

**CAN DAMAGES BE TOO DAMAGING?
EXAMINING MASON COUNTY AND ITS PROGENY**

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I. INTRODUCTION

West Virginia case law allows a wrongfully and maliciously discharged employee to secure a massive damage award. For example, one plaintiff recently received a front pay award of \$1,992,332 after he filed a wrongful discharge suit when his job was eliminated after his employer was acquired by a larger company.¹ The reason this individual was able to receive such a large front pay award is that, in West Virginia, a wrongfully and maliciously discharged employee is entitled to compensation calculated from the time of discharge until retirement age. In this case, the plaintiff was forty-seven years old when his position was eliminated; his front pay award represents what he would have earned in wages from the time his job was eliminated until he would have retired at age sixty-seven. This damages rule is the result of thirty years of jurisprudence rooted in *Mason County Board of Education v. State Superintendent of Schools*,² a 1982 case in which the West Virginia Supreme Court of Appeals (“WVSCA”) transplanted this de facto “collateral source rule” into the labor and employment relationship.

The collateral source rule is grounded in tort law and traditionally was applied only in tri-party situations involving accidents. The parties involved in such accidents were the injured party, the wrongdoer, and an insurance agency. The collateral source rule is a damages rule used to determine the amount of compensation the defendant will receive. The rule states that the defendant must pay the total amount he is deemed to owe the plaintiff even if the plaintiff has already recovered part of that amount from a third party, such as an insurance agency. For example, when the injured party is to be compensated a total of \$100,000 and the insurance agency—either the injured party’s or the wrongdoer’s insurance agency—pays \$60,000, should the wrongdoer then only be responsible for the remaining \$40,000? In other words, could the damages

¹ Rice v. Burke-Parsons-Bowlby Corp., No. 09-C-41, at 2 (W. Va. Cir. Ct. June 9, 2010), available at <http://www.courtswv.gov/supreme-court/calendar/2012/briefs/sept12/11-0183order.pdf>.

² Mason Cnty. Bd. of Educ. v. State Superintendent of Sch. (*Mason County III*), 295 S.E.2d 719 (W. Va. 1982).

the wrongdoer pays be mitigated by the insurance company's payments? The collateral source rule would say "no": the wrongdoer must pay the full \$100,000 in addition to any compensation the insurance agency—the collateral source—provides.

In *Mason County*, the WVSCA held that discharged employees are required to mitigate damages by making reasonable efforts to find comparable employment. An employee is incentivized to find new employment because if the employer can prove there was comparable employment available in the local area and the plaintiff did not take reasonable efforts to find and accept that employment, the court will deduct from his back pay award the wages the employee *could* have earned at that job. However, in *Mason County*, the WVSCA carved an exception to this rule: an employer who wrongfully and maliciously discharges an employee is estopped from raising the employee's duty to mitigate at trial, and the employee is instead entitled to receive a flat back pay award. Applying the collateral source rule to an employment scenario, the employee is the injured party, the employer is the wrongdoer, and the new employer is the collateral source. This is the malicious discharge exception, otherwise known as the *Mason County* rule.

It was not until 2009 that this rule allowed such large monetary recovery. Whereas the *Mason County* rule originally applied only to back pay, the WVSCA extended the rule to front pay in *Peters v. Rivers Edge Mining, Inc.*³ Front pay awards are traditionally calculated to cut off at the time the employee finds comparable employment or *should* have found comparable employment had he taken reasonable efforts to do so. But the *Mason County* malicious discharge exception removes this cut-off point, thereby allowing an employee to receive several decades worth of unearned wages.

The *Mason County* rule, as extended to front pay in *Peters*, is the collateral source rule applied to a labor and employment context. This application is unique, first, because the collateral source rule historically applied to tort cases involving automobile accidents or medical malpractice and, second, because the majority rule is that discharged employees are required to mitigate damages by seeking new employment. The rule's application to the labor and employment context is particularly interesting considering that the rule was transposed at a time when both the collateral source rule and at-will employment were controversial. In the 1980s, legal scholars criticized the collateral source rule as part of their call for tort reform, and simultaneously legal scholars were calling for reformation of at-will employment. Yet in the midst of this controversy, the WVSCA created the *Mason County* rule: an employer who maliciously discharges an employee is estopped from raising the affirmative defense of the mitigation of damages. Conversely, since 1982, the collateral source rule has been severely limited or even abolished by many states' legislatures. But the *Mason County* rule,

³ *Peters v. Rivers Edge Mining, Inc.*, 680 S.E.2d 791 (W. Va. 2009).

ensconced in the labor employment context, remains insulated from the limitations that the West Virginia legislature has placed on the rule in other areas of law.⁴

This Note argues that the *Mason County* rule is the collateral source rule applied to a labor and employment relationship, that the rule's strong presence in the labor and employment context contradicts its steady decline in other areas of law, and that the *Mason County* rule is detrimental to West Virginia's business climate and should be overruled and replaced with the majority rule. By extending the *Mason County* collateral source rule to front pay in *Peters*, the court allows plaintiff-employees to recover damages for the remainder of their working lives. These multi-decade damage awards both hurt business economics in West Virginia and remove incentives for employees to seek new employment. Furthermore, employees and employers are denied predictability and certainty with this rule because the court has not clearly defined what constitutes a "malicious discharge."

Part II provides the collateral source rule's legal background. Part III explains the employment relationship including the history of at-will employment, the public policy tort, remedies, and forms of employment other than at-will employment. Part IV then shows how the WVSCA grafted the collateral source rule into its labor and employment jurisprudence and has since extended the rule to award large damages. Part V summarizes the *Mason County* rule, collateral source rule, and the wrongful discharge cases.

Finally, Part VI provides recommendations. The author first provides an original recommendation, which is that the court should overrule the *Mason County* malicious discharge exception that acts as the collateral source rule in labor and employment relationships. Then the author summarizes four other recommendations that have been either used by legislatures or suggested by legal scholars and practitioners to prevent the collateral source rule from allowing excessive jury awards. These solutions are to apply due process restraints to the award, create a statutory arbitration model to reform employment law, enact a damages limitation statute, or enact a statutory scheme such as Montana's Wrongful Discharge from Employment Act. While each of these latter solutions would provide certainty and predictability for all parties that the current law does not provide, overruling the *Mason County* rule is optimal because it efficiently balances the policy considerations relevant to both plaintiff-employee and defendant-employer while not discouraging a positive business environment.

The *Mason County* rule, which is the collateral source rule applied in a labor and employment context, applies to a very narrow cause of action. For the *Mason County* rule to apply, the employee must file a public policy tort against his employer, and the court must then find that the employer not only wrongfully discharged the employee but also discharged the employee with

⁴ See, e.g., W. VA. CODE ANN. § 55-7B-9a (LexisNexis 2008).

malice. To fully understand how and when an employee can use a public policy tort cause of action, it is necessary to understand how the public policy tort came to exist as a cause of action. First, however, it is necessary to understand the collateral source rule and its place in American jurisprudence.

II. THE COLLATERAL SOURCE RULE

The collateral source rule has existed in American jurisprudence for over 150 years. During that time, legislatures have severely limited or even abolished the rule because it allows excessive damage awards. This Part provides the background of the collateral source rule and details about how legislatures have narrowed the rule, which is important for understanding why it is significant that this rule has remained unchanged while tucked away in West Virginia's labor and employment jurisprudence.

A. *Background of the Collateral Source Rule*

The collateral source rule requires a wrongdoer to pay the victim the full cost of the injury he caused, even if the victim already received compensation from an independent—a “collateral”—source.⁵ The collateral source rule is uniquely American and first appeared in American jurisprudence in 1854.⁶ This rule traditionally applied to common law tort insurance cases. For example, where one ship recklessly or negligently collides with a second ship and the second ship is covered by insurance, the damages owed by the first ship's owner will not be reduced by the payments the owner of the second ship receives from the collateral source.⁷ The insurance company is the collateral source. Thus, the second ship's owner will receive full compensation from the first ship's owner in addition to any payments received from the insurance company, which is essentially a double recovery or a windfall for the plaintiff. But if the wrongdoer—the second ship's owner—is relieved from paying damages or part of the damages due because of the collateral source's payments, then the wrongdoer would get a windfall. The question of who gets the windfall is one reason the collateral source rule is so controversial.⁸

⁵ John G. Fleming, *The Collateral Source and Contract Damages*, 71 CALIF. L. REV. 56, 57 (1983). John G. Fleming was a Professor of Law at the University of California at Berkeley.

⁶ *The Propeller Monticello v. Mollison*, 58 U.S. 152 (1854).

⁷ *Id.* at 155 (“The insurer does not stand in the relation of a joint trespasser, so that satisfaction accepted from him shall be a release of others.”).

⁸ Fleming, *supra* note 5, at 85. However, Professor Fleming argues that this dichotomy is “oversimplistic.” *Id.* at 86. He correctly states that this “problem is three-, not two-dimensional.” *Id.* The collateral source rule provides an opportunity for the insurer (the collateral source) to be reimbursed, and thus it is often the collateral source that “contests the defendant's plea for mitigation.” *Id.* However, this Note focuses on the relationship between the two parties and does not analyze indemnification from a collateral source.

Justifications for the collateral source rule in its traditional application include maximizing the possibility that the insurer will be indemnified,⁹ providing “the plaintiff with a measure of redemption by punishing the defendant,”¹⁰ and providing the plaintiff with adequate compensation.¹¹ While the rule may serve proper and reasonable purposes in many situations, there are narrow circumstances in which the collateral source rule’s justifications are not relevant. This Note addresses one such instance: when a maliciously and wrongfully discharged plaintiff is no longer required to mitigate either back or front pay damages by reasonably seeking comparable employment, and the rule allows him to recover damages for the remainder of his life—or at least until retirement age. It makes no difference whether the plaintiff is twenty-five years old or sixty years old; the defendant will be required to pay the plaintiff wages as if he had worked until retirement age, in addition to an unmitigated back pay award, emotional distress damages, and punitive damages.¹² In these circumstances, the “sting” of the collateral source rule is strong: by not being required to reasonably seek comparable employment, the plaintiff may keep ordinary damages and the collateral benefit and “thus turn his plight into a bonanza.”¹³ These excessive damage awards are one of the reasons that other legislatures have limited the collateral source rule in the context to which it traditionally applies.

B. Narrowing of the Collateral Source Rule

The potential for a plaintiff’s award to turn into a “bonanza” is one reason the rule is still “one of the most troublesome in the modern law of damages.”¹⁴ Scholars targeted this rule in their tort reform efforts, and many

⁹ James Ulciny, Note, *Corl v. Huron Castings, Inc.: Wrongful Discharge and the Collateral Source Rule*, 1997 DETROIT C.L. REV. 273, 275 (1997) (citing Fleming, *supra* note 5, at 77–79). Oftentimes, insurance companies can be indemnified or reimbursed after the primary source has made full payment. *Id.* at 275.

¹⁰ *Id.* (citing Fleming, *supra* note 5, at 58).

¹¹ *Id.* (citing James L. Branton, *The Collateral Source Rule*, 18 ST. MARY’S L.J. 883, 885 (1987)).

¹² In a recent case in West Virginia, a forty-seven-year-old plaintiff was awarded twenty years of unmitigated front pay based on the assumption that he would have retired at age sixty-seven; the front pay award was \$1,991,332. *Rice v. Burke-Parsons-Bowlby Corp.*, No. 09-C-41, at 2 (W. Va. Cir. Ct. June 9, 2010), available at <http://www.courtswv.gov/supreme-court/calendar/2012/briefs/sept12/11-0183order.pdf>.

