



## Jackson County jury awards \$2.1m in age case

On March 17, 2010, a jury in [Jackson County](#) in [West Virginia](#) awarded Jerold John Rice Jr. roughly \$2.1 million in an [age discrimination](#) case against [The Burke-Parsons-Bowlby Corporation](#), [Stella-Jones US Holdings Corporation](#), and [Stella-Jones, Inc.](#), tried in Judge Thomas C. Evans III's court.

Mr. Rice was represented by [Mark Atkinson](#) and [Paul Frampton](#) at [Atkinson & Polak, PLLC](#), and the defendants were represented by [Roger Wolfe](#) at [Jackson & Kelly PLLC](#) in [Charleston](#), and [Kevin Hyde](#) at [Foley & Lardner, LLP](#) in [Jacksonville, Florida](#).



Here is a quick run-down of what was awarded in the case:

- **Back pay:** \$142,659 awarded by jury.
- Pre-judgment interest: \$11,791.84 from date of termination through trial.
- **Front pay:** \$1,991,332.00 awarded by jury (from roughly age 48 through retirement age at 67).
- **Emotional distress:** \$0.
- **Punitive damages:** Jury did not answer question affirmatively which would have allowed award of punitive damages.
- **Total judgment based on jury's verdict:** \$2,145,782.84, plus post-judgment interest on that amount at 7% per annum.
- **Attorneys' fees:** \$117,235 awarded by judge (based on \$450 an hour for [Mark Atkinson](#) and \$300 per hour for [Paul Frampton](#)).
- Litigation expenses: \$20,324.16 awarded by judge.
- **Total award:** \$2,283,342.00 (based on jury verdict, pre-judgment interest, attorneys' fees and expenses) plus post-judgment interest at 7% per annum.

The Rice case illustrates the risk employers face when they terminate an older, good, long-standing employee, and replace him or her with a much younger person with little or no experience for the employer.

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[Age discrimination](#)

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[Emotional distress damages](#)

[Employment policies](#)

[Equal pay](#)

[Evidence issues](#)

[Family and Medical Leave Act \(FMLA\)](#)

[Federal Courts](#)

[Fourth Circuit](#)

[Harless wrongful discharge](#)

[Hostile work environment](#)

[Intentional infliction of emotional distress](#)

[Jury verdicts](#)

[Labor unions](#)

[Limitations periods](#)

[National origin discrimination](#)

[Pending legislation](#)

[Pleading requirements](#)

[Prompt remedial action](#)

# Jackson County jury awards \$2.1m in age case

## What Happened?

Mr. Rice at the time of his termination (in 2009) was age 47 and had worked for Burke-Parsons-Bowlby Corporation for 24 years. When Mr. Rice was terminated he was the corporate controller.

In the year or so preceding Mr. Rice's termination, in 2008, Burke-Parsons-Bowlby Corporation was acquired by Stella-Jones, Inc. Then on February 16, 2009, the company hired Jeremy Stover, age 27-28, as the "assistant controller" under Mr. Rice. There was testimony that Mr. Rice was instructed to teach Mr. Stover "everything you do". There was also evidence that, between the time of the *decision* to terminate Mr. Rice and the *actual* termination, there was a significant company audit which required Mr. Rice's expertise.

The kicker for the defendants was that apparently the company made the decision to terminate Mr. Rice's employment before hiring younger Mr. Stover. So the sequence of events, according to evidence presented by Mr. Rice, was: purchase of the old company by Stella-Jones, decision to terminate 47-year-old Mr. Rice (with 24 years of experience), hiring of Mr. Stover at age 27 or 28 (with no experience with the company), getting Mr. Rice to train Mr. Stover, completing the company audit with Mr. Rice's help, then firing 47-year-old Mr. Rice, and then getting 28 year old Mr. Stover to take over the bulk of Mr. Rice's job.

## Evidence of Discrimination: Conflicting Explanations for the Termination

For proving an [age discrimination](#) claim (or, for that matter, any other kind of discrimination claim), one of the standard threads of evidence which supports an inference of discrimination is proof of conflicting explanations by the employer for the reason for the employment decision.

In Mr. Rice's case, there were allegations that the company had conflicting versions of why it terminated Mr. Rice. The company originally claimed that part of the reason for terminating Mr. Rice was his inadequate performance quality. Then later, the company apparently shifted to the explanation that it simply eliminated Mr. Rice's position.

## Evidence of Discrimination: Replacing an Older Worker with a Substantially Younger One

Another type of evidence which is considered to be supportive of a finding of discrimination is the replacement of the plaintiff-employee in the "protected class" with an employee outside the protected class.

For his age discrimination claim, Mr. Rice was age 47, which meant that he satisfied the statutory requirement for being protected on the basis of age -- he was 40 years or older. Mr. Rice was replaced by an employee substantially younger than him, Mr. Stover at age 27 or 28.

The courts have concluded that, for [age discrimination](#), the inference of discrimination arises if the replacement employee is "substantially younger" than the plaintiff, even if the replacement employee is over 40 years of age. In Mr. Rice's case there were no complications on that issue -- Mr. Stover was both under age 40 and substantially younger than Mr. Rice (about 20 years younger).

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[Sexual orientation](#)  
[Summary judgment](#)  
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[US Legislation](#)  
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## Jackson County jury awards \$2.1m in age case

There was a dispute over whether Mr. Stover in fact "replaced" Mr. Rice, but the following facts were in the record which could have supported the conclusion that the younger Mr. Stover replaced the older Mr. Rice: Mr. Rice was the corporate controller, a decision was made to terminate Mr. Rice, Mr. Stover was hired as "assistant controller", management instructed Mr. Rice to teach Mr. Stover "everything you do", the company then conducted a significant audit (with Mr. Rice's assistance) to a successful conclusion, the company then terminated Mr. Rice, and Mr. Stover took over most of Mr. Rice's job responsibilities.

