

1984

Front Pay: A Necessary Alternative to Reinstatement Under the Age Discrimination in Employment Act

Peter Janovsky

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

Recommended Citation

Peter Janovsky, *Front Pay: A Necessary Alternative to Reinstatement Under the Age Discrimination in Employment Act*, 53 Fordham L. Rev. 579 (1984).

Available at: <https://ir.lawnet.fordham.edu/flr/vol53/iss3/6>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

NOTES

FRONT PAY: A NECESSARY ALTERNATIVE TO REINSTATEMENT UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT

INTRODUCTION

The Age Discrimination in Employment Act¹ (ADEA or Act) prohibits employers from discharging or refusing to hire any individual because of age,² or from using age as a basis for taking any action that adversely

1. 29 U.S.C. §§ 621-634 (1982). The ADEA was enacted in 1967 after a report to Congress by the Secretary of Labor recommended the implementation of a "national policy with respect to hiring on the basis of ability rather than age." 113 Cong. Rec. 7076 (1967) (statement of Sen. Javits) (quoting U.S. Dep't of Labor, *The Older American Worker: Age Discrimination in Employment* (1965)). This report had been mandated by § 715 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-14 (1970), *amended by* § 2000e-14 (1976). See *infra* note 28 and accompanying text. President Johnson's recommendation that Congress pass a law prohibiting age discrimination in employment also contributed to the passage of the Act. Malin, *Employment Discrimination: The Age Discrimination in Employment Act—Protections, Prohibitions and Exceptions*, in 1 *Age Discrimination* § 16.01, at 16-41 (H. Eglit ed. 1984); see Special Message to the Congress Proposing Programs for Older Americans, 1 Pub. Papers 32, 37-38 (1967).

The Act originally protected workers between the ages of 40 and 65. See 29 U.S.C. § 631 (1976), *amended by* 29 U.S.C. § 631(a) (1982). The 1978 amendments extended coverage to persons at least 40 years old but less than 70. Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, 92 Stat. 189 (codified as amended at 29 U.S.C. § 631(a) (1982)); see *Kodish v. United Air Lines*, 463 F. Supp. 1245, 1249 (D. Colo. 1979), *aff'd*, 628 F.2d 1301 (10th Cir. 1980); ABA Division of Communications, *Your Rights Over Age 50*, at 9 (1981). There is no upper age limit for federal employees except those in certain occupations. See 29 U.S.C. §§ 631(b), 633a (1982); 1 Federal Regulation of Employment Service § 5:1 (1981) [hereinafter cited as FRES]; B. Schlei & P. Grossman, *Employment Discrimination Law* 482 & n.6 (2d ed. 1983). Legislation has been introduced to remove the upper age limit of 70 for all workers. See H.R. 6233, 98th Cong., 2d Sess., 130 Cong. Rec. E3793 (daily ed. Sept. 12, 1984) (statement of Rep. Young); H. Sheppard & S. Rix, *The Graying of Working America* 167 (1977).

The Act was amended in 1984 to extend protection to American citizens who are employed in foreign countries by American companies. See Older Americans Act Amendments of 1984, Pub. L. No. 98-459, § 802(a)(b), 1984 U.S. Code Cong. & Ad. News (98 Stat.) 1767, 1792 (to be codified at 29 U.S.C. § 632(f)); see 130 Cong. Rec. S11,864 (daily ed. Sept. 26, 1984) (Conference Committee Agreement amending the ADEA); 130 Cong. Rec. H9805 (daily ed. Sept. 19, 1984) (same).

2. 29 U.S.C. § 623(a)(1); see *Trans World Airlines v. Thurston*, 53 U.S.L.W. 4024, 4026 (U.S. Jan. 8, 1985); *EEOC v. Wyoming*, 460 U.S. 226, 232 (1983); *Lorillard, Inc., v. Pons*, 434 U.S. 575, 577 (1978); *Kelly v. American Standard, Inc.*, 640 F.2d 974, 977 (9th Cir. 1981); McConnell, *Age Discrimination in Employment*, in *Policy Issues in Work and Retirement* 159, 190 (H. Parnes ed. 1983); M. Doering, S. Rhodes & M. Schuster, *The Aging Worker* 16 (1983) [hereinafter cited as M. Doering].

The prohibitions in the Act originally applied only to private employers. See 29 U.S.C. § 630(b) (1970), *amended by* 29 U.S.C. § 630(b) (1982). The 1974 amendments, however, extended its coverage to state and local governments, Fair Labor Standards Act Amendments of 1974, Pub. L. No. 93-259, § 28(a)(2), 88 Stat. 55, 74 (codified as amended at 29 U.S.C. § 630(b) (1982)), and the federal government, *id.* § 28(b)(2), 88 Stat. at 74-75 (codified as amended at 29 U.S.C. § 633a (1982)); see Malin, *supra* note 1,

affects any individual's status as an employee.³ The Act's purposes are "to promote employment of older persons based on their ability rather

§ 16.11 (state governments); *id.* § 16.12 (federal government). The constitutionality of the extension to state employees was upheld in *EEOC v. Wyoming*, 460 U.S. 226, 243 (1983). See Note, *EEOC v. Wyoming and Application of the ADEA to State and Local Governments*, 1983 Ann. Surv. Am. L. 303, 304 (1984).

The Act also provides several exceptions to its prohibitions. See 29 U.S.C. § 623(f) (1982). For example, an employer may take any action otherwise prohibited if "age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age." *Id.* § 623(f)(1); see, e.g., *Houghton v. McDonnell Douglas Corp.*, 553 F.2d 561, 564-65 (8th Cir.) (age of test pilots not necessarily a bona fide occupational qualification when plaintiff can demonstrate requisite physical capability), *cert. denied*, 434 U.S. 966 (1977); *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 226 (5th Cir. 1976) (affirming lower court's finding reasonably necessary company policy of refusing to consider applications of individuals between 40 and 65 for initial employment as intercity bus drivers). See generally Comment, *Age Discrimination in Employment—The Bona Fide Occupational Qualification Defense—Balancing the Interest of the Older Worker in Acquiring and Continuing Employment Against the Interest in Public Safety*, 24 Wayne L. Rev. 1339 (1978) (discussion of interpretations of Bona Fide Occupational Qualification exception in ADEA).

Another exception arises when the employer "observe[s] the terms of . . . any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of [the Act], except that no such employee benefit plan shall excuse the failure to hire any individual." 29 U.S.C. § 623(f)(2) (1982). The 1978 amendments limited this exception by adding that "no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual . . . because of the age of such individual." Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 2(a), 92 Stat. 189, 189 (codified as amended at 29 U.S.C. § 623(f)(2) (1982)). This provision thus prohibits employers from putting into effect employee retirement plans that require retirement prior to age 70. 3 A. Larson & L. Larson, *Employment Discrimination* § 101.11(a), at 21-154 (1984); see *EEOC v. City of Altoona*, 723 F.2d 4, 7 (3d Cir. 1983) (eligibility for pension may not be a basis for mandatory retirement), *cert. denied*, 104 S. Ct. 2386 (1984).

A third exception permits retirement of an employee at 65 rather than 70 who "for the 2-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position" if the employee will receive on retirement pension benefits of at least \$44,000. 29 U.S.C. § 631(c)(1) (1982); see *Whittlesey v. Union Carbide Corp.*, 567 F. Supp. 1320, 1323-28 (S.D.N.Y. 1983) (Chief Labor Counsel of Union Carbide held not to be a bona fide executive), *aff'd*, 742 F.2d 724 (2d Cir. 1984); J. Krauskopf, *Advocacy for the Aging* § 11.2 (1983); 3 A. Larson & L. Larson, *supra*, § 101.12; Kandel, *Executive Exemption Under ADEA*, 9 Employee Rel. L.J. 672, 676 (1984).

3. 29 U.S.C. § 623(a)(2) (1982); see *EEOC v. Wyoming*, 460 U.S. 226, 232 & n.4 (1983); *Kelly v. American Standard, Inc.*, 640 F.2d 974, 977 n.1 (9th Cir. 1981) (quoting 29 U.S.C. § 623(a)(2) (1976)); *Marshall v. Baltimore & O.R.R.*, 461 F. Supp. 362, 371 (D. Md. 1978), *aff'd in part, rev'd in part on other grounds*, 632 F.2d 1107 (4th Cir. 1980), *cert. denied*, 454 U.S. 825 (1981); see generally C. Edelman & I. Siegler, *Federal Age Discrimination in Employment Law 85-88* (1978) (discussion of ADEA's protections and prohibitions); Malin, *supra* note 1, § 16.15 (same); O'Donnell, Lasser & Bailor, *The Federal Age Discrimination Statute: Basic Law, Areas of Controversy, and Suggestions for Compliance*, 15 Wake Forest L. Rev. 1, 4 (1979) (same) [hereinafter cited as *Basic Law*].

The ADEA also prohibits discriminatory actions by employment agencies and labor organizations. See 29 U.S.C. § 623(b)(c) (1982); *Air Line Pilots Ass'n v. Trans World Airlines*, 713 F.2d 940, 956 (2d Cir. 1983), *aff'd in part, rev'd in part on other grounds sub nom. Trans World Airlines v. Thurston*, 53 U.S.L.W. 4024 (U.S. Jan. 8, 1985); *Brennan v. Paragon Employment Agency, Inc.*, 356 F. Supp. 286, 288 (S.D.N.Y. 1973), *aff'd mem.*, 489 F.2d 752 (2d Cir. 1974); see generally 3 A. Larson & L. Larson, *supra* note 2,

than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment."⁴ In order to enforce the ADEA's prohibitions, Congress designed a two-part remedial scheme. The first part is based on the enforcement mechanism of the Fair Labor Standards Act (FLSA).⁵ The ADEA permits a plaintiff to utilize the FLSA's administrative mechanism to recover back pay from the date of the violation to the date of judgment.⁶ An ADEA plaintiff may also recover liquidated damages equal to his back pay award,⁷ but only for willful violations of the Act.⁸

In addition to this remedy, the ADEA provides a grant of other "legal or equitable relief as may be appropriate to effectuate the purposes of [the Act], including without limitation judgments compelling employment, reinstatement or promotion."⁹ Whether this remedial scheme allows a

§§ 99.12-13 (discussion of ADEA prohibitions applicable to employment agencies and labor organizations); Malin, *supra* note 1, §§ 16.19-21 (same).

4. 29 U.S.C. § 621(b) (1982); see *EEOC v. Wyoming*, 460 U.S. 226, 231 & n.3 (1983); *Ramirez v. Puerto Rico Fire Serv.*, 715 F.2d 694, 699 (1st Cir. 1983); *Macellaro v. Goldman*, 643 F.2d 813, 815 (D.C. Cir. 1980) (*per curiam*); *Zinger v. Blanchette*, 549 F.2d 901, 905 (3d Cir. 1977), *cert. denied*, 434 U.S. 1008 (1978); *Gill v. Union Carbide Corp.*, 368 F. Supp. 364, 367 (E.D. Tenn. 1973); ABA Division of Communications, *supra* note 1, at 9; M. Doering, *supra* note 2, at 16; J. Krauskopf, *supra* note 2, § 11.1, at 223.

5. The enforcement mechanism of the FLSA is found at 29 U.S.C. §§ 211, 216-217 (1982). The ADEA incorporates this scheme at 29 U.S.C. § 626(b) (1982). See *infra* notes 15-25 and accompanying text.

6. See 29 U.S.C. § 626(b) (1982). See *infra* notes 22-24 and accompanying text.

7. 29 U.S.C. § 626(b) (1982). See *infra* notes 22-23 and accompanying text.

8. 29 U.S.C. § 626(b) (1982). See *infra* note 24 and accompanying text.

9. 29 U.S.C. § 626(b) (1982); see *Lorillard, Inc. v. Pons*, 434 U.S. 575, 579 & n.5 (1978); *Whittlesey v. Union Carbide Corp.*, 742 F.2d 724, 727 (2d Cir. 1984); *Davis v. Combustion Eng'g, Inc.*, 742 F.2d 916, 923 (6th Cir. 1984); *EEOC v. Prudential Fed. Sav. & Loan Ass'n*, 741 F.2d 1225, 1231 (10th Cir. 1984), *vacated on other grounds*, 53 U.S.L.W. 3506 (U.S. Jan. 15, 1985); *Vazquez v. Eastern Air Lines*, 579 F.2d 107, 109-10 (1st Cir. 1978); *Koyen v. Consolidated Edison Co.*, 560 F. Supp. 1161, 1168 (S.D.N.Y. 1983); Note, *Punitive Damages Under the Age Discrimination in Employment Act*, 33 *Hastings L.J.* 457, 469 (1981) [hereinafter cited as *Punitive Damages*]. See *infra* notes 34, 56-61 and accompanying text.

The FLSA was amended in 1977 through the addition to 29 U.S.C. § 216(b) of language very similar to the ADEA's grant of "legal and equitable relief" to protect workers whose employers violate the FLSA's retaliatory discharge provision, 29 U.S.C. § 215(a)(3) (1982). Fair Labor Standards Act Amendments of 1977, Pub. L. No. 95-151, § 10, 91 Stat. 1245, 1252 (codified as amended at 29 U.S.C. § 261(b) (1982)). See *infra* note 69 for a discussion of the FLSA's retaliatory discharge provision. This amendment should not alter the analysis of the ADEA's language and legislative history, see *infra* notes 53-70, because "[a] statute of specific reference incorporates the provisions referred to from the statute at the time of adoption without subsequent amendments." 2A C. Sands, *Sutherland Statutory Construction* § 51.08, at 516 (4th ed. 1984). Thus, the ADEA's incorporation of the FLSA's remedies should be analyzed through reference to the FLSA as it existed in 1967. See *Read, Is Referential Legislation Worthwhile?*, 25 *Minn. L. Rev.* 261, 271-72 (1941). In addition, cases interpreting the ADEA's incorporation of the FLSA remedies have not included discussion of this additional language added to the FLSA. See *infra* notes 53, 55.

plaintiff to recover "front pay"¹⁰—future damages in lieu of reinstatement—has been disputed by the courts.¹¹ Some courts have held that Congress did not intend this remedy to be a part of ADEA relief¹² or that such an award would be overly speculative.¹³ Other courts, however, have allowed recovery of front pay on the ground that it is necessary to make a plaintiff whole when reinstatement is not possible.¹⁴

10. Front pay has been defined in various ways. See, e.g., *Whittlesey v. Union Carbide Corp.*, 742 F.2d 724, 727 (2d Cir. 1984) ("damages for loss of future earnings"); *Davis v. Combustion Eng'g, Inc.*, 742 F.2d 916, 923 (6th Cir. 1984) ("prospective damages"); *EEOC v. Prudential Fed. Sav. & Loan Ass'n*, 741 F.2d 1225, 1231 (10th Cir. 1984) ("future damages in lieu of reinstatement"), *vacated on other grounds*, 53 U.S.L.W. 3506 (U.S. Jan. 15, 1985); *Koyen v. Consolidated Edison Co.* 560 F. Supp. 1161, 1167 (S.D.N.Y. 1983) ("damages for future loss of earnings"); 2 H. Eglit, *Age Discrimination* § 18.13, at 18-53 (1984) ("damages in lieu of reinstatement"); 3 A. Larson & L. Larson, *supra* note 2, § 103.44, at 21-340 ("payment for wages that would have been earned subsequent to trial but for the alleged discrimination"); see also *Fadhl v. City and County of San Francisco*, 741 F.2d 1163, 1167 (9th Cir. 1984) (front pay defined in Title VII case); *Folz v. Marriott Corp.*, No. 82-0219 (W.D. Mo. Aug. 31, 1984) (available on LEXIS, Genfed library, Dist file) (front pay described and awarded in ERISA case).

11. *Whittlesey v. Union Carbide Corp.*, 742 F.2d 724, 727 (2d Cir. 1984); *Davis v. Combustion Eng'g, Inc.*, 742 F.2d 916, 922 (6th Cir. 1984); *EEOC v. Prudential Fed. Sav. & Loan Ass'n*, 741 F.2d 1225, 1231 (10th Cir. 1984), *vacated on other grounds*, 53 U.S.L.W. 3506 (U.S. Jan. 15, 1985); *Koyen v. Consolidated Edison Co.*, 560 F. Supp. 1161, 1167 (S.D.N.Y. 1983); 2 H. Eglit, *supra* note 10, § 18.13, at 18-53 to -54; 3 A. Larson & L. Larson, *supra* note 2, § 103.44, at 21-340. Compare *Kolb v. Goldring, Inc.*, 694 F.2d 869, 874-75 n.4 (1st Cir. 1982) (denying front pay) and *Wildman v. Lerner Stores Corp.*, 582 F. Supp. 80, 83-84 (D.P.R. 1984) (same) with *Whittlesey v. Union Carbide Corp.*, 742 F.2d 724, 728-29 (2d Cir. 1984) (granting front pay).

12. See, e.g., *Kiel v. Goodyear Tire & Rubber Co.*, 575 F. Supp. 847, 849 (N.D. Ohio 1983); *Grecco v. Spang & Co.*, 566 F. Supp. 413, 415 (W.D. Pa. 1983); *Jaffee v. Plough Broadcasting Corp.*, 19 Fair Empl. Prac. Cas. (BNA) 1194, 1195 (D. Md. 1979); *Mader v. Control Data Corp.*, 19 Fair Empl. Prac. Cas. (BNA) 1192, 1193-94 (D. Md. 1978); *Monroe v. Penn-Dixie Cement Corp.*, 335 F. Supp. 231, 235 (N.D. Ga. 1971).

