

Nos. 31266 and 31267– *Sydney Walsh v. Jefferson Memorial Hospital and McDowell v. Jefferson Memorial Hospital*

McGraw, Justice, dissenting;

FILED

**December 10, 2003
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

The lower court granted summary judgment for the hospital in this case in the face of what I believe to be an ambiguity in the new company leave policy. This Court has clearly stated that: “Where an employer prescribes in writing the terms of employment, any ambiguity in those terms shall be construed in favor of the employee.” Syl. pt 2, *Lipscomb v. Tucker County Com’n.*, 206 W.Va. 627, 527 S.E.2d 171 (1999).

While it may be that a jury would have held against the plaintiff, a jury should have had the opportunity to hear this case. The lower court itself had to resort to a comparison of the old, rescinded policy with the new policy in order to reach its conclusion that the new policy was free of ambiguity. I believe a jury should have made this determination.

Also, it is important to note that the defendant, not the plaintiff, created the policy at issue. As this Court noted in *Lipscomb*:

[W]e recognize that many West Virginians are employed by small businesses, with varying degrees of legal sophistication, most businesses with a handbook or written wage and hour policy are larger operations. These larger businesses have usually employed major law firms, full of capable and intelligent attorneys with a full command of the Queen's English, as well as schooling in the nuances of our employment law. It is with

such professional assistance, often over a lengthy period of time, that these businesses craft carefully their employment policies and handbooks.

The employee, who usually does not have the benefit of professional legal training or advice, merely goes to work under the guidelines of the policy. He or she may receive a thick notebook of regulations, or may merely be told to read a posting, but the employee does not make the rules.

Lipscomb v. Tucker County Com'n., 206 W.Va. 627, 631, 527 S.E.2d 171, 175 (1999).

Because I believe that an ambiguity existed in this case and that a jury should have considered the issue, I must respectfully dissent.