

# **WEST VIRGINIA LEGISLATURE**

## **2017 REGULAR SESSION**

**Introduced**

### **House Bill 2159**

BY DELEGATES FLEISCHAUER, CAPUTO AND HORNBUCKLE

[ Introduced February 8, 2017; Referred  
to the Committee on Industry and Labor then the  
Judiciary.]

1 A BILL to amend the Code of West Virginia, 1931, as amended, by adding thereto a new article,  
 2 designated §21-3E-1, §21-3E-2, §21-3E-3, §21-3E-4, §21-3E-5, §21-3E-6, §21-3E-7,  
 3 §21-3E-8 and §21-3E-9, all relating to labor; providing for healthy workplaces by providing  
 4 remedies for hostile work environments; defining terms; providing an affirmative defense  
 5 for employers; banning retaliation in certain circumstances; providing an employer duty to  
 6 respond to third-party acts of malice; restricting applicability to employment practices not  
 7 covered by existing state laws on human rights or wrongful discharge; and providing  
 8 certain time limitations for commencing action.

*Be it enacted by the Legislature of West Virginia:*

1 That the Code of West Virginia, 1931, as amended, be amended by adding thereto a new  
 2 article, designated §21-3E-1, §21-3E-2, §21-3E-3, §21-3E-4, §21-3E-5, §21-3E-6, §21-3E-7, §21-  
 3 3E-8 and §21-3E-9, all to read as follows:

**ARTICLE 3E. THE HEALTHY AND SAFE WORKPLACE ACT.**

**§21-3E-1. Findings.**

1 The Legislature finds and declares that:  
 2 (1) The social and economic well-being of the state is dependent upon healthy and  
 3 productive employees;  
 4 (2) Between thirty-seven percent and fifty-nine percent of employees directly experience  
 5 health-endangering workplace bullying, abuse and harassment, and this mistreatment is  
 6 approximately four times more prevalent than sexual harassment alone;  
 7 (3) Workplace bullying, mobbing and harassment can inflict serious harm upon targeted  
 8 employees, including feelings of shame and humiliation, severe anxiety, depression, suicidal  
 9 tendencies, cardiovascular disease and symptoms consistent with posttraumatic stress disorder;  
 10 (4) Abusive work environments can have serious consequences for employers, including  
 11 reduced employee productivity and morale, higher turnover and absenteeism rates and increases  
 12 in medical and workers' compensation claims;

13 (5) If mistreated employees who have been subjected to abusive treatment at work cannot  
14 establish that the behavior was motivated by race, color, sex, sexual orientation, national origin  
15 or age, they are unlikely to be protected by the law against that mistreatment;

16 (6) Legal protection from abusive work environments should not be limited to behavior  
17 grounded in protected class status as that provided for under employment discrimination statuses;  
18 and

19 (7) Existing workers' compensation plans and common-law tort actions are inadequate to  
20 discourage this behavior or to provide adequate relief to employees who have been harmed by  
21 abusive work environments.

#### **§21-3E-2. Purpose.**

1 The Legislature states the purpose of this article is:

2 (1) To provide legal relief for employees who have been harmed, psychologically,  
3 physically or economically, by being deliberately subjected to abusive work environments; and

4 (2) To provide legal incentive for employers to prevent and respond to abusive  
5 mistreatment of employees at work.

#### **§21-3E-3. Definitions.**

1 For the purposes of this article:

2 "Abusive conduct" means conduct, including acts, omissions, or both, that a reasonable  
3 person would find hostile, based on the severity, nature, and frequency of the defendant's  
4 conduct. Abusive conduct may include, but is not limited to, repeated infliction of verbal abuse  
5 such as the use of derogatory remarks, insults and epithets; verbal or physical conduct of a  
6 threatening, intimidating or humiliating nature; the sabotage or undermining of an employee's  
7 work performance; or attempts to exploit an employee's known psychological or physical  
8 vulnerability. A single act normally will not constitute abusive conduct, but an especially severe  
9 and egregious act may meet this standard.

10 "Adverse employment action" means an action that includes, but is not limited to, a

11 termination, demotion, unfavorable reassignment, failure to promote, disciplinary action, or  
12 reduction in compensation.

13 "Abusive work environment" means an environment that exists when the defendant  
14 subjects an employee to abusive conduct so severe that it causes tangible harm to the employee.

15 "Constructive discharge" exists where: (A) The employee reasonably believed he or she  
16 was subjected to abusive conduct; (B) the employee resigned because of that abusive conduct;  
17 (C) prior to resigning, the employee brought to the employer's attention the existence of the  
18 abusive conduct and the employer failed to take reasonable steps to correct the situation. A  
19 constructive discharge is a termination and, therefore, an adverse employment action within the  
20 meaning of this article.

