DAMAGES IN EMPLOYMENT CASES AFTER SENATE BILL 344

Jessie F. Reckart, Esq.
Bowles Rice LLP
600 Quarrier Street
Post Office Box 1386
Charleston, West Virginia 25325-1386
jreckart@bowlesrice.com

INTRODUCTION

West Virginia's employment litigation landscape will transform on June 8, 2015. On that day, Senate Bill 344, a product of West Virginia's first Republican-majority legislature in eighty years, will take effect. S.B. 344, 82nd Leg., 1st. Sess. (W. Va. 2015) (hereinafter, Senate Bill 344 or S.B. 344).[1] Senate Bill 344 imposes upon plaintiffs pursuing wrongful or retaliatory discharge claims and other employment-related claims (generally, "employment cases" or "employment claims") an affirmative duty to mitigate their damages, regardless of "whether the plaintiff can prove the defendant employer acted with malice of malicious intent, or in willful disregard of the plaintiff's rights." S.B. 344 at 3. Senate Bill 344 also affirms the trial judge's responsibility to determine whether reinstatement or front pay is a plaintiff's appropriate remedy. *Id*. at 3. Finally, Senate Bill 344 tasks the trial judge with determining the amount of front pay, if any, to be awarded. *Id*.

Senate Bill 344 is a pointed response to a lengthy line of authority promulgated by the Supreme Court of Appeals of West Virginia (hereinafter, the Supreme Court).[2] The bill affirmatively abolishes the "malice exception" to a plaintiff's duty to mitigate her damages. *Id*. It also clarifies and expands the trial judge's role, tasking her with the determination of the type and amount of damages available to plaintiffs pursuing employment claims. The bill is a "game-changer," not only for the defense bar, but for trial judges, too, as parties test the new law's boundaries and intersections with other tort reforms passed by the 1st Session of the 82nd West Virginia Legislature. *See, e.g.*, S.B. 421, 82nd Leg., 1st. Sess. (W. Va. 2015).

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[1] Sponsored by Senators Charles S. Trump of the 15th District, Mitch Carmichael of the 4th District, and Craig Blair of the 15th District, the West Virginia Legislature passed Senate Bill 344 on March 10, 2015.

[2] *See Mason Co. Bd. of Ed. v. State Sup't of Schools*, 170 W. Va. 632, 295 S.E.2d 719 (1982); *Peters v. Rivers Edge Min., Inc.*, 224 W. Va. 160, 680 S.E.2d 791 (2009); *W. Va. Am. Water Co. v. Nagy*, No. 101229, 2011 WL 8583425 (W. Va. Supreme Court, June 15, 2011) (memorandum decision); and *Burke-Parsons-Bowlby Corp. v. Rice*, 230 W. Va. 105 (2012).

This Article will: (1) review the development of the "malice exception" to a plaintiff's duty to mitigate her damages in West Virginia jurisprudence; (2) synthesize various criticisms of that authority; (3) summarize Senate Bill 344 as passed by the West Virginia Legislature on March 10, 2015; and (4) identify key aspects of Senate Bill 344 and their impact upon the litigation of employment claims. Senate Bill 344 represents a major change in these types of cases, and its impact will not be fully understood for many years. This article is only the start of the conversation about this bill's meaning and application.

I. West Virginia Creates, Applies and Expands an Exception to an Employee's Duty to Mitigate Her Lost Wages

Starting in 1982, a plaintiff pursuing employment claims under West Virginia law could, in certain circumstances, be entitled to a flat back pay award, that is, a plaintiff might not have to mitigate her damages by seeking re-employment between the time of her discharge and trial. *See* Syl. Pt. 2, *Mason Co. Bd. of Ed. v. State Sup't of Sch.*, 170 W. Va. 632, 295 S.E.2d 719 (1982) (hereinafter, *Mason Co. BOE*). In 2009, the Supreme Court endorsed the application of that rule to the front pay awards. *See Peters v. Rivers Edge Min., Inc.*, 224 W. Va. 160, 184, 680 S.E.2d 791, 815 (2009) (hereinafter, *Rivers Edge*).[3] Additionally, the Supreme Court has approved both flat front and back pay *and* punitive damages awards for employment claims. *Id*. These cases combine to permit a plaintiff pursuing employment claims under West Virginia law to win both front pay for the rest of her working life, *plus* punitive damages based on the same "malicious" conduct by her former employer. *See WV Am. Water Co. v. Nagy*, Case No. 101229, 2011 WL 8583425 (W. Va. Supreme Court, June 15, 2011) (memorandum decision) (hereinafter,

[3] The Supreme Court *implicitly* expanded *Mason Co. BOE* to front pay awards in *Seymour v. Pendleton Community Care*, 209 W. Va. 468, 473, 549 S.E.2d 662, 667 (2001) (*per curiam*) (hereinafter, *Seymour*). *See* Amber Marie Moore, *Can Damages Be Too Damaging? Examining Mason County and Its Progeny*, 115 W. Va. L. Rev. 807, 829 (2012). In *Rivers Edge*, the Supreme Court endorsed the application of Syllabus Point 2 of *Mason Co. BOE* to front pay awards, although the Supreme Court did not cite to its decision in *Seymour*. *Rivers Edge*, 224 W. Va. at 184, 680 S.E.2d at 815.

