# *The Problem of Duplicative Punitive Damages in West Virginia Wrongful Discharge Cases*

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## I. Introduction

The Supreme Court of Appeals of West Virginia ("Supreme Court of Appeals") has long recognized the principle that plaintiffs are entitled to one, and only one, recovery. In wrongful discharge cases specifically, the Court has repeatedly cautioned that, because of the open-ended nature of emotional distress damages in such cases, which can serve a punitive purpose, an additional award of punitive damages may be impermissibly duplicative. At the same time, however, the Court has also created the very real and dangerous possibility of duplicative punitive damage awards in the form of an award for "flat" or unmitigated lost wage loss damages in addition to an award of traditional punitive damages.

While lost wages are normally compensatory, they become punitive in nature when a jury ignores, or is instructed to ignore, either the plaintiff's efforts at mitigation or any actual mitigation that occurs. When punitive damages are then added to the equation, a duplicative recovery occurs in violation of West Virginia's one recovery rule. This article will (1) provide a brief summary of wrongful discharge claims and their associated damages, (2) address the problem of duplicative punitive damages, and (3) explore a potential solution to the problem.

## II. Wrongful discharge claims and associated damages

### A. Wrongful discharge claims

In West Virginia, the phrase "wrongful discharge" typically refers to two general categories of employment law tort claims: those brought pursuant to statutory authority prohibiting discharge under certain circumstances, and those brought pursuant to the common law cause of action established in *Harless v. First National Bank in Fairmont,* 246 S.E.2d 270 (W.Va. 1978), also

referred to as a "public policy," "retaliatory discharge," or "*Harless*" claims. In *Harless*, the Supreme Court of Appeals held that, as an exception to the general rule of at-will employment, an employer may not discharge an employee if doing so would contravene a substantial public policy of the State. The *Harless* Court specifically found the reporting of potential violations of consumer credit law to be a substantial public policy, and that an employer could not discharge an employee in retaliation for making such reports.

Since *Harless*, the Supreme Court of Appeals has recognized many other public policies that prevent an employer from discharging employees. *See, e.g., Lilly v. Overnight Transp. Co.*, 425 S.E.2d 214 (W.Va. 1992) (recognizing a public policy against discharging an employee for refusal to operate a motor vehicle with unsafe brakes); *Mace v. Charleston Area Medical Center Foundation, Inc.*, 422 S.E.2d 624 (W.Va. 1992) (holding that it violates public policy to discharge an employee for exercising his rights under the Veterans Reemployment Rights Act); *Page v. Columbia Natural Resources, Inc.*, 480 S.E.2d 817 (W.Va. 1996) (recognizing a public policy against terminating an employee for giving truthful testimony in a legal action).[1] According to the Court, a substantial public policy can be expressed in the state constitution, statutes, administrative regulations, and judicial opinions. *Cordle v. General Hugh Mercer Corp.*, 325 S.E.2d 111 (W.Va. 1984). Thus, there are a multitude of potential *Harless*-type claims that can be brought in West Virginia.

As mentioned, wrongful discharge claims can also arise directly under a particular statute. Perhaps the most common types of statutory wrongful discharge claims are those brought pursuant to the West Virginia Human Rights Act, which prohibits taking adverse employment action,

[1] *See also Twigg v. Hercules Corp.*, 406 S.E.2d 52 (W.Va. 1990) (recognizing a violation of public policy where an employer requires an employee to submit to a drug test, unless the employer has a reasonable suspicion of the employee's drug use or the employee's job responsibility involves public safety or the safety of others); *Collins v. Elkay Mining Co.*, 371 S.E.2d 46 (W.Va. 1988) (holding that it is a violation of public policy to discharge an employee who refuses to falsify safety reports); and *Cordle v. General Hugh Mercer Corp.*, 325 S.E.2d 111 (W.Va. 1984) (holding that it is against public policy to require an employee to submit to a lie detector test as a condition of employment). There are many other examples, but a discussion of all possible *Harless*-style claims is beyond the scope of this article.

