is a specific form of discrimination in the workplace. Harassment on the basis of any legally protected classification, including age, race, sex, disability, and religion, is unlawful. While much of the following discussion speaks in terms of "sexual" harassment, most of the discussion (except with regard to "quid pro quo" harassment) is also applicable to harassment on the basis of other protected classifications, such as age, race, or disability.

There are two forms of sexual harassment in the workplace. "Quid pro quo sexual harassment" occurs when a manager or a supervisor demands sexual favors of a subordinate as a condition of getting or keeping a job or in retaliation for refusing sexual advances. One of the critical elements of this category is that the advance was unwelcomed. Courts will analyze the victim's actions and statements, and the alleged harasser will not be allowed to be obtuse about the victim's signals that the advances were unwelcomed.

The United States Supreme Court addressed this type of discrimination in *Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742 (1998). In that case, the Court made it clear that the mere threat of one's job advancement or tangible benefits by someone in authority, even if not a direct supervisor, is sufficient to be actionable discrimination.

"Hostile work environment sexual harassment" is the most common form of sexual harassment, but is often more difficult to understand. A hostile work environment claim exists where the conduct was unwelcomed, was based on one's gender, and was severe or pervasive enough to "alter the conditions of the victim's employment and create an abusive working environment." *Meritor Sav. Bank, FSB v. Vinson,* 477 U.S. 57 (1986). Later, the Supreme Court explained that Title VII is violated "when a workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment." *Harris v. Forklift Systems, Inc.,* 510 U.S. 17 (1993).

In *Harris,* the Supreme Court provided six factors to analyze in determining if there is sufficiently "severe or pervasive" conduct:

1) the frequency of the discriminatory conduct;
2) the severity of the conduct;
3) whether the conduct was physically threatening;
4) whether the conduct was humiliating;
5) whether the conduct was merely an offensive utterance; and
6) whether the conduct interfered with the employee's work performance.

In *Hanlon v. Chambers,* 464 S.E.2d 741 (W. Va. 1995), the Supreme Court of Appeals adopted the law as stated in *Harris.* However, the Supreme Court of Appeals concluded that a plaintiff need only prove four items:

1) the subject conduct was unwelcomed;
2) the subject conduct was based on the sex of the plaintiff;
3) the subject conduct was sufficiently severe or pervasive to alter the plaintiff's condition of employment and create an abusive work environment; and

4) the subject conduct was imputable on some factual basis to the employer.

Under West Virginia law, employers are automatically liable for sexual harassment by supervisors. Notably, however, in settling upon a solution for when vicarious liability can be imputed, the Supreme Court of the United States has recognized a sexual harassment policy as an affirmative defense to this type of liability. Justice Kennedy, writing for the Court in *Burlington Indus., Inc. v. Ellerth,* 524 U.S. 742, 764-65 (1998), stated:

> an employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, see Fed. Rule Civ. Proc. 8(c). The defense comprises two necessary elements: (a) that the employer exercise reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer to avoid harm otherwise. . . . No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.

In *Ellerth's* companion case, the Supreme Court explained that liability could be imposed for not having an effective and enforced policy where there was a hostile work environment and where the employer had failed to exercise reasonable care to prevent sexual harassment by a variety of inadequacies in the sexual harassment policy it had implemented. *Faragher v. City of Boca Raton,* 524 U.S. 775 (1998). Specifically, (1) the City of Boca Raton had not disseminated its policy against sexual harassment among its beach employees; (2) its officials did not try to keep track of its supervisors' conduct; and (3) the City's policy included no assurance that harassing supervisors could be by-passed in registering complaints. The Court concluded that those responsible for city operations could not reasonably have thought that precautions against hostile environments in any one of the many departments in far-flung

locations could be effective, without communicating some formal policy against harassment that included with it a sensible complaint procedure. Thus, under federal law, to avoid vicarious liability for sexual harassment by a supervisor, a company must have an effective and enforced policy prohibiting sexual harassment.

Sexual harassment may occur between different sexes and persons of the same sex. In *Oncale v. Sundowner Offshore Serv., Inc.,* 523 U.S. 75 (1998), the Supreme Court of the United States held that Title VII's protections extended to a male making a claim of same-sex sexual harassment. Following the *Oncale* decision, the Supreme Court of Appeals recognized a cause of action for same-gender sexual harassment in *Willis v. Wal-Mart Stores, Inc.,* 504 S.E.2d 648 (W. Va. 1998). In the *Willis* case, the plaintiffs' supervisor made offensive jokes, remarks, and gestures to the male and female plaintiffs, including the supervisor grabbing his crotch, making jokes about "coming," and pretending to unzip his pants. In emphasizing that it is possible to distinguish between harassment and horseplay for purposes of a same-gender harassment claim, the Supreme Court of Appeals in *Willis* pointed out that it "is not, it turns out, incapable of distinguishing between the occasional off-color joke, stray remark, or rebuffed proposition, and a work environment that is rendered hostile by severe or pervasive harassment," regardless of whether such harassment is directed towards women or men. *Id.* at 653-54.