Nagy); *Burke-Parsons-Bowlby v. Rice*, 736 S.E.2d 338 (W. Va. 2012) (hereinafter, *Rice*). This scenario created an unearned windfall for employee-plaintiffs and a boondoggle for defendant-employers.

A. Flat Back Pay Awards for School Personnel: *Mason County BOE*

Decided in 1982, *Mason County BOE* was the culmination of nearly ten years of litigation between Bright McCausland (Mr. McCausland), the Mason County Board of Education, and the State Superintendent of Schools. *See Mason County BOE*, 170 W. Va. at 633–34, 295 S.E.2d at 721 (recounting litigation and appellate history of dispute).

In 1980, after years of procedural wrangling, the Supreme Court held that the Mason County Board of Education erred in dismissing Mr. McCausland without first affording him an improvement period in accord with Section 5300(6)(a) of the Policies, Rules and Regulations of the West Virginia Board of Education. *Mason Cnty. Bd. of Educ. v. State Sup't of Sch.*, 165 W. Va. 732, 733, 274 S.E.2d 435, 436 (1980). In so holding, the Supreme Court reversed the Circuit Court of Kanawha County, ordered Mr. McCausland be reinstated to his position with the Mason County Board of Education, and awarded him back pay. *Id*. at 165 W. Va. at 740, 274 S.E.2d at 439. On remand, the Circuit Court of Kanawha County awarded Mr. McCausland "148,362.36 in back pay for the school years 1973–74 through 1980–81." *Mason County BOE*, 170 W. Va. at 634, 295 S.E.2d at 721.

The Mason County Board of Education appealed the back pay award, arguing that Mr. McCausland had an obligation "to mitigate his or her damages by seeking and accepting comparable employment for which he or she is qualified during the pendency of litigation," *id.*, 170 W. Va. at 635, 295 S.E.2d at 722, and that Mr. McCausland had neglected to do so. The Supreme Court disagreed, stating:

> while we hold that a wrongfully discharged employee is entitled to recover his actual loss from the wrongful act, we now reject the somewhat primitive rule measuring damages simply as the total of the employee's back pay from the date of discharge to the date of reinstatement, and adopt the rule prevailing in most jurisdictions contemplating a duty of the employee to mitigate damages by seeking other employment.

Id., 170 W. Va. at 635–36, 295 S.E.2d at 723.

The Supreme Court reached this holding following an extended discussion of the particularities of "the law regarding both the due process rights of school personnel and the rights of school personnel" under the rules and regulations of the West Virginia Board of Education. *Id*. at 170 W. Va. at 635, 295 S.E.2d at 723. The Supreme Court reasoned, a little wistfully, that

> [i]n the days when courts limited their intrusion into public employee discharge cases to those instances where clear violations of well-established law occurred—as for example, when an employee was fired without any hearing, discriminated against because of race or sex, or transferred out of malice in direct contravention of a civil service statute—it was possible to accept with equanimity the proposition that the employee should receive an award that, in effect, punishes the agency or other employer that is the wrongdoer.

Id., 170 W. Va. at 635, 295 S.E.2d at 722. In light of regulatory changes increasing reversals of agency decisions on technical grounds, the Supreme Court concluded that such flat back pay awards should no longer be the norm and adopted the holding set out above. *Id.*, 170 W. Va. at 635, 295 S.E.2d at 723.

The Supreme Court next clarified that, while it was adopting the majority rule "contemplating a duty of the employee to mitigate damages by seeking other employment," *id*. 170 W. Va. at 635–36, 295 S.E.2d at 723, it was also carving out this exception, in that an "employer is estopped from asserting the employee's duty to mitigate where the termination of

employment is malicious." *Id.*, 170 W. Va. at 637, 295 S.E.2d at 724. The Supreme Court based this exception on its distinction, sketched out earlier in the opinion, between (1) "cases where there are either technical violations of procedural rights or discharges prompted by poor judgment," and (2) "cases where an employee has been wrongfully discharged out of malice[, *i.e.*] the discharging agency or official willfully and deliberately violated the employee's rights under circumstances where the agency or individual knew or with reasonable diligence should have known of the employee's rights . . . ." *Id.*, 170 W. Va. at 637–38, 295 S.E.2d at 725. In the former case, "the innocent constituency served by the government agency should not be punished by an unjustifiably generous award." *Id.*, 170 W. Va. at 637, 295 S.E.2d at 725. In the latter, "the policy considerations against malicious discharge outweigh the policy considerations that favor protection of the constituent class receiving government services." *Id.*, 170 W. Va. at 638, 295 S.E.2d at 725.