13. See, e.g., *Wildman v. Lerner Stores Corp.*, 582 F. Supp. 80, 83-84 (D.P.R. 1984); *Helwig v. Suburban Chevrolet, Inc.*, 33 Fair Empl. Prac. Cas. (BNA) 1261, 1266-67 (D. Md. 1983); *Foit v. Suburban Bancorp.*, 549 F. Supp. 264, 267 (D. Md. 1982); *Jaffee v. Plough Broadcasting Corp.*, 19 Fair Empl. Prac. Cas. (BNA) 1194, 1195 (D. Md. 1979); *Mader v. Control Data Corp.*, 19 Fair Empl. Prac. Cas. (BNA) 1192, 1193-94 (D. Md. 1978); *Covey v. Robert A. Johnston Co.*, 19 Fair Empl. Prac. Cas. (BNA) 1188, 1192 (D. Md. 1977); *Monroe v. Penn-Dixie Cement Corp.*, 335 F. Supp. 231, 235 (N.D. Ga. 1971).

14. E.g., *Whittlesey v. Union Carbide Corp.*, 742 F.2d 724, 727-28 (2d Cir. 1984); *Davis v. Combustion Eng'g, Inc.*, 742 F.2d 916, 923 (6th Cir. 1984); *EEOC v. Prudential Fed. Sav. & Loan Ass'n*, 741 F.2d 1225, 1232 (10th Cir. 1984), *vacated on other grounds*, 53 U.S.L.W. 3506 (U.S. Jan. 15, 1985); *Gibson v. Mohawk Rubber Co.*, 695 F.2d 1093, 1100-01 (8th Cir. 1982); *Cancellier v. Federated Dep't Stores*, 672 F.2d 1312, 1319-20 (9th Cir.), *cert. denied*, 459 U.S. 859 (1982); *Whittlesey v. Union Carbide Corp.*, 567 F. Supp. 1320, 1330-31 (S.D.N.Y. 1983), *aff'd*, 742 F.2d 724 (2d Cir. 1984); *Ventura v. Federal Life Ins. Co.*, 571 F. Supp. 48, 50 (N.D. Ill. 1983); *Koyen v. Consolidated Edison Co.*, 560 F. Supp. 1161, 1168-69 (S.D.N.Y. 1983); *Hoffman v. Nissan Motor Corp.*, 511 F. Supp. 352, 355-57 (D.N.H. 1981); see also *O'Donnell v. Georgia Osteopathic Hosp., Inc.*, 748 F.2d 1543, 1551-52 (11th Cir. 1984) (front pay may be awarded if on remand "reinstatement is dismissed as a realistic alternative"). The Supreme Court vacated *EEOC v. Prudential Fed. Sav. & Loan Ass'n*, 741 F.2d 1225, 1232 (10th Cir. 1984), *vacated on other grounds*, 53 U.S.L.W. 3506 (U.S. Jan. 15, 1985), and remanded the case to the Tenth Circuit for reconsideration consistent with the Court's opinion in *Trans*

This Note argues that front pay should be awarded in appropriate circumstances. Part I examines ADEA remedies accepted in all jurisdictions and concludes that such remedies are insufficient to make whole certain workers who have been victims of discrimination. Part II analyzes the ADEA's language and legislative history and concludes that they support an award of front pay in appropriate circumstances. Part III examines the policy considerations involved, and Part IV discusses various approaches to implementing front pay and suggests methods for minimizing the possibly speculative nature of the award.

I. REMEDIES UNDER THE ADEA

When Congress enacted the ADEA, it incorporated certain aspects of the FLSA remedial scheme.¹⁵ The FLSA, which sets forth federal standards for minimum wages and overtime compensation,¹⁶ defines the back pay award recoverable by an injured employee as the amount unpaid because of the employer's violation of FLSA minimum standards.¹⁷ In

World Airlines v. Thurston, 53 U.S.L.W. 4024 (U.S. Jan. 8, 1985). See *infra* note 24 and accompanying text. Because the issue in *Thurston* did not involve front pay, *Prudential* remains valid precedent for the Tenth Circuit's view that front pay is an available remedy under the ADEA.

Other courts have recognized that front pay may be appropriate, but have denied it in particular cases for various reasons. See, e.g., *Ginsberg v. Burlington Indus. Inc.*, 500 F. Supp. 696, 701 (S.D.N.Y. 1980) (front pay may be appropriate, but not in cases in which plaintiff has not pursued reinstatement); *Robb v. Chemetron Corp.*, 17 Fair Empl. Prac. Cas. (BNA) 1535, 1545 (S.D. Tex. 1978) (noted some authority for front pay, but other damages and improved job position were sufficient to make plaintiffs whole); cf. *Blim v. Western Elec. Co.*, 731 F.2d 1473, 1479 (10th Cir.) (assumed but did not decide that front pay may be awarded, but concluded that repromotion was more appropriate than front pay), *cert. denied*, 105 S. Ct. 233 (1984); *Wehr v. Burroughs Corp.*, 619 F.2d 276, 283-84 (3d Cir. 1980) (plaintiff's failure to seek reinstatement precluded determination of the front pay issue); *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1022-23 (1st Cir. 1979) (discussed possible guidelines for front pay without making a final determination as to its appropriateness).

15. See 29 U.S.C. § 626(b) (1982) (ADEA incorporating aspects of FLSA, 29 U.S.C. §§ 211, 216-217 (1970)); see also *Lorillard, Inc. v. Pons*, 434 U.S. 575, 578-80 (1978) (noting incorporation); *Whittlesey v. Union Carbide Corp.*, 742 F.2d 724, 727 (2d Cir. 1984) (same); *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1020 (1st Cir. 1979) (same); 113 Cong. Rec. 31,253 (1967) (remarks of Sen. Yarborough); 113 Cong. Rec. 7076 (1967) (statement of Sen. Javits); *Punitive Damages*, *supra* note 9, at 460-61 (noting incorporation); Note, *Damage Remedies Under the Age Discrimination in Employment Act*, 43 Brooklyn L. Rev. 47, 64 & n.66 (1976) (same) [hereinafter cited as *Damage Remedies*].

16. See 29 U.S.C. § 206 (1982); 3 FRES, *supra* note 1, § 21:1; Steinberg, *Wages and Hours* 112-13 (1982); U.S. Dep't of Labor, *Handy Reference Guide to the Fair Labor Standards Act* 3-16 (1975) [hereinafter cited as *Reference Guide*].

17. 29 U.S.C. § 216(b) (1982). The FLSA provides: "Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages." *Id.*; see *Wirtz v. Malthor, Inc.*, 391 F.2d 1, 3 (9th Cir. 1968); *Neal v. Braughton*, 111 F. Supp. 775, 779 (W.D. Ark. 1953); Commerce Clearing House, *Guidebook to Federal Wage-Hour Laws* § 1007, at 299-300 (1974) [hereinafter cited as *Guidebook*]; *Reference Guide*, *supra* note 16, at 16.

addition, unless the employer can establish that the violation was in good faith,¹⁸ the plaintiff will recover "liquidated damages" in an amount equal to the back pay award.¹⁹ Thus, under the FLSA, plaintiffs can recover a net amount equal to twice their back pay award.²⁰

Under the ADEA, an employer generally is liable for back pay due an employee from the date of the violation to the date of judgment.²¹ As under the FLSA,²² an employer may also be liable for liquidated damages in an amount equal to the back pay award.²³ The ADEA departs from the FLSA, however, in that it requires the plaintiff to prove that the

18. 29 U.S.C. § 260 (1982). The Portal-to-Portal Pay Act, *id.* §§ 251-262, enables an employer subject to an FLSA action for recovery of unpaid minimum wages, overtime compensation and liquidated damages, see *infra* note 24 and accompanying text, to escape liability for liquidated damages by "show[ing] to the satisfaction of the court that the act or omission giving rise to such action was in good faith." 29 U.S.C. § 260 (1982); see *Flores Hernandez v. 65 de Infanteria Thom McAn, Inc.*, 516 F.2d 1293, 1296 (1st Cir. 1975); *Majchrzak v. Chrysler Credit Corp.*, 537 F. Supp. 33, 38 (E.D. Mich. 1981); *Martinez v. Phillips Petroleum Co.*, 283 F. Supp. 514, 524 (E.D. Idaho 1968), *aff'd per curiam*, 424 F.2d 547 (9th Cir. 1970); Guidebook, *supra* note 17, § 1007.10, at 306; Comment, *Age Discrimination: Monetary Damages Under the Federal Age Discrimination in Employment Act*, 58 Neb. L. Rev. 214, 225 n.76 (1978) [hereinafter cited as *Monetary Damages*].

19. See 29 U.S.C. § 216 (1982). The Supreme Court has held that liquidated damages under the FLSA are not penal in nature, but serve as "compensation for the retention of a workman's pay which might result in damages too obscure and difficult of proof for estimate other than by liquidated damages." *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 (1945); see *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 583-84 (1942); *Thompson v. Sawyer*, 678 F.2d 257, 281 (D.C. Cir. 1982); Guidebook, *supra* note 17, § 1007.10, at 306.

20. See 2 H. Eglit, *supra* note 10, § 18.14, at 18-61 n.2; Guidebook, *supra* note 17, at §§ 1007.3, 1007.10; Reference Guide, *supra* note 16, at 16; *Monetary Damages*, *supra* note 18, at 214, 224-25. See *supra* notes 18-19 and accompanying text.

21. See 29 U.S.C. § 626(b) (1982). The amount of back pay is usually the difference between the compensation the employee would have received absent the unlawful discharge and compensation actually received from other employment. *Fiedler v. Indianhead Truck Line*, 670 F.2d 806, 808 (8th Cir. 1982); see *Brennan v. Ace Hardware Corp.*, 495 F.2d 368, 373 (8th Cir. 1974). Such an award is within the discretion of the trial court. *Syvoock v. Milwaukee Boiler Mfg. Co.*, 665 F.2d 149, 160 (7th Cir. 1981). In addition to wages, courts have construed back pay to include pension benefits, see *Kelly v. American Standard, Inc.*, 640 F.2d 974, 986 n.20 (9th Cir. 1981); *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1021 (1st Cir. 1979); *Buchholz v. Symons Mfg. Co.*, 445 F. Supp. 706, 713 (E.D. Wis. 1978), health insurance benefits, see *Blackwell v. Sun Elec. Corp.*, 696 F.2d 1176, 1185 (6th Cir. 1983); *Syvoock v. Milwaukee Boiler Mfg. Co.*, 665 F.2d 149, 161 (7th Cir. 1981), disability benefits, see *Bishop v. Jelleff Assoc.*, 398 F. Supp. 579, 597 (D.D.C. 1974), accrued sick leave, see *Alford v. City of Lubbock*, 484 F. Supp. 1001, 1004-05 (N.D. Tex. 1979), *cert. denied*, 456 U.S. 975 (1982), and profit sharing benefits, see *Combes v. Griffin Television, Inc.*, 421 F. Supp. 841, 844 (W.D. Okla. 1976). See generally 3 A. Larson & L. Larson, *supra* note 2, § 103.41(b) (other financial benefits includible in back pay described); B. Schlei & P. Grossman, *supra* note 1, at 522-23.

22. See 29 U.S.C. § 216(b) (1982). See *supra* notes 18-20 and accompanying text.

23. 29 U.S.C. § 626(b) (1982); see *Lorillard, Inc. v. Pons*, 434 U.S. 575, 581 (1978); *Dickerson v. Deluxe Check Printers, Inc.*, 703 F.2d 276, 280 (8th Cir. 1983); *Syvoock v. Milwaukee Boiler Mfg. Co.*, 665 F.2d 149, 154 (7th Cir. 1981); *Kelly v. American Standard, Inc.*, 640 F.2d 974, 978 (9th Cir. 1981); 1 FRES, *supra* note 1, § 5:88, at 76; *Smith & Leggette, Recent Issues in Litigation Under the Age Discrimination in Employment Act*, 41 Ohio St. L.J. 349, 369 (1980).

employer's discriminatory action was willful in order to receive a liquidated damages award.²⁴ Another way in which the ADEA differs from the FLSA is that a conciliation process administered by the Equal Employment Opportunity Commission (EEOC) is a prerequisite to suit under the ADEA.²⁵

24. 29 U.S.C. § 626(b). Under the FLSA, the burden is on the employer to establish his good faith in order to avoid liability for liquidated damages. See *supra* notes 18-20 and accompanying text. The ADEA's willfulness standard was clarified by the Supreme Court in *Trans World Airlines v. Thurston*, 53 U.S.L.W. 4024 (U.S. Jan. 8, 1985). The Court stated that "a violation [of the ADEA] is 'willful' if 'the employer . . . knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA.'" *Id.* at 4028 (quoting *Air Line Pilots Ass'n v. Trans World Airlines*, 713 F.2d 940, 956 (2d Cir. 1983), *aff'd in part, rev'd in part on other grounds sub nom. Trans World Airlines v. Thurston*, 53 U.S.L.W. 4024 (U.S. Jan. 8, 1985)). The Court analogized to criminal standards for willfulness, arguing that the ADEA's legislative history shows that Congress intended a liquidated damage award to be punitive. *Thurston*, 53 U.S.L.W. at 4027. This conclusion was based in part on Senator Javits' remarks, 113 Cong. Rec. 7076 (1967), indicating that under the ADEA, double (liquidated) damages should substitute for the FLSA's criminal penalties for willful violations. *Thurston*, 53 U.S.L.W. at 4027. Compare 29 U.S.C. § 626(b) (1982) (ADEA's liquidated damages for willful violations) with *id.* § 216(a) (FLSA's criminal penalties for willful violations).

The Supreme Court has thus adopted the position of several lower courts that have held that liquidated damages are punitive in nature. See, e.g., *Kelly v. American Standard, Inc.*, 640 F.2d 974, 979 (9th Cir. 1981); *Kalli v. Great Am. Ins. Co.*, 516 F. Supp. 1273, 1275-76 (D. Minn. 1981) (quoting *Gifford v. B.D. Diagnostics*, 458 F. Supp. 462, 464 (N.D. Ohio 1978)); *Pavlo v. Stiefel Laboratories, Inc.*, 22 Fair Empl. Prac. Cas. (BNA) 489, 494 (S.D.N.Y. 1979). This view contradicts the Conference Committee Report to the 1978 ADEA amendments, which stated that "[t]he ADEA as amended by this act does not provide remedies of a punitive nature." H.R. Rep. No. 950, 95th Cong., 2d Sess. 14, reprinted in 1978 U.S. Code Cong. & Ad. News 528, 535. The Conference Committee supported this view by citing a Supreme Court FLSA case that held that liquidated damages are not a penalty but are available "in order to provide full compensatory relief for losses that are 'too obscure and difficult of proof for estimate other than by liquidated damages.'" *Id.*, reprinted in 1978 U.S. Code Cong. & Ad. News at 535 (quoting *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 583-84 (1942)). The Supreme Court has now indicated, however, that the liquidated damages provisions under the two acts should be regarded differently: Under the FLSA, liquidated damages do not serve a punitive function; there are criminal penalties available under that act. Liquidated damages are punitive, however, under the ADEA. See *Trans World Airlines v. Thurston*, 53 U.S.L.W. 4024, 4027 (U.S. Jan. 8, 1985). Courts have also distinguished the liquidated damages provisions in the two acts in another way. Whereas an employer may escape liability for liquidated damages under the FLSA by proving that his actions were in good faith, see *supra* note 18 and accompanying text, a majority of circuits that have considered the question have ruled that the good faith defense should not be available under the ADEA. See, e.g., *EEOC v. Prudential Fed. Sav. & Loan Ass'n*, 741 F.2d 1225, 1234 (10th Cir. 1984), *vacated on other grounds*, 53 U.S.L.W. 3506 (U.S. Jan. 15, 1985); *Hill v. Spiegel, Inc.*, 708 F.2d 233, 238 (6th Cir. 1983); *Goodman v. Heublein, Inc.*, 645 F.2d 127, 129-30 (2d Cir. 1981); *Kelly v. American Standard, Inc.*, 640 F.2d 974, 981 (9th Cir. 1981); *Wehr v. Burroughs Corp.*, 619 F.2d 276, 279 (3d Cir. 1980); *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1020 (1st Cir. 1979). But see *Hedrick v. Hercules, Inc.*, 658 F.2d 1088, 1096 (5th Cir. 1981) (employer may escape liquidated damages if actions taken in good faith).