including discharging an employee, on the basis of race, religion, color, national origin, ancestry, sex, disability, or age. W.Va. Code § 5-11-9. The Act also prohibits retaliation against any individual who seeks the protections of the Act. *Id*. Other West Virginia statutes provide similar prohibitions. For example, it is illegal to discharge an employee for availing himself of the benefits provided under the West Virginia Workers' Compensation Act, W.Va. Code § 23-5A-1; to prevent him from freely exercising the right to vote, W.Va. Code § 3-9-20; or to retaliate against him for filing a complaint or participating in proceedings under the West Virginia Occupational Safety and Health Act, W.Va. Code § 21-3A-13(a).[2]

**B. Available damages**

The full range of compensatory damages, as well as punitive damages, are potentially available to prevailing plaintiffs in wrongful discharge cases. Compensatory damages, of course, are "such that will compensate the injured party for the injury sustained, and nothing more." *Black's Law Dictionary*, 6th ed. 1991. In contrast, punitive damages are those that a "jury may allow against the defendant by way of punishment for willfulness, wantonness, malice, or other like aggravation of his wrong to the plaintiff, ***over and above full compensation***." Syllabus Point 4, *Harless v. First National Bank in Fairmont*, 289 S.E.2d 692 (W.Va. 1982) ("*Harless II*") (emphasis added).

In *Harless*-type cases, plaintiffs may potentially recover compensatory damages, including damages for lost wages and emotional distress, as well as punitive damages. *See Harless II*, 289 S.E.2d at 701-702 (in addition to lost wages, emotional distress damages are available in retaliatory discharge cases, and, under special circumstances, punitive damages may also be available). The damages available for claims of wrongful termination under a statute depend, of course, on the relevant statutory text. For example, in cases arising under the Human Rights Act, prevailing

[2] There are many other examples of West Virginia statutory prohibitions on discharge and/or retaliation. As with the examples of *Harless*-style claims, however, a full discussion of all such claims is beyond the scope of this article.

plaintiffs may potentially recover "back pay or any other legal or equitable relief," and the trial court may, in its discretion, award attorney fees and costs. W.Va. Code § 5-11-13. The Supreme Court of Appeals has interpreted "other legal or equitable relief" to include typical tort damages, including emotional distress, front pay, and punitive damages. *See Dobson v. Eastern Associated Coal Corp.*, 422 S.E.2d 494, 501-502 (W.Va. 1992) (holding that recovery of typical tort damages is permitted by the statutory language and that, specifically, front pay is available); *Akers v. Cabell Huntington Hospital, Inc.*, 599 S.E.2d 769, 777 (W.Va. 2004) (holding that emotional distress damages are available under the Act); Syllabus Point 4, *Haynes v. Rhone-Poulenc, Inc.*, 521 S.E.2d 331 (W.Va. 1999) (holding that punitive damages are available under the Act). Thus, as with *Harless* claims, the full range of tort law damages is available under the Human Rights Act. Problems arise, however, when certain of these damages overlap with each other.

## III. The Supreme Court of Appeals recognizes the danger of duplicative punitive damages -- and then makes the problem worse

### A. The Court holds that punitive damages *may* be available in *certain* wrongful discharge cases

In analyzing the types of damages available in wrongful discharge cases, the Supreme Court of Appeals in *Harless II* immediately recognized that an award of punitive damages in such cases creates the danger of a duplicative recovery because emotional distress damages may already contain a punitive element:

> We are aware that a claim for emotional distress damages without any physical trauma may permit a jury to have a rather open-hand in the assessment of damages. Additionally, a jury may weigh the defendant's conduct in assessing the amount of damages and to this extent emotional distress damages may assume the cloak of punitive damages.