In sum, this analysis resulted in the following new syllabus point:

> Unless a wrongful discharge is malicious, the wrongfully discharged employee has a duty to mitigate damages by accepting similar employment to that contemplated by his or her contract if it is available in the local area, and the actual wages received, or the wages the employee could have received at comparable employment where it is locally available, will be deducted from any back pay award; however, the burden of raising the issue of mitigation is on the employer.

Arguably, Syllabus Point 2 of *Mason County BOE* should have been cabined to the particular circumstances of that case. As a school board employee seeking review of the Mason County Board of Education's decision to terminate his teaching contract, Mr. McCausland was subject to Chapter 18A of the *West Virginia Code* ("School Personnel"). Under *West Virginia Code* §§ 18A-2-8, 18A-2-11, school personnel who successfully grieve the termination or suspension of their employment may win back pay, reinstatement, and attorneys'

fees. The Code does not authorize punitive damages. Viewed through that lens, the *dicta* in *Mason Co. BOE* describing the applicability of flat back-pay awards to employment claims by public employees makes sense. *See Mason Co. BOE*, 170 W. Va. at 635, 295 S.E.2d at 722. Viewed further through that lens, however, the subsequent application of Syllabus Point 2 of *Mason Co. BOE* to claims where punitive damages are otherwise available does not make sense. *See id.* Additionally, *Mason Co. BOE* said nothing about the application of its newly-minted "malice exception" to front pay awards—the question squarely addressed by the Supreme Court in 2009 in *Rivers Edge.*

B. Flat Front Pay Awards for Everyone: *Peters v. Rivers Edge Mining*

Mason Co. BOE could have lived out its days limited to back pay awards in school personnel grievance disputes. *See, e.g., Rice v. Cmty. Health Ass'n*, 203 F.3d 283, 286 (4th Cir. 2000) ("Nothing in *Mason County* . . . discusses whether that rationale would or would not apply to front pay damages when the employment contract at issue is one for a term of years."). But, Syllabus Point 2 contains our state's foundational law regarding mitigation of damages, and that syllabus point begins with this potent phrase: "Unless a wrongful discharge is malicious . . . ." In other words, application of Syllabus Point 2 of *Mason County BOE* beyond its facts—to uphold a flat, front pay award against a private employer—was simply a matter of time and one that practitioners had long expected.[4]

The time came in 2009 in *Rivers Edge Mining*. There, George Peters (Mr. Peters) sued his former employer, Rivers Edge Mining Co. (Rivers Edge), for retaliatory discharge under *West Virginia Code* § 23-5A-1 (Workers' Compensation Discrimination). *Rivers Edge*, 224 W. Va. at 169, 680 S.E.2d at 800. Mr. Peters claimed that Rivers Edge had fired him because he

[4] As a practical matter, most circuit courts and employment law practitioners assumed that Syllabus Point 2 of *Mason Co. BOE* applied to front pay awards well before the Supreme Court decided *Rivers Edge*. *See* Note 1, *supra*.

sought and received workers' compensation benefits. *Id.*, 224 W. Va. at 170, 680 S.E.2d at 801. Rivers Edge, on the other hand, claimed that it had terminated Mr. Peters' employment because Mr. Peters failed to return to work promptly after being released by his physician. *Id.*, 224 W. Va. at 171, 680 S.E.2d at 802. At trial, the jury returned a verdict for Mr. Peters and awarded him (a) a flat back pay award of $171,697; (b) a flat front pay award of $513,410; (c) $200,000 for aggravation; and (d) $1,000,000 in punitive damages. *Id.*, 224 W. Va. at 172, 680 S.E.2d at 803.

On appeal, Rivers Edge raised two arguments of relevance here: that the evidence did not support Mr. Peters' front pay award, and that Mr. Peters was not entitled to punitive damages. The Supreme Court addressed the first argument by quickly reviewing the evidence adduced at trial supporting the amount of front pay awarded: $513,410. Almost as an afterthought, the Supreme Court stated that "to the extent that Rivers Edge complains that Mr. Peters failed to mitigate his damages, Rivers Edge's contention is without merit." *Id.*, 224 W. Va. at 184, 680 S.E.2d at 815. The Supreme Court referenced Syllabus Point 2 of *Mason County BOE* in its entirety, emphasizing the portentous first clause, "*Unless a wrongful discharge is malicious . . . .*" *Id.* To support the conclusion that Rivers Edge's position was meritless, the Supreme Court simply directed readers to a subsequent section of the opinion in which the Court analyzed the appropriateness of punitive damages under *Mayer v. Frobe*, 40 W. Va. 246, 22 S.E. 58 (1895).

> **As will be discussed in greater detail in Sections III.D.1 and III.D.2, *infra*,** we find that Rivers Edge's malicious misconduct in terminating Mr. Peters's employment in retaliation for his application for and receipt of workers' compensation benefits absolves Mr. Peters of the duty to mitigate his damages in this case. Having thus determined the amount of Mr. Peters's front pay award to have been supported by the evidence, we affirm the circuit court's ruling upholding the jury's verdict in this regard.

