

**Senate Bill No. 598**

(By Senator Unger (By Request))

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[Introduced February 21, 2011; referred to the Committee on  
Labor; and then to the Committee on the Judiciary.]

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

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

That the Code of West Virginia, 1931, as amended, be amended  
by adding thereto a new article, designated §21-3E-1, §21-3E-2,

1 §21-3E-3, §21-3E-4, §21-3E-5, §21-3E-6, §21-3E-7, §21-3E-8 and §21-  
2 3E-9, all to read as follows:

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

4 **§21-3E-1. Findings.**

5 The Legislature hereby finds and declares that:

6 (a) The social and economic well-being of the state is  
7 dependent upon healthy and productive employees;

8 (b) Between thirty-seven percent and fifty-nine percent of  
9 employees directly experience health-endangering workplace  
10 bullying, abuse and harassment, and this mistreatment is  
11 approximately four times more prevalent than sexual harassment  
12 alone;

13 (c) Workplace bullying, mobbing and harassment can inflict  
14 serious harm upon targeted employees, including feelings of shame  
15 and humiliation, severe anxiety, depression, suicidal tendencies,  
16 cardiovascular disease and symptoms consistent with posttraumatic  
17 stress disorder;

18 (d) Abusive work environments can have serious consequences  
19 for employers, including reduced employee productivity and morale,  
20 higher turnover and absenteeism rates and increases in medical and  
21 workers' compensation claims;

22 (e) If mistreated employees who have been subjected to abusive  
23 treatment at work cannot establish that the behavior was motivated  
24 by race, color, sex, sexual orientation, national origin or age,

1 they are unlikely to be protected by the law against such  
2 mistreatment;

3 (f) Legal protection from abusive work environments should not  
4 be limited to behavior grounded in protected class status as that  
5 provided for underemployment discrimination statuses; and

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

10 **§21-3E-2. Purpose.**

11 The Legislature states the purpose of this article is:

12 (a) To provide legal relief for employees who have been  
13 harmed, psychologically, physically or economically, by being  
14 deliberately subjected to abusive work environments; and

15 (b) To provide legal incentive for employers to prevent and  
16 respond to abusive mistreatment of employees at work.

17 **§21-3E-3. Definitions.**

18 For the purposes of this article:

19 (a) "Abusive conduct" means conduct, including acts,  
20 omissions, or both, that a reasonable person would find hostile,  
21 based on the severity, nature, and frequency of the defendant's  
22 conduct. Abusive conduct may include, but is not limited to:  
23 Repeated infliction of verbal abuse such as the use of derogatory  
24 remarks, insults and epithets; verbal or physical conduct of a

1 threatening, intimidating or humiliating nature; the sabotage or  
2 undermining of an employee's work performance; or attempts to  
3 exploit an employee's known psychological or physical  
4 vulnerability. A single act normally will not constitute abusive  
5 conduct, but an especially severe and egregious act may meet this  
6 standard.

7 (b) "Adverse employment action" means an action that includes,  
8 but is not limited to, a termination, demotion, unfavorable  
9 reassignment, failure to promote, disciplinary action, or reduction  
10 in compensation.

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

14 (d) "Constructive discharge" exists where: (1) The employee  
15 reasonably believed he or she was subjected to abusive conduct; (2)  
16 the employee resigned because of that abusive conduct; (3) prior to  
17 resigning, the employee brought to the employer's attention the  
18 existence of the abusive conduct and the employer failed to take  
19 reasonable steps to correct the situation. A constructive  
20 discharge shall be considered a termination, and, therefore, an  
21 adverse employment action within the meaning of this article.

22 (e) "Employer" includes private employers as well as the state  
23 or any subdivision thereof, any county, municipality, unit of local  
24 government, school district, community college district, municipal

1 or public corporation, or state university.

2 (f) "Psychological harm" means the material impairment of a  
3 person's mental health, as established by competent evidence.

4 (g) "Physical harm" means the material impairment of a  
5 person's physical health or bodily integrity, as established by  
6 competent evidence.

7 (h) "Tangible harm" means psychological harm or physical harm.

8 **§21-3E-4. Unlawful employment practices.**

9 (a) It is an unlawful employment practice under this article  
10 to subject an employee to an abusive work environment as defined by  
11 this article. For the purposes of this article, expression  
12 protected by the First Amendment of the Constitution of the United  
13 States and Article III of the West Virginia Constitution including  
14 the exercise of free speech, free expression and free exercise of  
15 religion or expression of religiously based views may not be  
16 considered "abusive conduct" unless the intent is to intimidate or  
17 harass.

18 (b) It is an unlawful employment practice under this article  
19 to retaliate in any manner against an employee who has opposed any  
20 unlawful employment practice under this article, or who has made a  
21 charge, testified, assisted or participated in any manner in an  
22 investigation or proceeding under this article, including, but not  
23 limited to, internal complaints and proceedings, arbitration and  
24 mediation proceedings and legal actions.

1   **§21-3E-5.   Employer liability and defense.**

2           (a) An employer shall be vicariously liable for an unlawful  
3 employment practice, as defined by this article, committed by its  
4 employee.

5           (b) Where the alleged unlawful employment practice does not  
6 include an adverse employment action, it shall be an affirmative  
7 defense for an employer if:

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

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

13   **§21-3E-6.   Employee liability and defense.**

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

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

20   **§21-3E-7.   Relief.**

21          (a) Where a defendant has been found to have committed an  
22 unlawful employment practice under this article, the court may  
23 enjoin the defendant from engaging in the unlawful employment  
24 practice and may order any other relief that is deemed appropriate,

1 including, but not limited to, reinstatement or removal of the  
2 offending party from the complainant's work environment. The  
3 plaintiff may also recover from the defendant appropriate  
4 compensation for back pay, front pay, medical expenses, emotional  
5 distress, humiliation and loss of personal dignity and punitive  
6 damages. The court shall also award the costs of litigation,  
7 including reasonable attorney fees and witness fees, to the  
8 complainant.

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

15 **§21-3E-8. Procedures.**

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

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

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

22 (a) The remedies provided in this article are exclusive to the  
23 provisions of this article, except that if an employee receives  
24 workers' compensation for medical costs for the same injury or

1 illness pursuant to both this article and the Workers' Compensation  
2 Act, or compensation under both this article and that act in cash  
3 payments for the same period of time not working as a result of the  
4 compensable injury or illness or the unlawful employment practice,  
5 the payments of workers' compensation shall be reimbursed from  
6 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.

This article is new; therefore, strike-throughs and underscoring have been omitted.