25. 29 U.S.C. § 626(b) (1982). The Act requires that "[b]efore instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation,

A final difference between the FLSA and the ADEA is the wrong toward which each was directed. Whereas the FLSA is primarily concerned with redressing denial of minimum wages due employees,²⁶ the ADEA has as its focus the rights of workers who were discharged or not hired because of age discrimination.²⁷ In this sense it is more analogous to Title VII of the Civil Rights Act of 1964,²⁸ which prohibits employment discrimination on the basis of race, color, religion, sex or national origin.²⁹ The ADEA has its roots in Title VII³⁰ and shares that act's

conference, and persuasion." *Id.* ADEA enforcement was transferred from the Department of Labor to the EEOC as part of Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19,807 (1978), reprinted in 5 U.S.C.A. 111-12 app. (West Supp. 1984), and in 92 Stat. 3781 (1978). This transfer was challenged after the Supreme Court in *INS v. Chadha*, 103 S. Ct. 2764, 2788 (1983), questioned the validity of statutes containing legislative veto provisions such as the Reorganization Act. See *EEOC v. CBS*, 743 F.2d 969, 970-71 (2d Cir. 1984). *But see Muller Optical Co. v. EEOC*, 743 F.2d 380, 387-88 (6th Cir. 1984) (*Chadha* did not invalidate transfer of ADEA enforcement to the EEOC). Congress resolved this problem in 1984 by enacting the Reorganization Plan of 1978, thereby protecting the EEOC's authority to enforce the ADEA, the Equal Pay Act and § 501 of the Rehabilitation Act of 1973. Reorg. Act Amendments of 1984, Pub. L. No. 98-614, 1984 U.S. Code Cong. & Ad. News, 98 Stat. 3192 (to be codified at 5 U.S.C. §§ 903-912); see 130 Cong. Rec. S10,938-39 (daily ed., Sept. 11, 1984) (statement of Sen. Hatch).

The EEOC compliance manual describes the objectives of conciliation and specific conciliation devices. According to the manual, the specific objective of conciliation is "to achieve a just resolution of all violations found and to obtain an agreement with the respondent to eliminate the unlawful employment practices, to provide full retroactive and prospective relief for all aggrieved persons, and to insure that the practices do not recur in the future." EEOC Compl. Man. (BNA) 260:0001, at 323 (1982).

Courts have differed on the standards required for conciliation before a suit may be brought. The court in *Brennan v. Ace Hardware Corp.*, 495 F.2d 368, 374 (8th Cir. 1974), required "exhaustive" conciliation efforts before legal action could begin. The *Brennan* court enunciated a three part prerequisite to suit: The employer must be told what the Secretary and the Act require of him, he must be informed of the possibility of litigation should the matter not be resolved, and he must be given a chance to respond at least orally to the charges. *Id.* at 375. Other courts have questioned this "exhaustive" standard. See *Marshall v. Hartford Fire Ins. Co.*, 78 F.R.D. 97, 104 (D. Conn. 1978) ("reasonable" rather than "exhaustive" standard upheld); cf. *EEOC v. Chrysler Corp.*, 546 F. Supp. 54, 63 (E.D. Mich. 1982) (plaintiff may proceed directly to litigation if defendant states that it does not believe that it is guilty of wrongdoing), *aff'd*, 733 F.2d 1183 (6th Cir. 1984); *Marshall v. Baltimore & O.R.R.*, 461 F. Supp. 362, 370 (D. Md. 1978) (court may stay an action while conciliation proceeds anew), *aff'd in part, rev'd in part on other grounds*, 632 F. 2d 1107 (4th Cir. 1980), *cert. denied*, 454 U.S. 825 (1981). A less rigid application of the conciliation requirement was supported in the Senate Report of the Committee on Human Resources in consideration of the 1978 amendments to the ADEA. See S. Rep. No. 493, 95th Cong., 2d Sess. 3 (1977), reprinted in 1978 U.S. Code Cong. & Ad. News 504, 516.

26. See *supra* note 16 and accompanying text.

27. See *supra* notes 1-4 and accompanying text.

28. 42 U.S.C. §§ 2000e to 2000e-17 (1982); see *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979); *Lorillard, Inc. v. Pons*, 434 U.S. 575, 583-85 (1978); *Coke v. General Adjustment Bureau, Inc.*, 640 F.2d 584, 587 (5th Cir. 1981); *Chappell v. Emco Mach. Works*, 601 F.2d 1295, 1301 (5th Cir. 1979).

29. See 42 U.S.C. § 2000e-2 (1982).

30. The origins of the ADEA date from the passage of Title VII in 1964. See *EEOC v. Wyoming*, 460 U.S. 226, 229 (1983); C. Edelman & I. Siegler, *supra* note 3, at 69. Proposals to include the prohibitions of age discrimination in Title VII were rejected

dual purpose of making plaintiffs whole³¹ and deterring future discrimination.³² Because of this common purpose, courts have frequently con-

because of concern that such inclusion would jeopardize the passage of the Civil Rights Act and the belief that the question of age discrimination needed further study. See *EEOC v. Wyoming*, 460 U.S. 226, 229 (1983); 110 Cong. Rec. 2598-99 (1964) (statements of Rep. Goodell, Rep. Rooney and Rep. Roosevelt); Malin, *supra* note 1, § 16.01, at 16-3; see also Note, *The Age Discrimination in Employment Act of 1967*, 90 Harv. L. Rev. 380, 381 (1976) (discussing reasons for not including age in Title VII). Title VII did, however, mandate that the Secretary of Labor write and transmit to Congress "a complete study of the factors which might tend to result in discrimination in employment because of age and of the consequences of such discrimination on the economy and individuals affected." 42 U.S.C. § 2000e-14 (1970), *superseded by* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 10, 86 Stat. 103, 111 (codified as amended at 42 U.S.C. § 2000e-14 (1982)); see *EEOC v. Wyoming*, 460 U.S. 226, 230 (1983). This report became the basis for the ADEA. See *supra* note 1. See H.R. Rep. No. 805, 90th Cong., 1st Sess. 1-2, *reprinted in* 1967 U.S. Code Cong. & Ad. News 1st Sess., 2213, 2214 (describing origins of ADEA in Title VII); 113 Cong. Rec. 34,742-43 (1967) (remarks of Rep. Matsunaga on the need for the ADEA to extend to the older worker protections similar to those in Title VII).

31. See *Lorillard, Inc. v. Pons*, 434 U.S. 575, 584 (1978); 29 U.S.C. § 621 (1982). Cases under the ADEA have stressed its purpose of making whole a worker who has been unlawfully discharged. See, e.g., *Whittlesey v. Union Carbide Corp.*, 742 F.2d 724, 727-28 (2d Cir. 1984); *Davis v. Combustion Eng'g, Inc.*, 742 F.2d 916, 923 (6th Cir. 1984); *Cancellier v. Federated Dep't Stores*, 672 F.2d 1312, 1319 (9th Cir. 1982), *cert. denied*, 459 U.S. 859 (1982); *Geller v. Markham*, 635 F.2d 1027, 1036 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981); *Rodriguez v. Taylor*, 569 F.2d 1231, 1238 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978). Similarly, Title VII cases have stressed the aim of making plaintiffs whole. See, e.g., *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 764 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975); *Locke v. Kansas City Power & Light Co.*, 660 F.2d 359, 367-68 (8th Cir. 1981); see also 118 Cong. Rec. 7168 (1972) (section-by-section analysis of 1972 Act; § 706(g) of Title VII "intended to make victims . . . whole"). See generally *Punitive Damages*, *supra* note 9, at 473 (noting similarity of aims and prohibitions of ADEA and Title VII).

The legislative history of the ADEA reveals Congress' goals of protecting and increasing the employment opportunities of older workers. See H.R. Rep. No. 805, 90th Cong., 1st Sess. 7-8, *reprinted in* 1967 U.S. Code Cong. & Ad. News 2213, 2220-25 (purposes of the ADEA described in section-by-section analysis); see also 113 Cong. Rec. 34,745 (1967) (remarks of Rep. Daniels that the "affirmative purpose" of the ADEA is to promote the employment of older workers); 113 Cong. Rec. 34,744 (1967) (remarks of Rep. Pucinski that the ADEA will serve the need to "legislate against one of the cruelest forms of discrimination"). See *infra* note 68 and accompanying text.

32. ADEA cases have stressed the Act's purpose of eliminating discrimination against older workers. See *EEOC v. Wyoming*, 460 U.S. 226, 231-32 (1983); *Rodriguez v. Taylor*, 569 F.2d 1231, 1236-37 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978); *Macellaro v. Goldman*, 643 F.2d 813, 815 (D.C. Cir. 1980); *Koyen v. Consolidated Edison Co.*, 560 F. Supp. 1161, 1168 (S.D.N.Y. 1983). Remarks by members of Congress before passage of the ADEA reveal their emphasis on this purpose of the act. See, e.g., 113 Cong. Rec. 34,746-47 (1967) (remarks by Rep. Dent that the "essential purpose [of the ADEA is] the employment of older workers based on their ability"); 113 Cong. Rec. 7077 (1967) (statement of Sen. Javits on the need for legislation that will "protect the opportunities of our older workers to find employment").

Cases under Title VII have also emphasized its purposes of promoting employment and deterring discrimination. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975); *Rosenfeld v. Southern Pac. Co.*, 444 F.2d 1219, 1225 (9th Cir. 1971); *Bowe v. Colgate Palmolive Co.*, 416 F.2d 711, 720 (7th Cir. 1969); *EEOC v. Kallir, Philips, Ross, Inc.*, 420 F. Supp. 919, 926 (S.D.N.Y. 1976) (quoting *Albemarle Paper Co. v. Moody*,

sidered the remedies available under Title VII when interpreting the ADEA.³³

The ADEA's nature as an anti-discrimination statute accounts for its further departure from the FLSA remedies. Its provision for other "legal and equitable relief" should allow a court to restore a worker to the position he would have occupied had the employer's discriminatory acts not occurred.³⁴ The broad language of the statute permits remedies other than those specifically listed,³⁵ but the precise nature and scope of these additional remedies are still uncertain. Several district courts have read this broad remedial grant as justifying awards of compensatory damages for pain and suffering³⁶ or of punitive damages.³⁷ Nearly all of the cir-

422 U.S. 405, 421 (1975)), *aff'd mem.*, 559 F.2d 1203 (2d Cir.), *cert. denied*, 434 U.S. 920 (1977).

33. *See, e.g.*, *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 756 (1979); *Spagnuolo v. Whirlpool Corp.*, 717 F.2d 114, 119-20 (4th Cir. 1983); *Purtill v. Harris*, 658 F.2d 134, 137 (3d Cir. 1981), *cert. denied*, 103 S. Ct. 3110 (1983); *Coke v. General Adjustment Bureau, Inc.*, 640 F.2d 584, 594-95 (5th Cir. 1981); *Moses v. Falstaff Brewing Corp.*, 525 F.2d 92, 94 (8th Cir. 1975); *Laugesen v. Anaconda Co.*, 510 F.2d 307, 316 (6th Cir.), *cert. denied*, 422 U.S. 1045 (1975); *Rogers v. Exxon Research & Eng'g Co.*, 404 F. Supp. 324, 328 (D.N.J. 1975), *vacated on other grounds*, 550 F.2d 834 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978); *see also Damage Remedies, supra* note 15, at 61-62 & n.57 (noting ADEA-Title VII relationship); *Punitive Damages, supra* note 9, at 472-73 (same); *Monetary Damages, supra* note 18, at 215-16 (same).

34. *See Whittlesey v. Union Carbide Corp.*, 742 F.2d 724, 727-28 (2d Cir. 1984); *Davis v. Combustion Eng'g, Inc.*, 742 F.2d 916, 923 (6th Cir. 1984); *EEOC v. Prudential Fed. Sav. & Loan Ass'n*, 741 F.2d 1225, 1231 (10th Cir. 1984), *vacated on other grounds*, 53 U.S.L.W. 3506 (U.S. Jan. 15, 1985); *Geller v. Markham*, 635 F.2d 1027, 1036 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981); *Koyen v. Consolidated Edison Co.*, 560 F. Supp. 1161, 1168 (S.D.N.Y. 1983); *Basic Law, supra* note 3, at 31; *Punitive Damages, supra* note 9, at 468-69; *cf. Lorillard, Inc. v. Pons*, 434 U.S. 575, 581 (1978) ("Congress made plain its decision to follow a different course in the ADEA [than in the FLSA] by permitting 'such . . . equitable relief as may be appropriate to effectuate the purposes of [the ADEA] . . .'" (quoting 29 U.S.C. § 626 (1982))). *See infra* notes 53-70 and accompanying text.

35. *See Whittlesey v. Union Carbide Corp.*, 742 F.2d 724, 727-28 (2d Cir. 1984); *Geller v. Markham*, 635 F.2d 1027, 1036 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981); *Koyen v. Consolidated Edison Co.*, 560 F. Supp. 1161, 1168 (S.D.N.Y. 1983); *see also Smith & Leggette, supra* note 23, at 366 (discussing ADEA's additional grant of legal and equitable relief). The court in *Vazquez v. Eastern Airlines*, 579 F.2d 107 (1st Cir. 1978), although denying damages for pain and suffering, stressed that this denial should not "permanently foreclose[s] remedies which might prove essential to guarantee the integrity of the statute." *Id.* at 112.

36. *See, e.g.*, *Brenimer v. Great Western Sugar Co.*, 567 F. Supp. 218, 224 (D. Colo. 1983); *Wise v. Olan Mills Inc.*, 485 F. Supp. 542, 544-45 (D. Colo. 1980); *Flynn v. Morgan Guaranty Trust Co.*, 463 F. Supp. 676, 679 (E.D.N.Y. 1979); *Gifford v. B.D. Diagnostics*, 458 F. Supp. 462, 464 (N.D. Ohio 1978); *Combes v. Griffin Television, Inc.*, 421 F. Supp. 841, 847 (W.D. Okla. 1976); *Rogers v. Exxon Research & Eng'g Co.*, 404 F. Supp. 324, 327-33 (D.N.J. 1975), *vacated*, 550 F.2d 834 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978). Courts supporting compensatory damages for pain and suffering and punitive damages have argued that because the ADEA established a new statutory tort, "the panoply of usual tort remedies is available to recompense injured parties for all provable damages." *Rogers*, 404 F. Supp. at 327; *cf. Curtis v. Loether*, 415 U.S. 189, 195 (1974) ("a damages action under [Title VII] sounds basically in tort"). The district court in *Rogers* reasoned that out-of-pocket economic loss is not sufficient to compensate for

cuit courts of appeals, however, have rejected these awards,³⁸ some arguing that reinstatement and an award of back pay are sufficient to assuage the pain and suffering of a discharged ADEA plaintiff.³⁹

In some cases, however, reinstatement may be inappropriate or impossible.⁴⁰ For example, animosity between an employer and employee may be so great that reinstatement would create an untenable situation for both parties.⁴¹ When reinstatement is not appropriate, the only way to make a plaintiff whole may be a front pay award.⁴² Although it may be

the psychological effects of age discrimination, *Rogers*, 404 F. Supp. at 330, and found further support in the legislative history of the ADEA, *id.* at 330 n.3, and through analogy to other discrimination statutes, *id.* See generally 2 H. Eglit, *supra* note 10, § 18.20 (discussing arguments for compensatory damages for pain and suffering); Note, *Damages in Age Discrimination Cases: A Closer Look*, 17 U. Rich. L. Rev. 573, 580-82 (1983) (advocating compensatory damages for pain and suffering); *Monetary Damages, supra* note 18, at 234-43 (same).

37. See, e.g., *Kennedy v. Mountain States Tel. & Tel. Co.*, 449 F. Supp. 1008, 1010-11 (D. Colo. 1978); *Aaron v. Davis*, 414 F. Supp. 453, 463 (E.D. Ark. 1976); *Murphy v. American Motors Sales Corp.*, 410 F. Supp. 1403, 1405 (N.D. Ga. 1976), *rev'd*, 570 F.2d 1226 (5th Cir. 1978). See generally *Punitive Damages, supra* note 9 (arguing for punitive damages under the ADEA).

38. See, e.g., *Johnson v. Al Tech Specialties Steel Corp.*, 731 F.2d 143, 146-48 (2d Cir. 1984); *Perrell v. FinanceAmerica Corp.*, 726 F.2d 654, 657 (10th Cir. 1984); *Hill v. Spiegel, Inc.*, 708 F.2d 233, 235-36 (6th Cir. 1983); *Fiedler v. Indianhead Truck Line*, 670 F.2d 806, 809-10 (8th Cir. 1982); *Pfeiffer v. Essex Wire Corp.*, 682 F.2d 684, 687-88 (7th Cir.), *cert. denied*, 459 U.S. 1039 (1982); *Naton v. Bank of Cal.*, 649 F.2d 691, 698-99 (9th Cir. 1981); *Slatin v. Stanford Research Inst.*, 590 F.2d 1292, 1296 (4th Cir. 1979); *Vazquez v. Eastern Air Lines*, 579 F.2d 107, 109-10 (1st Cir. 1978); *Dean v. American Sec. Ins. Co.*, 559 F.2d 1036, 1038-40 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978); *Rogers v. Exxon Research and Eng'g Co.*, 550 F.2d 834, 839-42 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978); see J. Krauskopf, *supra* note 2, § 11.1 (Supp. 1984).