Id. (emphasis added).

In two sentences, the Supreme Court endorsed two alterations to remedies previously available in employment cases. First, it extended the rule of *Mason County BOE* to front pay awards. In 2000, the Fourth Circuit had recognized that this was an open question under West Virginia law. *See, e.g.*, *Rice v. Cmty. Health Ass'n*, 203 F.3d 283, 286 (4th Cir. 2000) ("Nothing in *Mason County* . . . discusses whether that rationale would or would not apply to front pay damages when the employment contract at issue is one for a term of years."). In 2001, the Supreme Court had *implicitly* approved of this extension when it had applied *Mason County BOE* to order the reinstatement of a $125,000 flat front pay award after finding the appellee's discharge to have been malicious. *See Seymour*, 209 W. Va. 468, 473, 549 S.E.2d at 667.[5] *Rivers Edge*, however, was the first time the Supreme Court made this extension plain. After *Rivers Edge*, plaintiffs bringing employment claims could pursue flat front pay awards in addition to the flat back pay awards allowable under *Mason County BOE*.

Second, the Court indicated that the finding of malice necessary to support the exception carved out in Syllabus Point 2 of *Mason County BOE* was the same finding of malice necessary to support an award of punitive damages under *Mayer v. Frobe*. Applying *Mayer v. Frobe* to the facts adduced at Mr. Peters' trial, the Court concluded that,

> Not only did Mr. Peters adduce evidence to prove that his termination by Rivers Edge was in retaliation for his application for and receipt of workers' compensation benefits, Mr. Peters also proved that Rivers Edge's actions in this regard were malicious. The foundation of an inference of malice is the general disregard of the rights of others, rather than an intent to injure a particular individual. Here, the evidence demonstrated that Rivers Edge had a

[5] Justice Davis's partial concurrence and partial dissent in *Seymour* forecasted *Rivers Edge*. *Seymour*, 209 W. Va. at 475, 549 S.E.2d at 669. Justice Maynard's dissent in *Seymour* highlights the tension created when *Mason County BOE* was applied beyond its limited facts and potential punitive damages awards in employment claims. *Id.*

> general disregard of the rights of others, which was apparent from Rivers Edge's treatment of Mr. Peters throughout his receipt of statutory workers' compensation benefits for an injury he received while working for Rivers Edge.

Rivers Edge, 224 W. Va. at 190, 680 S.E.2d at 821. As it had presaged in its discussion of the front pay award, the Supreme Court treated the two damages analyses as if they were identical. *See id.*, 224 W. Va. at 184, 680 S.E.2d at 815. This "double whammy" permitted the same evidence to support two separate categories of damages: a flat front pay award and punitive damages under *Mayer v. Frobe*.

C. *Nagy* and *Rice*: The Fruition of *Rivers Edge*

The Supreme Court confirmed the permissibility of that "double whammy" in a 2011 memorandum decision, *West Virginia American Water Co. v. Nagy*.[6] There, James A. Nagy (Mr. Nagy) alleged that West Virginia American Water Company (WVAWC) had terminated his employment due to his age (54 years old), in violation of the West Virginia Human Rights Act ("WVHRA"), *West Virginia Code* § 55-11-1 *et seq*. *Nagy*, 2011 WL 8583425 at *1. WVAWC asserted that it legitimately terminated Mr. Nagy's employment because he had failed to fulfill the duties attendant to his informal job title of "construction supervisor." *Id*. at *1–*2. Mr. Nagy prevailed at trial, and the jury awarded him total damages of $1,750,450 (flat back pay of $200,450; flat front pay of $900,000; $150,000 in humiliation; $150,000 in emotional distress; and $350,000 in punitive damages). *Id*. at *2.

On appeal, WVAWC argued that "the circuit court erred in allowing the jury to consider the issues of punitive damages and unmitigated wage loss damages, and then erred in the post-trial review by refusing to eliminate either of these awards." *Id*. at *3. WVAWC

[6] Justice Margaret Workman and Justice Brent Benjamin would have heard *Nagy* on the Supreme Court's argument docket.

invoked *Harless v. First National Bank of Fairmont*, 169 W. Va. 673, 691–692, 289 S.E.2d, 692, 702 (1982) (hereinafter, *Harless II*), for the proposition that punitive damages are only appropriate in employment cases "when the employee can show evidence of egregious conduct by the employer over and above the improper conduct necessary to establish wrongful termination." *Nagy*, 2011 WL 8583425 at *3. Rivers Edge had also invoked *Harless II*, *see Rivers Edge*, 224 W. Va. at 187, 680 S.E.2d at 818, and, as in that case, the Supreme Court, in *Nagy*, rejected the argument with little (or no) analysis: "The circuit court found sufficient evidence to allow the issue of punitive damages to go to the jury and, upon review of the record, we find no error in this decision." *Nagy*, 2011 WL 8583425 at *3.