*Harless*, 289 S.E.2d at 702. Thus, the Court held that "[b]ecause there is a certain open-endedness in the limits of recovery for emotional distress in a retaliatory discharge claim, we decline to

automatically allow a claim for punitive damages to be added to the damage picture." *Id*. at 703. Indeed, the Court noted that "recovery for emotional distress as well as other compensatory damages such as lost wages should adequately compensate the plaintiff." *Id*. Thus, according to the Court, in the ordinary wrongful discharge case, punitive damages should not even enter into the equation. This rule helps to alleviate concerns about duplicative punitive damages in violation of West Virginia's one recovery rule, which states:

> [T]here can be only one recovery of damages for one wrong or injury. Double recovery of damages is not permitted; the law does not permit a double satisfaction for a single injury. A plaintiff may not recover damages twice for the same injury simply because he has two legal theories.

*Harless II*, 289 S.E.2d at Syllabus Point 7.

Nevertheless, the Court in *Harless II* recognized that punitive damages "may be appropriate" where the employer's conduct is "wanton, willful or malicious." *Id*. Importantly, however, the Court emphasized that, to obtain punitive damages, an employee "must prove further egregious conduct on the part of the employer." *Id*. As examples, the Court noted that "such a situation may arise where the employer circulates false or malicious rumors about the employee before or after the discharge or engages in a concerted action of harassment to induce the employee to quit or actively interferes with the employee's ability to find other employment." *Id*. These examples provided by the Court clearly indicate that the Court was focusing on conduct by the employer that was completely separate and apart from the conduct that gave rise to the claim of discrimination. Because no such circumstances existed in that case, the *Harless II* Court overturned the jury's award of punitive damages. *Id*. at 705-706.

### B. The Court separately holds that a punitive component to wage loss awards *may* be appropriate in *certain* wrongful discharge cases

About three and a half months after the *Harless II* decision, the Supreme Court of Appeals considered the employee's duty to mitigate his damages in a wrongful discharge case. Specifically, the Court in *Mason County Bd. of Educ. v. State Sup't.*, 295 S.E.2d 719, 722 (W. Va. 1982), considered "the obligation of a wrongfully discharged employee to mitigate his or her damages by seeking and accepting comparable employment for which he or she is qualified during the pendency of litigation." In *Mason County*, the Court addressed whether a school principal, whose termination was found to be unlawful, was entitled to the full amount of his salary from the date of discharge until his reinstatement. The County Board of Education argued that the principal should have only been awarded a back pay award for the length of his employment contract, or 3 years, and not the 8 years awarded by the trial court. *Id*. at 721. The Court held that "while 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*. at 723.

Importantly, the Court's analysis in *Mason County* was fueled by the fact that the plaintiff was a public employee, and that the only damages at issue were back pay damages. Justice Neely, writing for the Court, noted that the old rule, "which we have followed in the past, is that when an employee is wrongfully discharged he or she is entitled to all back pay from the date of discharge to the date of reinstatement, together with interest." *Mason County*, 295 S.E.2d at 722. Justice Neely then justified a new approach requiring mitigation, however, because "the law regarding both the due process right of school personnel and the rights of school personnel under the administrative rules

and regulations of the State Board has been changing rapidly in West Virginia over the past six years." *Id*. at 722. Additionally, Justice Neely observed, when the rules governing public employment were so "well-established" and violations "clear[,]" then "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*. at 722 (emphasis added). In other words, when the rules were so clear and unambiguous that it was easy to determine if a violation had occurred, the Court did not mind awarding a flat back pay award, despite the fact that such an award "in effect, punishes the agency or other employer that is the wrongdoer." Justice Neely further acknowledged the punitive aspect of a flat back pay award when he noted that, "[w]hile a simple rule regarding damages may be easy for those administering the judicial system to apply, and may adequately recompense the injured party, its punitive effects are imprecise." *Id*. at 723.