¹³ John G. Fleming, *The Collateral Source Rule and Loss Allocation in Tort Law*, 54 CALIF. L. REV. 1478, 1478 (1966). Professor Fleming states that this “problem is a by-product of the affluent society.” *Id.* In the “olden days,” there was rarely any outside source such as an accident policy or life insurance with which to provide a remedy. *Id.*

¹⁴ Fleming, *supra* note 5, at 56.

state legislatures restricted the rule's usage.¹⁵ At least eighteen states abolished or limited the rule for medical malpractice cases,¹⁶ and one state abolished the rule in products liability cases.¹⁷ Two states abolished the rule in torts cases in which the government is the defendant,¹⁸ Minnesota abolished or restricted the rule in automobile cases,¹⁹ some states have entirely abolished the rule,²⁰ and others have abolished it in regard to sources that are "public collateral sources."²¹ Even where legislatures have not yet abolished the rule, some have attempted to reform the rule. In Alaska, the rule has been so restricted that the plaintiff bears the burden of proof to show that it was actually he who initially paid for those collateral benefits.²² Illinois' legislature enacted a "collateral threshold" of \$25,000, "after which there is a fifty percent reduction in recoverable damages that represent benefits received from a collateral source."²³

West Virginia's legislature also limited the collateral source rule. In 2003, it enacted West Virginia Code Section 55-7B-9a, which allows compensatory damages for economic losses to be reduced by payments from collateral sources for the same injury in a medical professional liability action.²⁴ Specifically, a defendant who has been found liable to a plaintiff for damages for "medical care, rehabilitation services, lost earnings or other economic losses" may now provide "evidence of payments the plaintiff has received for the same injury from collateral sources"²⁵ or will receive in the future from a collateral source for the same injury.²⁶

Given that there has been such a strong movement among legislatures—including West Virginia's legislature—to reform or abolish the collateral source rule, it is inconsistent that the West Virginia courts have applied the rule to labor and employment relationships since 1982 and have

¹⁵ Branton, *supra* note 11, at 887. Some statutes limiting or abolishing the rule have been challenged. *Id.* at 888. They are typically challenged on equal protection or due process grounds. *Id.*

¹⁶ *See id.* at 887 n.23.

¹⁷ *Id.* at 887–88 (citing ALA. CODE § 6-6-522 (1975)).

¹⁸ Branton, *supra* note 11, at 888. Those two states are New Jersey and Pennsylvania. *Id.*; *see* N.J. STAT. ANN. § 59:9-2 (West 1982); 42 PA. STAT. ANN. § 8663(d) (West 1982). *Id.* at n.25.

¹⁹ Branton, *supra* note 11, at 888; *see* MINN. STAT. ANN. § 65B.51 (West 2012).

²⁰ Branton, *supra* note 11, at 888; *see, e.g.*, COLO. REV. STAT. ANN. § 13-21-111.6 (West 2012).

²¹ Branton, *supra* note 11, at 888; *see* DEL. CODE ANN., tit. 18, § 6862 (2012).

²² Branton, *supra* note 11, at 889.

²³ *Id.* at 889.

²⁴ W. VA. CODE ANN. § 55-7B-9a (LexisNexis 2008).

²⁵ *Id.* § 55-7B-9a(a).

²⁶ *Id.* § 55-7B-9a(b).

extended the rule as recently as 2009. The collateral source rule may have been grafted into labor and employment jurisprudence in response to the controversy over at-will employment in the 1980s. To further realize why this may be the case, an explanation of the controversy surrounding at-will employment is discussed next.

III. THE EMPLOYMENT RELATIONSHIP

To understand why it is significant that the collateral source rule has been applied to labor and employment relationships, it is first necessary to understand the law surrounding those relationships—particularly how the law is used when those relationships end—because the *Mason County* rule applies to the public policy tort action. The public policy tort action is an exception to at-will employment. Therefore, to fully understand *Mason County*, the starting point is America's default employment rule: at-will employment.

A. *At-Will Employment*²⁷

At-will employment is the premise of the American employment relationship.²⁸ This rule states that an employer and an employee create a relationship that either party may end at any time for any reason.²⁹ Neither party owes the other party damages for severing that relationship.³⁰ At-will employment, like the collateral source rule, is uniquely American³¹ and arose in

²⁷ For a strong defense of at-will employment, see Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984).

²⁸ See Clyde W. Summers, *Employment At Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65 (2001).

²⁹ *Payne v. W. & Atl. R.R.*, 81 Tenn. 507, 516 (1884), *overruled in part by Hutton v. Watters*, 179 S.W. 134 (Tenn. 1915).

³⁰ *Id.*

³¹ American employment law was rooted in English common law, which presumed an employment relationship to be a one-year hiring unless the parties explicitly stated otherwise. Summers, *supra* note 28, at 66; see also 1 WILLIAM BLACKSTONE, COMMENTARIES *413. This presumption could be rebutted by showing that the parties' intent or industry customs indicated otherwise. Summers, *supra* note 28, at 66. However, American employment law did not adopt the annual hiring presumption and instead ascertained the parties' intent through the "facts and circumstances of each case . . . with the most critical fact being the period of payment." *Id.* at 66–67. But American courts were divided over what facts defined the terms of the employment relationship: some courts found the pay period—weekly, monthly, or annually—to be determinable, and other courts instead looked at the facts surrounding the contract. *Id.* at 67. American employment law was "confused"; courts were "going in diverse directions." *Id.* Horace Wood, an American treatise writer, sought to "resolve the contradictions in American law." *Id.* In 1877, Wood explained what is now the rule of at-will employment:

With us, the rule is inflexible, that a general or indefinite hiring is *prima facie* a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is on him to establish it by proof. A hiring at so much a day, week,

the late nineteenth century when “natural law concepts of property and freedom of contract, *laissez faire* economics, and [the] great industrial expansion” dominated the legal and cultural landscape.³² By 1930, the rule was firmly embedded in American law.³³ West Virginia adopted the at-will employment rule in 1913³⁴ and has consistently upheld the rule to present day.³⁵

However, there are exceptions to the at-will employment relationship. These exceptions developed in the mid-1900s when at-will employment was limited by common law and statutory laws such as the labor-management statutes produced by the New Deal Era, federal and state fair employment laws of the 1960s, and other federal and state statutes governing the employment relationship.³⁶ In the 1980s, a number of legal academics called for at-will employment to either be reformed or done away with altogether.³⁷ Despite being severely tailored, at-will employment is still the default American employment rule. Thus, to understand the significance of the collateral source rule’s application to an employment relationship, it is necessary to explain how labor and employment law transformed from a damages-free, at-will employment rule to allow tort-action remedies.

At-will employment has been reshaped by three common law doctrines: implied in fact contract theory,³⁸ implied covenant theory,³⁹ and

month or year, no time being specified, is an indefinite hiring, and no presumption attaches that it was for a day even, but only at the rate fixed for whatever time the party may serve.

H. G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134 (1877); *see also* Summers, *supra* note 28, at 67.

³² *See* Robert M. Bastress, *A Synthesis and a Proposal for Reform of the Employment At-Will Doctrine*, 90 W. VA. L. REV. 319, 342 (1988).

³³ Summers, *supra* note 28, at 68.

³⁴ *Resener v. Watts*, 80 S.E. 839, 840 (W. Va. 1914). In *Resener*, the employee who worked as a salesman quit his job and demanded that he be given the amount of sales commissions he had earned thus far and would have otherwise been given to him at the end of the work year. *Id.* at 839. The employee argued that he was an at-will employee and should be given the sales commission he had earned up to the point of quitting. *Id.* The WVSCA agreed with him and simultaneously adopted the at-will employment rule. *Id.* at 840–41.

³⁵ *Swears v. R.M. Roach & Sons, Inc.*, 696 S.E.2d 1, 5 (W. Va. 2010) (quoting Syl. pt. 2, *Wright v. Standard Ultramarine & Color Co.*, 90 S.E.2d 459 (W. Va. 1955)) (explaining that it is a long-established rule that “[w]hen a contract of employment is of indefinite duration it may be terminated at any time by either party to the contract”); *see also id.* at 5–6 (quoting *Feliciano v. 7-Eleven, Inc.*, 559 S.E.2d 713, 718 (W. Va. 2001)) (concluding that “an at-will employee serves the will and pleasure of his or her employer and can be discharged at any time, with or without cause”).

³⁶ Bastress, *supra* note 32, at 321–24.

³⁷ *See id.*; Summers, *supra* note 28.

³⁸ *See* 1 HENRY H. PERRITT, JR., *EMPLOYEE DISMISSAL LAW AND PRACTICE* 4 (4th ed. 1998). The implied in fact theory breaks the at-will presumption by forming an implied contract between the employer and employee. One of the most popular arguments under this theory is the

public policy tort theory.⁴⁰ This Note focuses on the public policy tort theory and its implications in West Virginia, particularly how the collateral source rule was grafted into its jurisprudence.

B. Exception to At-Will Employment: The Public Policy Tort Theory

The public policy tort theory is also referred to as “retaliatory discharge” and “wrongful discharge”⁴¹ and is the “most widely-adopted common law exception to the at-will doctrine.”⁴² This doctrine allows an employee to sue in tort theory if her dismissal violates public policy.⁴³ Professor Charles McCormick was the first to suggest that arbitrary discharge—even from at-will employment—be treated as a tort for which a plaintiff can recover emotional and punitive damages.⁴⁴ McCormick stated that this cause of action would be created through “a hybrid tort-contract basis of liability” that would be triggered if an employee—even an at-will employee—was discharged for “false charges or from inadequate reason.”⁴⁵ In addition to these three wrongful dismissal doctrines, more than twenty federal statutes and even more state statutes now provide legal redress for wrongful termination.⁴⁶

To recover under the public policy tort theory, the plaintiff must prove (1) “[t]he existence of a clear public policy manifested in a state or federal

“handbook rule,” which West Virginia adopted in 1986 in *Cook v. Heck’s Inc.*, 342 S.E.2d 453, 459 (W. Va. 1986). If an employer promises via an employee handbook to not discharge employees except for specific reasons, then that handbook “may form the basis of a unilateral contract.” *Id.* The employer is bound to abide by the rules of conduct, discipline procedures, and benefits delineated in the handbook. Summers, *supra* note 28, at 71. Handbooks are now considered to be part of the employment contract even if the parties did not sign a contract upon hiring. *See id.* at 71. For a thorough analysis of how *Cook* contributed to the erosion of the at-will employment doctrine in West Virginia, see Francesca Tan, Comment, *Cook v. Heck’s: Erosion of Employment At Will in West Virginia*, 89 W. VA. L. REV. 379 (1987).

³⁹ See PERRITT, *supra* note 38, at 5. The implied covenant theory holds every employment relationship—including at-will employment—is a contract and that the parties are required to act with good faith and fair dealing. Bastress, *supra* note 32, at 337. However, most states, including West Virginia, do not recognize this doctrine. PERRITT, *supra* note 38, at 7–8; *see also* Shell v. Metropolitan Life Ins. Co., 396 S.E.2d 174, 181 (W. Va. 1990) (declining to adopt implied covenant theory; facts showed no breach of “substantial public policy”).

⁴⁰ See PERRITT, *supra* note 38, at 4.

⁴¹ Bastress, *supra* note 32, at 326.

⁴² *Id.*

⁴³ Summers, *supra* note 28, at 70.

⁴⁴ John Marks, *Symmetrical Use of Universal Damages Principles—Such as the Principles Underlying the Doctrine of Proximate Cause—to Distinguish Breach-Induced Benefits That Offset Liability from Those That Do Not*, 55 WAYNE L. REV. 1387, 1432 (2009).

⁴⁵ *Id.* (quoting CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 163, at 638 (1935)).