In denying these awards courts have reasoned that the ADEA's specific reference to the FLSA limits any monetary damages to back pay and liquidated damages as defined under that statute, see *Johnson v. Al Tech Specialties Steel Corp.*, 731 F.2d 143, 147-48 (2d Cir. 1984), that the legislative history of the ADEA makes no specific mention of pain and suffering damages, see *Fiedler v. Indianhead Truck Line*, 670 F.2d 806, 810 (8th Cir. 1982), that the legislative history of the 1978 amendments specifically precludes remedies of a punitive nature, see *Johnson v. Al Tech Specialties Steel Corp.*, 731 F.2d 143, 147-48 (2d Cir. 1984), that liquidated damages are available in the case of a willful violation of the Act, see *id.* at 147, that the possibility of large awards for pain and suffering would undermine the conciliation process by encouraging plaintiffs to resist settlement, see *id.*; *Rogers v. Exxon Research & Eng'g Co.*, 550 F.2d 834, 841 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978), and that Title VII has not been interpreted to permit these awards, *Covey v. Robert A. Johnston Co.*, 19 Fair Empl. Prac. Cas. (BNA) 1188, 1191 (D. Md. 1977).

39. See *Slatin v. Stanford Research Inst.*, 590 F.2d 1292, 1295-96 (4th Cir. 1979); *Rogers v. Exxon Research & Eng'g Co.*, 550 F.2d 834, 840 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978); *Dean v. American Sec. Ins. Co.*, 559 F.2d 1036, 1038 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978); *Vazquez v. Eastern Air Lines, Inc.*, 579 F.2d 107, 112 (1st Cir. 1978).

40. See *infra* notes 100-15 and accompanying text.

41. See *Whittlesey v. Union Carbide Corp.*, 742 F.2d 724, 727 (2d Cir. 1984) (Union Carbide exhibited "hostility and outrage" toward the plaintiff) (quoting 567 F. Supp. 1320, 1330 (S.D.N.Y. 1983)). See *infra* note 101 and accompanying text.

42. See *Whittlesey v. Union Carbide Corp.*, 742 F.2d 724, 728 (2d Cir. 1984); *Davis v. Combustion Eng'g Co.*, 742 F.2d 916, 923 (6th Cir. 1984); *Ventura v. Federal Life Ins.*

argued that front pay is not necessary because the plaintiff can secure other employment,⁴³ this argument fails to acknowledge that most older workers face great difficulties in obtaining similar employment.⁴⁴ Per-

Co., 571 F. Supp. 48, 50 (N.D. Ill. 1983); *Koyen v. Consolidated Edison Co.*, 560 F. Supp. 1161, 1168 (S.D.N.Y. 1983); *cf. O'Donnell v. Georgia Osteopathic Hosp., Inc.*, 574 F. Supp. 214, 222 (N.D. Ga. 1983) (front pay appropriate given plaintiff's position after discharge), *aff'd in part, rev'd in part on other grounds*, 748 F.2d 1543 (11th Cir. 1984); *Hoffman v. Nissan Motor Corp.*, 511 F. Supp. 352, 355 (D.N.H. 1981) (plaintiff awarded \$20,000 plus pension rights).

43. *See Covey v. Robert A. Johnston Co.*, 19 Fair Empl. Prac. Cas. (BNA) 1188, 1192 (D. Md. 1977) (front pay inappropriate when plaintiff has many employable years ahead); *Monroe v. Penn-Dixie Cement Corp.*, 335 F. Supp. 231, 235 (N.D. Ga. 1971) (plaintiff's prospects for future employment cut off employer's liability).

44. The report that was the basis for the ADEA recognized the difficulty older workers experience in gaining employment, *see U.S. Dep't of Labor, The Older American Worker: Age Discrimination in Employment 67-70 (1975)* [hereinafter cited as *Older American Worker*], and was included in the Statement of Findings and Purpose of the Act, *see 29 U.S.C. § 621(a)(3) (1982)*. Conditions have not significantly improved since the ADEA became law in 1968. Although older Americans generally have a low rate of unemployment, *see Bureau of Labor Statistics, U.S. Dep't of Labor, Employment and Earnings 51 (Jan. 1984)*, this data alone fails to reflect the serious problem of long term unemployment among older workers. *See Rones, The Labor Market Problems of Older Workers*, 106 Monthly Lab. Rev., May 1983, at 3, 10. Older workers "are far less likely to find a job than their younger counterparts." *Id.*; *see C. Edelman & I. Siegler, supra* note 3, at 7; 3 A. Larson & L. Larson, *supra* note 2, § 98.20. When they do find work it is likely to be at a much lower salary than their previous employment. Rones, *supra*, at 10 (citing data showing much lower wages of retirees who returned to work or displaced older workers who later found jobs). In 1965 it was found that older workers do not recover as quickly from recessions as do younger workers, *Older American Worker, supra*, at 67-70, and the situation is the same today. Comparative figures from 1982-84 show improvement in long term unemployment for all age groups during the 1983-84 recovery except workers between 55 and 64:

PERCENT OF TOTAL UNEMPLOYED IN EACH AGE GROUP WHO WERE UNEMPLOYED OVER 15 WEEKS

Age Group	Dec. 1982	Dec. 1983	Sept. 1984
16-19	27.6	21.8	14.6
20-24	36.3	31.1	22.5
25-34	39.1	38.5	28.4
35-44	42.4	40.9	33.1
45-54	45.3	42.7	37.2
55-64	43.9	45.2	52.0
65-	38.7	44.3	37.1

Adapted from Bureau of Labor Statistics, U.S. Dep't of Labor, *Employment and Earnings 33 (Jan. 1984)*, and from Bureau of Labor Statistics, U.S. Dep't of Labor, *Employment and Earnings 24 (Oct. 1984)*. In September 1984, the average duration of unemployment for workers age 55-64 was 27.8 weeks, compared to 13.5 weeks for workers 20-24 and 21.5 weeks for workers 45-54. Bureau of Labor Statistics, U.S. Department of Labor, *Employment and Earnings 24 (Oct. 1984)*. The relatively lower level of long-term unemployment for workers between 40-54 might be a rationale for front pay awards covering shorter periods for such plaintiffs. *See infra* note 209.

In spite of their problems in regaining jobs once unemployed, many older workers want to continue working. *See Harris, Myths and Realities of Life for Older Americans*, in *The New Old 90*, 112 (R. Gross, B. Gross, & S. Seidman ed. 1978) (poll of older Americans

mitting front pay awards would not solve the immediate problems of the increasing number of older Americans who want to continue working. The remedy is essential, however, to make discriminatorily discharged workers whole, given the difficulties they face in regaining their former salary, status and job satisfaction.⁴⁵ Without the front pay remedy, the scheme of relief designed to effectuate the purposes of the Act would be incomplete.

II. STATUTORY INTERPRETATION AND FRONT PAY

Support for the availability of front pay can be found in the ADEA's language⁴⁶ and legislative history.⁴⁷ The ADEA has been deemed a "remedial statute"⁴⁸—one that provides a remedy "for the enforcement of

showed that nearly one half preferred not to retire); *cf.* H. Sheppard & S. Rix, *supra* note 1, at 164-65 (excess of job applications for funded jobs reserved for older workers indicates desire of older Americans to continue to work). Many become discouraged, however, and give up their job search. McConnell, *supra* note 2, at 159-60. Most members of this group give up their search because they perceive that employers believe that older workers are too old for employment. Bureau of Labor Statistics, U.S. Department of Labor, Employment and Earnings 65 (Jan. 1984).

The problems older workers encounter in obtaining employment after losing a job may support more frequent use of preliminary injunctions in ADEA cases. See *EEOC v. Chrysler Corp.*, 546 F. Supp. 54, 66-71 (E.D. Mich. 1982), *aff'd*, 733 F.2d 1183 (6th Cir. 1984). In order to obtain a preliminary injunction, plaintiffs must prove four factors: a strong or substantial likelihood of success on the merits, irreparable injury, lack of substantial harm to others including the defendant, and that the public interest would be served by issuing a preliminary injunction. *Id.* at 66 (citing *Mason County Medical Ass'n v. Knebel*, 563 F.2d 256, 261 (6th Cir. 1977)). The difficulties of older workers discussed *supra* are strong evidence that a discharge would cause irreparable harm to a plaintiff in many cases. Furthermore, the legislative history of the ADEA shows recognition by members of Congress that discharge of a worker late in life may cause such harm. See *supra* note 30, *infra* notes 68, 212 and accompanying text. This legislative history would also lend support to the "public interest" element of the preliminary injunction test. The other two factors in the test would be determined on a case-by-case basis. See *EEOC v. Chrysler Corp.*, 546 F. Supp. at 66-71. For example, a finding of a high degree of animosity between the employer and employee may preclude a preliminary injunction on the basis of the "harm to others" element of the test. Such a finding of animosity might also preclude reinstatement after plaintiff's success on the merits, see *infra* note 101 and accompanying text, and be a basis for an award of front pay, see *infra* notes 116, 117 and accompanying text. See *infra* note 77 and accompanying text (Title VII awards of front pay because of antagonism between employer and employee).

45. "The willingness of federal appellate courts to condone front pay awards in ADEA actions is grounded in the perception that an older plaintiff is unlikely to easily relocate after being terminated following long service with one employer." Kaye, Scholer, Fierman, Hays & Handler, *Front Pay Remedy Sustained by Second, Sixth and Tenth Circuits*, Labor and Employment Law Newsletter, Sept. 1984, at 5 (available in files of *Fordham Law Review*) [hereinafter cited as *Front Pay Remedy*]. See *supra* notes 42-44 and accompanying text.

46. *O'Donnell v. Georgia Osteopathic Hosp., Inc.*, 748 F.2d 1543, 1551 (11th Cir. 1984). See *infra* notes 53-61 and accompanying text.

47. See *infra* notes 62-68 and accompanying text.

48. See *Holliday v. Ketchum, MacLeod & Grove, Inc.*, 584 F.2d 1221, 1229 (3d Cir. 1978); *Dart v. Shell Oil Co.*, 539 F.2d 1256, 1260 (10th Cir. 1976), *aff'd*, 434 U.S. 99 (1977); *EEOC v. Borden's Inc.*, 551 F. Supp. 1095, 1100 (D. Ariz. 1982), *aff'd*, 724 F.2d

rights and the redress of injuries"⁴⁹—because it affords a remedy to those who have been discriminated against on the basis of age.⁵⁰ As such, it should be given a liberal construction in order to “suppress the evil and advance the remedy” and “effectuate the remedial purpose for which it was enacted.”⁵¹ The place of front pay in the ADEA’s scheme of relief must be analyzed in terms of the degree to which it helps to achieve the Act’s two purposes: restoring plaintiffs to the position they would have occupied but for the illegal discrimination and deterring future age discrimination by employers.⁵²

A. Language, Legislative History and FLSA Precedent

Opponents of front pay have argued that the ADEA’s specific incorporation of the FLSA provisions limits any monetary relief under the statute to back pay and liquidated damages.⁵³ This narrow view fails to afford the ADEA the liberal construction it merits as a remedial statute.⁵⁴ In addition, the narrow view misinterprets the ADEA’s language. In passing the Act, Congress “exhibited both detailed knowledge of the FLSA provisions and their judicial interpretation and a willingness to depart from those provisions regarded as undesirable or inappropriate for incorporation.”⁵⁵ The most important departure from the FLSA is the ADEA’s broad grant of “legal and equitable relief . . . without limita-

1390 (9th Cir. 1984); *Jackson v. Alcan Sheet & Plate*, 462 F. Supp. 82, 87 (N.D.N.Y. 1978); 3 C. Sands, *supra* note 9, § 60.02, at 15.

49. 3 C. Sands, *supra* note 9, § 60.02, at 31.

50. *See Datt v. Shell Oil Co.*, 539 F.2d 1256, 1260, (10th Cir. 1976), *aff’d*, 434 U.S. 99 (1977); *Jackson v. Alcan Sheet & Plate*, 462 F. Supp. 82, 87 (N.D.N.Y. 1978); *Hall v. United States*, 436 F. Supp. 505, 509 (D. Minn. 1977).

51. 3 C. Sands, *supra* note 9, § 60.01, at 29; *see Vazquez v. Eastern Air Lines*, 579 F.2d 107, 109 (1st Cir. 1978); *Datt v. Shell Oil Co.*, 539 F.2d 1256, 1260 (10th Cir. 1976), *aff’d*, 434 U.S. 99 (1977); *Jackson v. Alcan Sheet & Plate*, 462 F. Supp. 82, 87 (N.D.N.Y. 1978); *E. Crawford, The Construction of Statutes* § 73, at 107 (1940).

52. *Koyen v. Consolidated Edison Co.*, 560 F. Supp. 1161, 1168 (S.D.N.Y. 1983). *See supra* notes 31, 32 and accompanying text.

53. *See EEOC v. Prudential Fed. Sav. & Loan Ass’n*, 741 F.2d 1225, 1235 (6th Cir. 1984) (Barrett, J., dissenting), *vacated on other grounds*, 53 U.S.L.W. 3506 (U.S. Jan. 15, 1985); *Blim v. Western Elec. Co.*, 731 F.2d 1473, 1481 (10th Cir.) (Seth, J., dissenting), *cert. denied*, 105 S. Ct. 233 (1984); *Grecco v. Spang & Co.*, 566 F. Supp. 413, 415 (W.D. Pa. 1983); *Ginsberg v. Burlington Indus., Inc.*, 500 F. Supp. 696, 700 (S.D.N.Y. 1980); *see also Wildman v. Lerner Stores Corp.*, 582 F. Supp. 80, 84 (D.P.R. 1984) (Congress specifically limited monetary damages to unpaid wages); *Helwig v. Suburban Chevrolet, Inc.*, 33 Fair Empl. Prac. Cas. (BNA) 1261, 1266-67 (D. Md. 1983) (front pay is beyond the scope of the statute’s remedial scheme); *Kiel v. Goodyear Tire & Rubber Co.*, 33 Fair Empl. Prac. Cas. (BNA) 1122, 1123 (N.D. Ohio 1983) (Congress limited “damage awards for loss of income only up to the time of trial”); *cf. Kolb v. Goldring, Inc.*, 694 F.2d 869, 874 n.4 (1st Cir. 1982) (ADEA “damages are ‘settled’ on the date of judgment”); *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1022 (1st Cir. 1979) (ADEA’s remedial grant is expansive, but remedies “limited for the most part by the remedies available under the FLSA”).

54. *See supra* notes 48-51 and accompanying text.

55. *Lorillard, Inc. v. Pons*, 434 U.S. 575, 581 (1978).

tion."⁵⁶ This additional language would be superfluous⁵⁷ if equitable relief were limited to the specific measures listed.⁵⁸ It follows that the additional grant of legal and equitable relief "without limitation" should encompass any other forms of relief that serve the same ends as those remedies enumerated.⁵⁹ If reinstatement is not appropriate,⁶⁰ only an award of front pay can effectuate the ADEA's purpose of making the plaintiff whole after a discriminatory discharge.⁶¹

The ADEA's legislative history also indicates that front pay is an appropriate remedy. During the debate preceding the Act's passage, Senator Javits spoke of the beneficial aspects of incorporating FLSA enforcement.⁶² His remarks have been cited as evidence of congressional intent to confine the ADEA remedies to those enumerated in the FLSA.⁶³ A full reading of Senator Javits' remarks, however, reveals a primarily administrative motive for incorporation of FLSA procedures.⁶⁴ The bill's sponsors sought to avoid the creation of a new bureaucracy solely to enforce the ADEA⁶⁵ and saw the Wage and Hour Division of

56. 29 U.S.C. § 626(b) (1982). See *supra* notes 9, 34 and accompanying text.

57. A fundamental principle of statutory interpretation is that effect must be given to all the provisions of a statute "so that no part will be inoperative or superfluous." 2A C. Sands, *supra* note 9, § 46.06.

58. See *Punitive Damages*, *supra* note 9, at 468-69.

59. See *Whittlesey v. Union Carbide Corp.*, 742 F.2d 724, 728 (2d Cir. 1984); *Davis v. Combustion Eng'g, Inc.*, 742 F.2d 916, 923 (6th Cir. 1984); *EEOC v. Prudential Fed. Sav. & Loan Ass'n*, 741 F.2d 1225, 1232 (10th Cir. 1984), *vacated on other grounds*, 53 U.S.L.W. 3506 (U.S. Jan. 15, 1985); *Cancellier v. Federated Dep't Stores*, 672 F.2d 1312, 1319 (9th Cir.), *cert. denied*, 459 U.S. 859 (1982); *Whittlesey v. Union Carbide Corp.*, 567 F. Supp. 1320, 1330 (S.D.N.Y. 1983), *aff'd* 742 F.2d 724 (2d Cir. 1984); *Koyen v. Consolidated Edison Co.*, 560 F. Supp. 1161, 1168 (S.D.N.Y. 1983); *O'Donnell v. Georgia Osteopathic Hosp., Inc.*, 574 F. Supp. 214, 218-19 (N.D. Ga. 1982), *aff'd in part, rev'd in part on other grounds*, 748 F.2d 1543 (11th Cir. 1984); *Pavlo v. Stiefel Laboratories, Inc.*, 22 Fair Empl. Prac. Cas. (BNA) 489, 494 (S.D.N.Y. 1979).

60. See *infra* notes 100-07 and accompanying text.

61. See *O'Donnell v. Georgia Osteopathic Hosp., Inc.*, 748 F.2d 1543, 1551 (11th Cir. 1984). See *supra* notes 41-45 and accompanying text.

