WEST VIRGINIA CODE: §23-5A-3

§23-5A-3. Termination of injured employees prohibited; reemployment of injured employees.

(a) It shall be a discriminatory practice within the meaning of section one of this article to terminate an injured employee while the injured employee is off work due to a compensable injury within the meaning of §23-4-1 *et seq*. of this code and is receiving or is eligible to receive temporary total disability benefits, unless the injured employee has committed a separate dischargeable offense. A separate dischargeable offense shall mean misconduct by the injured employee wholly unrelated to the injury or the absence from work resulting from the injury. A separate dischargeable offense shall not include absence resulting from the injury or from the inclusion or aggregation of absence due to the injury with any other absence from work.

(b) It shall be a discriminatory practice within the meaning of section one of this article for an employer to fail to reinstate an employee who has sustained a compensable injury to the employee's former position of employment upon demand made in writing and transmitted by the United States Postal Service, return receipt requested, to the employer's principal office for such reinstatement provided that the position in which the employee sustained the compensable injury is still available and the employee is not disabled from performing the duties of such position. If the former position is not available, the employee shall be reinstated to another comparable position which is available and which the employee is capable of performing. A comparable position for the purposes of this section shall mean a position which is comparable as to wages, working conditions and, to the extent reasonably practicable, duties to the position held at the time of injury. A written statement from a duly licensed physician that the physician approves the injured employee's return to his or her regular employment shall be prima facie evidence that the worker is able to perform such duties. In the event that neither the former position nor a comparable position is available, the employee shall have a right to preferential recall to any job which the injured employee is capable of performing which becomes open after the injured employee notifies the employer that he or she desired reinstatement. Said right of preferential recall shall be in effect for one year from the day the injured employee notifies the employer that he or she desires reinstatement: *Provided*, That the employee provides to the employer a current mailing address during this one-year period.

(c) For the preferential recall rights authorized by this section when an employee is employed by an employer defined by §30-42-3(d) of this code, the employee's right to preferential recall shall be no greater than 120 days from the date the employee is released by a duly licensed physician to return to his or her regular employment. It is the employee's obligation to continually seek the possibility of employment during the employee's preferential recall period under this subsection. The employee's right to preferential recall authorized by this subsection terminates once the employer offers the employee his or her

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former position or a comparable position.

(d) Any civil action brought under this section shall be subject to the seniority provisions of a valid and applicable collective bargaining agreement, or arbitrator's decision thereunder, or to any court or administrative order applying specifically to the injured employee's employer, and shall further be subject to any applicable federal statute or regulation.

(e) Nothing in this section shall affect the eligibility of the injured employee to workers' compensation benefits under this chapter.

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