The Supreme Court of the United States has held that a retaliation claim cannot be based on a non-severe, single incident of alleged harassment. *See Clark County Sch. Dist. v. Breeden,* 532 U.S. 268 (2001). In *Breeden,* the employee met with a male supervisor and male co-worker to review the psychological evaluations of four job applicants. One applicant's report disclosed that he had once told a co-worker, "I hear making love to you is like making love to the

Grand Canyon." The supervisor read the remark aloud, looked at the female employee and stated, "I don't know what that means." The male co-worker replied, "Well, I'll tell you later." Then, both men laughed.

The employee complained about the comment to the male supervisor and two assistant superintendents and alleged she was later punished for making these complaints. The federal district court granted summary judgment to the school district on the ground that Breeden's good-faith belief that she was being sexually harassed was not reasonable. The Ninth Circuit reversed, stating that the school district's regulations, which the employee consulted, stated that the uninvited sexual teasing, jokes, remarks, and questions were such that a reasonable person in Breeden's position could reasonably believe them to have constituted sexual harassment.

The Supreme Court reversed the Ninth Circuit, finding that no reasonable person could have believed that the single complained-of incident violated its sexual harassment standard. The Court noted that it was Breeden's job to review job applicants' files and that the supervisor's statement, the co-worker's response, and their laughter was an isolated incident that could not remotely be considered "extremely serious." Thus, the Court rejected Breeden's retaliation claim. Note, however, that the Supreme Court of Appeals has held that a reprisal claim can stand on its own, without any accompanying actionable sexual harassment. *See Kalany v. Campbell,* 640 S.E.2d 113, 117-18 (W. Va. 2006).

III. Employee leave issues

Covered employers must comply with the mandates of the Family and Medical Leave Act ("FMLA"), federal and state anti-discrimination statutes, state workers' compensation laws, and other laws governing the employment relationship. Practical application of these laws is somewhat confusing because the laws impose requirements that often overlap and

sometimes conflict. In addition to understanding the mandates of each law, an employer must consider any obligations that it has under its own policies or employer-sponsored benefits plan.

The following are basic guidelines for the coordination of the obligations that arise under the FMLA, the Americans with Disabilities Act ("ADA"), the West Virginia Human Rights Act ("WVHRA"), and the West Virginia Workers' Compensation Act ("WVWCA"), particularly in the area of leave management.

A. Purpose of leave laws

A fundamental key to compliance is understanding the purpose of each law. The FMLA requires covered employers to provide up to 12 weeks per year of unpaid family and medical leave (26 weeks for military caregiver leave) to eligible employees, to maintain the employee's benefits while out on FMLA leave, and to restore the employee to the same or an equivalent position upon his or her return.

The ADA and the WVHRA prohibit covered employers from discriminating against qualified individuals with disabilities. A qualified individual with a disability can perform the essential functions of the job, with or without reasonable accommodation. In order to comply with this mandate, an employer must provide reasonable accommodations that will not result in undue hardship. While the ADA and the WVHRA cover all aspects of employment, including the applications process, hiring, on-the-job training, wages, benefits, advancement, and employer-sponsored social and training activities, an employer may need to consider granting leave as a reasonable accommodation for employees with disabilities. Moreover, an employer may be required to grant leave beyond that required by the FMLA.

The WVWCA was developed as a compromise between the needs of employers and

employees. First, employers obtain immunity from tort liability through the state's exclusivity provisions. Second, employees receive limited benefits without having to prove the employer's fault in causing the injury. Finally, the costs of the workers' compensation system are insured in the sense that employers may pass the cost of the program onto the buyers of their products or services. An employer's obligation to provide leave arises under the anti-discrimination provisions of the WVWCA. The anti-discrimination provisions were developed to resolve the conflict inherent in allowing an employee to collect benefits without providing the employee protection from retaliation for pursuing his or her statutory remedies. While the anti-discrimination provisions prohibit an employer from discriminating in any manner against a former or current employee because of their receipt of or attempt to receive workers' compensation benefits, the statute specifically addresses termination, reinstatement, and maintenance of benefits for employees out on workers' compensation leave.