62. See 113 Cong. Rec. 31,254 (1967); 113 Cong. Rec. 7076 (1967).

63. See, e.g., *Pfeiffer v. Essex Wire Corp.*, 682 F.2d 684, 686 (7th Cir.), *cert. denied*, 459 U.S. 1039 (1982); *Slatin v. Stanford Research Inst.*, 590 F.2d 1292, 1295 (4th Cir. 1979); *Vazquez v. Eastern Air Lines*, 579 F.2d 107, 110 (1st Cir. 1978); *cf. Fiedler v. Indianhead Truck Line*, 670 F.2d 806, 810 (8th Cir. 1982) (Except for slight modifications, Congress intended to incorporate fully FLSA remedies and procedures.).

64. Senator Javits stressed the functional aspects of enforcing the ADEA through the use of the Labor Department's Wage-Hour Office. See 113 Cong. Rec. 7076 (1967). There is no discussion of the exclusivity of the FLSA remedies. Senator Javits' later statement that the ADEA "incorporates by reference, to the greatest extent possible, the provisions of the [FLSA]," 113 Cong. Rec. 31,254 (1967), appeared in the context of a discussion of process rather than specific remedies. His analogy to the FLSA refers to enforcement techniques and procedure, *see id.*, rather than remedies. The ADEA's broad grant of "other legal and equitable relief," *see supra* notes 9, 34 and accompanying text, and its departure from the FLSA in its liquidated damages provisions, *see supra* note 24, provide additional evidence suggesting that incorporation of the FLSA scheme was primarily an administrative mechanism for the implementation of the ADEA and not a bar to remedies other than those specifically provided by the FLSA.

65. By avoiding the creation of a new agency, the bill's sponsors sought to avoid

the Department of Labor as an efficient mechanism for quick and inexpensive implementation of the Act.⁶⁶ Thus, the ADEA's reference to FLSA procedures should be viewed as a convenience rather than as a strict limit on the ADEA's remedial scope.⁶⁷

The legislative history also demonstrates Congress' acute sensitivity to the difficulty and frustration encountered by older Americans seeking re-entry into the job market.⁶⁸ It would frustrate Congress' emphasis on the plight of the older job seeker to deny full relief through front pay to a plaintiff who cannot return to his former job.

Thus, the ADEA's additional language and legislative history indicate that Congress intended to provide remedies beyond those available under the incorporated provisions of the FLSA. Furthermore, future damages in lieu of reinstatement have been upheld in FLSA actions brought in response to retaliatory discharges of workers who have filed complaints for violations of that act.⁶⁹ This precedent under the FLSA itself for

delays such as those encountered by the EEOC, which was "years behind in disposing of its docket." 113 Cong. Rec. 7076 (1967) (statement of Sen. Javits before the Labor Subcommittee of the Senate Labor and Public Welfare Committee).

66. *Id.*; see 113 Cong. Rec. 31,254 (1967) (statement of Sen. Javits).

67. See O'Donnell v. Georgia Osteopathic Hosp., Inc., 574 F. Supp. 214, 218-19 (N.D. Ga. 1982), *aff'd in part, rev'd in part on other grounds*, 748 F.2d 1543 (11th Cir. 1984); Pavlo v. Stiefel Laboratories, Inc., 22 Fair Empl. Prac. Cas. (BNA) 489, 493 (S.D.N.Y. 1979); Brief for the Plaintiff-Appellee at 24, Davis v. Combustion Eng'g, Inc., 742 F.2d 916 (6th Cir. 1984).

The Supreme Court has stressed the procedural motive for use of the FLSA mechanism. See *Lorillard, Inc. v. Pons*, 434 U.S. 575, 580 (1978). The Court's analysis of the FLSA incorporation as largely procedural is evident in the way in which it quotes the ADEA: "[W]e find a significant indication of Congress' intent in its directive that the ADEA be enforced in accordance with the 'powers, remedies and procedures' of the FLSA." *Id.* (quoting 29 U.S.C. § 626(b) (1976)) (Court's emphasis).

68. The debate before passage of the ADEA demonstrates Congress' great concern for the plight of older workers. Representative Randall noted that a person between 40 and 65 who loses his job "will have a most difficult time trying to find another one." 113 Cong. Rec. 34,750 (1967). This uncertain job market means that many in this age bracket are in "constant fear" of loss of their jobs. *Id.* According to Representative Dwyer, once an older worker loses a job "the chances against finding another like it are 6 to 1 against him" and "he faces the prospect of long months of frustration, fear, and insecurity as he searches for a new one." 113 Cong. Rec. 34,751-52 (1967); see 113 Cong. Rec. 34,751 (1967) (statement of Rep. Pepper); 113 Cong. Rec. 34,745 (1967) (statement of Rep. Eilberg); 113 Cong. Rec. 31,256-57 (1967) (statement of Sen. Young); 113 Cong. Rec. 7076 (1967) (statement of Sen. Javits). President Johnson expressed similar concerns in a Special Message to Congress, which helped lead to the passage of the Act. He noted that joblessness caused by age discrimination was "[i]n economic terms . . . a serious—and senseless—loss to a nation on the move. But the greater loss is the cruel sacrifice in happiness and well-being which joblessness imposes on these citizens and their families." Special Message to the Congress Proposing Programs for Older Americans, 1 Pub. Papers 32, 37 (1967).

69. Under the FLSA, it is unlawful "to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee." 29 U.S.C. § 215(a)(3) (1982).

In *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288 (1960), the Supreme Court

awards of front pay to unlawfully discharged employees might be sufficient to validate the remedy under the ADEA even absent Congress' additional language.⁷⁰

B. *Front Pay Under Analogous Statutes*

Analysis of front pay awards under statutes such as Title VII of the Civil Rights Act of 1964,⁷¹ the Employee Retirement Income Security Act (ERISA)⁷² and the Taft-Hartley Act⁷³ provide further support for the availability of front pay under the ADEA.

The Supreme Court has noted that the "prohibitions of the ADEA were derived *in haec verba* from Title VII."⁷⁴ Front pay is an accepted remedy under Title VII in certain circumstances.⁷⁵ The standard applied

gave lower courts wide discretion to fashion equitable relief under this section. *Id.* at 291. Relying on *DeMario*, the court in *Goldberg v. Bama Mfg. Corp.*, 302 F.2d 152 (5th Cir. 1962), held that future damages in lieu of reinstatement might be available to a wrongfully discharged plaintiff whose reinstatement is not appropriate. *Id.* at 156. An important rationale for the holding was that the employer should not be able to violate the FLSA without suffering some consequences. *Id.* The court saw a future damages award as a way to "promote the purpose of the Act by reassuring employees that their right to seek statutory relief will be protected." *Id.* at 156-57; see also *Wirtz v. Atlas Roofing Mfg. Co.*, 377 F.2d 112, 115 n.5 (5th Cir. 1967) (payment of \$100 made to plaintiff in lieu of reinstatement). The court in *Loeb v. Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979), analyzed this FLSA precedent as providing some support for ADEA damages in lieu of reinstatement. *Id.* at 1022-23. Although the *Loeb* court did not hold for or against front pay, its opinion has been cited by courts on both sides of the issue. *Compare Hoffman v. Nissan Motor Corp.*, 511 F. Supp. 352, 355-57 (D.N.H. 1981) (viewing *Loeb* analysis as validating front pay) with *Wildman v. Lerner Stores*, 582 F. Supp. 80, 83-84 (D.P.R. 1984) (*Loeb* cited as authority against front pay). See also Brief for the Plaintiff-Appellee at 22-25, *Davis v. Combustion Eng'g, Inc.*, 742 F.2d 916 (6th Cir. 1984) (analysis of *Loeb* as support for a front pay award).

70. . *Cf.* *Gibson v. Mohawk Rubber Co.*, 695 F.2d 1093, 1100-01 (8th Cir. 1982) (FLSA precedent supported front pay award under ADEA); *Hoffman v. Nissan Motor Corp.*, 511 F. Supp. 352, 357 (D.N.H. 1981) (same).

71. 42 U.S.C. §§ 2000e to 2000e-17 (1982). See *infra* notes 74-80 and accompanying text.

72. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified in scattered sections of 5, 18, 26, 29, 31, 42 U.S.C.). See *infra* notes 81-89 and accompanying text.

73. 29 U.S.C. §§ 141-197 (1982). See *infra* notes 90-93 and accompanying text.

74. *Lorillard, Inc. v. Pons*, 434 U.S. 575, 584 (1978). See *supra* notes 28-33 and accompanying text.

75. See, e.g., *Briseno v. Central Technical Community College Area*, 739 F.2d 344, 348 (8th Cir. 1984); *Weatherspoon v. Andrews & Co.*, 32 Fair Empl. Prac. Cas. (BNA) 1226, 1229 (D. Colo. 1983); *Thompson v. Sawyer*, 678 F.2d 257, 292-93 (D.C. Cir. 1982); *Locke v. Kansas City Power & Light Co.*, 660 F.2d 359, 369 (8th Cir. 1981); *EEOC v. Safeway Stores, Inc.*, 634 F.2d 1273, 1281-82 (10th Cir. 1980), *cert. denied*, 451 U.S. 986 (1981); *Fitzgerald v. Sirloin Stockade, Inc.* 624 F.2d 945, 955-58 (10th Cir. 1980); *Hill v. Western Elec. Co.*, 596 F.2d 99, 104 (4th Cir.), *cert. denied*, 444 U.S. 929 (1979); *White v. Carolina Paperboard Corp.*, 564 F.2d 1073, 1091 (4th Cir. 1977); *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 358 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978); *Patterson v. American Tobacco Co.*, 535 F.2d 257, 269 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976); *Ingram v. Madison Square Garden Center*, 482 F. Supp. 918, 926-27 (S.D.N.Y. 1979); *EEOC v. Pacific Press Publishing Ass'n*, 482 F. Supp. 1291, 1320 (N.D. Cal. 1979), *aff'd*, 676 F.2d 1272 (9th Cir. 1982); *Chewing v. Schlesinger*, 471 F.

in determining whether front pay should be awarded is the degree to which it will further the goals of ending illegal discrimination and rectifying the harm caused by such discrimination.⁷⁶ Front pay in lieu of reinstatement under Title VII has been justified in situations in which antagonism between employer and employee is so great as to preclude reinstatement⁷⁷ or in which no job is available for the plaintiff at the date of judgment.⁷⁸ Under both Title VII and the ADEA, front pay retains its basic nature as the monetary equivalent of the equitable remedy of reinstatement.⁷⁹ Furthermore, front pay is necessary to fulfill both statutes' specific and general purposes: making the plaintiff whole and deterring future discrimination.⁸⁰

ERISA⁸¹ is another federal statute with aims similar to those of the ADEA.⁸² ERISA was enacted to provide for minimum standards for all

Supp. 767, 776 (D.D.C. 1979); *EEOC v. Kallir, Philips, Ross, Inc.*, 420 F. Supp. 919, 926-27 (S.D.N.Y. 1976), *aff'd mem.*, 559 F.2d 1203 (2d Cir.), *cert. denied*, 434 U.S. 920 (1977).

76. See *Briseno v. Central Technical Community College Area*, 739 F.2d 344, 348 (8th Cir. 1984); *Thompson v. Sawyer*, 678 F.2d 257, 293 (D.C. Cir. 1982); *Patterson v. American Tobacco Co.*, 535 F.2d 257, 269 (4th Cir. 1976); *cf. Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975) (back pay award should fulfill Title VII's dual purpose of eradicating discrimination and making plaintiffs whole).

77. See *Fitzgerald v. Sirlain Stockade, Inc.*, 624 F.2d 945, 957 (10th Cir. 1980); *EEOC v. Kallir, Philips, Ross, Inc.*, 420 F. Supp. 919, 927 (S.D.N.Y. 1976), *aff'd mem.*, 559 F.2d 1203 (2d Cir.), *cert. denied*, 434 U.S. 920 (1977); *see also Fadhl v. City and County of San Francisco*, 741 F.2d 1163, 1167 (9th Cir. 1984) (front pay may be awarded when antagonism precludes reinstatement).

78. *Briseno v. Central Technical Community College Area*, 739 F.2d 344, 348 (8th Cir. 1984); *White v. Carolina Paperboard Corp.*, 564 F.2d 1073, 1091 (4th Cir. 1977); *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310, 358 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978); *Patterson v. American Tobacco Co.*, 535 F.2d 257, 268-69 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976); *Ingram v. Madison Square Garden Center*, 482 F. Supp. 918, 926-27 (S.D.N.Y. 1979); *EEOC v. Safeway Stores, Inc.*, 634 F.2d 1273, 1281-82 (10th Cir. 1980), *cert. denied*, 451 U.S. 986 (1981); *Chewning v. Schlesinger*, 471 F. Supp. 767, 776-77 (D.D.C. 1979).

79. "The Supreme Court has given approval to the concept of an award of 'front pay' in discrimination actions." *EEOC v. Safeway Stores, Inc.*, 634 F.2d 1273, 1281 (10th Cir. 1980) (citing *Franks v. Bowman Transp. Inc.*, 424 U.S. 747 (1976)), *cert. denied*, 451 U.S. 986 (1981).

Cases under the ADEA awarding front pay have made clear that it is the equivalent of the equitable remedy of reinstatement. See *Whittlesey v. Union Carbide Corp.*, 742 F.2d 724, 728 (2d Cir. 1984); *EEOC v. Prudential Fed. Sav. & Loan Ass'n*, 741 F.2d 1225, 1232 (10th Cir. 1984), *vacated on other grounds*, 53 U.S.L.W. 3506 (U.S. Jan. 15, 1984); *Gibson v. Mohawk Rubber Co.*, 695 F.2d 1093, 1100 (8th Cir. 1982); *Cancellier v. Federated Dep't Stores*, 672 F.2d 1312, 1319 (9th Cir.), *cert. denied*, 459 U.S. 859 (1982); *O'Donnell v. Georgia Osteopathic Hosp., Inc.*, 574 F. Supp. 214, 223 (N.D. Ga. 1983), *aff'd in part, rev'd in part on other grounds*, 748 F.2d 1543 (11th Cir. 1984); *Koyen v. Consolidated Edison Co.*, 560 F. Supp. 1161, 1169 (S.D.N.Y. 1983). Front pay has also been characterized as equitable relief in lieu of reinstatement under Title VII. *Fitzgerald v. Sirlain Stockade, Inc.*, 624 F.2d 945, 957 (10th Cir. 1980).

80. See *supra* notes 31, 32, 75-78 and accompanying text.

81. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified in scattered sections of 5, 18, 26, 29, 31, 42 U.S.C.).

82. See *Folz v. Marriott*, No. 82-0219 (W.D. Mo. August 31, 1984) (available on LEXIS, Genfed library, Dist file). Both statutes seek to prevent violations of employees'

private pension plans⁸³ and includes specific prohibitions designed to prevent "unscrupulous employers from discharging or harassing their employees in order to keep them from obtaining vested pension rights."⁸⁴ One court justified a front pay award to an unlawfully discharged ERISA plaintiff by both analysis of ERISA's legislative history and comparison of ERISA with other remedial statutes.⁸⁵ ERISA's provision for "other appropriate equitable relief"⁸⁶ is similar to the ADEA's grant of "legal and equitable relief . . . without limitation,"⁸⁷ and the two statutes have a shared philosophy of protecting employees against harassment and discharge.⁸⁸ In certain cases, a front pay award may be essential in order to carry out the aims of both acts.⁸⁹

Front pay awards under the Taft-Hartley Act⁹⁰—which gives employees the right to sue their unions⁹¹—have been upheld on the ground that federal courts have the power to fashion effective remedies for the impairment of federally created rights in the field of labor relations.⁹² Similarly, that power should allow a court to award front pay in an ADEA case.

The precedent for front pay under these similar federal statutes provides strong support for its acceptance under the ADEA. Such support is also found in the statute's language and legislative history.⁹³ In addition, there are persuasive policy arguments favoring the availability of the remedy.

rights relating to retirement and retirement plans. Compare 29 U.S.C. § 623(a) (1982) (ADEA) with *id.* §§ 1132, 1140 (ERISA).

83. 29 U.S.C. § 1001(2) (1982); see *Folz v. Marriott*, No. 82-0219 (W.D. Mo. August 31, 1984) (available on LEXIS, Genfed library, Dist file); ABA Division of Communications, *supra* note 1, at 21.

84. *West v. Butler*, 621 F.2d 240, 245 (6th Cir. 1980); see 29 U.S.C. §§ 1132(b)(1)(B), 1140 (1982).

85. See *Folz v. Marriott*, No. 82-0219 (W.D. Mo. August 31, 1984) (available on LEXIS, Genfed library, Dist file). The plaintiff in *Folz* was illegally discharged after he had contracted multiple sclerosis. The front pay award was justified under ERISA's purpose to "recreate the circumstances that would have existed absent an employer's illegal conduct." *Id.*

86. 29 U.S.C. § 1132(a)(3) (1982).

87. *Id.* § 626(b). See *supra* notes 9, 34 and accompanying text.

88. See *supra* notes 2, 4, 31, 32, 84 and accompanying text.

89. See *supra* notes 52, 84, 85 and accompanying text.

90. 29 U.S.C. §§ 141-197 (1982).

91. *Id.* § 185.