⁴⁶ PERRITT, *supra* note 38, at 3.

constitution, statute, or administrative regulation, or common law”; (2) that the employee’s dismissal would “jeopardize” that public policy; (3) that the dismissal was “motivated by conduct related to the public policy”; and (4) that the employer “lacked overriding legitimate business justification for the dismissal.”⁴⁷ The question becomes how to determine what public policies are appropriate to limit employer discretion in discharging employees.⁴⁸ West Virginia has a broad standard: its sources of public policy are the federal and state constitutions, public statutes, judicial decisions, the common law, and the “acknowledged prevailing concepts of the federal and state government relating to and affecting the safety, health, morals and general welfare of the people.”⁴⁹

C. *The Remedies for Wrongful Discharge*

Because the collateral source rule is an exception to traditional labor and employment remedy doctrines, it is necessary to understand the rules that govern employees’ remedies in a public policy tort action. The preferred remedy is reinstatement, and the employee can typically recover compensatory damages in addition to reinstatement. If the court finds that reinstatement is not appropriate, the plaintiff can then recover front pay in lieu of reinstatement. In a public policy tort action, a plaintiff can recover emotional distress damages and punitive damages as well.

1. Reinstatement

The “fundamental principle” of remedies is to place the injured party as close as possible to the same position as he was in before he was injured.⁵⁰ In

⁴⁷ *Id.* at 4.

⁴⁸ See Bastress, *supra* note 32, at 331. Professor Bastress states that, “[i]n its narrowest form, public policy must be derived from clear and specific legislation designed to protect employees in their jobs” and that an employee must show that the employer’s “actions contravened some specific provision of that legislation.” *Id.* Courts have little authority to identify public policy under this standard. *Id.* But courts have more expansive authority under the following steps: (1) finding public policy in “general concerns regarding public health, safety, welfare, morals, etc.”; (2) finding public policies in “broadly stated legislative goals”; and (3) expanding the “sources for identifying public policies beyond those stated in legislation to include administrative regulations and executive rules, codes of ethics of professional organizations, constitutional provisions, and judicial decisions.” *Id.*

⁴⁹ *Cordle v. Gen. Hugh Mercer Corp.*, 325 S.E.2d 111, 325 (W. Va. 1984) (quoting *Allen v. Commercial Cas. Ins. Co.*, 37 A.2d 37, 38–39 (N.J. 1944)); see also Bastress, *supra* note 32, at 333.

⁵⁰ DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES* 15 (3d ed. 2002); Marks, *supra* note 44, at 1394; see also *RESTATEMENT (SECOND) OF CONTRACTS* § 347 cmt. a (1981) (“Contract damages are ordinarily based on the injured party’s expectation interest and are intended to give him the benefit of his bargain by awarding him the sum of money that will, to the extent possible, put him in as good a position as he would have been in had the contract been performed.”);

other words, the plaintiff should be returned to his “rightful position.”⁵¹ In a wrongful discharge case, a plaintiff employee is returned to his rightful position through reinstatement to his job; this is an equitable remedy that is used at the court’s discretion.⁵² Reinstatement historically was not recognized as a remedy for a retaliatory discharge tort action; legal damages were the preferred remedy for this exception to at-will employment.⁵³ But because “no other remedy can fully compensate an employee for the wrongful loss of his or her job,”⁵⁴ reinstatement is now the “standard remedy for employees discharged in violation of the labor laws, civil service laws, employment discrimination laws, constitutions, and collective bargaining agreements.”⁵⁵ Some employers argue—and some cases have held—that “reinstatement should be the preferred or exclusive remedy, because juries award excessive damages.”⁵⁶ In such cases, whether an employee is reinstated or not, he can still recover some amount of compensatory damages.

2. Compensatory Damages

Both back pay and front pay are compensatory damages intended “to make a plaintiff as well off as he would have been if he never had been wronged.”⁵⁷ In West Virginia, compensatory damages include back and front pay,⁵⁸ and a plaintiff may also recover emotional distress damages as part of compensatory damages in a retaliatory discharge case.⁵⁹

The purpose of back pay is to compensate the employee for the losses incurred from the date of wrongful dismissal and through the date of judgment.⁶⁰ Back pay includes salary or wages and fringe benefits such as health insurance, holiday pay, accrued vacation days, pensions and profit-sharing contributions, and childcare.⁶¹

RESTATEMENT (SECOND) OF TORTS § 901 cmt. a (1979) (“The law of torts attempts primarily to put an injured person in a position as nearly as possible equivalent to his position prior to the tort.”).

⁵¹ LAYCOCK, *supra* note 50, at 16.

⁵² *Peters v. Rivers Edge Mining, Inc.*, 680 S.E.2d 791, 812 (W. Va. 2009).

⁵³ *Id.* at 811.

⁵⁴ *Id.* (quoting 82 AM. JUR. 2D *Wrongful Discharge* § 230 (2003)).

⁵⁵ LAYCOCK, *supra* note 50, at 440.

⁵⁶ *Id.*

⁵⁷ *See id.* at 3.

⁵⁸ *Id.*

⁵⁹ *Harless v. First Nat’l Bank in Fairmont*, 289 S.E.2d 692, 702 (W. Va. 1982).

⁶⁰ 2 HENRY H. PERRITT, JR., *EMPLOYEE DISMISSAL LAW AND PRACTICE* 363 (4th ed. 1998).

⁶¹ *Id.*

Front pay is defined as the “pay for the period after judgment and before reinstatement.”⁶² These are “damages for loss of future earnings that he would have received had he remained with the company.”⁶³ However, calculating front pay “require[s] some degree of speculation as to how long the employee would have continued working for the employer.”⁶⁴ Courts have held that front pay can be awarded “in lieu of reinstatement”⁶⁵ when the employer and employee have a “hostile relationship”⁶⁶ or the “employer objects to reinstatement.”⁶⁷

3. Punitive Damages

A plaintiff employee in a public policy tort action can receive punitive damages.⁶⁸ The purpose of punitive damages is to punish the wrongdoer.⁶⁹ Tort law, the only body of law that allows punitive damages, evaluates the “moral aspect of the defendant’s conduct—the moral guilt or blame to be attached in the eyes of society to the defendant’s acts, motives, and state of mind.”⁷⁰ In a tort action, the “tortfeasor is always blameworthy,” but in a breach of contract action, the court determines which party is in breach not to “punish or stigmatize that person,” but rather to see whether the non-breaching party should receive a remedy.⁷¹ Thus, as opposed to breach-of-contract remedies, tort remedies are tailored to simultaneously compensate the injured party and punish the wrongdoer.⁷²

⁶² LAYCOCK, *supra* note 50, at 1118.

⁶³ PERRITT, *supra* note 60, at 365.

⁶⁴ *Id.*

⁶⁵ LAYCOCK, *supra* note 50, at 1118. The WVSCA held that

[a]n employee who asserts a claim alleging workers’ compensation discrimination in accordance with W. VA. CODE § 23-5A-1, *et seq.*, may recover damages for front pay in lieu of reinstatement. 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, and such determination will be reviewed for an abuse of discretion.

Syl. pt. 11, *Peters v. Rivers Edge Mining, Inc.*, 680 S.E.2d 791 (W. Va. 2009).

⁶⁶ *Peters*, 680 S.E.2d at 812; *see also* *Thompson v. Town of Alderson*, 600 S.E.2d 290, 293 (W. Va. 2004) (holding that a court may rule preliminarily that it will not consider reinstatement as a remedy); *Dobson v. E. Associated Coal Corp.*, 422 S.E.2d 494, 501 (W. Va. 1992) (recognizing front pay as a substitute for reinstatement).

⁶⁷ *Peters*, 680 S.E.2d at 813.

⁶⁸ PERRITT, *supra* note 60, at 366.

⁶⁹ *See* LAYCOCK, *supra* note 50, at 5.

⁷⁰ *Ulciny*, *supra* note 9, at 293 n.208 (quoting *Corl v. Huron Castings*, 544 N.W.2d 278, 281 n.14 (Mich. 1996)).

⁷¹ *See* *Ulciny*, *supra* note 9, at 292.

⁷² *Id.*

4. Mitigation of Damages

Both contract and tort legal theories require the plaintiff to mitigate his damages. Whether the plaintiff is suing under a contract⁷³ or tort theory,⁷⁴ he is still required to mitigate his damages by using reasonable efforts to seek comparable employment.⁷⁵ This doctrine is an affirmative defense with the burden of proof resting on the defendant.⁷⁶ The Supreme Court of the United States summarized the rule in 1982 in *Ford Motor Co. v. Equal Employment Opportunity Commission*.⁷⁷

This duty, rooted in an ancient principle of law, requires the claimant to use reasonable diligence in finding other suitable employment. Although the unemployed or underemployed claimant need not go into another line of work, accept a demotion, or take a demeaning position, he forfeits his right to backpay if he refuses a job substantially equivalent to the one he was denied.⁷⁸

Therefore, an employee should use reasonable efforts to find similar employment.⁷⁹ His damages award will be reduced by the wages he has earned in his new employment.⁸⁰ If he chooses not to seek new employment, then his damages will be reduced by what he could have received if similar employment

⁷³ LAYCOCK, *supra* note 50, at 96. This is the doctrine of avoidable consequences. *Id.*

⁷⁴ RESTATEMENT (SECOND) OF TORTS § 920 (1979). Under the offsetting of benefits rule, any benefit that the plaintiff did or could receive may offset the plaintiff's recoverable damages. *Id.* The collateral source rule is an exception to the offsetting of benefits rule. LAYCOCK, *supra* note 50, at 107; *see also* Fleming, *supra* note 13, at 1478 (describing the collateral source rule as "[high ranking] among the oddities of American accident law" and providing an international comparative analysis). This rule operates as "both a rule of evidence and a rule of damages." Branton, *supra* note 11, at 883. Branton states that "[a]s a rule of evidence, it precludes the defendant in a personal injury or wrongful death case from introducing evidence that some of the plaintiff's damages have been paid by a collateral source." *Id.* It has traditionally applied in tort cases and "operate[d] to preclude the offsetting of payments made by health and accident insurance companies or other collateral sources as against the damages claimed by the injured party." Syl. pt. 7, *Ratlief v. Yokum*, 280 S.E.2d 584, 585 (W. Va. 1981).

⁷⁵ LAYCOCK, *supra* note 50, at 97.

⁷⁶ *Id.*

⁷⁷ 458 U.S. 219, 231–32 (1982).

⁷⁸ *Id.*; *see also* LAYCOCK, *supra* note 50, at 97–98 (discussing *Ford Motor Co.*, 458 U.S. 219).

⁷⁹ WILLIAM J. HOLLOWAY & MICHAEL J. LEECH, *EMPLOYMENT TERMINATION RIGHTS AND REMEDIES* 705 (2d ed. 1993); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 350 (1981) ("(1) Except as stated in Subsection (2), damages are not recoverable for loss that the injured party could have avoided without undue risk, burden or humiliation. (2) The injured party is not precluded from recovery by the rule stated in Subsection (1) to the extent that he has made reasonable but unsuccessful efforts to avoid loss.").

⁸⁰ *Id.*

was available.⁸¹ The purpose of the mitigation rule is to avoid a double recovery of damages;⁸² if any employee recovers the wages or salary (the back pay award) from the first job as well as the replacement job's salary, he will be in a better position than he would have been prior to termination.⁸³

D. Other Forms of Employment

Beyond the default rule of at-will employment, there are a variety of other forms of employment relationships including contractual, union, and public sector. These are all exceptions to at-will employment, and each of these is governed by its own regulations. The relationships of contracted employees are governed by the agreed-upon terms of the contract, and any disputes during the course of the employment are resolved in accordance with those terms. The relationship between unionized employees and their employers is governed by the terms of the collective bargaining agreement.⁸⁴ Public sector employees typically include state and county employees such as teachers and postal employees. These employees can also be unionized. Public sector employees—including federal, state, and city employees—cannot be dismissed except for just cause.⁸⁵ The *Mason County* rule applies to these employment relationships as well.⁸⁶

IV. HOW WEST VIRGINIA APPLIED AND EXTENDED THE COLLATERAL SOURCE RULE IN LABOR AND EMPLOYMENT CASES: *MASON COUNTY*, *SEYMOUR*, AND *PETERS*

Now that the basics of employment law and the public policy tort have been established, this Note shows that the court adopted the de facto collateral source rule in *Mason County* so that employees would get a flat back pay award and extended the rule to front pay in *Peters*, which allows wrongfully and maliciously discharged employees to collect a bonanza of damages. This Note identifies that using the collateral source rule in this way endangers West Virginia's business environment, and it also points out that the court has failed to define "malice" and thus prevents employers and employees from being certain about what is truly a "malicious discharge."