B. Requests for leave

In response to an employee's request for leave, an employer must consider the following with respect to its obligations to provide leave under each law:

(1) whether the employer is covered by the law;

(2) whether the employee is eligible for leave (or extended leave) under any of the laws;

(3) whether the employer and/or employee are required to provide any types of notice relating to the leave;

(4) whether the law permits medical examinations or certifications for the employee to take the leave or to return to work;

(5) whether the employee has rights to reinstatement;

(6) whether the employer must provide any benefits during the leave period; and

(7) whether an employer may require the employee to work in a light

duty position.

In evaluating an employee's request for leave, an employer must examine each law for the purpose of determining whether it covers the employer, the employee, and the situation at issue.

C. Coverage of leave laws - employers

The FMLA covers employers engaged in commerce or an industry or activity affecting commerce if 50 or more employees are employed at least 20 or more calendar workweeks in the current or preceding calendar year. In addition, all public agencies, state governments, political subdivisions, elementary and secondary school systems, and institutions of higher education are covered.

The ADA covers any employer engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year. In addition, the ADA covers all employment agencies, labor organizations, and joint labor-management committees.

The WVHRA contains certain provisions that apply to "employers," which include the state and its political subdivisions, and any person employing 12 or more persons within the state for 20 or more weeks during the year in which the discriminatory act took place, or the preceding year, except for private clubs. Other provisions apply to "persons," which include one or more individuals, partnerships, associations, organizations, corporations, labor organizations, cooperatives, legal representatives, trustees, trustees in bankruptcy, receivers, and other organized groups of persons. The Act also applies to employment agencies and labor organizations.

The WVWCA applies to the State of West Virginia and all government agencies or departments, county boards of education, political subdivisions of the State, volunteer fire

department and emergency service organizations defined by W. Va. Code §§ 15-5-1, *et seq.*, and all persons, firms, associations, and corporations regularly employing another person or persons for the purpose of carrying on any form of industry, service, or business in this state.

D. Coverage of leave laws - employees

The FMLA covers an employee who has been employed for at least 12 months and for at least 1,250 hours of service during the previous 12 month period unless the employee is employed at a worksite having fewer than 50 employees, if the total number of employees employed within 75 miles of the worksite is less than 50.

The ADA applies to any individual employed by an employer and individuals employed in foreign countries who are citizens of the United States. The WVHRA applies to any employee unless employed by his or her parents, spouse, or child.

The WVWCA applies to all persons in the service of employers and employed by them for the purpose of carrying on the industry, business, service, or work in which they are engaged.

E. Coverage of leave laws - conditions

The FMLA provides up to 12 weeks of unpaid leave during any 12-month period for one or more of the following conditions: (1) because of the birth of a son or daughter of the employee, in order to care for such son or daughter; (2) because of the placement of a son or daughter with the employee for adoption or foster care; (3) to care for the employee's spouse, son, daughter, or parent with a serious health condition; (4) because the employee has a serious health condition that renders the employee unable to perform the functions of the position; (5) for a "qualifying exigency" arising from a spouse, child, or parent's military service obligations (applies only to family members of National Guard and Reserves and retired military -- not active members of the regular armed services). The Act provides up to 26 weeks for military caregiver leave -- to care for a covered service member (spouse, parent, child, or "next of kin")

(applies to all military and the "year" begins on the first day of leave and ends 12 months later).

The ADA and the WVHRA apply to qualified individuals with disabilities. The WVWCA applies to injuries received in the course of and resulting from covered employment. The antidiscrimination provisions prohibit an employer from discriminating in any manner against former or current employees because of their receipt of or attempt to receive workers' compensation benefits. These provisions specifically address termination, reinstatement, and maintenance of benefits for employees out on workers' compensation leave.

F. Notice and medical certification requirements -- employees

An employee must provide 30 days of notice for foreseeable FMLA leave. If 30 days of notice is not possible, the employee must explain why. An employee must provide notice of the need for unforeseeable FMLA leave as soon as practicable. An employee can be required to follow normal notice requirements except in "unusual circumstances." Employee notice must include the reason for the anticipated timing of the leave. An employee is not required to specifically reference the FMLA when requesting leave; however, calling in sick is not enough. Employers may designate leave as FMLA leave, even when an employee has not specifically requested FMLA leave.

Under the ADA and the WVHRA, employers and employees should discuss the need for leave as part of the reasonable accommodation process. If the need for leave is obvious, the employer may need to initiate the discussions.

Under the WVWCA, employees must give written notice of work-related injuries immediately or as soon as practicable after the occurrence.