92. *De Arroyo v. Sindicato De Trabajadores Packinghouse*, 425 F.2d 281, 292 (1st Cir. 1970) (citing *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456-57 (1957)), *cert. denied*, 400 U.S. 877 (1970); *Thompson v. Brotherhood of Sleeping Car Porters*, 367 F.2d 489, 493 (4th Cir. 1966) (same), *cert. denied*, 386 U.S. 960 (1967); see also *Richardson v. Communication Workers*, 443 F.2d 974, 985 (8th Cir. 1971) (award of damages under the Taft-Hartley Act "should embrace future earnings"), *cert. denied*, 414 U.S. 818 (1973).

93. See *supra* notes 53-70 and accompanying text.

III. POLICY CONSIDERATIONS

Discussion of the ADEA's remedial scheme requires an analysis of the Act's emphasis on reinstatement,⁹⁴ conciliation⁹⁵ and avoidance of overly speculative remedies.⁹⁶ This section discusses the interaction of front pay with each of these considerations.

A. *Front Pay and Reinstatement: Necessary Complements in a Scheme of Equitable Relief*

The preferred remedy under the ADEA is reinstatement of the plaintiff to the job from which he was unlawfully discharged.⁹⁷ The statute expressly mentions reinstatement⁹⁸ and courts have deemed this equitable remedy to be appropriate in many cases.⁹⁹ In several situations, however, reinstatement has been held to be unacceptable for both employer and employee.¹⁰⁰ One such situation is when animosity is so severe that reinstatement would create untenable conditions for both parties.¹⁰¹ An-

94. See *infra* notes 97-117 and accompanying text.

95. See *infra* notes 118-33 and accompanying text.

96. See *infra* notes 134-54 and accompanying text.

97. *EEOC v. Prudential Fed. Sav. & Loan Ass'n*, 741 F.2d 1225, 1232 (10th Cir. 1984), *vacated on other grounds*, 53 U.S.L.W. 3506 (Jan. 15, 1985); *Blim v. Western Elec. Co.*, 731 F.2d 1473, 1479 (10th Cir.), *cert. denied*, 105 S. Ct. 233 (1984); *Babb v. Sun Co.*, 562 F. Supp. 491, 492 (D. Minn. 1983); see *Whittlesey v. Union Carbide Corp.*, 742 F.2d 724, 728 (2d Cir. 1984); *Dickerson v. Deluxe Check Printers, Inc.*, 703 F.2d 276, 280 (8th Cir. 1983); *Merkel v. Scovill, Inc.*, 570 F. Supp. 141, 144 (S.D. Ohio 1983); 3 A. Larson & L. Larson, *supra* note 2, § 103.30, at 21-324 to -326.

98. See 29 U.S.C. § 626(b) (1982). See *supra* note 9 and accompanying text.

99. See *Whittlesey v. Union Carbide Corp.*, 742 F.2d 724, 728 (2d Cir. 1984); *Cancellier v. Federated Dep't Stores*, 672 F.2d 1312, 1320 (9th Cir.), *cert. denied*, 459 U.S. 859 (1982); *Merkel v. Scovill, Inc.*, 570 F. Supp. 141, 143 (S.D. Ohio 1983); *Bishop v. Jelleff Assocs.*, 398 F. Supp. 579, 596 (D.D.C. 1974); 2 Eglit, *supra* note 10, § 18.14; 1 FRES, *supra* note 1, § 5:87.

100. See *infra* notes 101-15 and accompanying text.

101. See, e.g., *Whittlesey v. Union Carbide Corp.*, 742 F.2d 724, 729 (2d Cir. 1984); *EEOC v. Prudential Fed. Sav. & Loan Ass'n*, 741 F.2d 1225, 1232 (10th Cir. 1984), *vacated on other grounds*, 53 U.S.L.W. 3506 (U.S. Jan. 15, 1985); *Dickerson v. Deluxe Check Printers, Inc.*, 703 F.2d 276, 281 (8th Cir. 1983); *Cancellier v. Federated Dep't Stores*, 672 F.2d 1312, 1319 (9th Cir.), *cert. denied*, 459 U.S. 859 (1982); *Chern v. Ogden Food Serv. Corp.*, 33 Fair Empl. Prac. Cas. (BNA) 1547, 1548 (E.D. Pa. 1984); *Merkel v. Scovill, Inc.*, 570 F. Supp. 141, 144 (S.D. Ohio 1983); *Hoffman v. Nissan Motor Corp.*, 511 F. Supp. 352, 355 (D.N.H. 1981); *Combes v. Griffin Television, Inc.*, 421 F. Supp. 841, 846-47 (W.D. Okla. 1976). See *supra* note 78 (animosity in Title VII context).

In *Whittlesey v. Union Carbide*, 567 F. Supp. 1320 (S.D.N.Y. 1983), *aff'd*, 742 F.2d 724 (2d Cir. 1984), the plaintiff had been Chief Labor Counsel for Union Carbide, which mandatorily retired him at 65 under the bona fide executive exception of the ADEA. *Id.* at 1321; see 29 U.S.C. § 631(c)(1) (1982); *Kandel, supra* note 2, at 672-76. The district court ruled that *Whittlesey's* position did not fall in this category, 567 F. Supp. at 1328, and recommended front pay because reinstatement would have been disastrous for both parties, *id.* at 1330-31. Some courts have held that when antagonism results solely from litigation, it is not sufficient to preclude reinstatement. See, e.g., *Dickerson v. Deluxe Check Printers, Inc.*, 703 F.2d 276, 281 (8th Cir. 1983); *Taylor v. Teletype Corp.*, 648 F.2d 1129, 1138 (8th Cir.), *cert. denied*, 454 U.S. 969 (1981); *Merkel v. Scovill*, 570 F. Supp. 141, 144 (S.D. Ohio 1983). In *Whittlesey*, however, the district court ruled that the

other is where the plaintiff is a high managerial employee:¹⁰² Courts have reasoned that reinstatement creates greater burdens for both parties when the plaintiff is close to the employer in the corporate hierarchy.¹⁰³

A third situation in which reinstatement may be inappropriate is when there would be no comparable job available to the plaintiff if he were to obtain a favorable judgment.¹⁰⁴ For example, plaintiffs who, if reinstated, would be required to relocate to an undesirable area have been awarded the equivalent of front pay until comparable jobs became available.¹⁰⁵ Similarly, such a recovery has been awarded when reinstatement would result in the displacement of an employee hired to replace the plaintiff after the plaintiff's discharge but before the determination that the discharge was discriminatory.¹⁰⁶

antagonism that had developed during the litigation, primarily as a result of the defendant's conduct, was sufficient to warrant front pay in lieu of reinstatement. 567 F. Supp. at 1330-31. In some cases, reinstatement of the plaintiff in a climate of animosity may lead to continuing conflict with the employer and to further litigation. A court should not be required "to supervise the employer/employee relationship over the length of a plaintiff's lifetime; a task for which the courts are poorly suited." *Heheman v. E.W. Scripps, Co.*, 661 F.2d 1115, 1125 (6th Cir. 1981) (non-ADEA breach of employment contract case).

102. See *Dickerson v. Deluxe Check Printers, Inc.*, 703 F.2d 276, 280 (8th Cir. 1983); *Merkel v. Scovill, Inc.*, 570 F. Supp. 141, 144 (S.D. Ohio 1983); *Combes v. Griffin Television, Inc.*, 421 F. Supp. 841, 846 (W.D. Okla. 1976); cf. *EEOC v. Kallir, Phillips, Ross, Inc.*, 420 F. Supp. 919, 926-27 (S.D.N.Y. 1976) (Title VII plaintiff's job "required a close working relationship between plaintiff and top executives of defendant."), *aff'd*, 559 F.2d 1203 (2d Cir.), *cert. denied*, 434 U.S. 920 (1977).

103. See *Dickerson v. Deluxe Check Printers, Inc.*, 703 F.2d 276, 280-81 (8th Cir. 1983) (courts have declined to reinstate plaintiffs in "high level" positions); *Cancellier v. Federated Dep't Stores*, 672 F.2d 1312, 1315, 1319 (9th Cir.) (court ruled reinstatement of executives not appropriate), *cert. denied*, 459 U.S. 859 (1982); *Loeb v. Textron, Inc.*, 17 Fair Empl. Prac. Cas. (BNA) 1332, 1333-34 (D.R.I. 1978) (plaintiff's position "was, at least, quasi-policy making in that [he] very directly participated in the carrying out of [policies] in a large part of the world"), *rev'd on other grounds*, 600 F.2d 1003 (1st Cir. 1979); *Combes v. Griffin Television, Inc.*, 421 F. Supp. 841, 846-47 (W.D. Okla. 1976) (close working relationship of plaintiffs and defendants precluded reinstatement). Conversely, reinstating a worker with little contact with management is likely to produce few problems. See *Dickerson v. Deluxe Check Printers, Inc.*, 703 F.2d 276, 280-81 (8th Cir. 1983); *Cline v. Roadway Express, Inc.*, 689 F.2d 481, 489 (4th Cir. 1982).

104. See *Spagnuolo v. Whirlpool Corp.*, 717 F.2d 114, 116-20 (4th Cir. 1983); cf. *Briseno v. Central Technical Community College Area*, 739 F.2d 344, 348 (8th Cir. 1984) (front pay awarded in Title VII case until plaintiff receives comparable position); *EEOC v. Safeway Stores, Inc.*, 634 F.2d 1273, 1281-82 (10th Cir. 1980) (front pay awarded until plaintiff's "rightful place" secured); *White v. Carolina Paperboard Corp.*, 564 F.2d 1073, 1077 (4th Cir. 1977) (same).

105. See *Spagnuolo v. Whirlpool Corp.*, 717 F.2d 114, 118-19 (4th Cir. 1983); cf. *Oil Chem. & Atomic Workers Int'l Union v. NLRB*, 547 F.2d 598, 603 (D.C. Cir. 1976) (unlawfully discharged workers in NLRB case not required to accept employment that is an unreasonable distance from home), *cert. denied*, 429 U.S. 1078 (1977); *Florence Printing Co. v. NLRB*, 376 F.2d 216, 221 (4th Cir.) (same), *cert. denied*, 389 U.S. 840 (1967).

106. See *Spagnuolo v. Whirlpool Corp.*, 717 F.2d 114, 120-21 (4th Cir. 1983); cf. *Briseno v. Central Technical Community College Area*, 739 F.2d 344, 348 (8th Cir. 1984) (front pay awarded in Title VII case until plaintiff is able to assume comparable position); *EEOC v. Safeway Stores, Inc.*, 634 F.2d 1273, 1281-82 (10th Cir. 1980) (front pay awarded in Title VII case until plaintiff is able to assume rightful place), *cert. denied*, 451 U.S. 986 (1981); *Patterson v. American Tobacco Co.*, 535 F.2d 257, 269 (4th Cir.)

A final situation that precludes reinstatement is abolition of the plaintiff's position for valid business reasons.¹⁰⁷ Courts have differed in their analyses of such reductions in force. Some courts have viewed them as a justification for ordering front pay in lieu of reinstatement.¹⁰⁸ One court has extended this analysis to post-judgment reductions in force, granting front pay in part because the probability of such reductions imperiled the plaintiff's job security.¹⁰⁹

Other courts have allowed a plaintiff whose position has been eliminated in good faith before trial to recover back pay only for the period between his unlawful discharge and the elimination of his position.¹¹⁰

(same), *cert. denied*, 429 U.S. 920 (1976). Some courts have held that reinstatement may not be appropriate if a plaintiff has secured another job in the interval between discharge and trial. *See Davis v. Combustion Eng'g, Inc.*, No. 79-241, slip op. at 6 (E.D. Tenn. Mar. 18, 1982), *aff'd in part, rev'd in part on other grounds*, 742 F.2d 916 (6th Cir. 1984); *Robb v. Chemetron Corp.*, 17 Fair Empl. Prac. Cas. (BNA) 1535, 1545 (S.D. Tex. 1978); *cf. Folz v. Marriott Corp.*, No. 82-0219 (W.D. Mo. Aug. 31, 1984) (available on LEXIS, Genfed library, Dist file) (ERISA).

According to this view, a plaintiff who has fulfilled his duty to mitigate by accepting other employment should not be penalized by being forced to return to a job from which he was wrongfully discharged in order to regain fully his former salary. If the plaintiff's acceptance of the other job is the only factor precluding reinstatement, however, this view seems to conflict with the Supreme Court's ruling in a Title VII case, *Ford Motor Co. v. EEOC*, 458 U.S. 219, (1982), that a reinstatement offer by an employer cuts off back pay liability. *Id.* at 230-34. This analysis would seem to impose a similar obligation on a plaintiff to accept reinstatement after a successful ADEA suit if no other factors discussed in this section preclude his return to his old position. *See O'Donnell v. Georgia Osteopathic Hosp., Inc.*, 748 F.2d 1543, 1550 (11th Cir. 1984) ("unreasonably refused offer of reinstatement will preclude recovery of front pay and back pay"). *See supra* notes 100-05, *infra* notes 107-15 and accompanying text.

There may be cases, however, in which an offer of reinstatement is not bona fide. *See O'Donnell v. Georgia Osteopathic Hosp., Inc.*, 574 F. Supp. 214, 221 (N.D. Ga. 1983) (defendant claimed an offer of reinstatement was made but court held it was "not clear that [such an offer] was actually made"), *aff'd in part, rev'd in part*, 748 F.2d 1543, 1551-52 (11th Cir. 1984) (back pay and front pay award reversed; remanded for reconsideration of reinstatement offers). The legitimacy of a reinstatement offer should be an element of proof open to the plaintiff in a request for front pay in lieu of reinstatement. *See supra* notes 104-05 and accompanying text. *Cf. Front Pay Remedy, supra* note 45, at 5 (suggesting that employers may keep reinstatement open "as a viable alternative in order to make a claim for front pay less compelling").

107. *See Davis v. Combustion Eng'g, Inc.*, 742 F.2d 916, 923 (6th Cir. 1984); *Gibson v. Mohawk Rubber Co.*, 695 F.2d 1093, 1100-01 (8th Cir. 1982); *Cleverly v. Western Elec. Co.*, 594 F.2d 638, 641-42 (8th Cir. 1979); *Chern v. Ogden Food Serv. Corp.*, 33 Fair Empl. Prac. Cas. (BNA) 1547, 1548 (E.D. Pa. 1984); *see also Houghton v. McDonnell Douglas Corp.*, 627 F.2d 858, 866-67 (8th Cir. 1980) (reinstatement denied because of valid determination after trial that test pilot was no longer qualified for service).

108. *See Davis v. Combustion Eng'g, Inc.* 742 F.2d 916, 923 (6th Cir. 1984); *Chern v. Ogden Food Serv. Corp.*, 33 Fair Empl. Prac. Cas. 1547, 1548 (E.D. Pa. 1984).

109. *Davis v. Combustion Eng'g, Inc.*, No. 79-241, slip op. at 6 (E.D. Tenn. Mar. 18, 1982), *aff'd in part, rev'd in part on other grounds*, 742 F.2d 916 (6th Cir. 1984).

110. *See Cleverly v. Western Elec. Co.*, 594 F.2d 638, 641-42 (8th Cir. 1979); *see also Houghton v. McDonnell Douglas Corp.*, 627 F.2d 858, 863-66 (8th Cir. 1980) (plaintiff denied reinstatement because he would have been legitimately unqualified for the position at the time of trial); *cf. Hill v. Spiegel, Inc.*, 708 F.2d 233, 238 (6th Cir. 1983) (back pay award under Title VII limited to date plaintiff's position was eliminated); *Welch v. Uni-*

Under this view, the probability that the plaintiff's position will be eliminated after trial would not alone justify an award of front pay in lieu of reinstatement.¹¹¹ This appears to be the better view. The elimination of the plaintiff's position through a post-judgment reduction in force should not justify an award of front pay if reinstatement is otherwise appropriate.¹¹² Reinstatement and an award of back pay are sufficient to make a plaintiff whole because elimination of his position will occur irrespective of the unlawful discharge. Even if it is determined that reinstatement is not appropriate because of other circumstances such as those discussed above,¹¹³ the defendant should have the opportunity to show that a future good faith reduction in force limits his front pay liability.¹¹⁴ The defendant's liability for front pay should not extend beyond the time at which the plaintiff's position would have been eliminated through a good faith reduction in force.¹¹⁵

These situations illustrate the variety of circumstances in which reinstatement is an inappropriate remedy. Denial of reinstatement without a front pay award, however, leads to an unjust result: The plaintiff is not restored to the position he would have held but for the discrimination,¹¹⁶ and the employer is not deterred from future wrongful acts.¹¹⁷ Thus, unless front pay is permitted, the Act's specific goal of making the plain-

versity of Texas & Its Marine Science Inst., 659 F.2d 531, 535 (5th Cir. 1981) (damage award under Title VII limited to date plaintiff's grant expired).