WVAWC next argued that because the flat back and front pay awards and the punitive damages are punitive in nature, and based upon the same finding of malice, they are duplicative and unreasaonable under *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (W. Va. 1991) (hereinafter, "*Garnes*"). Again, the Supreme Court summarily rejected this argument, stating—without citation to any authority—that, "West Virginia law permits both types of damages." *Nagy*, 2011 WL 8583425 at *3. Finally, WVAWC argued that "the amount of the excess unmitigated wage loss should be counted as punitive damages when determining whether the punitive damages bear a reasonable relationship to the compensatory damages." *Id*. at *4. The Supreme Court was dismissive of this argument, concluding that "unmitigated wage loss damages and punitive damages are not the same" because "[e]ven when not mitigated, a wage loss award is still compensatory in nature." *Id.* The *dicta* of *Mason County BOE*, acknowledging the punitive nature of flat back pay awards, was forgotten. *See Mason County BOE*, 170 W. Va. at 635, 295 S.E.2d at 722.

One year later, in *Rice*, the Supreme Court confirmed its new characterization of flat back and front pay awards as "compensatory." *See Rice*, 230 W. Va. at 116, 736 S.E.2d at 349. There, Jerold John Rice, Jr. (Mr. Rice) sued his former employer, The Burke-Parsons-Bowlby Corporation (Burke-Parsons) for terminating his employment due to his age, in violation of the WVHRA. *Id.*, 230 W. Va. at 109, 736 S.E.2d at 342. Burke-Parsons contended that Mr. Rice's employment was terminated due to the elimination of his position. *Id.* After Mr. Rice filed suit, Burke-Parsons offered to reinstate Mr. Rice to a position similar to that which he had formerly held with the company, but Mr. Rice refused. *Id.* At trial, the jury found for Mr. Rice, awarding him a $2,133,991 verdict that included damages for lost back pay and front pay, attorneys' fees and costs. *Id.*, 230 W. Va. at 108, 736 S.E.2d at 341. The jury did not award Mr. Rice punitive damages. *Id.* Burke-Parsons moved for a new trial, arguing, *inter alia*, that "the allowance by the circuit court of an unmitigated jury award of back pay and front pay unfairly constituted a *de facto* finding of punitive damages, without the due process constraints ordinarily associated with punitive damage awards." *Id.*, 230 W. Va. at 111, 736 S.E.2d at 344.

The Supreme Court rejected Burke-Parsons' argument. The Supreme Court reasoned that the jury's finding that Rice's termination was malicious was based on "factors [that] are personal to Rice," that is, that Rice was (a) terminated without notice, (b) given little explanation as to why he was terminated, and (c) told to vacate the Burke-Parsons premesis immediately. *Id.*, 230 W. Va. at 116, 736 S.E.2d at 349. Those facts, the Supreme Court reasoned, do not "fall into the more broadly based category of punitive damages." *Id.* For that reason, the unmitigated front and back pay and punitive damages were incomparable, and the due process constraints normally associated with the punitive damages awards were inapplicable. *Id.* Once again, the Supreme Court had ignored the *dicta* of *Mason County BOE*, acknowledging

the punitive nature of flat back pay awards. *See Mason County BOE*, 170 W. Va. at 635, 295 S.E.2d at 722.

Rice also highlighted another issue attendant to damages in employment cases: reinstatement versus front pay. The Supreme Court had addressed this issue in *Rivers Edge* in the context of the permissibility of front pay as a remedy for workers' compensation discrimination. *Rivers Edge*, 224 W. Va. at l79–182, 680 S.E.2d at 810–813. In *Rice*, Burke-Parsons' offer of reinstatement invoked the issue more directly. *See Rice*, 230 W. Va. at 113–115, 736 S.E.2d at 346–348. Burke-Parsons argued that Rice's front pay should be limited to the time period between the termination of his employment and the offer of reinstatement. *Id*.

At trial, the circuit court found that whether Rice had reasonably rejected the offer of reinstatement was a jury question, but, on appeal, Burke-Parsons argued that the circuit court had erred by not deciding this issue itself. *Id*., 230 W. Va. at 114, 736 S.E.2d at 347 (citing *Rivers Edge*, 224 W. Va. at 182, 680 S.E.2d at 813 ("Whether the facts of a particular case warrant an award of front pay in lieu of reinstatement is a decision committed to the circuit court . . . .")). The Supreme Court, relying on the potential fact issue raised by the reasonableness of Mr. Rice's rejection of Burke-Parsons' offer of reinstatement, held that the circuit court had not erred, and that "a circuit court may submit the question of reinstatement to employment versus an award of front pay to the jury, where the facts and inferences concerning those remedies are in conflict." *Rice*, 230 W. Va. at 114, 736 S.E.2d at 347.[7]

[7] Notably, *Rivers Edge* cited *Thompson v. Town of Alderson*, 215 W. Va. 578, 581 600 S.E.2d 290, 293 (2004) (hereinafter, "*Town of Alderson*"), for the proposition that "[A] court may rule preliminarily, that reinstatement is not a remedy that will be considered by the court." *Nagy* did not cite to *Town of Alderson*, a case which emphasized the trial court's role in deciding the appropriateness of reinstatement as a remedy. *See Town of Alderson*, 215 W. Va. at 581, 600 S.E.2d at 293 ("A number of factors may go into a trial judge's exercise of discretion relating to the reinstatement issue in a given employment case.").