⁸¹ *Id.*

⁸² *Id.* at 706.

⁸³ Marks, *supra* note 44, at 1391 n.12 (quoting JOHN E. MURRAY JR., MURRAY ON CONTRACTS § 122, at 800 (4th ed. 2001)).

⁸⁴ PERRITT, *supra* note 38, at 16.

⁸⁵ *Id.* at 15; *see also* PERRITT, *supra* note 60, § 8, at 199–271.

⁸⁶ *See generally Mason County III*, 295 S.E.2d 719 (W. Va. 1982) (applying *Mason County* rule to a probationary high school principal).

In 1982, The WVSCA held that discharged employees must mitigate their damages by using reasonable measures to seek comparable employment.⁸⁷ The court recognized that the majority of jurisdictions employ this doctrine.⁸⁸ However, when adopting this majority rule and discarding the old, “primitive” rule, the court carved a narrow exception: when an employee is *maliciously* discharged, this doctrine will not apply to back pay, and the employee can receive a full back pay award.⁸⁹ This Note argues that the *Mason County* rule is the collateral source rule applied in a labor and employment context. At its creation, this seemed to be a just and fair rule. After all, the goal of a tort action is to compensate the victim *and* to punish the wrongdoer,⁹⁰ and an employer who has maliciously discharged an employee has presumably violated an employee’s right. Additionally, this rule was originally limited in scope because it applied only to back pay when it was adopted in 1982. But the court extended it to front pay in *Seymour*⁹¹ and *Peters*,⁹² and a plaintiff can now recover front pay for the remainder of his life—or at least until retirement age. Although the rule applies to a narrow issue, it is applied to all types of employment cases. Three such types are explained below: public employees who have contracts,⁹³ at-will employees,⁹⁴ and unionized employees.⁹⁵ This rule, narrow as it may be, has far-reaching consequences for West Virginia businesses, citizens, and legal jurisprudence. The courts are already seeing the full effects of *Mason County* and its progeny.⁹⁶ And as employers continue to

⁸⁷ *Id.* at 723.

⁸⁸ *Id.*

⁸⁹ *Id.* at 724.

⁹⁰ Ulciny, *supra* note 9, at 292.

⁹¹ *Seymour v. Pendleton Cmty. Care*, 549 S.E.2d 662 (W. Va. 2001) (per curiam).

⁹² *Peters v. Rivers Edge Mining, Inc.*, 680 S.E.2d 791 (W. Va. 2009).

⁹³ *See Mason County III*, 295 S.E.2d at 721.

⁹⁴ *See Seymour*, 549 S.E.2d at 663–64.

⁹⁵ *See Peters*, 680 S.E.2d at 801.

⁹⁶ *See* Brief for the Petitioners, *Burke-Parsons-Bowlby Corp. v. Rice*, No. 11-0183 (W. Va. filed May 13, 2011), *available at* <http://www.courtswv.gov/supreme-court/calendar/2012/briefs/sept12/11-0183petitioner.pdf>; Supplemental Brief for the Appellants, *W. Va.-Am. Water Co. v. Nagy*, No. 101229 (W. Va. 2012), *available at* <http://www.courtswv.gov/supreme-court/calendar/2012/briefs/sept12/101229appellant.pdf>. *West Virginia-American Water Co. v. Nagy* settled before oral arguments were held, but *Burke-Parsons-Bowlby Corp. v. Rice* was argued before the West Virginia Supreme Court of Appeals on September 5, 2012. Supreme Court of Appeals of W. Va., *Supreme Court of Appeals Argument Docket: Wednesday, September 5, 2012*, W. VA. JUDICIARY, <http://www.courtswv.gov/supreme-court/calendar/2012/dockets/sept-5-12ad.html> (last visited Oct. 18, 2012) [hereinafter *Argument Docket: Sept. 5, 2012*]. An opinion has not yet been published.

be overwhelmed by excessive damage awards granted under this rule, there will be damaging effects in the West Virginia business community and economy.⁹⁷

A. Mason County Board of Education v. State Superintendent of Schools

To fully understand the de facto collateral source rule's impact on West Virginia's labor and employment law, it is necessary to look at its origin, *Mason County*. An examination of *Mason County*'s holding, facts, and reasoning show that the rule adopted in 1982—allowing a flat back pay award—is much more narrow and contained than the current rule, which allows unmitigated back and front pay awards.

1. Holding of *Mason County*

In 1982, the WVSCA held that “[u]nless a wrongful discharge is malicious,” the wrongfully discharged employee must mitigate damages by seeking similar employment in the local area.⁹⁸ The wages the employee receives from that employment or, if the employee fails to meet this requirement, the wages the employee *could* have received through comparable employment will be deducted from his back pay award.⁹⁹ However, the employer has the burden of raising this issue at trial.¹⁰⁰ The employee is only required to use “reasonable and diligent efforts to secure acceptable employment.”¹⁰¹ The new employment must be in the same line of work; thus, an employee is not required to accept a lower-status job or a job outside of his education or training.¹⁰² Finally, if the employee's new job is compatible with the previous job from which he was discharged, the wages the employee receives from his new job will not be deducted from the employee's back pay award.¹⁰³

⁹⁷ West Virginia is currently ranked thirty-fourth on the Best/Worst States for Business. JP Donlon, *Another Triumph for Texas: Best/Worst States for Business 2012*, CHIEFEXECUTIVE.NET (May 2, 2012), <http://chiefexecutive.net/best-worst-states-for-business-2012>. At 7.5% unemployment, West Virginia currently has the twenty-fifth worst unemployment rate in the country. See Bureau of Labor Statistics, *2012 State Unemployment Rates*, NAT'L CONF. OF ST. LEGISLATURES (Sept. 21, 2012), <http://www.ncsl.org/issues-research/labor/2012-state-unemployment-rates.aspx>. Thus, if West Virginia's unemployment rates and stunted economic growth correlates to or is caused by our deterrent business or labor laws, then the *Mason County* rule and said progeny are only hurting West Virginia's economic problem.

⁹⁸ Syl. pt. 2, *Mason County III*, 295 S.E.2d at 720–21.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 725.

¹⁰² *Id.*

¹⁰³ *Id.*

When a wrongful discharge is malicious, however, the employee is not required to mitigate damages.¹⁰⁴ This allows the employee to recover damages from his employer as well as any wages earned through new employment. The new employment is the collateral source. By not offsetting the plaintiff's recovery by the benefits received from the collateral source, the collateral source rule is applied to the employment relationship. A thorough explanation of *Mason County*'s history and the court's reasoning shows that the court was trying to be just and fair to future maliciously discharged plaintiffs by awarding them a flat back pay award. A back pay award, as previously discussed¹⁰⁵ is limited in scope. The 1982 court could not have anticipated that the 2009 court would extend the *Mason County* rule to front pay.

2. Facts of *Mason County*

The eight years that *Mason County* spent in the West Virginia court system earned it the description of a case with a "long and tortuous history" and "an example of painful judicial delay."¹⁰⁶ The case appeared before the WVSCA three times.¹⁰⁷ The appellee, Bright McCausland, was a probationary school principal at Hannan High School who was discharged from his position by the Mason County Board of Education ("Board") on September 1, 1972.¹⁰⁸ After two school district members said that McCausland was "*incompetent* and that he had *willfully neglected his duties as school principal*," the Board initiated proceedings to dismiss McCausland.¹⁰⁹ At a hearing on September 1, 1973, several teachers and other school employees gave evidence supporting the charges.¹¹⁰ The county superintendent testified that he had given McCausland favorable reviews and that McCausland carried out the administration's policies.¹¹¹

The Board ultimately found that there was "sufficient evidence of seven incidents of incompetence, willful neglect of duty, and intemperance to justify" dismissing McCausland.¹¹² These actions included: (1) he willfully failed to provide an effective discipline policy at Hannan High School and was

¹⁰⁴ Syl. pt. 2, *id.* at 720–21.

¹⁰⁵ *See supra*, Part III.C.2.

¹⁰⁶ *Id.* at 726 (McHugh, J., concurring in part and dissenting in part).

¹⁰⁷ *See Mason County III*, 295 S.E.2d 719 (W. Va. 1982); *Mason Cnty. Bd. of Educ. v. State Superintendent of Sch. (Mason County II)*, 274 S.E.2d 435 (W. Va. 1980); *Mason Cnty. Bd. of Educ. v. State Superintendent of Sch. (Mason County I)*, 234 S.E.2d 321 (W. Va. 1977).

¹⁰⁸ *Mason County III*, 295 S.E.2d at 720.

¹⁰⁹ *Mason County II*, 274 S.E.2d at 436.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

not equipped to handle the discipline problems at the high school; (2) he exhibited intemperate conduct towards students and teachers including directing profane language at them; (3) he entered classrooms while class was in session and proceeded to sleep in the presence of both students and teachers and slept in other areas of the school; (4) he willfully refused to properly evaluate teachers and said that “evaluations were purely a social matter and had nothing to do with their teaching ability”; (5) he willfully refused to follow the Board’s grievance procedures and misrepresented their functions to the teachers; (6) he lacked a competent educator’s attitude toward students; and (7) he willfully failed to perform his duties as principal.¹¹³ After making these findings, the Board immediately dismissed McCausland and declared his three-year contract to be void.¹¹⁴

McCausland appealed to the State Superintendent of Schools challenging the sufficiency of the evidence and argued that the Policies, Rules, and Regulations of the West Virginia Board of Education only allow an employee to be dismissed if the supervisor is dissatisfied with the employee’s performance and if that employee has been given time to correct any inadequate performance.¹¹⁵ The State Superintendent agreed.¹¹⁶ He ordered McCausland be reinstated with back pay and interest.¹¹⁷ After receiving the State Superintendent’s decision, the Board petitioned the Circuit Court of Kanawha County for a writ of certiorari.¹¹⁸ The court reviewed the petition and held that the Board lacked standing for judicial review.¹¹⁹

The Board appealed to the WVSCA, which held that a county board of education does indeed have standing and remanded the case to the circuit court.¹²⁰ On remand, the circuit court then upheld the Board’s dismissal, and McCausland appealed.¹²¹ The WVSCA reversed his dismissal stating that the procedures of the West Virginia Board of Education’s policies and regulations “must be followed in every proceeding under W. Va. Code 18A-2-8 (1969) for the dismissal of a school employee on the ground of incompetency.”¹²² Thus, McCausland must first receive a “professional evaluation of his competency”

¹¹³ *Id.* at 436 n.1.

¹¹⁴ *Id.* at 437.

¹¹⁵ *Id.* (citing Policies, Rules, and Regulations of the West Virginia Board of Education §5300(6)(a) (codified at W. VA. CODE R. § 126-141-2.6.a (1983)). McCausland appealed pursuant to the provisions of W. VA. CODE § 18A-2-8 (1969). *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* This petition was filed on May 10, 1974. *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* at 438.

