

## West Virginia Employers Beware: You May Be Liable For Multiple Punitive Damages Awards in Wrongful Discharge Cases

If an employer engages in illegal discrimination when terminating an employee, that employer should pay compensatory damages related to that termination. Moreover, if the employer acted maliciously in conducting the termination, it could also face punitive damages. Should, however, an employer be subject to *duplicative* punitive damages? No, because that would be patently unfair.

Recently, however, the WV Supreme Court upheld a \$1.6 million verdict in favor of an employee who claimed that his employer wrongfully terminated him because of age discrimination. *West Virginia American Water Company v. James A. Nagy* (No. 101229, June 15, 2011). Mr. Nagy claimed that his employer wrongfully discharged him, and the jury agreed. Among other damages, the jury awarded Mr. Nagy \$350,000 in punitive damages, and over \$1 million in past and *future* lost wages -- even though Mr. Nagy, age 54, found a job within months of his termination earning just less than what he had earned before. Mr. Nagy's own economic expert calculated Mr. Nagy's actual out-of-pocket lost income -- past and future -- to be approximately \$52,000. How then, you may ask, could a jury award over \$1 million in lost wages if *actual* lost wages were no more than \$52,000?

The answer lies in a concept of law introduced years ago and blindly followed and expanded upon since then. In 1982 the Court decided in *Mason County Bd of Educ. v. State Superintendent of Schools* that if an employer wrongfully and maliciously discharged an employee, that employee could recover his lost wages, whether or not the employee had received interim or replacement income. The Court described such "unmitigated" or "flat" wage loss awards as an effort "to punish" employers who maliciously discharge employees. Importantly, punitive damages were *not* available to the employee in that case.

In a separate decision that same year, the Court held in *Harless v. First National Bank in Fairmont* that punitive damages may be appropriate in certain wrongful discharge cases. Punitive damages are, of course, damages designed to punish a defendant.

The result of these cases is that, today, an employee who proves that his wrongful discharge was done maliciously may recover *both* punitive damages *and* unmitigated lost income damages. In recent years, these duplicative damages have led to some astounding verdicts in wrongful discharge cases, including several in the \$2 million dollar range.

This is not a legislatively-created problem. The Court itself, by blindly merging these two separate lines of authority, has created this troubling situation. The Court had the opportunity to address the problem head-on in the *Nagy* case, but declined to do so, simply stating that an unmitigated wage loss award represents "compensatory" damages and that both punitive damages and unmitigated wage loss awards are available under West Virginia law. In doing so, the Court maintained the fiction that the difference between *actual* out-of-pocket lost wages and unmitigated lost wages represents "compensatory" damages. Nonsense. In the case of Mr. Nagy, the difference between the unmitigated lost wages awarded by the jury (~\$1

million) and his actual out-of-pocket lost wages (~\$52,000) do not “compensate” him for anything. Rather, this amount serves “to punish” the employer. The problem, of course, is that this is the *exact reason for permitting punitive damages*, which Mr. Nagy also received.

This situation is especially abhorrent in the *Nagy* case where Mr. Nagy actually found gainful employment and, therefore, sustained little actual lost income as a result of his termination. In confirming that the jury *must* ignore all income that Mr. Nagy earned, the Court ignored a fundamental principle of employment law – an individual has a duty to mitigate his lost income damages. Here, Mr. Nagy did just that, yet the Court engaged in the fiction that he had not.

How did the Court explain its decision? It did not. Instead, it decided *Nagy* through a “memorandum decision” in accordance with its recent revisions to its own rules that were meant to stave off establishment of an intermediate court of appeals. Like most other memorandum decisions, the *Nagy* decision provides very little in the way of analysis or rationale. Certainly, the employer in this case, and West Virginia employers in general, are entitled to full review of this issue. Until the issue is addressed and fixed, however, the *Nagy* decision serves as a warning that West Virginia continues to be a hostile legal environment for employers.

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