111. See *Davis v. Combustion Eng'g, Inc.*, 742 F.2d 916, 924 (6th Cir. 1984) (Wellford, J., dissenting).

112. See *id.*

113. See *supra* notes 100-07 and accompanying text.

114. In *Whittlesey v. Union Carbide Corp.*, 35 Fair Empl. Prac. Cas. (BNA) 1085, (S.D.N.Y. 1983), *aff'd*, 742 F.2d 724 (2d Cir. 1984), evidence was accepted on the plaintiff's future earnings had he remained with Union Carbide. *Id.* at 1086. Defendants should be able to introduce similar evidence predicting probable reductions in force in which the plaintiff would likely be discharged for permissible business reasons. See *Gibson v. Mohawk Rubber Co.*, 695 F.2d 1093, 1097-98 (8th Cir. 1982) (defendant argued that plaintiff's position had been eliminated and that he would have been permissibly discharged before trial; remanded for consideration of this issue by jury). Reductions in force must meet two tests in order to justify forced early retirement of workers protected by the ADEA. EEOC v. Chrysler Corp., 733 F.2d 1183, 1186 (6th Cir. 1984). "First, the necessity for drastic cost reductions . . . must be real Second, the forced early retirement must be the least-detrimental-alternative means available to reduce costs." *Id.*

115. "The ADEA was not intended to insulate workers from the problems of a struggling company in a difficult and uncertain economy and the probability of layoffs or even plant closing." *Davis v. Combustion Eng'g, Inc.*, 742 F.2d 916, 924 (6th Cir. 1984) (Wellford, J., dissenting).

116. See *Whittlesey v. Union Carbide Corp.*, 742 F.2d 724, 728 (2d Cir. 1984); EEOC v. Prudential Fed. Sav. & Loan Ass'n, 741 F.2d 1225, 1232 (10th Cir. 1984), *vacated on other grounds*, 53 U.S.L.W. 3506 (U.S. Jan. 15, 1985); *Koyen v. Consolidated Edison Co.*, 560 F. Supp. 1161, 1168 (S.D.N.Y. 1983); see also *O'Donnell v. Georgia Osteopathic Hosp., Inc.*, 574 F. Supp. 214, 222 (N.D. Ga. 1983) (plaintiff's inability to find substitute work given as one reason for front pay award), *aff'd in part, rev'd in part on other grounds*, 748 F.2d 1543 (11th Cir. 1984) (remanded for reconsideration of validity of reinstatement offer). See *supra* note 31 and accompanying text.

117. See *Whittlesey v. Union Carbide Corp.*, 742 F.2d 724, 728 (2d Cir. 1984); EEOC v. Prudential Fed. Sav. & Loan Ass'n, 741 F.2d 1225, 1232 (10th Cir. 1984), *vacated on*

tiff whole and its general purpose of deterring discrimination are thwarted.

B. *Front Pay and the Statutory Mandate for Conciliation*

The ADEA requires that efforts at conciliation precede any litigation under the Act.¹¹⁸ Although courts have differed on how exhaustive conciliation efforts must be,¹¹⁹ the conciliation process has remained a central part of the ADEA and a prerequisite to any suit.¹²⁰ Opponents of front pay argue that the plaintiff will be less likely to conciliate if there is a possibility of a large front pay award.¹²¹ It is claimed that this effect thwarts the congressional mandate for conciliation and unduly improves the plaintiff's bargaining position during the conciliation process.¹²²

This view does not stand up to scrutiny. If a plaintiff holds out during conciliation proceedings in the hope that he will recover front pay in litigation, his hope is quite speculative. Statistics indicate that he has a good chance of losing on the discrimination issue.¹²³ Even if he wins, however, the court may rule that reinstatement is more appropriate;¹²⁴ the plaintiff has thus gained no financial benefit by proceeding to litigation. Because a plaintiff who resists conciliation in hope of a front pay windfall must gamble on favorable judgments on both the liability and front pay issues, and because there are few fact situations in which front pay is likely to be awarded,¹²⁵ this "hold-out" possibility appears remote.¹²⁶

The argument that front pay will undermine conciliation is based on the assumption that absent the possibility of a front pay award, an equi-

other grounds, 53 U.S.L.W. 3506 (U.S. Jan. 15, 1985); *Koyen v. Consolidated Edison Co.*, 560 F. Supp. 1161, 1168 (S.D.N.Y. 1983). See *supra* note 32 and accompanying text.

118. See *supra* note 25 and accompanying text.

119. See *supra* note 25 and accompanying text.

120. See 29 U.S.C. § 626(b) (1982).

121. See *MacGill v. Johns Hopkins Univ.*, 33 Fair Empl. Prac. Cas. (BNA) 1254, 1259 (D. Md. 1983); *Ginsberg v. Burlington Indus., Inc.*, 500 F. Supp. 696, 701 (S.D.N.Y. 1980); *Jaffee v. Plough Broadcasting Co.*, 19 Fair Empl. Prac. Cas. (BNA) 1194, 1195 (D. Md. 1979); *Mader v. Control Data Corp.*, 19 Fair Empl. Prac. Cas. (BNA) 1192, 1193 (D. Md. 1978); *cf. Pfeiffer v. Essex Wire Corp.*, 682 F.2d 684, 687 (7th Cir.) (effects on conciliation discussed in denying damages for pain and suffering), *cert. denied*, 459 U.S. 1039 (1982). See *supra* note 127 and accompanying text.

122. See *supra* note 121.

123. See *Schuster & Miller, An Empirical Assessment of the Age Discrimination in Employment Act*, 38 Indus. & Lab. Rel. Rev., Oct. 1984, at 64, 71. (employers win 64% of litigated ADEA cases on discrimination issue).

124. See *supra* notes 97-99 and accompanying text.

125. See *Whittlesey v. Union Carbide Corp.*, 742 F.2d 724, 729 (2d Cir. 1984) (front pay appropriate in "limited circumstances"); *Davis v. Combustion Eng'g, Inc.*, 742 F.2d 916, 922-23 (6th Cir. 1984) (front pay may not be appropriate in all cases).

126. One court has suggested that restricting damages to back pay may encourage employees to delay the judgment date because their award depends on the length of time between discharge and trial. See *Koyen v. Consolidated Edison Co.*, 560 F. Supp. 1161, 1169 (S.D.N.Y. 1983). Availability of front pay would reduce this incentive to delay. See *id.*

librium exists between the parties in terms of their motivation to conciliate.¹²⁷ Several factors, however, suggest that regardless of the possibility of front pay awards, employers hold superior bargaining power during the conciliation process. First, most plaintiffs are not likely to obtain representation by the EEOC because it concentrates its efforts on conciliation¹²⁸ and brings few suits under the ADEA.¹²⁹ Second, ADEA plaintiffs have only a limited chance of recovery.¹³⁰ Third, such plaintiffs are likely to be aware of the substantial resources most employers can devote to litigation should conciliation fail.¹³¹ Finally, the possibility of a substantially reduced award due to mitigation¹³² should make it apparent to plaintiffs that they are unlikely to receive a front pay windfall.¹³³

C. *Front Pay and the Problem of Speculation*

There are two areas of speculation inherent in the determination of a front pay award: the plaintiff's future had he remained at his old job¹³⁴ and his probable earnings in alternative employment.¹³⁵ Although future damages are more difficult to determine than back pay,¹³⁶ this problem should not preclude implementation of a necessary remedy.¹³⁷ That uncertainty of amount should not deprive the plaintiff of a damage award has been established by a line of Supreme Court and lower court cases in

127. The view that a remedy not previously available will tip the scales toward plaintiffs is the basis for the argument that an award of front pay will frustrate the congressional mandate to conciliate. See *supra* notes 121-22 and accompanying text.

128. See *supra* note 25 and accompanying text.

129. In 1984, the EEOC litigated in 63 ADEA cases and in 1983 half that number. Middleton, *Age Discrimination Awards Surge*, Nat'l L.J., Feb. 4, 1985, at 8, col. 1. In 1983, the EEOC filed suit in a total of 191 cases under the ADEA, Title VII and the Equal Pay Act. EEOC Compl. Man. (BNA) No. 67, at 5 (Sept. 1984). The EEOC received 15,303 charges under the ADEA alone in 1983. Data from EEOC to appear in EEOC Annual Report, 1983 (available in files of *Fordham Law Review*).

130. See *supra* note 123.

131. See du Fresne, *Is There Compensation for Litigation of Age Discrimination? Yes!*, 55 Fla. Bar J. 200, 200 (1981) ("The purpose of attorney's fees awards in age discrimination cases is to involve competent, experienced members of the bar in the litigation of these plaintiffs' demands. Certainly the employer/defendant will engage such counsel to defend."). Most corporations have extensive legal departments. See *The National Law Journal, Directory of the Legal Profession 1067-85* (1984). Some corporate legal departments include substantial staff devoted exclusively to labor and EEOC litigation. For example, E.I. Du Pont has a staff of ten labor lawyers, *id.* at 1076, the Greyhound Corporation includes among its senior positions the positions of Chief Labor Counsel and Assistant Labor Counsel, *id.* at 1079, and Pfizer's legal department lists EEO suits as among its full service areas, *id.* at 1084.

132. See *infra* notes 151, 199-214 and accompanying text.

133. See *Whittlesey v. Union Carbide Corp.*, 742 F.2d 724, 728-29 (2d Cir. 1984); *Koyen v. Consolidated Edison Co.*, 560 F. Supp. 1161, 1168 (S.D.N.Y. 1983).

134. See *infra* notes 187-98 and accompanying text.

135. See *infra* notes 199-214 and accompanying text.

136. See *Blim v. Western Elec. Co.*, 731 F. 2d 1473, 1481 (10th Cir.) (Seth, J., dissenting) (front pay may be speculative), *cert. denied*, 105 S. Ct. 133 (1984); *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1023 (1st Cir. 1979) (same).

137. Section IV.B.2. of this Note discusses methods for reducing speculativeness in front pay awards. See *infra* notes 173-214 and accompanying text.

a variety of contexts.¹³⁸ The principle behind these decisions is that a wrongdoer should not escape liability because the exact amount of damages may be difficult to compute,¹³⁹ a rationale that fully applies to front pay under the ADEA.¹⁴⁰

Some courts have regarded ADEA actions as identical to common law breach of contract suits for back wages.¹⁴¹ One such court has held that because such a suit requires proof of all damages, the speculative nature of front pay precludes its use as an ADEA remedy.¹⁴² Rather than precluding front pay, however, this contract theory supports its use in certain cases.¹⁴³ Proof of future damages is routinely admitted in breach of employment contract cases. Similarly, future damages are an accepted remedy in wrongful discharge actions in states in which such actions are considered to be contractual.¹⁴⁴ Because proof of future damages is acceptable in common law cases based on contract principles, it should be permitted in ADEA cases when they are analyzed under such principles.¹⁴⁵ Although such proof may not be sufficient to rebut the assertion

138. See *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 566-67 (1981) (antitrust); *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 124-25 (1969) (same); *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 265-66 (1946) (same); *Palmer v. Connecticut Ry. & Lighting Co.*, 311 U.S. 544, 559 (1941) (damages for rejection of lease); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562-63 (1931) (antitrust); *Pierce v. Tennessee Coal, Iron & Ry. Co.*, 173 U.S. 1, 16 (1899) (breach of employment contract); *Hetzel v. Baltimore & O.R.R.*, 169 U.S. 26, 37-38 (1898) (damage to land); *Donovan v. Tony & Susan Alamo Found.*, 722 F.2d 397, 404 (8th Cir. 1983) (FLSA), cert. granted, 105 S. Ct. 290 (1984); *Lam, Inc. v. Johns-Manville Corp.*, 718 F.2d 1056, 1065 (Fed. Cir. 1983) (patents); *Inland Container, Inc. v. United States*, 512 F.2d 1073, 1082 (Ct. Cl. 1975) (breach of contract).

139. See *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 265-66 (1946).

140. See *EEOC v. Prudential Fed. Sav. & Loan Ass'n*, 741 F.2d 1225, 1232 (10th Cir. 1984), vacated on other grounds, 53 U.S.L.W. 3506 (U.S. Jan. 15, 1985); *Koyen v. Consolidated Edison Co.*, 560 F. Supp. 1161, 1169 (S.D.N.Y. 1983).

141. See *Kolb v. Goldring, Inc.*, 694 F.2d 869, 871-72 (1st Cir. 1982); *Rogers v. Exxon Research & Eng'g Co.*, 550 F.2d 834, 838 (3d Cir. 1977), cert. denied, 434 U.S. 1022 (1978).

142. The court in *Kolb v. Goldring, Inc.*, 694 F.2d 869 (1st Cir. 1982), first used its contract analysis to limit back pay awards to those damages actually proven, thus denying prospective wage increases for which no evidence had been introduced. See *id.* at 872-73. The court then extended its limitation on damages to a general denial of front pay. See *id.* at 874 n.4.

143. See, e.g., *Pierce v. Tennessee Coal, Iron & Ry. Co.*, 173 U.S. 1, 16 (1899); *Budge v. Post*, 643 F.2d 372, 375-76 (5th Cir. 1981); *Dixie Glass Co. v. Pollack*, 341 S.W.2d 530, 538 (Tex. Civ. App. 1960); see *J. Calamari & J. Perillo, The Law of Contracts* § 14-18, at 544 & n.46 (2d ed. 1977); *C. McCormick, Handbook on the Law of Damages* § 158 (1935).

144. See *Maddaloni v. Western Mass. Bus Lines*, 422 N.E.2d 1379, 1385-87 (Mass. App. 1981); *Rudman v. Cowles Communications, Inc.*, 30 N.Y.2d 1, 14, 280 N.E.2d 867, 874, 330 N.Y.S.2d 33, 43 (1972); cf. *Santex, Inc. v. Cunningham*, 618 S.W.2d 557, 558 (Tex. Civ. App. 1981) (future damages awarded for retaliatory discharge under workers' compensation laws).

145. Cf. *Kolb v. Goldring, Inc.*, 694 F.2d 869, 871-72 (1st Cir. 1982). The *Kolb* analysis of the ADEA as contractual led to the conclusion that damages must be proven. Future damages, if proven, may therefore be supported under this analysis.

of speculativeness in a particular case,¹⁴⁶ the future projections involved in the computation of a front pay award should not bar the use of the remedy in appropriate cases.¹⁴⁷

The main difference between ADEA and breach of employment contract actions is the possibly open-ended nature of an ADEA award.¹⁴⁸ Cases denying front pay stress a "worst case" scenario in which plaintiffs in their forties or fifties could receive huge front pay awards.¹⁴⁹ The possibility of extreme situations, however, "does not warrant denial of relief in appropriate cases."¹⁵⁰ Moreover, windfall front pay awards for younger plaintiffs who are clearly reemployable would be limited by an increased mitigation deduction.¹⁵¹ Further, courts awarding front pay have emphasized that it is not a per se remedy¹⁵² and should be used with discretion.¹⁵³ They would be reluctant to exercise their equitable powers to grant a huge front pay award to a young plaintiff.¹⁵⁴

These policy considerations indicate that the availability of front pay under the ADEA complements rather than contravenes Congress' goals of making the plaintiff whole and deterring future age discrimination.¹⁵⁵ In order to demonstrate that front pay is a viable addition or alternative

146. Because the plaintiff still bears the burden of proving future losses, speculativeness will defeat or reduce future damages in any area of the law if insufficient proof is offered. See *Locklin v. Day-Glo Color Corp.*, 429 F.2d 873, 879 (7th Cir. 1970), cert. denied, 400 U.S. 1020 (1971); see also *Bigelow v. RKO Radio Pictures, Inc.* 327 U.S. 251, 264 (1946) ("[T]he jury may not render a verdict based on speculation or guesswork."); cf. *D. Dobbs, Handbook on the Law of Remedies* § 8.1, at 541-42 (1973) (reasonable certainty required in proof of lost profits). Failure of proof in an ADEA case would thus defeat a future damage award.

147. See *Whittlesey v. Union Carbide Corp.*, 742 F.2d 724, 728 (2d Cir. 1984); *Davis v. Combustion Eng'g, Inc.*, 742 F.2d 916, 923 (6th Cir. 1984); *EEOC v. Prudential Fed. Sav. & Loan Ass'n*, 741 F.2d 1225, 1232 (10th Cir. 1984), vacated on other grounds, 53 U.S.L.W. 3506 (U.S. Jan. 15, 1985); *Koyen v. Consolidated Edison Co.*, 560 F. Supp. 1161, 1168 (S.D.N.Y. 1983). But see *Wildman v. Lerner Stores Corp.*, 582 F. Supp. 80, 84 (D.P.R. 1984) (speculative nature of front pay bars its use).

148. See *Whittlesey v. Union Carbide Corp.*, 742 F.2d 724, 729 (2d Cir. 1984) (ADEA award may extend to the projected retirement date of the plaintiff); *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1023 & n.34 (1st Cir. 1979) (ADEA front pay awards may extend to the projected retirement date of the plaintiff). Future damages for breach of contract are limited to the duration of the contract. See *D. Dobbs, supra* note 146, § 12.25, at 924-25.

149. See, e.g., *Helwig v. Suburban Chevrolet, Inc.*, 33 Fair Empl. Prac. Cas. (BNA) 1261, 1267 (D. Md. 1983); *Foit v. Suburban Bancorp.*, 549 F. Supp. 264, 267 (D. Md. 1982); *Covey v. Robert A. Johnston Co.*, 19 Fair Empl. Prac. Cas. (BNA) 1188, 1191 (D. Md. 1977); *Monroe v. Penn-Dixie Cement Corp.*, 335 F. Supp. 231, 235 (N.D. Ga. 1971).