¹²² Syl. pt. 3, *id.* at 436.

and an “improvement period” before any dismissal.¹²³ The court ordered that McCausland be reinstated with back pay.¹²⁴ The case was again remanded to the circuit court—this time to determine the amount of back pay—but it boomeranged back to the WVSCA over a question of whether or not a discharged employee is required to mitigate damages.¹²⁵ The court ultimately found that McCausland’s discharge was not malicious, and the case was again remanded to the circuit court for the damages award to be decided under the newly-minted mitigation of damages rule.¹²⁶

3. Reasoning of the Court

The issue in this case was 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.”¹²⁷ The Board, citing *Williston on Contracts*, argued that McCausland should not receive a full back pay award and that his damages should be limited at most to his three-year contract, which expired in 1975.¹²⁸ But the WVSCA stated that the rule requiring employment to expire at the end of the agreed-upon contract does not apply to employment contracts of West Virginia teachers; they have “unique protection” under the West Virginia Board of Education’s policies.¹²⁹ Rule 5300 provides that even a probationary employee’s teaching contract must be renewed unless certain due process requirements have been met.¹³⁰ The WVSCA stated that had McCausland been accorded his Rule 5300 rights, he would have achieved tenure status.¹³¹ Thus, the WVSCA found the Board’s argument to be without merit.¹³²

In prior cases, wrongfully discharged employees would have received all back pay from the discharge date to the reinstatement date, with interest.¹³³ However, the WVSCA decided that it was time for West Virginia to adopt the majority rule—the rule requiring mitigation of damages—due to rapid changes in the law regarding the complications in applying school personnel’s due process rights provided by administrative rules and regulations of the State

¹²³ Syl. pt. 5, *id.* at 436.

¹²⁴ *Id.* at 439.

¹²⁵ *Mason County III*, 295 S.E.2d 719 (W. Va. 1982).

¹²⁶ *Id.* at 726.

¹²⁷ *Id.* at 722.

¹²⁸ *Id.* at 721 (citing 9 S. WILLISTON, CONTRACTS § 1017 (3d ed. 1967)).

¹²⁹ *Id.* at 722.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

Board,¹³⁴ the “enormously technical” nature of these rules and regulations,¹³⁵ and the fact that such laws are still developing and thus unpredictable.¹³⁶ Thus, the WVSCA rejected what it called the “primitive rule” of calculating back pay as from the date of discharge to the date of reinstatement and adopted the majority rule: the employee must mitigate damages by seeking other employment.¹³⁷ The WVSCA said this adoption should not be surprising;¹³⁸ it had previously remanded a case involving a discharged teacher and directed the circuit court to consider mitigation of damages.¹³⁹ The WVSCA said that the old rule might be easier for the judicial system to apply and might adequately compensate the injured party, but the old rule’s punitive effects were also imprecise.¹⁴⁰ By this statement, it is fair to infer that the WVSCA meant that the exception to this rule—that an employer who maliciously discharges an employee is estopped from raising this issue—be punitive.

The WVSCA then sought to “illuminate” its new rule and how it would be applied.¹⁴¹ First, a wrongful discharge plaintiff must prove what he would have earned during the remainder of his term of employment.¹⁴² The defendant must then prove what the plaintiff earned—or by “reasonable diligence” could have earned—in other employment during that period.¹⁴³ That employment must have been of the “same grade, in the same line of work, and in the same locality.”¹⁴⁴ The WVSCA also clarified that if the employee’s new job is one that he could have held while maintaining his old job, then the wages from his new job would not be deducted from the back pay award.¹⁴⁵ An example would be a teacher taking “a night job supervising a federal adult education program.”¹⁴⁶ The WVSCA thus adopted the “majority rule” with the caveat that “the employer is estopped from asserting the employee’s duty to mitigate where the termination of employment was malicious.”¹⁴⁷

The question is: what is “malice”? The WVSCA defined a malicious discharge as occurring when “the discharging agency or official willfully and

¹³⁴ *Id.*

¹³⁵ *Id.* at 723.

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* (citing *Burks v. McNeel*, 264 S.E.2d 651 (W. Va. 1980)).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 724 (quoting CHARLES MCCORMICK, DAMAGES §§ 159, 160 (1935)).

¹⁴⁵ *Id.* (quoting *Martin v. Bd. of Educ.*, 199 S.E. 887 (W. Va. 1938)).

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 724.

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"¹⁴⁸ The WVSCA stated that the purpose of this rule was to discourage malicious discharges.¹⁴⁹ But the WVSCA did not clearly define what "malicious" means; it simply stated that it is a violation of the employee's rights.¹⁵⁰ West Virginia's public policies are drawn from a broad base. An employee or plaintiff's lawyer can look to the federal and state constitutions, public statutes, judicial decisions, the common law, and the "acknowledged prevailing concepts of the federal and state governments relating to and affecting the safety, health, morals and general welfare of the people"¹⁵¹ to find a cause of action and label it as "malicious." As Richard Craswell argues, "labels such as *willfully*, or *in bad faith*, or *fraudulently*, or *maliciously*—or, as Dickens once put it, 'otherwise evil-adverbiously'"—are not self-defining nor are they well-defined by legal literature.¹⁵² Yet these definitions often determine how large damages will be in a breach of contract labeled with one or more such adverbs.¹⁵³ This prohibits employers from having any predictability or certainty about what constitutes a "malicious" discharge, and it also requires employees and their lawyers to go searching for an action to be considered "malicious." If the WVSCA or the legislature defined "malice," then both parties would know exactly what constitutes a "malicious discharge" and what the consequences of their actions would be.

Once the employer has raised the affirmative defense of the mitigation of damages and has met its burden of proof, the "wrongfully discharged employee who has not secured employment must be prepared to demonstrate that he or she did not make a voluntary decision not to work, but rather used reasonable and diligent efforts to secure acceptable employment."¹⁵⁴ If the second employment has the same or higher salary than the employment from which the employee was wrongfully discharged "so that effectively all damages are mitigated [,] the employee is still entitled" to attorney's fees and litigation expenses.¹⁵⁵

¹⁴⁸ *Id.* at 725.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 722.

¹⁵¹ *Cordle v. Gen. Hugh Mercer Corp.*, 325 S.E.2d 111, 114 (W. Va. 1984).

¹⁵² Richard Craswell, *When is a Willful Breach "Willful"? The Link Between Definitions and Damages*, 107 MICH. L. REV. 1501, 1501 (2009) (quoting CHARLES DICKENS, *A TALE OF TWO CITIES* 47 (Courier Dover Publ'ns 1998) (1859)).

¹⁵³ *Id.*

¹⁵⁴ *Mason County III*, 295 S.E.2d at 725–26.

¹⁵⁵ *Id.* at 726.

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B. Mason County Progeny: *Seymour v. Pendleton Community Care & Peters v. Rivers Edge Mining, Inc.*

The *Mason County* decision focused on school personnel—all of whom typically have a contract—and only addressed the issue of back pay. The WVSCA did not address any other types of compensatory damages and whether they could or should be affected by this rule. The WVSCA did not give objective standards for how juries were to decide if conduct was “malicious.”¹⁵⁶ Further, while the *Mason County* court declared McCausland’s discharge to not be malicious, it did not explicitly state whether this finding should be a question of law or of fact. Therefore, *Mason County*’s progeny were left to answer these questions and, in doing so, extended and further shaped this rule.

1. *Seymour v. Pendleton Community Care* Implicitly Extended *Mason County* to Front Pay

In 2001 in *Seymour v. Pendleton Community Care*,¹⁵⁷ the WVSCA applied the *Mason County* rule to an at-will employment issue. Michael Judy, the manager of Pendleton Community Care (“PCC”) discharged Barbara Seymour on March 28, 1998, from her position as office manager, claiming that she had engaged in “insubordinate behavior” and had refused “to adhere to management policies.”¹⁵⁸ Seymour brought a retaliatory discharge action against both Judy and PCC, claiming that her termination was in retaliation for her complaining about the falsification and lack of records that PCC is required by law to maintain.¹⁵⁹

The jury was instructed that if it found that Seymour was “discharged out of malice [and] . . . [PCC] willfully and deliberately violated Mrs. Seymour’s rights under circumstances where [PCC] knew, or with reasonable diligence should have known, of Mrs. Seymour’s rights to be free from retaliatory discharge then Barbara Seymour is entitled to a flat back pay award,” which was “back pay from the date of discharge to the date of trial together with interest.”¹⁶⁰

The circuit court jury awarded Seymour \$70,000 in past lost earnings, \$125,000 in future lost earnings, \$30,000 in emotional damages, \$500 in medical damages, \$500 for future medical damages, and a total of \$300,000 in

¹⁵⁶ See Craswell, *supra* note 152, at 1501.

¹⁵⁷ 549 S.E.2d 662 (W. Va. 2001) (per curiam).

¹⁵⁸ *Id.* at 664.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 664 n.1.

punitive damages.¹⁶¹ The judge reduced the \$70,000 for past lost earnings to \$42,921 because that was more accurate per her salary¹⁶² and lowered the punitive damages award because it “was appropriate to keep the punitive damages award proportional.”¹⁶³ The judge found that Seymour failed to mitigate her damages and consequently eliminated the \$125,000 front pay award.¹⁶⁴ He did not reduce her back pay award, per *Mason County*, and instead eliminated her front pay award.¹⁶⁵

On appeal, the WVSCA restored the full punitive damages award and restored the \$125,000 front pay award.¹⁶⁶ The WVSCA made no mention of the fact that the lower court had modified the front pay award instead of the back pay award as per *Mason County*.¹⁶⁷ There was no mention of reinstatement as a remedy.¹⁶⁸ The WVSCA declared Seymour’s discharge to be malicious.¹⁶⁹ The majority opinion also declared that Seymour made reasonable efforts to mitigate, which prompted two judges to vigorously dissent this point.¹⁷⁰ But by

¹⁶¹ *Id.* at 665. Michael Judy was to pay \$100,000, and \$200,000 was to be obtained from PCC.
Id.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 667.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* When discussing the requirement to mitigate damages, another problematic question is what constitutes “reasonable” efforts to find comparable employment. This discussion is beyond the scope of this Note, but *Seymour* is an example of how even judges disagree on how to define “reasonable” in this context. Seymour testified that she “watched the paper, and [she had] kept her eye on things—and kept an eye for what’s out there, and kept [her] eyes open. [She] just ha[dn’t] gone to apply.” *Id.* at 664. She started staining glass at home, she had sold one or two pieces, and she hoped to sell more. *Id.* Although the majority opinion declared her discharge to be malicious, three justices filed dissenting opinions regarding this issue. Justice Robin Jean Davis both dissented and concurred. She dissented from the majority’s finding that Seymour made reasonable attempts to mitigate her damages: “[T]here is absolutely no evidence that such mitigation occurred,” and “[s]uch finding is just plain wrong.” *Id.* at 668–69 (Davis, J., concurring in part, dissenting in part). An employee who must mitigate must use “‘reasonable and diligent efforts’ to obtain acceptable, replacement employment,” and Seymour’s actions did not meet this standard. *Id.* at 669 (quoting *Mason County III*, 295 S.E.2d 719, 726 (W. Va. 1982)). However, Justice Davis concurred with the holding saying that because Seymour’s discharge was found to be malicious she had no duty to mitigate. *Id.* Chief Justice Elliott Maynard dissented with the majority’s entire opinion, indicating rather that he would affirm the trial court’s order. *Id.* at 669 (Maynard, J., dissenting). Finally, Justice Larry Starcher concurred with Justice Davis and emphasized that the defendant has the burden of proving the plaintiff’s failure to mitigate. *Id.* at 669 (Starcher, J., concurring). The issues he discussed in his concurrence regarded the defense’s trial strategy: he thought that the defense should have called

allowing Seymour to recover \$125,000 in future lost earnings—the front pay award—the WVSCA impliedly extended the *Mason County* malicious discharge rule to front pay. The *Mason County* rule had only discussed back pay; it did not discuss front pay. Thus, although the WVSCA did not explicitly state that it was extending the *Mason County* rule that a maliciously-discharged employee can receive a full back pay award and not be required to mitigate a front pay award, the WVSCA applied the *Mason County* rule to front pay when it gave Seymour the full, non-mitigated front pay award of \$125,000.