### **Evidence of Discrimination: Contradicting the Employer's Explanation**

There is a third type of evidence which supports a finding of discrimination: the contradicting of the company's stated legitimate, non-discriminatory reason for terminating the plaintiff.

The defendants' initial description of the reason for termination was inadequate job performance. Mr. Rice presented evidence that he had an excellent work history with the company that was free of any disciplinary action.

### **Damages**

The awarded damages in this case are interesting. First, the jury awarded \$142,659 in "back pay", which is essentially lost income and lost benefits from the point of termination through the date of trial.

The jury also awarded \$1,991,332 for "front pay", which is future (from date of trial) lost income through some point in the future. An expert witness for Mr. Rice calculated future lost income through a projected retirement age of 67. The expert's calculation of front pay was as I understand it, nearly exactly what the jury awarded: \$1,991,332.

So the jury awarded Mr. Rice front pay from his age at trial, which appears to me to have been age 48 or 49, through retirement at age 67 -- a total of about 19 years.

An important facet of the jury's decision on front pay is that it did not reduce its award of front pay by the amount of any income Mr. Rice would be receiving in the future from employment after termination by the defendants. West Virginia has a somewhat unusual characteristic on awards of lost income, both past and future. Ordinarily, and this is also true in West Virginia, the jury would be instructed to take its prediction of lost income in the future (which is calculated by projecting the annual salary and benefits for the plaintiff's last position with the defendant), and then subtract what the jury believes will be income to be earned by the plaintiff during that same time future time period.

For example, let's assume that the jury knows that the plaintiff was making \$100,000 a year in the last position for the defendant-employer that terminated the plaintiff. In awarding front pay, the jury would first project out that \$100,000 each of the next 10 years. Let's also assume that at time of trial the plaintiff is making \$50,000 year at a new job (after his termination), and that job is likely to continue into the future. (For these calculations, I am ignoring the prospects of pay raises, I am ignoring benefits, and I am ignoring any effort to apply a "discount rate" to the future income amounts.) Under this scenario, the jury would subtract the \$50,000 of annual wage from the \$100,000 figure,

## Jackson County jury awards \$2.1m in age case

for a yearly front pay damage amount of \$50,000, and a total front pay award of \$500,000 (10 years at \$50,000 per year).

Under West Virginia law, however, the jury is instructed that if it concludes termination of the plaintiff was "malicious", then the jury *should not subtract the subsequent replacement income* (in my example, \$50,000 a year), and should instead award a "flat" amount for front pay consisting solely of the calculation of the annual wage from the employee's income with the defendant (in my example, \$100,000 per year). That would mean an award of \$100,000 per year, and a total award of \$1,000,000 (10 years times \$100,000).

Obviously, the "malice" rule makes a big difference. In the example I provided above, with 10 years of future lost income, wages of \$100,000 per year at the defendant, and wages of \$50,000 per year in a subsequent job: the plaintiff would receive \$500,000 in front pay damages if the termination was not malicious. However, the plaintiff would receive \$1,000,000 in front pay if the jury concludes that the termination was malicious and does not subtract any of the replacement (post-defendant) job income.

In Mr. Rice's case, my understanding is the jury awarded the \$1,991,332 in front pay based on a conclusion of malice, so the jury did not subtract any income Mr. Rice might receive in the future from any subsequent employment.

The West Virginia Supreme Court most recently reiterated this "malicious termination rule" for back and front pay awards in *Peters v. Rivers Edge Mining, Inc.*, 224 W. Va. 160, 680 S.E.2d 791, 814-815 (2009).

Interestingly, the jury did not award any compensation for [emotional distress](#).

The jury also did not award any [punitive damages](#).

Thus, when you add prejudgment interest to the award of back pay (and the prejudgment interest was \$11,791.84), the total amount of damages that the judge awarded based on the jury's verdict was \$2,145,782.84

### Attorney's Fees and Expenses

Because Mr. Rice was the prevailing party in an age discrimination claim under the [West Virginia Human Rights Act](#), he also received from the trial judge after the jury's verdict an award of [reasonable attorney's fees and expenses](#). The lead lawyer for Mr. Rice was [Mark Atkinson](#), who has been practicing about 27 years. Mr. Atkinson has tried several employment discrimination and other wrongful discharge cases in West Virginia to jury verdicts of roughly \$1-\$3 million each. The trial court approved an hourly rate for Mr. Atkinson of \$450. [Paul Frampton](#) also tried the case with Mr. Atkinson, has been practicing law for about 7 years, and the trial judge approved an hourly rate for Mr. Frampton of \$300. The trial court also approved an hourly rate of \$125 for paralegal time.

The trial court then multiplied those hourly rates by the number of hours expended by the lawyers and their legal assistants, and awarded attorneys fees' of \$117,235. The trial court also awarded expenses incurred by counsel for Mr. Rice in the amount of \$20,324.16.

# Jackson County jury awards \$2.1m in age case

## Post-Judgment Interest

Under West Virginia law "post-judgment interest" would then be applied to all of those awarded amounts at the rate of 7% per year.

## Appeal?

The defendants have filed a motion for new trial, and I don't have significant information on that motion (it has not been ruled upon as of this date). Given the size of the verdict, it seems likely that an appeal will follow, assuming the trial court does not grant the motion for new trial.

Written by [Drew M. Capuder](#) © ([contact information](#)); Voice: 304-333-5261; July 21, 2010

This is a PDF copy of my article originally published on my blog at:

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