D. Summary: *Mason County BOE* Thirty Years Later

Mason County BOE, *Rivers Edge*, *Nagy* and *Rice*, chart the awkward growth in West Virginia of the "malice exception" to an employee's duty to mitigate her damages from 1982 to 2012. Arguably, after *Mason County BOE*, the exception was limited to awards of back pay for public employees. *Rivers Edge* changed that, explicitly applying the exception to a front pay award to a private employee. Following *Rivers Edge*'s intertwining of the "malice exception" with traditional punitive damages under *Mayer v. Frobe*, employer-defendants attempted to limit flat back and front pay awards by applying the due process analysis of *Garnes*. In *Nagy* and *Rice*, the Supreme Court made clear that it now viewed such awards as compensatory—not punitive—despite the *dicta* of *Mason County BOE* and, therefore, beyond the reach of *Garnes*. Finally, the Supreme Court held that the jury, and not the trial court, could determine whether reinstatement or front pay was an appropriate remedy in certain cicumstances. Thus, at the ripe old age of thirty, the relatively constrained rule of *Mason County BOE* had become an unpredicatble and nearly unreviewable fact of life in West Virginia employment cases.

III. Senate Bill 344: Reining in *Mason County BOE* and Its Progeny

On January 28, 2015, Republican Senators Trump, Carmichael and Blair introduced Senate Bill 344, "Relating to limitations on back and front pay and punitive damages." The introduced version of Senate Bill 344 minced no words about its intended effect: "The purpose of this article is to provide a framework for adequate and reasonable compensation to those persons who have been subjected to an unlawful employment action, but to ensure that compensation does not far exceed the goal of making a wronged employee whole." (Introduced Version of S.B. 344 at 5) (attached at "Appendix A"). The introduced version also included a

detailed, multi-page description of the development of damages law in West Virginia employment cases, and it openly criticized the rationale and results of *Mason Co. BOE*, *Peters*, *Nagy*, and *Rice*.

The introduced version contained the following notable provisions:

	Introduced Version
Malice exception to duty to mitigate	Abolished; flat back pay and front pay awards are not an available remedy
Back pay liability	Shall accrue for a period not more than two (2) years prior to the filing of any claim or civil action
Front pay liability	Shall accrue for a period not more than three (3) years prior to the filing of any claim or civil action
Reinstatement vs. Front Pay	Trial court must make a preliminary ruling on the appropriateness of the remedy
Determination of amount of front pay	Decided by the trial judge
Limitation on punitive damages	May not exceed two times the amount of compensatory damages exclusive of attorney fees
Limitation of punitive damages for small employers (*fifty employees or less*)	May not exceed the lesser of two times the amount of compensatory damages awarded to the plaintiff from the defendant or ten percent of the employer or individual's net worth up to a maximum of $250,000

Introduced on February 17, 2015, the Committee Substitute for Senate Bill 344 jettisoned the introduced version's narrative regarding *Mason Co. BOE, Peters*, *Nagy*, and *Rice*. (*See* Committee Substitute for S.B. 344) (attached as "Appendix B"). The Committee Substitute did retain the introduced version's statement that recent damages awards in West Virginia employment cases "have been inconsistent with established federal law and the law of surrounding states," and that this "lack of uniformity in the law puts our state and its business at a competitive disadvantage." (Committee Substitute for S.B. 344). The Committee Substitute further changed the Introduced Version of Senate Bill 344 as follows:

	Introduced Version	Committee Substitute
Malice exception to duty to mitigate	Abolished; flat back pay and front pay awards are not an available remedy	Same
Mitigation of damages	Plaintiff has an affirmative duty to mitigate past and future wage loss	Same
Burden of proof	Defendant's burden to show that Plaintiff did not exercise reasonable diligence	Same
Back pay liability	Shall accrue for a period not more than two (2) years prior to the filing of any claim or civil action	Deleted
Front pay liability	Shall accrue for a period not more than three (3) years prior to the filing of any claim or civil action	Deleted
Reinstatement vs. Front Pay	Trial court must make a preliminary ruling on the appropriateness of the remedy	Same
Determination of amount of front pay	Decided by the trial judge	Same
Limitation on punitive damages	May not exceed two times the amount of compensatory damages exclusive of attorney fees	Deleted
Limitation of punitive damages for small employers (Fifty (50) employees or less)	May not exceed the lesser of two times the amount of compensatory damages awarded to the plaintiff from the defendant or ten percent of the employer or individual's net worth up to a maximum of $250,000.	Deleted
Definition of "front pay"		Added
Definition of "back pay"		Added

The Legislature passed the Enrolled Committee Substitute Senate Bill 344 on March 10, 2015, and it has since been signed into law by the Governor. Senate Bill 344 will take effect on June 8, 2015, and it will be codified at *West Virginia Code* §§ 55-7E-1, 55-7E-2 and 55-7E-3.