2. *Peters v. Rivers Edge Mining, Inc.* Explicitly Extended *Mason County* to Front Pay

The most recent extension¹⁷¹ of the *Mason County* rule was in 2009 in *Peters v. Rivers Edge Mining, Inc.*¹⁷² In *Peters*, the WVSCA explicitly extended the *Mason County* rule to front pay. Now a maliciously discharged employee can recover back pay, emotional distress damages, punitive damages, and front pay damages without mitigation if the jury finds the discharge to be malicious. Thus, upon a finding of malicious discharge, the employee can recover damages at least until retirement age.

George M. Peters was a coal miner and a unionized employee at Rivers Edge Mining, Inc. (“Rivers Edge”).¹⁷³ Peters broke his wrist while hanging cable underground and was later terminated when he did not show up for his return-to-work shift.¹⁷⁴ He filed suit against Rivers Edge alleging that his

Seymour to the stand when it presented its evidence of available work in the area in the form of newspaper advertisements. *Id.* Instead, the defense presented those advertisements during its case-in-chief, and did not place Seymour on the stand to question her regarding the advertisements. *Id.*

¹⁷¹ On September 5, 2012, the West Virginia Supreme Court of Appeals heard arguments in *Burke-Parsons-Bowlby Corp. v. Rice*, which challenged the *Mason County* rule as a unlawful punitive damages award in that it does not have proper due process constraints. Brief for the Petitioners, *supra* note 96, at 30–35.

¹⁷² 680 S.E.2d 791 (W. Va. 2009).

¹⁷³ *Id.* at 800.

¹⁷⁴ *Id.* He was placed in the Transitional Work Program to work as a coal hauler while his wrist healed. *Id.* He fulfilled that position for approximately five months until his doctor reported that his wrist was not healing properly and recommended that he stop working. *Id.* Peters received workers’ compensation temporary total disability benefits during the two months that he did not work. *Id.* On Monday, May 10, 2004, his workers’ compensation case manager received a call from the Transitional Work Program to say that Rivers Edge could accommodate Peters and his employment restrictions. *Id.* at 801. The manager of the Transitional Work Program called the number Peters had provided in his personnel information, which happened to be Peters’s mother’s home. *Id.* Peters did not live with his mother. *Id.* The manager left a message, and then called twice more and left two more messages. *Id.* Peters spoke with his mother the night of May 11; at this time, his regular work shift had begun. *Id.* The following morning, Peters called his manager, who informed him that he would return to work in the Transitional Work Program. *Id.*

termination from employment was a retaliatory discharge that violated workers' compensation statutes.¹⁷⁵ Rivers Edge responded that Peters had been fired for violating the collective bargaining agreement's two-day rule.¹⁷⁶ The jury found his discharge to be malicious. The circuit court jury awarded Peters \$171,697 for back pay; \$513,410 for front pay; \$200,000 for aggravation, inconvenience, humiliation, embarrassment, and loss of dignity; and \$1,000,000 for punitive damages.¹⁷⁷

On appeal, Rivers Edge argued, *inter alia*, that the circuit court erred when it upheld the jury's \$513,410 front pay award. Rivers Edge argued that the workers' compensation statutes are "silent" as to whether front pay is a proper remedy and that because those statutes simply codified the common law retaliatory discharge action, only common law remedies for a workers' compensation retaliatory discharge claim should be available. Reinstatement was not a remedy for retaliatory discharge; thus, Rivers Edge argued that "front pay, which is a substitute for reinstatement," is not an appropriate remedy.¹⁷⁸

Second, Rivers Edge argued that the legislature did not intend for a workers' compensation discrimination employee to be reinstated because it knew "the law in existence at the time it enacted the workers' compensation discrimination statutes," and "front pay should not be read into the statutes as a remedy for such discrimination when the Legislature made no such designation."¹⁷⁹

Third, Rivers Edge contended that "even if front pay [was] an appropriate remedy in this case," there was not enough evidence to support the amount of front pay that was awarded.¹⁸⁰ This contention was based on the fact that the amount awarded was speculative because it extended too far into the future.¹⁸¹

The circuit court, in its discretion, made a preliminary finding that reinstatement was not an appropriate remedy for this case.¹⁸² Thus, the two issues in this case were whether Peters was entitled to a front pay award and, if so, whether the evidence supported the amount awarded.¹⁸³

The WVSCA responded that the relevant statute is a codification of the common law, which at that time found that a retaliatory discharge of an

¹⁷⁵ *Id.*; see W. VA. CODE § 23-5A-3(b) (1990); W. VA. CODE § 23-5A-1 (1978).

¹⁷⁶ *Peters*, 680 S.E.2d at 801.

¹⁷⁷ *Id.* at 803.

¹⁷⁸ *Id.* at 810.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² *Id.* at 811.

¹⁸³ *Id.*

employee for filing a workers' compensation claim "sounds in tort."¹⁸⁴ Reinstatement was not historically recognized as a "remedy for the tort of retaliatory discharge" because this tort was "fashioned as an exception" to at-will employment; therefore, damages were the appropriate remedy.¹⁸⁵ But other states, such as Tennessee and Illinois, have accepted reinstatement as a remedy for retaliatory discharge.¹⁸⁶ West Virginia recognizes reinstatement to be an appropriate remedy for an employee who is wrongfully discharged for whistleblowing,¹⁸⁷ wrongfully discharged in violation of tenure,¹⁸⁸ and wrongfully discharged for a good-faith violation of a civil right.¹⁸⁹ But reinstatement is not appropriate when "the wrongful discharge is precipitated by or results in a hostile relationship between the employee and employer";¹⁹⁰ in those cases, front pay is "an acceptable substitute."¹⁹¹ The decision of whether reinstatement is appropriate "rest[s] within a circuit court's discretion."¹⁹² Thus, the WVSCA extended the option of receiving reinstatement or front pay to retaliatory discharge actions.¹⁹³

The next question for the WVSCA to consider was whether the amount of front pay that the jury awarded—\$513,410—was excessive.¹⁹⁴ The jury considered Peters's age, retirement, and life expectancy.¹⁹⁵ The WVSCA stated that Rivers Edge could not argue that Peters failed to mitigate his damages because his discharge was malicious.¹⁹⁶ Thus, the WVSCA upheld the jury's award of front pay and, in doing so, explicitly extended the *Mason County* rule to front pay awards. The WVSCA said that the factors that the jury could consider—age, retirement, and life expectancy—were facts that had been considered in "calculating awards for lost future earnings in other cases."¹⁹⁷

¹⁸⁴ *Id.* (citing *Shanholtz v. Monongahela Power Co.*, 270 S.E.2d 178,182 (W. Va. 1980)).

¹⁸⁵ *Id.* (quoting *Harless v. First Nat'l Bank of Fairmont*, 289 S.E.2d 692, 703 (W. Va. 1982)).

¹⁸⁶ *Id.* at 812 (citing *Eddins v. Geneva Farms, Inc.*, 877 F. Supp. 413, 421 (E.D. Tenn. 1994); *Skirpan v. United Air Lines, Inc.*, No. 83 C 0447, 1989 WL 84463, at *3 (N.D. Ill. July 21, 1989) (memorandum decision)).

¹⁸⁷ *Id.* (citing *Thompson v. Town of Alderson*, 600 S.E.2d 290 (W. Va. 2004)).

¹⁸⁸ *Id.* (citing *Syl. pt. 3, Bonnell v. Carr*, 294 S.E.2d 910 (W. Va. 1982)).

¹⁸⁹ *Id.* at 801 (citing *Martin v. Mullins*, 294 S.E.2d 161, 165 (W. Va. 1982)).

¹⁹⁰ *Id.* at 812.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.* at 813.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 814.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 815.

3. An Opportunity to Untangle *Mason County*: How *Burke-Parsons-Bowlby Corp. v. Rice* Could Modify *Mason County* and Its Progeny

Jerold John Rice Jr. was employed as a staff accountant and credit manager at the Burke-Parsons-Bowlby Corporation (“BPB”), a Ripley, West Virginia-based company that produced railroad ties, fence posts, fence boards, guardrail posts, and log homes.¹⁹⁸ Rice worked at BPB’s corporate headquarters in Ripley.¹⁹⁹ When BPB’s controller retired in August 2006, Rice filled the position.²⁰⁰ He worked as BPB’s controller until March 2009, which is when the position was eliminated.²⁰¹

On April 1, 2008, Stella-Jones Inc., a Canadian corporation, acquired BPB through a share acquisition through its holding corporation, Stella-Jones U.S. Holding Corporation.²⁰² After the acquisition, Stella-Jones initially retained all BPB employees, including Rice.²⁰³ At that time, Rice was forty-six years old.²⁰⁴ In August 2008, Stella-Jones appointed Eric Vachon as Vice President of Finance of U.S. Operations.²⁰⁵ Vachon was from the Canadian headquarters, and his job was to “facilitate the integration of the operations of the BPB and Stella-Jones operations.”²⁰⁶ Vachon was Rice’s supervisor.²⁰⁷ In February 2009, Vachon sought to re-structure the BPB’s Ripley finance department.²⁰⁸ This re-structuring eliminated the controller position at BPB, which was the position that Rice held at that time.²⁰⁹ Vachon informed Rice that his position—and therefore his employment—had been eliminated.²¹⁰ Rice was forty-seven years old.²¹¹

On April 9, 2009, Rice filed suit against BPB alleging age discrimination under the West Virginia Human Rights Act.²¹² At trial in Jackson County, West Virginia, the court applied the *Mason County* rule, and

¹⁹⁸ Brief for the Petitioners, *supra* note 96, at 2.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.* at 3.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 5.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

the jury found in Rice's favor and awarded him \$142,659 in unmitigated back pay and \$1,991,332 in unmitigated front pay.²¹³ The front pay award is the amount of twenty years of front pay because the expert witness calculated the front pay award based on a retirement age of sixty-seven years.²¹⁴ The award totaled \$2,113,991, and the jury did not assign punitive damages.²¹⁵

On appeal, BPB argued that the "application of and extension of *Mason County* to allow an unmitigated, unlimited award of back pay and front pay damages . . . amounts to a punitive damage award without any of the due process constraints applied to awards of punitive damages."²¹⁶ BPB argued that the "standard articulated by *Mason County* for determining if an employer's action [sic] are malicious is essentially a punitive damages standard."²¹⁷ Therefore, the *Garnes* factors for due process considerations must be included in the jury instructions.²¹⁸

In response to BPB's arguments, Rice argued that the WVSCA has already established that "unmitigated wage loss damages and punitive damages are not the same. Even when not mitigated, a wage loss award is still compensatory in nature."²¹⁹ However, the case upon which Rice relies is a memorandum decision that actually was appealed and set to be argued before the WVSCA adjacent to *Burke-Parsons v. Rice* on September 5, 2012.²²⁰ The case settled prior to oral argument.²²¹ Rice further argues that because wage loss damages are compensatory in nature and not punitive, the *Garnes* factors cannot apply.²²²

Oral argument was held on September 5, 2012.²²³ During argument, the justices raised a number of policy considerations, including many that surround

²¹³ *Id.* at 6, 10.

²¹⁴ Brief for the Respondents at 14, *Burke-Parsons-Bowlby Corp.*, No. 11-0183 (W. Va. June 27, 2011), available at <http://www.courtswv.gov/supreme-court/calendar/2012/briefs/sept12/11-0183respondent.pdf>.

²¹⁵ Brief for the Petitioners, *supra* note 96, at 6. Also, it was revealed during argument that Rice is now deceased. Oral Argument, *Burke-Parsons-Bowlby Corp.*, No. 11-0183 (W. Va. Sept. 5, 2012) (The Supreme Court of Appeals of West Virginia does not publish transcripts or provide recordings of oral arguments, but author was present during the hearing).

²¹⁶ Brief for the Petitioners, *supra* note 96, at 30–31.

²¹⁷ *Id.* at 33.