It is clear, therefore, that the Court in *Mason County* intended for a flat wage loss award to carry a punitive element. Indeed, punitive damages were not otherwise available in that case. It is against this backdrop, then, that the following language from *Mason County* must be analyzed:

> In our exploration of the law of damage mitigation as it applies to wrongful discharges, we are particularly concerned with cases where there are either technical violations of procedural rights or discharges prompted by poor judgment. It goes without saying that in these cases the innocent constituency served by the government agency should not be punished by an unjustifiably generous reward. *On the other hand, in those cases where an employee has been wrongfully discharged out of malice, by which we mean that 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, then the employee is entitled to a flat back pay award.* We consider the policy considerations against malicious discharge to outweigh the policy considerations that favor protection of the constituent class receiving government service, and this rule should operate to discourage malicious discharges.

*Mason County*, 295 S.E.2d at 725 (emphasis added).

This language is instructive in a number of respects. First, the Court recognized that the "old" rule that did not take mitigation into account resulted in "an unjustifiably generous award." Second, "where an employee has been wrongfully discharged out of malice . . . then the employee is entitled to a flat back pay award." Generally, such an award is limited in nature because back pay necessarily ends no later than the date of adjudication, even if the employee does not find other employment. Finally, the Court explicitly noted that the "maliciousness" exception to the "new" rule of mitigated damages "should operate to discourage malicious discharges." In other words, the punitive element of an unmitigated damage back pay award fulfills the *same* purpose as a punitive damage award -- to punish the wrongdoer and to discourage unlawful conduct. Unfortunately, subsequent decisions have taken this language and ripped it from its context, expanding it to also provide for flat front pay awards and to apply in situations where punitive damages are otherwise available, resulting in damage awards that contain clearly duplicative punitive elements.

## IV. The problem of duplicative punitive damages

### A. Subsequent decisions in wrongful discharge cases incorporate both *Harless II* and *Mason County* resulting in duplicative punitive damages being upheld

Since the early 1980s, the Supreme Court of Appeals has incorporated the holdings of both *Harless* and *Mason County* in a wide array of wrongful discharge cases, which has resulted in not only flat *back* pay awards, but flat *front* pay awards, in cases where punitive damages are also available, making the problem of duplicative punitive damages crystal clear.

In the most recent such case, *Peters v. River's Edge Mining, Inc.*, 680 S.E.2d 791, 815 (W.Va. 2009), the employer terminated the employee because, the employer alleged, he failed to timely return to work after being released by his physician following a compensable injury. The plaintiff filed suit alleging that the employer failed to reinstate him to work in retaliation for filing a workers' compensation claim in violation of W.Va. Code §§ 23-5A-1 and 23-5A-3. The jury found

for the plaintiff and awarded $885,107 in compensatory damages and $1,000,000 in punitive damages. The "compensatory damages" consisted of $171,697 for back pay, $513,410 for front pay, and $200,000 for aggravation, inconvenience, humiliation, embarrassment, and loss of dignity. *Id.* at 803.

Importantly, the plaintiff in *Peters* did *not* return to employment by the time of trial, and the Court noted that "[t]he amount of front pay awarded . . . was within the range of figures proffered by the experts as indicative of 'the difference between what [Mr. Peter's] would have earned from [River's Edge] had he not been fired and what he can expect to earn in any employment in the future.'" *Peters*, 680 S.E.2d at 814 (*quoting Casteel v. Consolidation Coal Co.*, 383 S.E.2d 305, 311 n.8 (W.Va. 1989)). In addition, the Court's discussion of the front pay award focused on the employer's contention that Peters failed to mitigate his damages, which led to the Court's conclusion that "River's Edge's malicious misconduct in terminating Mr. Peter's employment in retaliation for his application for benefits *absolves Mr. Peters of the duty to mitigate his damages in this case*." *Peters*, 680 S.E.2d at 815 (emphasis added). This language suggests that the Court narrowly limited its holding about maliciousness in employment cases to situations in which an employee does *not* find another job after the wrongful termination, in which case the employee is "absolved" from his "duty" to try to find employment. It does *not* suggest that a plaintiff who *actually* finds employment, and who actually earns income, is entitled to have that income disregarded in the calculation of lost past or future income.