IV. Applying Senate Bill 344

Senate Bill 344 changes the settled practice of employment claims arising under West Virginia law. The bill abolishes the "malice exception," clarifies when and how the trial court should address whether a plaintiff is even entitled to pursue front pay damages, and directs the trial judge to determine the amount of front pay damages to be awarded. Importantly, trial courts and litigants have little time to ponder these changes, as Senate Bill 344 takes effect on June 8, 2015, and should apply retroactively.

A. The Malice Exception to the Duty to Mitigate Damages is Abolished.

Senate Bill 344 abolishes the "malice exception." The bill, to be codified at *West Virginia Code* § 55-7E-3, makes this plain: "The malice exception to the duty to mitigate damages is abolished." Abolition of this exception will necessarily refocus the damages inquiry in employment cases to the question of whether plaintiff has satisfied her "affirmative duty to mitigate past and future wage loss," that is, whether she has acted with "reasonable diligence" to secure like employment. *See* S.B. 344 at 3. This refocused inquiry aligns West Virginia law with well-settled federal law regarding mitigation of wage loss. S*ee, e.g.*, *Brady v. Thurston Motor Lines, Inc.*, 753 F.2d 1269, 1273 (4th Cir. 1985) ("In the case of a Title VII claimant who has been unlawfully discharged, the duty to mitigate damages requires that the claimant be reasonably diligent in seeking and accepting new employment substantially equivalent to that from which he was discharged."). Senate Bill 344 clarifies that "[i]t is the defendant's burden to prove the lack of reasonable diligence" by a plaintiff to mitigate her damages.

B. The Trial Court Shall Make a Preliminary Ruling on the Appropriateness of the Remedy of Reinstatement Versus Front Pay.

Procedurally, Senate Bill 344 makes two changes of interest to trial courts and litigants. First, the bill instructs that "the trial court **shall** make a preliminary ruling on the

appropriateness of the remedy of reinstatement versus front pay if such remedies are sought by the plaintiff." *See* S.B. 344 at 3 (emphasis added). This clarification could be read as a direct response to *Rice*, where the Supreme Court held that "in a wrongful discharge action . . . the circuit court may submit the question of reinstatement to employment versus an award of front pay to the jury, where the facts and inferences concerning those remedies are in conflict." 230 W. Va. at 114, 736 S.E.2d at 347.[8] Legally, this approach makes sense because reinstatement is an equitable remedy and, as such, falls within the province of the court. *See Rivers Edge*, 224 W. Va. at 181, 680 S.E.2d at 811; *Ford v. Rigidply Rafters, Inc.*, 984 F. Supp. 386, 392 (D. Md. 1997) ("Reinstatement and/or front pay, like back pay, is an equitable, discretionary remedy within the province of the Court."). Additionally, the Legislature's selection of the word "ruling" is meaningful. *Black's Law Dictionary* defines a "ruling" as "[t]he outcome of a court's decision either on some point of law or on the case as a whole," lending further support to the understanding that even in cases with conflicting facts, the trial court, and not the jury, will now determine the appropriateness of reinstatement versus front pay. *Black's Law Dictionary*, "Ruling" (10th ed., 2014).

C. The Amount of Front Pay, If Any, To Be Awarded Shall Be an Issue For The Trial Judge To Decide.

Senate Bill 344 also changes the procedure to determine the amount of front pay to be awarded in an employment cases. The bill states: "If front pay is determined to be the appropriate remedy, the amount of front pay, if any, to be awarded shall be an issue for the trial judge to decide." Obviously, this language creates a huge change in the manner in which employment cases arise under West Virginia law. As demonstrated by *Peters*, *Nagy* and *Rice*, it

[8] This provision of Senate Bill 344 may also be a limited revivification of *Town of Alderson*. S*ee* Note 7, *supra*.

has been the practice in West Virginia for the jury to determine the amount of front pay awards. Senate Bill 344 changes this practice and clearly assigns this task to the trial judge.

Trial judges and litigants may balk at this approach, believing that the amount of front pay to be awarded is so fraught with factual determinations that it cannot be decided by the trial judge; however, federal circuits have already addressed this argument:

> The Third, Sixth, and Ninth Circuits have expressly ruled that the quantification of front pay is a legal question which should be submitted to the jury. . . . On the other hand, the First, Second, Eighth, and Eleventh Circuits have expressly adopted the position that front pay is an equitable remedy, the amount of which should be left for the court to decide.