²¹⁸ *Id.* at 31; see Syl. pt. 3, *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897 (W. Va. 1991). For a discussion of the factors, see *infra* Part VI.B.

²¹⁹ Brief for the Respondents, *supra* note 214, at 17 (quoting *W. Va. Am. Water Co. v. Nagy*, No. 101229 (W. Va. June 15, 2011) (memorandum decision)).

²²⁰ *Argument Docket: Sept. 5, 2012*, *supra* note 96.

²²¹ Oral Argument, *supra* note 215.

²²² Brief for the Respondents, *supra* note 214, at 17.

²²³ *Argument Docket: Sept. 5, 2012*, *supra* note 96.

the collateral source rule.²²⁴ For example, Justice Robin Jean Davis questioned why the defendant should get the benefit of the plaintiff seeking and finding other employment.²²⁵ Both BPB and Rice stated that West Virginia is the only state in the country with a damages rule like *Mason County*.²²⁶

Both parties argued well, and the substance of the discussion revealed the murkiness and undefined nature of the *Mason County* rule. For example, Rice argued that the WVSCA has found all wage loss damages—including those provided by *Mason County*—to be compensatory, yet Rice then justified *Mason County*'s very existence using the collateral source rule as an example.²²⁷ The problem is that the collateral source rule is punitive in nature; it was created to address a tort where the goal was not only to make the injured party whole but to also, quite intentionally, punish the defendant. Additionally, Rice stated that the *Mason County* rule is akin to the collateral source rule and provided the example of a car accident and compared the employer to the tortfeasor driver and the employee to the innocent victim.²²⁸ Justice Brent D. Benjamin responded that there are “different policy considerations” at play when using the collateral source rule in that context.²²⁹

Justice Benjamin is correct. The policy considerations present in a situation where the collateral source rule *should* be applied and the policy considerations present in wrongful discharge cases are quite different. The problem is that the *Mason County* damages rule *is* the collateral source rule applied in an employment context. Therefore, it is time to untangle *Mason County*'s thirty years of growth, clearly state its policy considerations, and articulate its exact standards and proper method of application.

V. *MASON COUNTY*, THE COLLATERAL SOURCE RULE, AND WRONGFUL DISCHARGE CASES

As discussed previously, the collateral source rule allows the injured party to recover from both the wrongdoer and a third-party, collateral source. The *Mason County* rule operates in the same manner. In recent years, some jurisdictions have decided to apply the collateral source rule to wrongful discharge cases,²³⁰ but it usually involves unemployment benefits or workers

²²⁴ Oral Argument, *supra* note 215. The justices present were Justice Margaret L. Workman, Justice Davis, Chief Justice Menis E. Ketchum, Justice Brent D. Benjamin, and Justice Thomas E. McHugh.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ Marks, *supra* note 44, at 1430 n.243.

compensation benefits.²³¹ As of yet, this author has not found a rule like the *Mason County* rule in any other jurisdiction. No other jurisdictions appear to have considered whether or not the contracts rule of mitigation of damages should be replaced with the collateral source rule in a wrongful discharge case. As the WVSCA noted in *Mason County*, this is the majority rule.²³² It is contradictory that, in the midst of reigning in the collateral source rule concerning medical professional liability, the West Virginia courts have actually expanded the scope of this rule in the labor and employment context. The *Mason County* rule is applied to all types of employment cases without discrimination: at-will, union, and state employees covered by contracts (e.g., teachers). Indeed, not only have the courts indiscriminately applied the rule, but the WVSCA continued to broaden the rule's reach. *Mason County* began with back pay: a maliciously discharged employee could receive a flat back pay award. But in 2009, only three years ago, the WVSCA extended the no-duty-of mitigation rule to front pay: now a maliciously discharged employee can receive front pay for the rest of his or her life. Other jurisdictions temper the potency of front pay awards by requiring employees to make reasonable efforts to search for comparable employment and cutting off front pay awards when subsequent employment begins or reasonably *should* have begun.²³³ But the WVSCA removed that duty and now allows a maliciously discharged employee to recover future earnings from the time of discharge until retirement age without ever having to search for new employment.

Another question to consider is why the WVSCA applied the de facto collateral source rule to labor and employment situations. Is the *Mason County* rule truly necessary to punish the defendant and compensate the wrongfully discharged plaintiff, or are these policy concerns satisfied by the fact that—under the majority rule—a wrongfully discharged employee can already recover compensatory, emotional distress, and punitive damages? After all, the majority rule requires only that the employee take *reasonable* measures to find *comparable* employment. The employee is not required to uproot her home or take an inferior job. The *Mason County* court said that it was rejecting the

²³¹ “In some cases, the cause of action is less important than the source of the collateral benefits. When the benefit is derived from the state’s unemployment compensation statute, legislative intent becomes a factor in deciding whether the collateral source rule should apply.” Ulciny, *supra* note 9, at 280; *see also* Joseph M. Perillo, *The Collateral Source Rule in Contract Cases*, 46 SAN DIEGO L. REV. 705 (2009).

²³² *Mason County III*, 295 S.E.2d 719, 723 (W. Va. 1982).

²³³ *See e.g.*, *Cassino v. Reichhold Chemicals, Inc.*, 817 F.2d 1338, 1347 (9th Cir. 1987) (“It is clear that front pay awards, like backpay awards, must be reduced by the amount plaintiff could earn using reasonable mitigation efforts.”); *Whittlesey v. Union Carbide Corp.*, 742 F.2d 724, 728 (2d Cir. 1984) (“[T]he duty to mitigate damages by seeking employment elsewhere significantly limits the amount of front pay available.”); *Kempfer v. Automated Finishing, Inc.*, 564 N.W.2d 692, 701 (Wis. 1997) (“In those situations where reinstatement is not feasible an award of front pay is still limited by the concepts of foreseeability and mitigation.”).

“primitive rule” of awarding a flat back pay award in every case and that it also wanted to alleviate the financial burden on the state and government (i.e., taxpayers).²³⁴ But taking a closer look at the policies behind the collateral source rule provides better understanding of the rule’s actual effect and perhaps the court’s motive.

There are several policies for the collateral source rule, and some have even waffled over the decades as the rule has been swamped with controversy. Some groups argue that the collateral source rule should be discarded because it provides the plaintiff with a double recovery.²³⁵ Others argue that double recovery should not be a concern because it is better to reward the plaintiff—the injured party—than the defendant.²³⁶ Another group argues that there is no way to fully compensate a tort victim for the wrong that has been done to him.²³⁷ Yet others say that the blameworthy defendant should not be able to benefit in any way from payments made to the plaintiff; the defendant should have to pay the full amount of the injury he has caused the plaintiff regardless of whether the plaintiff has been partially or fully compensated by a third party.²³⁸

No matter the motive, the effect of the rule is to benefit the plaintiff and punish the defendant. On its face this may seem appropriate, but by extending the rule to front pay, the West Virginia courts have opened the monetary floodgates. This now means that if an employer discharges an employee and a jury happens to find it malicious (and malice is not well-defined), that employer is now responsible for paying not only back pay, emotional distress damages, and punitive damages, but also the same amount of money as if he were to employ the plaintiff until retirement, which as in the *Burke-Parsons* case, could be twenty or more years. Emotional distress damages and punitive damages can be massive in quantity—the *Peters* plaintiff received one million dollars in punitive damages alone. The question becomes: what does this mean for labor and employment in West Virginia?

VI. RECOMMENDATIONS

Both the West Virginia courts and the legislature should consider what the employment and business environment in West Virginia. These high

²³⁴ *Mason County III*, 295 S.E.2d at 723.

²³⁵ Branton, *supra* note 11, at 885–86.

²³⁶ *Id.* at 884; see also Nora J. Pasmán-Green & Ronald D. Richards Jr., *Who is Winning the Collateral Source Rule War? The Battleground in the Sixth Circuit States*, 31 U. TOL. L. REV. 425, 429 (2000).

²³⁷ Branton, *supra* note 11, at 885 (citing *Hudson v. Lazarus*, 217 F.2d 344, 346 (D.C. Cir. 1954) (The basis reasoning behind this argument is that a plaintiff must pay the attorney out of his recovery; therefore, he does not receive the full recovery granted by the court.)).

²³⁸ *Id.* at 884–85 (citing *Grayson v. Williams*, 256 F.2d 61, 65 (10th Cir. 1958)).

damage awards will certainly affect the labor and employment markets just as they sparked a strong movement for tort reform. Thus, the WVSCA and legislature should start considering their options. Below are five options: the first is original and only applies to the instant problem, and the following four options have been used or considered in regard to limiting large awards to plaintiffs in employment actions.

A. *Eradicate the Malicious Discharge Exception to the Mason County Rule Requiring Employees to Mitigate Their Damages*

The first option is for the WVSCA to overrule the *Mason County* “malicious discharge” exception. The rule that discharged employees take reasonable steps to mitigate damages is not exceptional. It is not unusual. It is, as the court stated in *Mason County*, the majority rule. But the malicious discharge exception that the court carved out in *Mason County* in 1982 is both exceptional and unusual. Moreover, the exception is problematic for West Virginia’s business climate and work ethic, and it is unnecessary because the majority rule sufficiently addresses all relevant policy concerns.

First, if the state wishes to retain the businesses that already exist in West Virginia and to continue to grow the economy by attracting new businesses, then the state should not have a law that allows a discharged employee to receive unearned pay until retirement. If an employer has indeed maliciously discharged an employee, which is difficult to determine because “malice” is not defined, then perhaps that employer should be punished, which is the purpose of the collateral source rule. However, applying the collateral source rule to front pay as did the court in *Peters* is excessive. Compensatory damages for back and front pay, emotional distress damages, and punitive damages are perfectly adequate to make the plaintiff whole and to punish the employer for wrongdoing.

Second, the collateral source rule—as created in *Mason County* and extended to front pay in *Peters*—does not encourage plaintiff employees to seek new employment. This does not encourage a strong workforce. The majority rule does not *require* a plaintiff employee to seek new employment, but the wages he could have earned if he had reasonably done so will be deducted from his award. This is not unreasonable. The plaintiff will still receive what he is justly owed for being wrongfully discharged, and he will still be responsible for his own livelihood and for being a productive, engaged member of society.

Third, removing the malicious discharge exception properly addresses and provides equilibrium for both parties’ policy concerns while still ultimately placing the financial burden on the defendant. The majority rule is quite simple: it requires only that the plaintiff take reasonable steps to find comparable employment. Again, it does not require the employee to leave the local area to find employment, nor is she required to take an inferior job. The defendant will still be punished by punitive damages if the jury decides that the defendant

deserves such punishment. If the plaintiff finds comparable employment and her damages are thus mitigated, she will still be made whole by her back pay, front pay, and emotional distress awards (in addition to her punitive damage award). If the plaintiff is unable to find comparable employment, which may be especially challenging in a recession, she will be provided for by the defendant because the majority rule requires that the defendant pay her unmitigated front pay. In summary, if the plaintiff makes a reasonable effort to find comparable employment, she will be financially provided for either through her new job or by the defendant.

B. Apply the Garnes Factors to the Unmitigated Front and Back Pay Awards

Another option is applying the *Garnes* factors to unmitigated front and back pay awards as petitioner's counsel in *Burke-Parsons v. Rice* suggested. The premise of this argument is that the *Mason County* malicious discharge exception is punitive in nature.²³⁹ As Burke-Parson's counsel argued, "[t]he Due Process Clause requires a jury to measure entitlement to punitive damages by the amounts of harm suffered and prohibits 'grossly excessive or arbitrary punishments.'"²⁴⁰ In order to ensure that an award is constitutional, the *Garnes* factors should be used to weed out those awards that are arbitrary and excessive. The *Garnes* factors are as follows:

- (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.

²³⁹ Brief for the Petitioners, *supra* note 96, at 30–31.

²⁴⁰ *Id.* at 32 (citing *Perrine v. E.I. du Pont de Nemours & Co.*, 694 S.E.2d 815 (W. Va. 2010)).