The net result of the *Harless-Mason County-Peters* line of cases is that trial courts permit a jury to consider not only an award of flat back and front pay damages, regardless of whether the employee found other employment, but *also* allow a jury to make an award of punitive damages. If a jury awards both, especially when a plaintiff has actually obtained another job, then the employee

is receiving two separate awards -- unmitigated back and front pay and punitive damages -- which neither represent compensatory damages to the plaintiff nor serve any purpose other than to punish the employer for engaging in malicious conduct. In short, the employer is hit with two separate punitive damage awards.

This point is brought home in the *Peters* case, where the Court used the *exact same analysis*, and examined the *very same evidence*, in deciding (1) whether there was sufficient evidence that the employer's conduct was "malicious" for purposes of an unmitigated wage loss award, and (2) whether there was sufficient evidence that the employer's conduct was "malicious" such that an award of punitive damages was warranted. Using this identical analysis, and after examining the identical evidence to support both, the Court allowed both awards to stand. *See Peters*, 680 S.E.2d at 815 ("As will be discussed in more 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 . . . absolves Mr. Peters of the duty to mitigate his damages in this case.") and 818-826 (detailed discussion in Sections III.D.1 and III.D.2, following which the Court concluded that employer's "actions were malicious" and conduct was "sufficiently reprehensible to warrant punitive damages . . . ."). Thus, according to *Peters*, the *same* conduct that supports an award of punitive damages *also* supports a finding that an employer acted "maliciously" such that an employee is entitled to a flat back and front pay award. *See also Seymour v. Pendleton Community Care*, 549 S.E.2d 662 (W.Va. 2001) (holding that, because there was evidence of "malice, or wanton, willful, or reckless conduct or criminal indifference" for purposes of punitive damages, a flat wage loss award was also appropriate).

**B. A flat wage loss award is punitive if mitigation efforts are ignored**

The *Peters* Court lumped the flat back and front pay awards into the category of "compensatory damages." *Peters*, 680 S.E.2d at 803. As an initial matter, it is beyond question that

lost wages, when mitigation is taken into account, represent compensatory damages. Indeed, front pay has been defined by the Supreme Court of Appeals as "the difference between what an employee would have earned from his former employer had he not been fired and what he can expect to earn in any employment in the future." *Casteel v. Consolidation Coal Co.*, 383 S.E.2d 305, 311 n. 8 (W.Va. 1989). Thus, the very definition of "front pay" takes mitigation into account. Where mitigation is ignored, however, flat back and/or front pay awards go above and beyond making a plaintiff whole and are plainly punitive in nature. This result can be excused where the defendant fails to meet its burden of introducing evidence pertaining to mitigation.[3] Where the defendant does introduce such evidence, however, and it is either ignored or the jury is instructed to disregard it upon a finding of malice, then calling at least a portion of the award anything other than punitive is erroneous.

A simple example illustrates the point. Employee, a 50 year old female, is terminated from her position earning $100,000 per year. Six months after her termination, she finds replacement employment earning $90,000 per year. Employee brings a sex discrimination claim against the employer. At trial, Employee presents evidence that, with mitigation, her lost wages, including both back and front pay, i.e., the difference between what she would have earned had she remained employed with Employer until her retirement at age 65 and what she will actually earn with her new employer, is $200,000. If mitigation is not taken into account, however, her lost wages until retirement are $1,500,000. The jury awards Employee $100,000 in emotional distress damages. The jury finds that the Employer acted "maliciously" and awards Employee $1,500,000 in lost wages. The jury also awards $1,000,000 in punitive damages. The net result is that Employee, who has compensatory damages of $300,000 (i.e., she is "made whole" by an award of $200,000 in lost wages and $100,000 in emotional distress damages) has received a total award of $2.6 million, $2.3