Duke v. Uniroyal Inc., 928 F.2d 1413, 1421–22 (4th Cir. 1991). The Fourth Circuit adopted the latter position and has even emphasized that "[t]he infinite variety of factual circumstances that can be anticipated do not render any remedy of front pay susceptible to legal standards for awarding damages." *Id*. at 1424; *see also Nichols v. Ashland Hosp. Corp.*, 251 F.3d 496, 504 (4th Cir. 2001) ("The award of front pay rests squarely within the district court's discretion, which must be tempered by the potential for windfall to the plaintiff.") (internal quotations and citations omitted). At bottom, while trial judges may find daunting the task of determining the amount of front pay to be awarded to plaintiffs, a large body of federal case law exists to support our courts' analyses. *See, e.g.*, *Evans v. Larchmont Baptist Church Infant Care Ctr., Inc.*, 956 F. Supp. 2d 695, 707 (E.D. Va. 2013) ("Although '[t]he Fourth Circuit has not specifically enumerated a list of factors to consider in deciding to award front pay[,] [o]ther courts have considered the plaintiff's prospect of obtaining comparable employment; the time period of the award; whether the plaintiff intended to work; and whether liquidated damages have been awarded.'") (quoting *Ford v. Rigidply Rafters, Inc.*, 984 F. Supp. 386, 392 (D. Md. 1997).

D. Senate Bill 344 Takes Effect on June 8, 2015.

Senate Bill 344 goes into effect on June 8, 2015, and it should apply retroactively to employment cases already filed. Although the Legislature did not specify that Senate Bill 344 would apply retroactively, it is a remedial statute that does not affect individuals' vested rights. It does not take away any causes of action, nor does it create any. Accordingly, trial courts should apply the law to all employment claims, retroactively and prospectively, on June 8, 2015.

"In determining whether a statute should be applied retroactively perhaps the most fundamental principle to which we look is reliance since a person should be able to plan his conduct with reasonable certainty." *Pnakovich v. SWCC*, 163 W. Va. 583, 589, 259 S.E.2d 127, 130 (1979). While Senate Bill 344 abolishes the malice exception to a plaintiff's duty to mitigate her wage loss, it does not abolish front or back pay as available remedies in employment cases. Those remedies still exist. Because front and back pay remain available remedies in employment cases after passage of Senate Bill 344, the law does not thwart parties' reasonable reliance upon the settled law of damages in employment cases.

Moreover, Senate Bill 344 is a remedial statute. Remedial statutes "describe methods for enforcing, processing, administering, or determining rights, liabilities or status." 2 *Sutherland Statutory Construction* § 41:9 (7th ed.). The Legislature "may control remedies by enacting laws curing defects in previous statutes, supplying omissions, and legalizing past acts," and "[t]here is no constitutional objection to a retroactive statute which makes a reasonable change in a remedy." In this case, the Legislature has enacted a law to cure a defect in the damages rules applicable to employment claims and to refine the procedures for determining liability for such claims. For those reasons, Senate Bill 344 is a remedial statute that should be applied retroactively when the law takes effect on June 8, 2005.

CONCLUSION

Senate Bill 344 makes major changes to the damages available to plaintiffs pursuing employment claims under West Virginia law. The law also changes the procedure by which those damages will be determined. Attorneys and trial courts must be prepared to put these changes into practice. Certainly, Senate Bill 344 is a game-changer, but it is not the end of the conversation started by the Supreme Court in *Mason County BOE* and continued in *Rivers Edge*, *Nagy* and *Rice*. Rather, it is the Legislature's first contribution to an ongoing discourse regarding damages available for employment claims under West Virginia law.

EXHIBIT A

Senate Bill No. 344

(By Senators Trump, Carmichael and Blair)

_____

[Introduced January 28, 2015; referred to the Committee on the Judiciary.]

_____

A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article, designated §55-7E-1 and §55-7E-2, all relating to setting adequate and reasonable amounts of compensatory and punitive damages available to an employee in statutory and common law wrongful or retaliatory discharge causes of action and other employment law claims.

Be it enacted by the Legislature of West Virginia:

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

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

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

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

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

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

Employees of this state are entitled to be free from unlawful discrimination, wrongful discharge, and unlawful retaliation in the workplace. Employers are often confronted with difficult choices in the hiring, discipline, promotion, layoff and discharge of employees. The court's role is not to act as a super personnel department that second guesses employers' business judgments.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(e) Limits on Punitive Damages –

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

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

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

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

EXHIBIT B

COMMITTEE SUBSTITUTE

FOR

Senate Bill No. 344

(By Senators Trump, Carmichael and Blair)

[Originating in the Committee on the Judiciary;

reported February 17, 2015.]

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

Be it enacted by the Legislature of West Virginia:

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

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

§55-7E-1. Definitions.

In this article:

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

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

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

(a) The Legislature finds that:

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

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

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

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

disadvantage.

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

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

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

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