(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.²⁴¹

Although this approach correctly recognizes that the malicious discharge exception is punitive in nature, it does not adequately address the problem. Overruling *Mason County* and adopting the majority rule is a more effective solution. Requiring courts to apply the *Garnes* factors to the wage loss awards does not change the fact that the plaintiff is still recovering both punitive damages and unmitigated wage loss awards. To apply the *Garnes* factors is adding more work for the courts, and it is an even more complicated task for jurors—who likely do not fully understand the differences among all the different types of damages and the need for due process constraints—to first determine the damage award and then try to apply the factors appropriately to reduce the award.

In sum, although this approach correctly states that the *Mason County* rule is punitive in nature and is inappropriate, it is not the best solution. It is administratively cumbersome. The best solution is to simply overrule *Mason County*, which would reinstate the majority rule: a plaintiff should make reasonable efforts to find comparable employment.

C. *Statutorily Reform Employment Law with an Arbitration Model*

Third, the legislature could consider reforming at-will employment using a model such as that proposed by Robert Bastress, a law professor at West Virginia University College of Law, in *A Synthesis and a Proposal for Reform of the Employment At-Will Doctrine*.²⁴² Professor Bastress discussed the conflicting interests of employers and employees in wrongful discharge litigation. He argues that employers do not have a “legitimate interest in retaining the right to unjustly fire an employee, [but] they do have valid, substantial interests in maintaining a dependable workforce and avoiding both extended litigation and the threat of six- or seven-figure verdicts.”²⁴³

²⁴¹ Syl. pt. 3, *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897, 899–900 (W. Va. 1991), modified by *Perrine*, 694 S.E.2d at 882–83.

²⁴² Bastress, *supra* note 32.

²⁴³ *Id.* at 346.

Employees have “substantial interests in a procedure that provides a fast, affordable remedy for a wrongful discharge” that is both reliable and fair.²⁴⁴

Professor Bastress proposes an “alternative system [that is] analogous to arbitration in the collective bargaining context.”²⁴⁵ This system would be a just-cause system, meaning that employees would be able to bring suit under a tort cause of action for any discharge that was not for just cause and would have access to all legal and equitable remedies.²⁴⁶ “Just cause” is a term of art that “encompasses inadequate performance, misconduct, and economic necessity.”²⁴⁷ Employers would then “be able to raise as a qualified defense the offer, or actual results, of an arbitration procedure that meets certain minimum standards.”²⁴⁸ Professor Bastress compares this to “buy[ing] the insurance of arbitration or run[ning] the risks of expensive litigation and a sizeable verdict.”²⁴⁹

In Professor Bastress’s arbitration model, the “arbitrator’s decision or the offer of arbitration should bar the employee’s tort recovery” if the arbitration meets the standards of his model.²⁵⁰ For the arbitration standards to be fair and adequate, they must include four elements. First, there must be “an opportunity for a full and fair hearing before an arbitrator who is (a) provided by the government; (b) selected by agreement of the employee, his representative, and the employer; or (c) selected by a neutral person or organization” that the parties have agreed upon.²⁵¹ Second, the employer should pay procedural costs.²⁵² Third, the arbitrator must have the discretion “to award partial or complete relief . . . including reinstatement, backpay, back benefits, and back seniority.”²⁵³ The fourth element requires that formal, timely notice of discharge be given to the employee.²⁵⁴ This notice must include the reason for discharge and “a description of the full range of rights available to the employee.”²⁵⁵

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ *Id.* at 347.

²⁴⁸ *Id.* at 346.

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 347.

²⁵¹ *Id.*

²⁵² *Id.* These costs include arbitration fees, the employee’s attorney fees, and any expert witness fees. *Id.*

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ *Id.* The list of rights must include “notice of the right to engage an attorney (or, at the employee’s election, some other representative) whose fee will be paid by the employer and to have the representative join in the selection of the arbitrator.” *Id.*

As with Montana's Wrongful Discharge Employment Act, Professor Bastress suggests that an exception be provided for probationary employees. An employer may require "an evaluation period as a means for selecting employees for permanent hiring and achieving the best possible workforce."²⁵⁶ At the conclusion of the probationary period, "the employer may release individuals without the same demonstration of just cause as would be required for permanent employees."²⁵⁷ For this exception to work, however, employers would have to provide "notice of the probationary status to employees and a specific, reasonable duration for the probationary status."²⁵⁸

D. Enact a Damages Limitation Statute

Fourth, the legislature could consider adopting a damage limitation statute that would prohibit the collateral source rule in labor and employment situations. West Virginia Code Section 55-7B-9a(a) applies to the Medical Professional Liability Act ("MPLA") and changes the way the collateral source rule is applied in MPLA lawsuits.²⁵⁹ This statute allows the defendant to show that the plaintiff has already received payments from other sources.²⁶⁰ The defendant would present this evidence after the verdict and before the judgment is entered.²⁶¹ The defendant can even produce evidence of future payments from collateral sources if the court determines that (1) the collateral source has a "preexisting contractual or statutory obligation . . . to pay the benefits;"²⁶² (2) there is a reasonable degree of certainty that the benefits "will be paid to the plaintiff for expenses the trier of fact has determined the plaintiff will incur in the future;"²⁶³ and (3) the amount of the future expenses is readily reducible to a sum certain.²⁶⁴ However, if the plaintiff made payments to secure the right to those collateral source benefits (such as insurance), the plaintiff may present evidence of such payments.²⁶⁵ The court can make findings of fact that will allow the plaintiff to receive a "net amount of collateral source payments."²⁶⁶ In

²⁵⁶ *Id.* at 349.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ See W. VA. CODE ANN. § 55-7B-9a (LexisNexis 2008); Thomas J. Hurney & Jennifer M. Mankins, *Medical Professional Liability Litigation in West Virginia: Part II*, 114 W. VA. L. REV. 573, 590 (2012).

²⁶⁰ Hurney & Mankins, *supra* note 259, at 590–91; see W. VA. CODE ANN. § 55-7B-9a.

²⁶¹ Hurney & Mankins, *supra* note 259, at 590–91; see W. VA. CODE ANN. § 55-7B-9a(a).

²⁶² Hurney & Mankins, *supra* note 259, at 590–91; see W. VA. CODE § 55-7B-9a(b).

²⁶³ Hurney & Mankins, *supra* note 259, at 590–91; see W. VA. CODE § 55-7B-9a(b).

²⁶⁴ Hurney & Mankins, *supra* note 259, at 590–91; see W. VA. CODE § 55-7B-9a(b).

²⁶⁵ Hurney & Mankins, *supra* note 259, at 590–91; see W. VA. CODE § 55-7B-9a(c).

²⁶⁶ Hurney & Mankins, *supra* note 259, at 590–91; see W. VA. CODE § 55-7B-9a(e).

other words, the plaintiff will receive the full benefit of having made those initial payments to secure the collateral source benefits. This way, the potential damages award is offset so that the plaintiff will not receive double what would otherwise be awarded but will still be compensated enough to punish the defendant.

This statute codifies what is essentially the mitigation of damages rule. Extending this statute to the labor and employment context would provide both employer and employee with certainty and predictability. However, because the court created the *Mason County* rule, it is probably best that the court be the entity to undo the rule.

E. The Montana Model: The Wrongful Discharge from Employment Act

Finally, the legislature could consider enacting a Wrongful Discharge from Employment Act (“WDEA”)²⁶⁷ as Montana did in 1987. This act defines wrongful discharge²⁶⁸ and the remedies a wrongfully discharged employee may recover.²⁶⁹ A discharge is wrongful if it was a retaliatory act against an employee who refused to violate a public policy or who reported a violation of public policy,²⁷⁰ if the discharge was not for good cause and the employee had already completed the probationary period of employment,²⁷¹ or if “the employer violated the express provisions of its own personnel policy.”²⁷² The WDEA requires that employers have a probationary period of employment, and during this period, the employment may be terminated at-will by either party.²⁷³ The employer may establish his own probationary period.²⁷⁴ If any employer does not set his own probationary period, the WDEA provides that the probationary period will be six months from the date of hire.²⁷⁵ The WDEA does allow employees to be discharged for good cause, which is defined as “reasonable job-related grounds for dismissal based on a failure to satisfactorily perform duties, disruption of the employer’s operation, or other legitimate business reason.”²⁷⁶

²⁶⁷ See MONT. CODE ANN. § 39-2-901 (2011).

²⁶⁸ *Id.* § 39-2-904.

²⁶⁹ *Id.* § 39-2-905.

²⁷⁰ *Id.* § 39-2-904(1)(a).

²⁷¹ *Id.* § 39-2-904(1)(b).

²⁷² *Id.* § 39-2-904(1)(c). Public policy is defined as “a policy in effect at the time of the discharge concerning the public health, safety, or welfare established by a constitutional provision, state, or administrative rule.” *Id.* § 39-2-903(7).

²⁷³ *Id.* § 39-2-904(2)(a).

²⁷⁴ *Id.* § 39-2-904(2)(b).

²⁷⁵ *Id.*

²⁷⁶ *Id.* § 39-2-903(5).

Under the WDEA, a wrongfully discharged employee may be awarded lost wages and fringe benefits for up to four years from the date of discharge.²⁷⁷ But even under the WDEA, the employee is still required to mitigate his damages by reasonably seeking other employment.²⁷⁸ If he does not seek other employment with reasonable diligence, the amount that he could have earned if he had fulfilled his obligation will be deducted from the amount awarded for lost wages.²⁷⁹ In addition to lost wages and fringe benefits, the wrongfully discharged employee may recover punitive damages if he establishes by clear and convincing evidence that the employer discharged him while engaging in actual fraud or actual malice.²⁸⁰ An employee cannot recover any other types of damages except those provided for in the WDEA:²⁸¹ lost wages and fringe benefits with interim earnings deducted and, when actual fraud or actual malice is proved by clear and convincing evidence, punitive damages. Adopting a similar statute in West Virginia would promote predictability and certainty for employers while providing security for the employee. However, this statute would also dramatically change West Virginia's employment landscape and overrule approximately one hundred years of case law supporting at-will employment. Therefore, simply overruling the Mason County malicious discharge exception is not only the most efficient and expedient option but also the one that best fits with the whole of West Virginia law.

VII. CONCLUSION

The collateral source rule has been active in the West Virginia labor and employment community since 1982 under the title of the *Mason County* rule, and the WVSCA extended this rule to front pay in *Peters*. Employers increasingly must pay larger damage awards to wrongfully discharged employees, and it is time for the West Virginia courts and legislature to consider the effects of this rule on West Virginia's employment and business environment. The court should overrule the *Mason County* rule in order to incentivize employees to seek new employment and to prevent enormous damage awards that hurt the West Virginia business economy. In the alternative, the West Virginia legislature could consider the *Garnes* factors

²⁷⁷ *Id.* § 39-2-905(1). This includes interest on the lost wages and fringe benefits. *Id.* Fringe benefits includes the "value of any employer-paid vacation leave, sick leave, medical insurance plan, disability insurance plan, life insurance plan, and pension benefit plan in force on the date of the termination." *Id.* § 39-2-903(4).

²⁷⁸ *Id.* § 39-2-905(1).

²⁷⁹ *Id.* However, before these interim earnings are deducted from the lost wages award, the employee may deduct any reasonable expenses he incurred in "searching for, obtaining, or relocating to new employment." *Id.*

²⁸⁰ *Id.* § 39-2-905(2).

²⁸¹ *Id.* § 39-2-905(3).

application to the award, collateral source reform such as the tort community is currently undergoing, a just cause statute that establishes exactly what damages an employer must pay in a wrongful discharge statute, or at-will employment reform that would lower damage awards and provide more certainty and predictability for all parties involved. These solutions will allow West Virginia to maintain an “open for business” environment and create predictability and certainty for both employee and employer.

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