[3] The burden of raising mitigation is on the employer. *Mason County*, 295 S.E.2d at Syllabus Point 2.

million of which is unquestionably punitive but has been classified into two different categories: flat wage loss and punitive damages. The employer is "punished" because of its conduct not *only* by the punitive damage award, on which the jury is (presumably) instructed, and which must pass the required analysis of punitive damages set forth in *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897 (W.Va. 1991), but *also* by the flat back and front pay awards that do not compensate Employee for any actual monetary loss. In short, the wage loss award in this example, to the extent it surpasses $200,000, serves only to "punish" the Employer for acting "maliciously" in terminating the Employee. Indeed, the Supreme Court of Appeals stated that this was the purpose of a flat wage loss award. *Mason County*, 295 S.E.2d at 722 ("the employee should receive [a lost wage award] that, in effect, punishes the agency or other employer that is the wrongdoer").

The problems with this scenario are manifest. The jury, which is presumably instructed on the purposes of punitive damages, determined that the Employer should be "punished" in the amount of $1,000,000. The jury is not told, however, that, in awarding flat back and front pay, it is likewise "punishing" the Employer by an additional amount. The punitive nature of the wage loss award becomes even more evident if you change the age of the hypothetical employee to 40, assume a pre-termination salary of $150,000 per year, and assume that she immediately found replacement employment at the same rate of pay. If a jury ignores Employee's efforts at mitigation, or worse, the trial court instructs them that if they find malice, they *must* ignore mitigation, a front pay award of $3,750,000 (through age 65) is conceivable. The plaintiff has an actual monetary loss of zero, and has received $100,000 in emotional distress damages to account for the emotional impact of the discharge, and has received $1,000,000 in punitive damages designed to punish the employer. The additional flat back and front pay awards in this scenario serve only a punitive purpose. Thus, punitive damages have essentially been assessed twice for the same conduct. Because wrongful

discharge cases are the only types of tort claims that potentially involve a "malicious discharge," this problem is unique to such cases. Moreover, as set forth below, this issue raises constitutional due process concerns.

**C. Constitutional concerns**

The Supreme Court of Appeals has put in place several safeguards to ensure the constitutionality of punitive damage awards in West Virginia. In Syllabus Point 2 of *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897 (W.Va. 1991), the Court recognized that, when punitive damages are allowed, there must be "(1) a reasonable constraint on jury discretion; (2) a meaningful and adequate review by the trial court using well-established principles; and (3) a meaningful and adequate appellate review, which may occur when an application is made for an appeal." Syllabus Points 3, 4, and 5 specifically outline the steps that must be taken to uphold these goals. First, when instructing a jury, the trial court should, at a minimum, explain the factors to be considered in awarding punitive damages. These factors are:

> (1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the defendant's actions caused or would likely cause in a similar situation only slight harm, the damages should be relatively small. If the harm is grievous, the damages should be greater.
>
> (2) The jury may consider (although the court need not specifically instruct on each element if doing so would be unfairly prejudicial to the defendant), the reprehensibility of the defendant's conduct. The jury should take into account how long the defendant continued in his actions, whether he was aware his actions were causing or were likely to cause harm, whether he attempted to conceal or cover up his actions or the harm caused by them, whether/how often the defendant engaged in similar conduct in the past, and whether the defendant made reasonable efforts to make amends by offering a fair and prompt settlement for the actual harm caused once his liability became clear to him.

(3) If the defendant profited from his wrongful conduct, the punitive damages should remove the profit and should be in excess of the profit, so that the award discourages future bad acts by the defendant.

(4) As a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages.

(5) The financial position of the defendant is relevant.

*Garnes*, 413 S.E.2d at Syllabus Point 3.

After the trial is concluded, the trial court must perform a review of the punitive damages award, analyzing the appropriateness of the award in light of the factors with which it instructed the jury, as well as the following additional factors:

(1) The costs of the litigation.

