

1 COMMITTEE SUBSTITUTE

2 FOR

3 **Senate Bill No. 344**

4 (By Senators Trump, Carmichael and Blair)

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6 [Originating in the Committee on the Judiciary;
7 reported February 17, 2015.]
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11 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article,
12 designated §55-7E-1, §55-7E-2 and §55-7E-3, all relating to setting adequate and reasonable
13 amounts of compensatory damages available to an employee in statutory and common law
14 wrongful or retaliatory discharge causes of action and other employment law claims; setting
15 forth definitions; setting forth legislative findings and declaration of public policy; placing
16 duty to mitigate damages on plaintiffs in employment-related lawsuits and causes of action;
17 and requiring a judge to make a finding on the appropriateness of remedy versus
18 reinstatement before front pay damages are to be considered by a jury.

19 *Be it enacted by the Legislature of West Virginia:*

20 That the Code of West Virginia, 1931, as amended, be amended by adding thereto a new
21 article, designated §55-7E-1, §55-7E-2 and §55-7E-3, all to read as follows:

22 **ARTICLE 7E. DUTY TO MITIGATE DAMAGES IN EMPLOYMENT CLAIMS.**

1 **§55-7E-1. Definitions.**

2 In this article:

3 (a) “Back pay” means the wages that an employee would have earned, had the employee not
4 suffered from an adverse employment action, from the time of the adverse employment action
5 through the time of trial.

6 (b) “Front pay” means the wages that an employee would have earned, had the employee not
7 suffered from an adverse employment action, from the time of trial through a future date.

8 **§55-7E-2. Legislative findings and declaration of purpose.**

9 (a) The Legislature finds that:

10 (1) Employees of this state are entitled to be free from unlawful discrimination, wrongful
11 discharge and unlawful retaliation in the workplace. Employers are often confronted with difficult
12 choices in the hiring, discipline, promotion, layoff and discharge of employees.

13 (2) The citizens and employers of this state are entitled to a legal system that provides
14 adequate and reasonable compensation to those persons who have been subjected to unlawful
15 employment actions, a legal system that is fair, predictable in its outcomes, and a legal system that
16 functions within the mainstream of American jurisprudence.

17 (3) The goal of compensation remedies in employment law cases is to make the victim of
18 unlawful workplace actions whole, including back pay; reinstatement or some amount of front pay
19 in lieu of reinstatement; and under certain statutes, attorney’s fees for the successful plaintiff.

20 (4) In West Virginia, the amount of damages recently awarded in statutory and common law
21 employment cases have been inconsistent with established federal law and the law of surrounding
22 states. This lack of uniformity in the law puts our state and its businesses at a competitive

1 disadvantage.

2 (b) The purpose of this article is to provide a framework for adequate and reasonable
3 compensation to those persons who have been subjected to an unlawful employment action, but to
4 ensure that compensation does not far exceed the goal of making a wronged employee whole.

5 **§55-7E-3. Statutory or common law employment claims ; duty to mitigate damages.**

6 (a) In any employment law cause of action against a current or former employer, regardless
7 of whether the cause of action arises from a statutory right created by the Legislature or a cause of
8 action arising under the common law of West Virginia, the plaintiff has an affirmative duty to
9 mitigate past and future lost wages, regardless of whether the plaintiff can prove the defendant
10 employer acted with malice or malicious intent, or in willful disregard of the plaintiff's rights. The
11 malice exception to the duty to mitigate damages is abolished. Unmitigated or flat back pay and
12 front pay awards are not an available remedy. Any award of back pay or front pay by a commission,
13 court or jury shall be reduced by the amount of interim earnings or the amount earnable with
14 reasonable diligence by the plaintiff. It is the defendant's burden to prove the lack of reasonable
15 diligence.

16 (b) In any employment law claim or cause of action, the trial court shall make a preliminary
17 ruling on the appropriateness of the remedy of reinstatement versus front pay if such remedies are
18 sought by the plaintiff. If front pay is determined to be the appropriate remedy, the amount of front
19 pay, if any, to be awarded shall be an issue for the trial judge to decide.

(NOTE: The purpose of this bill is to establish adequate and reasonable amounts of

compensatory and punitive damages that may be awarded in statutory and common law wrongful or retaliatory discharge and other employment law claims or causes of action.

This section is new; therefore, strike-throughs and underscoring have been omitted.)