G. Notice and medical certification requirements -- employers

Employers must provide a notice explaining the FMLA's provisions and the procedure for filing complaints about FMLA violations, and the notice must be posted prominently where it

can be seen by employees and applicants. Notice must be posted even if the employer has no FMLA-eligible employees. The employer's eligibility notice to the employee must state at least one reason if the employee is not eligible and be accompanied by a "rights and responsibilities" notice. The employer's designation notice must be within 5 days of the medical certification or other information requested of the employee.

Under the ADA and the WVHRA, the employer must post notice describing the provisions of the laws and the duty to provide reasonable accommodation.

Under the WVWCA, the employer must report an injury to the commissioner within five days of receiving the employee's notice of injury or within five days after the commissioner notifies the employer that a claim of benefits has been filed, whichever is sooner.

H. Certification and access to medical information

Under the FMLA, certification may be required even if paid leave is substituted. An employer has 5 days to request certification. An employee has 15 days to submit the certification. The employee must pay for the examination. An employer may seek a second opinion at the employer's expense. If the opinions are in disagreement, the employer may pay for a third certification, which is binding. An FMLA certification may ask how the condition meets the definition of a "serious health condition," the duration of the incapacity, and treatment. Direct contact with a physician is permitted, subject to limitations: to "clarify" and "authenticate," but not for "additional limitations." Annual certifications are permitted for conditions lasting longer than a year. Recertification is permitted every six months for open-ended conditions. A fitness for duty certification is allowed.

Under the ADA and the WVHRA, most employers should refrain from contacting the employee's physician without a release. In contrast, under the WVWCA, an employee who files for compensation agrees that any physician may release to and orally discuss with the

employer, or its representative, or a representative of the division, the employee's medical history and any medical reports pertaining to the occupational injury or disease, or to any prior injury or disease for which a medical impairment is alleged. The information includes detailed information as to the employee's condition, treatment, prognosis, and anticipated period of disability, and dates as to when the employee will reach or has reached maximum degree of improvement or will be released to return to work. Thus, the patient-physician privilege of confidentiality is waived. Information obtained and developed by a rehabilitation professional will also be made available to the parties.

I. Intermittent leave

Under the FMLA, intermittent leave is allowed as part of the 12 week entitlement. An employer cannot make an employee take more time than is actually needed, but the employer may limit increments to the shortest period allowed under the payroll system. An employer may transfer the employee to another position more suited for the part-time schedule. An employer can require an employee on intermittent leave to comply with the employer's regular "call-in" policy to the extent possible.

Under the ADA and the WVHRA, intermittent leave may be a type of reasonable accommodation. And, under the WVWCA, an intermittent schedule may be available to assist the employee in returning to work.

J. Serious health condition defined

The FMLA defines a "serious health condition" as "an illness, injury, impairment or physical or mental condition that involves inpatient care in a hospital, hospice or residential medical care facility or continuing treatment by a health care provider. "Inpatient care" means an overnight stay in a hospital, hospice, or residential medical care facility.

"Continuing treatment" involves continuing treatment by a health care provider. In general, the following categories of conditions will rise to the level of serious health conditions: (1) inpatient care; (2) pregnancy-related conditions (pregnancy itself is not a serious health condition); (3) conditions resulting in more than three days of incapacitation; (4) chronic health conditions; (5) treatment to prevent incapacitation or restorative surgery. Chronic health conditions, such as diabetes, asthma, or epilepsy, do not require a doctor's visit for each absence; however, the new regulations require twice-a-year visits to a health care provider.

K. Return to work issues: equivalent position, discipline, and termination

Under the FMLA, return to work certification is permitted if all employees are required to have one, notice is given, and the certification relates only to the condition causing leave. Reinstatement is required unless the position is eliminated, the employee is a "key employee," or the employee cannot perform the essential functions of the job. An employer is permitted to reassign an employee to an equivalent position with equivalent pay and benefits as the former job.

Under the ADA and the WVHRA, the employer may request return to work certification to ascertain if the employee may perform the essential functions of the job, with or without a reasonable accommodation. Reinstatement is required as a reasonable accommodation so long as it does not cause an undue hardship. Reassignment is an accommodation so long as the employee is qualified. A lower salary is acceptable only if the position is a lower-level position. An employer is not required to create a vacant position. If an employer has a work-related injury, the employer will need to evaluate whether the injury rises to the level of a disability under the ADA or the WVHRA. Under disability discrimination laws, an employer has a duty to make reasonable accommodations for employees with disabilities

so they can perform the essential functions of the job. One such accommodation may be a temporary leave of absence, even if the employee has used all of his or her FMLA or workers' compensation leave. The employer must examine whether the additional leave will cause an undue hardship on the employer's business. If it will not, then the employee may be entitled to an additional temporary leave of absence.