(2) Any criminal sanctions imposed on the defendant for his conduct.

(3) Any other civil actions against the same defendant, based on the same conduct; and

(4) The appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed. A factor that may justify punitive damages is the cost of litigation to the plaintiff.

*Id*. at Syllabus Point 4.

The *Garnes* Court also held that, upon petition, it would review all punitive damages awards. *Id*. at Syllabus Point 5. "In our review of the petition, we will consider the same factors that we require the jury and trial judge to consider, and all petitions must address each and every factor set forth in Syllabus Points 3 and 4 of this case with particularity, summarizing the evidence presented to the jury on the subject or to the trial court at the post-judgment review phase." *Id*. Shortly after the *Garnes* decision, the Supreme Court of Appeals added a further restriction on the size of any punitive damage award:

> The outer limit of the ratio of punitive damages to compensatory damages in cases in which the defendant has acted with extreme negligence or wanton disregard but with no actual intention to cause harm and in which compensatory damages are neither negligible nor very large is roughly 5 to 1. However, when the defendant has acted with actual evil intention, much higher ratios are not per se unconstitutional.

Syllabus Point 15, *TXO Prod. Corp. v. Alliance Res. Corp.*, 419 S.E.2d 870 (W.Va. 1992), *affirmed*, 509 U.S. 443 (1993).

In contrast, none of these safeguards exist with the punitive element of a flat wage loss award. As stated, it is quite possible that such an award could far surpass any amount awarded as punitive damages. Where the plaintiff has totally mitigated his losses, but the jury has either ignored or been instructed to ignore those efforts, then the lost wage award serves only a punitive purpose. Yet, there are no safeguards in place to ensure that an unconstitutional taking of the defendant's property, without due process of law, has not occurred. Moreover, unlike a punitive damages award, the Supreme Court of Appeals has not held that the trial court *must* review unmitigated wage loss awards for reasonableness or that the Supreme Court of Appeals *will* review such awards upon petition.

## V. Potential solution to the problem

The problem of duplicative punitive damages is easily solved. First, a plaintiff should *always* have a duty to mitigate his or her lost pay damages, with the burden of raising mitigation remaining with the employer. Second, the maliciousness exception to the mitigation rule should be eliminated. In light of the availability of punitive damages in wrongful discharge cases, flat back and front pay damages, which are punitive in nature, are simply not necessary and not only unjustly enrich a plaintiff, but also unfairly penalize an employer who is subject to two punitive damage awards.

Certainly, the justification for this approach is consistent with West Virginia law. This approach encourages that which should be an unassailable public policy of encouraging individuals to seek productive employment in the work force. If, for whatever reason, the person cannot find work, then the person is not penalized because the burden of proving mitigation remains with the employer. Likewise, eliminating the maliciousness exception comports with the original intent of the mitigation rule, which was only created to address situations where neither future lost wages nor punitive damages were available.

Certainly, this approach does not let an employer "off the hook" for its conduct because the jury could still be instructed on punitive damages. If a jury is compelled to punish an employer, it may due so, though subject to the constitutional scrutiny that is presently absent for a flat wage loss award. In this way, the *only* way an employer gets hit with both punitive damages and unmitigated wage loss is if it fails to prove that the employee mitigated or could have mitigated his lost wage damages. In that case, the employer has little upon which it can reasonably complain.

A solution is unquestionably needed. Instead of a mechanism to make wronged individuals whole, wrongful discharge cases have became a source of potential windfalls in West Virginia. Multi-million dollar awards have set dangerous expectations of entitlement to plaintiffs in wrongful discharge cases. Even in cases where plaintiffs have mitigated their losses, juries have been instructed to simply ignore mitigation if malice is found, resulting in clearly duplicative punitive damages. These results are clear constitutional violations, violate the well-settled one recovery rule, and contribute to West Virginia's reputation as a judicial hellhole. Thus, changes need to be made to ensure that such results do not continue unabated into the future.