

1 **Senate Bill No. 344**

2 (By Senators Trump, Carmichael and Blair)

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4 [Introduced January 28, 2015; referred to the Committee on the Judiciary.]
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9 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article,
10 designated §55-7E-1 and §55-7E-2, all relating to setting adequate and reasonable amounts
11 of compensatory and punitive damages available to an employee in statutory and common
12 law wrongful or retaliatory discharge causes of action and other employment law claims.

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

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

16 **ARTICLE 7E. LIMITATIONS ON BACK AND FRONT PAY AND PUNITIVE DAMAGES**
17 **IN EMPLOYMENT CLAIMS.**

18 **§55-7E-1. Legislative findings and declaration of purpose.**

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

1 disadvantage. If such large amounts of damages continue to be awarded in employment cases,
2 employers may not be able to obtain reasonably-priced Employment Practices Liability (EPLI) I
3 Insurance.

4 The Legislature hereby finds and declares that the citizens and employers of this state are
5 entitled to a legal system that provides adequate and reasonable compensation to those persons who
6 have been subjected to unlawful employment actions, a legal system that is fair, predictable in its
7 outcomes, and a legal system that functions within the mainstream of American jurisprudence. The
8 absence of such a legal climate serves to discourage business expansion and economic growth, and
9 threatens jobs.

10 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. The court's role is
13 not to act as a super personnel department that second guesses employers' business judgments.

14 The goal of compensation remedies in employment law cases is to make the victim of
15 unlawful workplace actions whole, including back pay; reinstatement or some amount of front pay
16 in lieu of reinstatement; and under certain statutes, attorney fees for the successful plaintiff. Back
17 pay is generally defined as lost wages from the time of the unlawful discharge to trial. Front pay is
18 generally defined as lost wages the employee-plaintiff would earn after the date of the trial into the
19 future. Every jurisdiction recognizes that it is the employee-plaintiff's duty to mitigate the impact
20 of lost wages. Accordingly, a back pay award and front pay award will be reduced by the amount
21 of interim earnings or the amount earnable with reasonable diligence by the plaintiff-employee. In

1 the 1982 decision of *Mason County Board of Education v. State Superintendent of Schools*, 295
2 S.E.2d 719 (W. Va. 1982), the Supreme Court of Appeals held that where an employee has been
3 wrongfully discharged out of "malice,"the employee has no duty to mitigate and he is entitled to a
4 flat back pay award. In *Mason County*, punitive damages and front pay were not otherwise available
5 to the plaintiff, a public employee. The court admitted that a flat back pay award was designed to
6 have a punitive element under such circumstances.

7 Standing alone, the *Mason County* decision may not be particularly controversial. However,
8 its holding has been applied to not only back pay awards, but front pay awards as well, and in cases
9 where punitive damages are otherwise available. In 2009, in *Peters v. Rivers Edge*, 680 S.E.2d 791
10 (W.Va. 2009), the plaintiff-employee had not found other employment by the time of trial. The
11 plaintiff-employee was awarded over \$170,000 in back pay, more than \$500,000 in flat front pay,
12 and \$1million dollars in punitive damages. The Supreme Court of Appeals concluded that the
13 employer's malicious conduct in unlawfully discharging the employee absolved the plaintiff-
14 employee of the duty to try to find other employment. And, courts have allowed flat wage loss
15 damages even in cases where plaintiff-employees have mitigated their damages by finding other
16 employment. In 2011, the Supreme Court of Appeals, in *WV American Water Company v. Nagy*,
17 Case No. 101229, June 15, 2011 (Memorandum Decision), upheld a wrongful discharge award of
18 \$350,000 in punitive damages and over \$1million dollars, in back pay and front pay, even though the
19 employee-plaintiff had found a job within months of his discharge earning just less than what he
20 had earned before. The income earned in the plaintiff-employee's new job did not reduce the amount
21 of back pay and front pay otherwise allowable. In 2012, the Supreme Court of Appeals, in *Burke-*

1 *Parsons-Bowlby v. Rice*, 736 S.E.2d 338 (W. Va. 2012), upheld a flat or unmitigated front pay award
2 of \$1,900,000. The plaintiff-employee essentially received a twenty year front pay award. The
3 wages the plaintiff-employee generated from his new/replacement job and could be expected to be
4 generated in the future did not reduce the front pay award.