21 "Employer" includes private employers as well as the state or any subdivision thereof, any  
22 county, municipality, unit of local government, school district, community college district, municipal  
23 or public corporation, or state university.

24 "Psychological harm" means the material impairment of a person's mental health, as  
25 established by competent evidence.

26 "Physical harm" means the material impairment of a person's physical health or bodily  
27 integrity, as established by competent evidence.

28 "Tangible harm" means psychological harm or physical harm.

#### **§21-3E-4. Unlawful employment practices.**

1 (a) It is an unlawful employment practice under this article to subject an employee to an  
2 abusive work environment as defined by this article. For the purposes of this article, expression  
3 protected by the First Amendment of the Constitution of the United States and Article III of the  
4 West Virginia Constitution including the exercise of free speech, free expression and free exercise  
5 of religion or expression of religiously based views may not be considered "abusive conduct"  
6 unless the intent is to intimidate or harass.

7 (b) It is an unlawful employment practice under this article to retaliate in any manner

8 against an employee who has opposed any unlawful employment practice under this article, or  
9 who has made a charge, testified, assisted or participated in any manner in an investigation or  
10 proceeding under this article, including, but not limited to, internal complaints and proceedings,  
11 arbitration and mediation proceedings and legal actions.

**§21-3E-5. Employer liability and defense.**

1 (a) An employer is vicariously liable for an unlawful employment practice, as defined by  
2 this article, committed by its employee.

3 (b) Where the alleged unlawful employment practice does not include an adverse  
4 employment action, it is an affirmative defense for an employer if:

5 (1) The employer exercised reasonable care to prevent and correct promptly any  
6 actionable behavior; and

7 (2) The complainant employee unreasonably failed to take advantage of appropriate  
8 preventive or corrective opportunities provided by the employer.

**§21-3E-6. Employee liability and defense.**

1 (a) An employee may be individually liable for an unlawful employment practice as defined  
2 by this article.

3 (b) It is an affirmative defense for an employee only that the employee committed an  
4 unlawful employment practice, as defined in this article, at the direction of the employer, under  
5 threat of an adverse employment action.

**§21-3E-7. Relief.**

1 (a) Where a defendant has been found to have committed an unlawful employment  
2 practice under this article, the court may enjoin the defendant from engaging in the unlawful  
3 employment practice and may order any other relief that it considers appropriate, including, but  
4 not limited to, reinstatement or removal of the offending party from the complainant's work  
5 environment. The plaintiff may also recover from the defendant appropriate compensation for  
6 back pay, front pay, medical expenses, emotional distress, humiliation and loss of personal dignity

7 and punitive damages. The court shall also award the costs of litigation, including reasonable  
 8 attorney fees and witness fees, to the complainant.

9 (b) Where an employer has been found to have committed an unlawful employment  
 10 practice under this article that did not culminate in an adverse employment action, its liability for  
 11 damages for emotional distress may not exceed \$50,000, and it is not subject to punitive  
 12 damages. This provision does not apply to an individually named employee defendant.

**§21-3E-8. Procedures.**

1 (a) This article may be enforced solely by a private right of action with the right to a jury  
 2 trial.

3 (b) An action under this article must be commenced no later than one year after the last  
 4 act that constitutes the alleged unlawful employment practice.

**§21-3E-9. Effect on other legal relationships.**

1 The remedies provided in this article are in addition to any remedies provided under any  
 2 other law, and this article does not relieve any person from any liability, duty, penalty or  
 3 punishment provided by any other law, except that if an employee receives workers'  
 4 compensation for medical costs for the same injury or illness pursuant to both this article and the  
 5 Workers' Compensation Act, or compensation under both this article and that act in cash  
 6 payments for the same period of time not working as a result of the compensable injury or illness  
 7 or the unlawful employment practice, the payments of workers' compensation shall be reimbursed  
 8 from compensation paid under this article.

NOTE: The purpose of this bill is to create a new cause of action to deter workplace bullying. This bill makes it an unlawful employment practice to subject an employee to an abusive work environment that exists when the defendant, acting with malice, subjects an employee to abusive conduct so severe that it causes tangible harm to the employee. Further, this bill makes it an unlawful employment practice to retaliate in any manner against an employee who has made a charge, testified, assisted or participated in any manner against an employee who has made a charge, testified, assisted or participated in any manner in an investigation or proceeding regarding bullying in the workplace.

Strike-throughs indicate language that would be stricken from a heading or the present law, and underscoring indicates new language that would be added.