Under the WVWCA, reinstatement is required so long as the position is available, and the employee is not disabled from performing the duties of the position. The employer may need to make a reasonable accommodation under the ADA or the WVHRA so that the employee can perform the essential functions of the job. If the position is not available, the employee may be reinstated to another comparable position (in terms of wages, working conditions, and duties) that he/she is capable of performing. If the position held and a comparable position are unavailable, then the employee has preferential recall rights to any position that the employee is capable of performing for one year from the date the employee notifies the employer that he/she wants reinstatement.

L. Light duty and limited duty considerations

Under the FMLA, light duty is acceptable, but the employer cannot force the employee to take a light duty position in lieu of FMLA leave. Light duty does not count towards FMLA allotment.

Under the ADA and the WVHRA, light duty is a possible reasonable accommodation, but the employer need not create a light duty position or make the position permanent.

Under the WVWCA, an employee may return to work at a transitional, light duty, restructured or modified work assignment on either a temporary or trial basis. Modifications may be of duties, hours, or any other item which may assist the employee in attaining his/her

rehabilitation goals. An employer may place an employee in a light duty position to reduce workers' compensation benefits. However, the employer cannot force the employee to take the light duty position in lieu of FMLA leave. If the employee opts to take FMLA leave, instead of a light duty position, the employee may do so, but the decision will affect benefits received. If the treating physician certifies that the employee may return to a light duty job, but that the employee is unable to return to the same or equivalent job, the employee may refuse the offer and opt to take unpaid FMLA leave (if available). If the employee loses workers' compensation benefits as a result of refusing the light duty job, the employer may substitute accrued paid leave, if any, for the unpaid FMLA leave.

IV. The West Virginia Wage Payment and Collection Act

The West Virginia Wage Payment and Collection Act, W. Va. Code §§ 21-5-1, *et seq.,* which applies to all employers regardless of size, requires that payment for an employee's service be made in the form of actual money, or an instrument redeemable for money. It also governs the timing of wage payments to employees. The Act is separate and distinct from those laws dealing with minimum wages and maximum hours. Thus, it does not require any particular amount of wages be paid to employees -- it merely governs when those payments must be made.

The Act provides that employers must pay employees every two weeks for wages earned up to and including the fifth day immediately preceding the payday. W. Va. Code §§ 21-5-3 and 21-5-1(i). There is an exception to this rule where the employer has in place an agreement with the West Virginia Division of Labor. W. Va. Code § 21-5-3.

Employers must provide laid off employees their wages in full by the next regularly scheduled payday. W. Va. Code § 21-5-4(d). Employees who voluntarily terminate

their employment must also be paid their final wages by the next regularly scheduled payday. W. Va. Code § 21-5-4(c). An exception to this rule exists where an employee provides at least one pay period's notice of his resignation. *Id.* In that case, he must be paid his final wages on his last day of employment. *Id.* Payment can be made by the regular channels, or by mail if requested by the employee. *Id.* Discharged employees must be paid their wages in full no later than the next regular payday or within four business days from the discharge date, whichever comes first. W. Va. Code § 21-5-4(b).

An employer that fails to timely provide an employee's final check can be held liable for not only the amount of that check, but an additional three times that amount as liquidated damages. W. Va. Code § 21-5-4(e). Moreover, plaintiffs who prevail in their claims under the Act are entitled to the costs of the action, including reasonable attorney fees. W. Va. Code § 21-5-12(b).

Under the Act, the term "wages" includes fringe benefits capable of calculation, which would include accrued vacation or other types of leave payable to employees at the conclusion of their employment. W. Va. Code § 21-5-1(c). Note, however, that whether such leave is payable in the first place is dictated by the employer's policies. Syllabus point 5, *Meadows v. Wal-Mart Stores, Inc. et al.,* 530 S.E.2d 676 (W. Va. 1999). As stated, the Act itself does not require any particular amount of wages and/or benefits.

The Act also prohibits certain deductions from an employee's pay without a wage assignment from the employee. W. Va. Code § 21-5-3. This requirement does not apply to legal deductions, such as those for taxes, or to deductions for union dues, health care premiums, pension plans, payroll savings plans, charitable contributions, or hospitalization. W. Va. Code § 21-5-1(g). The requirement would apply, however, to an attempt to recoup a prior overpayment

to an employee, or a deduction for an employee's purchase of company merchandise. The assignment must contain the notarized signature of the employee and also be signed by the employer. W. Va. Code § 21-5-3. It must also state the total amount due, that three-fourths of the employee's wages are exempt from the assignment, and that it is only good for one year. *Id.* A form wage assignment is available on the West Virginia Division of Labor's website.