5 This "malice" exception to the duty to mitigate damages means that a jury can award front
6 pay for as many years as it sees fit even though the plaintiff-employee may have found a replacement
7 job that pays more. Where mitigation and interim earnings are not set off, flat back and/or front pay
8 awards go well beyond making a plaintiff-employee whole and create a windfall for the plaintiff-
9 employee. These flat front pay awards serve to punish an employer when the jury concludes the
10 employer acted with "malice." Juries may find "malice" where the evidence reflects only unfair
11 treatment and not unlawful treatment. This damage award for a finding of "malice" is in addition to
12 punitive damages when the jury concludes the discharge was malicious or the employer acted with
13 wanton and willful indifference to its civil obligations. Thus, employers in West Virginia are
14 essentially subject to two sets of punitive damage awards.

15 Federal law and almost every other state jurisdiction requires employees to make an effort
16 to mitigate their back pay and front pay claims for damages and permits a reduction based on what
17 a plaintiff-employee subsequently earned at another job or what a plaintiff-employee could
18 reasonably be expected to earn following a diligent job search. There is no "malice"exception to the
19 duty to mitigate damages. Further, in federal court, the number of years front pay can be awarded
20 is often limited, in part, due to the speculative nature of such awards.

21 In 1999, the Supreme Court of Appeals in *Haynes v. Rhone Poulenc*, 521 S.E.2d 331 (W. Va.

1 1999), ruled for the first time that punitive damages are also available under the West Virginia
2 Human Rights Act, although the West Virginia Human Rights Act, passed in 1967 and amended in
3 1998, does not specify that such damages are available. There is no cap on punitive damages in
4 West Virginia wrongful discriminatory discharge cases such as exists under the federal Civil Rights
5 Act and in surrounding states.

6 Unmitigated flat front pay and punitive damages awards with no caps, as a regular element
7 of damages in wrongful or retaliatory discharge cases, puts West Virginia at a competitive
8 disadvantage as it tries to retain jobs or attract new jobs for our citizens. This situation also unfairly
9 punishes those businesses who have chosen to operate in West Virginia and employ West Virginia
10 citizens. Possible exposure to unduly large verdicts in employment law cases not only hurts West
11 Virginia businesses, it negatively impacts other employees who rely on the stability of these
12 businesses for their livelihood.

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

16 **§55-7E-2. Statutory or common law employment claims ; duty to mitigate back pay and front
17 pay damages; limits on punitive damages.**

18 (a) In any employment law cause of action against a current or former employer, regardless
19 of whether the cause of action arises from a statutory right created by the Legislature or a cause of
20 action arising under the common law of West Virginia, the plaintiff has an affirmative duty to
21 mitigate past and future lost wages, regardless of whether the plaintiff can prove the defendant

1 employer acted with malice or malicious intent, or in willful disregard of the plaintiff's rights. The
2 malice exception to the duty to mitigate damages is abolished. Unmitigated or flat back pay and
3 front pay awards are not an available remedy. Any award of back pay or front pay by a commission,
4 court or jury shall be reduced by the amount of interim earnings or the amount earnable with
5 reasonable diligence by the plaintiff. It is the defendant's burden to prove the lack of reasonable
6 diligence.

7 (b) Back pay liability shall not accrue for a period of more than two (2) years prior to the
8 filing of any claim or civil action.

9 (c) Front pay liability shall not accrue for a period of more than three (3) years from the date
10 of judgment in any claim or civil action.

11 (d) In any employment law claim or cause of action, the trial court shall make a preliminary
12 ruling on the appropriateness of the remedy of reinstatement versus front pay if such remedies are
13 sought by the plaintiff. If front pay is determined to be the appropriate remedy, the amount of front
14 pay, if any, to be awarded shall be an issue for the trial judge to decide subject to the limitations set
15 forth in subsection (c) above.

16 (e) Limits on Punitive Damages –

17 (1) In any employment law claim or cause of action against a current or former employer,
18 regardless of whether the cause of action arises from a statutory right created by the Legislature or
19 a cause of action arising under the common law of West Virginia, a judgment for punitive or
20 exemplary damages may not exceed two times the amount of the compensatory damages awarded
21 to the plaintiff, exclusive of attorney fees.

1 (2) If the defendant is a small employer, fifty employees or less, or an individual, a judgment
2 for punitive or exemplary damages may not exceed the lesser of two times the amount of
3 compensatory damages awarded to the plaintiff from the defendant or ten percent of the employer's
4 or individual's net worth at the time of the unlawful employment action up to a maximum of
5 \$250,000.

6 (3) An award of prejudgment interest may not include prejudgment interest on punitive or
7 exemplary damages.

8 (f) *Jury trial* – If a party plaintiff seeks compensatory or punitive damages in an employment
9 law case, whether the claim or cause of action arises from a statutory right created by the West
10 Virginia Legislature or arising under the common law of West Virginia, any party may demand a
11 trial by jury and the court shall not inform the jury of the limitations described in subsection (e) of
12 this section.

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.