150. *Koyen v. Consolidated Edison Co.*, 560 F. Supp. 1161, 1168 (S.D.N.Y. 1983).

151. See *Whittlesey v. Union Carbide Corp.*, 742 F.2d 724, 728 (2d Cir. 1984); *EEOC v. Prudential Fed. Sav. & Loan Ass'n*, 741 F.2d 1225, 1232 (10th Cir. 1984), vacated on other grounds, 53 U.S.L.W. 3506 (U.S. Jan. 15, 1985); *Koyen v. Consolidated Edison Co.*, 560 F. Supp. 1161, 1168-69 (S.D.N.Y. 1983). See *supra* notes 209, 214 and accompanying text.

152. See *Davis v. Combustion Eng'g, Inc.*, 742 F.2d 916, 922 (6th Cir. 1984).

153. See *Whittlesey v. Union Carbide Corp.*, 742 F.2d 724, 729 (2d Cir. 1984); *Davis v. Combustion Eng'g, Inc.*, 742 F.2d 916, 922-23 (6th Cir. 1984).

154. See *Davis v. Combustion Eng'g, Inc.*, 742 F.2d 916, 923 (6th Cir. 1984).

155. See *supra* notes 31, 32 and accompanying text.

to other remedies under the ADEA, an examination of front pay's implementation is necessary.

IV. GUIDELINES FOR IMPLEMENTING FRONT PAY

Parts II and III of this Note have concluded that front pay is an appropriate remedy in light of the ADEA's language, legislative history and underlying policies. Part IV examines issues involving front pay's interaction with other ADEA remedies and considers approaches to avoiding speculativeness in front pay awards.

A. *The Interaction of Front Pay and Other Remedies*

1. Front Pay and a Request for Reinstatement

Some courts have held that a request for reinstatement is a necessary precondition to a front pay award.¹⁵⁶ Others, however, have held that a plaintiff's failure to request reinstatement does not result in a waiver of his right to front pay.¹⁵⁷ The second view is more consistent with the ADEA's purposes. Under the first view, a plaintiff who is unlawfully discharged must seek reinstatement even though he believes that it is inappropriate.¹⁵⁸ Rather than compelling such a plaintiff to maintain the fiction that he desires reinstatement, he should be given the opportunity to prove in his request for front pay that reinstatement is not appropriate.¹⁵⁹ A plaintiff who would as a last resort accept reinstatement were front pay not available should be given the opportunity to seek both remedies in the alternative.¹⁶⁰ This approach will give the court better gui-

156. See, e.g., *Wehr v. Burroughs Corp.*, 619 F.2d 276, 283-84 (3d Cir. 1980); *Ventura v. Federal Life Ins. Co.*, 571 F. Supp. 48, 50 n.2 (N.D. Ill. 1983); *Monroe v. Penn-Dixie Cement Corp.*, 335 F. Supp. 231, 235 (N.D. Ga. 1971); see H. Eglit, *supra* note 10, § 18.13, at 18-57.

157. See, e.g., *EEOC v. Prudential Fed. Sav. & Loan Ass'n*, 741 F.2d 1225, 1232 n.2 (10th Cir. 1984) (citing *Fitzgerald v. Sirloin Stockade, Inc.*, 624 F.2d 945, 957 (10th Cir. 1980)), *vacated on other grounds*, 53 U.S.L.W. 3506 (U.S. Jan. 15, 1985); *Koyen v. Consolidated Edison Co.*, 560 F. Supp. 1161, 1169 (S.D.N.Y. 1983); *O'Donnell v. Georgia Osteopathic Hosp., Inc.*, 574 F. Supp. 214, 219, 222 (N.D. Ga. 1982), *aff'd in part, rev'd in part on other grounds*, 748 F.2d 1543 (11th Cir. 1984); cf. *Fitzgerald v. Sirloin Stockade, Inc.*, 624 F.2d 945, 957 (10th Cir. 1980) (failure to request reinstatement not fatal in Title VII case).

158. If front pay were not available "an employer could avoid the purpose of the Act simply by making reinstatement so unattractive and infeasible that the wronged employee would not want to return." *EEOC v. Prudential Fed. Sav. & Loan Ass'n*, 741 F.2d 1225, 1232 (10th Cir. 1984), *vacated on other grounds*, 53 U.S.L.W. 3506 (U.S. Jan. 15, 1985); see *Cancellier v. Federated Dep't Stores*, 672 F.2d 1312, 1319-20 (9th Cir.), *cert. denied*, 459 U.S. 859 (1982); *Koyen v. Consolidated Edison Co.*, 560 F. Supp. 1161, 1169 (S.D.N.Y. 1983).

159. See *O'Donnell v. Georgia Osteopathic Hosp., Inc.*, 574 F. Supp. 214, 222 (N.D. Ga. 1983), *aff'd in part, rev'd in part on other grounds*, 748 F.2d 1543 (11th Cir. 1984) (remanded for reconsideration of whether reinstatement was more appropriate than front pay); *Koyen v. Consolidated Edison Co.*, 560 F. Supp. 1161, 1169 (S.D.N.Y. 1983).

160. See *Whittlesey v. Union Carbide Corp.*, 567 F. Supp. 1320, 1331 (S.D.N.Y. 1983) *aff'd*, 742 F.2d 724 (2d Cir. 1984); *Davis v. Combustion Eng'g, Inc.*, No. 79-241, slip op.

dance in exercising its equitable discretion to award front pay than would a rule requiring all plaintiffs to make a pro forma request for reinstatement.

2. Front Pay and Liquidated Damages

Liquidated damages are an amount equal to the plaintiff's back pay award and can provide a net award to the plaintiff of twice the amount of back pay.¹⁶¹ Courts are in disagreement about the relationship between these damages and front pay awards. Some courts have held that although front pay may be an appropriate ADEA remedy, it should not be awarded if there is a substantial liquidated damages award.¹⁶² These courts have reasoned that such an award is sufficient to fulfill front pay's function of making the plaintiff whole.¹⁶³ Under another view, however, front pay is included in the liquidated damages award so that the plaintiff receives a net award equal to a doubling of front and back pay.¹⁶⁴

A third and better view regards front pay and liquidated damages independently.¹⁶⁵ Liquidated damages are of a punitive nature and are

at 6 (E.D. Tenn. Mar. 18, 1982), *aff'd in part, rev'd in part on other grounds*, 742 F.2d 916 (6th Cir. 1984).

161. See *supra* note 23 and accompanying text.

162. See *Cancellier v. Federated Dep't Stores*, 672 F.2d 1312, 1319 (9th Cir.), *cert. denied*, 459 U.S. 859 (1982); *Robb v. Chemetron Corp.*, 17 Fair Empl. Prac. Cas. (BNA) 1535, 1545-46 (S.D. Tex. 1978); see also *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1023 n.3 (1st Cir. 1979) ("availability of a substantial liquidated damages award under the ADEA may be a proper consideration in denying additional damages in lieu of reinstatement").

163. See *Cancellier v. Federated Dep't Stores*, 672 F.2d 1312, 1319-20 (9th Cir.), *cert. denied*, 459 U.S. 859 (1982); *Robb v. Chemetron Corp.*, 17 Fair Empl. Prac. Cas. (BNA) 1535, 1545 (S.D. Tex. 1978); see also *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1023 n.35 (1st Cir. 1979) (though not equating front pay with liquidated damages, noted that a substantial liquidated damages award may provide a rationale for denying damages in lieu of reinstatement).

164. See *Blim v. Western Elec. Co.*, 496 F. Supp. 818 (W.D. Okla. 1980), *aff'd in part, rev'd in part on other grounds*, 731 F.2d 1473 (10th Cir.), *cert. denied*, 105 S. Ct. 233 (1984).

165. See *O'Donnell v. Georgia Osteopathic Hosp., Inc.*, 574 F. Supp. 214, 223 (N.D. Ga. 1983), *aff'd in part, rev'd in part on other grounds*, 748 F.2d 1543 (11th Cir. 1984). The district court in *O'Donnell* awarded liquidated damages because the jury found that the hospital's violation of the ADEA was willful and because the court found that the hospital presented insufficient evidence of good faith. 574 F. Supp. at 222-23. See *supra* note 24. The court ruled, however, that doubling both back pay and front pay was inappropriate in computing liquidated damages. *Id.* The Eleventh Circuit vacated the liquidated damages award in *O'Donnell* after concluding that the case should be remanded for reconsideration whether the plaintiff unreasonably refused an offer of reinstatement. 748 F.2d at 1551. A finding by the district court on remand that the plaintiff unreasonably rejected a reinstatement offer would cut off all of the front pay award and back pay dating from the offer of reinstatement until the trial. Such a finding would reduce the amount of the liquidated damages award because these damages are awarded in an amount equal to back pay, see *supra* notes 7, 22-23 and accompanying text, and if back pay is reduced, liquidated damages would be commensurately reduced. It is assumed that the liquidated damages determination will be made on remand in light of the standards for liquidated

awarded only in the event of willful violations.¹⁶⁶ As part of the ADEA's legal relief they may be determined by a jury.¹⁶⁷ Front pay is awarded only if a judge in the exercise of his equitable discretion determines that monetary damages are more appropriate than reinstatement.¹⁶⁸ Front pay should therefore be unaffected by a liquidated damages award.¹⁶⁹ A substantial liquidated damages award should not be viewed as a "cure" for the assertedly speculative nature of a front pay award.¹⁷⁰ Although separate treatment of the two remedies may lead to substantial recoveries for plaintiffs whose discharge was willful and who are entitled to front pay,¹⁷¹ this approach does avoid the extremely large awards caused by doubling both back and front pay.¹⁷²

damages delineated by the Supreme Court in *TWA v. Thurston*, 53 U.S.L.W. 4024, 4027 (U.S. Jan. 8, 1985). See *supra* note 24. In any event, the Eleventh Circuit in *O'Donnell* does not seem to be questioning the district court's analysis of front pay and liquidated damages as separate and independent remedies.

166. See *Trans World Airlines v. Thurston*, 53 U.S.L.W. 4024, 4027 (U.S. Jan. 8, 1985); 29 U.S.C. § 626(b) (1982). See *supra* note 24 and accompanying text.

167. See H.R. Rep. No. 950, 95th Cong., 2d Sess. 14 (conference report on 1978 amendments), reprinted in 1978 U.S. Code Cong. & Ad. News 528, 535; 29 U.S.C. § 626(c) (1982).

168. See *Whittlesey v. Union Carbide Corp.*, 742 F.2d 724, 728 (2d Cir. 1984); *Davis v. Combustion Eng'g, Inc.*, 742 F.2d 916, 922-23 (6th Cir. 1984); *EEOC v. Prudential Fed. Sav. & Loan Ass'n*, 741 F.2d 1225, 1232 (10th Cir. 1984), vacated on other grounds, 53 U.S.L.W. 3506 (U.S. Jan. 15, 1985); *Koyen v. Consolidated Edison Co.*, 560 F. Supp. 1161, 1168 (S.D.N.Y. 1983).

169. See *O'Donnell v. Georgia Osteopathic Hosp., Inc.*, 574 F. Supp. 214, 223 (N.D. Ga. 1983), *aff'd in part, rev'd in part on other grounds*, 748 F.2d 1543 (11th Cir. 1984). See *supra* note 165 and accompanying text. The Supreme Court's decision in *Trans World Airlines v. Thurston*, 53 U.S.L.W. 4024 (U.S. Jan. 8, 1985), lends support to this view. The Court's statement that liquidated damages are punitive, *id.* at 4027, further distinguishes these damages from front pay, the award of which is not dependent on a willful violation of the act. See *Whittlesey v. Union Carbide Corp.*, 742 F.2d 724, 726-28 (2d Cir. 1984) (front pay awarded in the case of a nonwillful violation).

170. See *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1023 (1st Cir. 1979). See *supra* note 162 and accompanying text.

171. See, e.g., *Davis v. Combustion Eng'g, Inc.*, 742 F.2d 916, 918 (6th Cir. 1984) (award of \$22,000 in back pay, \$20,000 in liquidated damages and \$88,800 in front pay for six years until retirement date); *O'Donnell v. Georgia Osteopathic Hosp., Inc.*, 574 F. Supp. 214, 222-23 (N.D. Ga. 1983) (award of \$18,991.70 in back pay, an equal amount in liquidated damages, and \$51,577.29 in front pay to cover a four year period until expected retirement), *aff'd in part, rev'd in part*, 748 F.2d 1543 (11th Cir. 1984).

172. See *Blim v. Western Elec. Co.*, 496 F. Supp. 818, 821 (W.D. Okl. 1980), *aff'd in part, rev'd in part on other grounds*, 731 F.2d 1473 (10th Cir.), *cert. denied*, 105 S. Ct. 233 (1984). In *Blim*, the district court awarded front pay consisting of expected lost wages after demotion of the plaintiffs. One plaintiff was awarded \$127,851.60 after doubling of both front pay and back pay awards. His front pay award alone, however, was \$6,115.84 for approximately seven months until his expected retirement. Another plaintiff with eight years until retirement was awarded front pay of \$20,091.41 and a total award of \$119,438.28 after both back pay and front pay were doubled. The front pay awards were rendered moot, however, when the Tenth Circuit found that repromotion was more appropriate. *Blim*, 731 F.2d at 1479.

B. Approaches to Avoiding Speculativeness in Front Pay Awards

1. Lump Sum Awards and Periodic Payments

The general practice in most cases involving future damages has been to award plaintiffs a lump sum based on expected earnings less a mitigation factor.¹⁷³ There is, however, some authority for the use of periodic rather than lump sum payments.¹⁷⁴ Under a periodic payment system, the plaintiff's award would be reevaluated at periodic intervals and adjusted according to the degree to which he has fulfilled his duty to mitigate.¹⁷⁵ Proponents of this view argue that it provides a more realistic approximation of the future needs of the plaintiff and decreases the speculation inherent in lump sum awards.¹⁷⁶

The continuing jurisdiction inherent in the use of periodic payments, however, may place an undue burden on the courts.¹⁷⁷ Periodic reevaluation could lead to a multiplication of litigation¹⁷⁸ in an era in which court calendars are already overcrowded.¹⁷⁹ The burden of such continuing litigation would also fall more heavily on plaintiffs than on defendants, because whereas defendants usually maintain legal staffs that conduct ADEA litigation,¹⁸⁰ plaintiffs may have difficulty in obtaining counsel for maintenance of their awards.¹⁸¹ In any case, because it is not likely that lump sum awards will be abandoned for another system in the

173. See D. Dobbs, *supra* note 146, §§ 8.1, 8.7, 8.9, at 540-41, 551, 570-75, 579-81; Page, *Impairment of Earning Capacity*, in *Damages in Personal Injury and Wrongful Death Cases* 447, 449 (S. Schreiber ed. 1965); Elligett, *The Periodic Payment of Judgments*, 46 *Insurance Couns. J.* 130 (1979); Rea, *Lump-Sum Versus Periodic Damage Awards*, 10 *J. Legal Stud.* 131 (1981).

174. See Elligett, *supra* note 173, at 130-31; Rea, *supra* note 173, at 131-33.

175. See Elligett, *supra* note 173, at 139; Rea, *supra* note 173, at 131-32; Note, *Variable Periodic Payments of Damages: An Alternative to Lump Sum Awards*, 64 *Iowa L. Rev.* 138, 139 n.17 (1978).

176. See *infra* note 177. The court in *Patterson v. American Tobacco Co.*, 535 F.2d 257 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976), a Title VII case, suggested as an alternative to a lump sum award that the court maintain jurisdiction over the case during a series of periodic back pay awards until the plaintiffs were repromoted. *Id.* at 269. A similar relitigable award was proposed in *Valcourt v. Hyland*, 503 F. Supp. 630, 636 (D. Mass. 1980), a case under 42 U.S.C. § 1983 (1982).

177. See *Frankel v. United States*, 321 F. Supp. 1331, 1340-41 (E.D. Pa. 1970), *aff'd*, 466 F.2d 1226 (1972); see also *Heheman v. E.W. Scripps Co.*, 661 F.2d 1115, 1125 (6th Cir. 1981), *cert. denied*, 456 U.S. 991 (1982) (courts are poorly suited to supervise employer-employee relationship over plaintiff's lifetime).

178. See *Whittlesey v. Union Carbide Corp.*, 35 *Fair Empl. Prac. Cas. (BNA)* 1085, 1086 (S.D.N.Y. 1983), *aff'd*, 742 F.2d 724 (2d Cir. 1984); *Frankel v. United States*, 321 F. Supp. 1331, 1340-41 (E.D. Pa. 1970), *aff'd*, 466 F.2d 1226 (3d Cir. 1972); Rea, *supra* note 173, at 144.

179. See Lasker, *The Court Crunch: A View From the Bench*, 76 *F.R.D.* 245, 246 (speech delivered at 1977 meeting of the Federal Bar Council); Mills, *Caseload Explosion: The Appellate Response*, 16 *J. Mar. L. Rev.* 1, 1-2 (1982).

180. See *supra* note 131 and accompanying text.

181. *Cf.* Rea, *supra* note 173, at 146 (noting lawyers' concern that contingent fee might not be received as a reason why periodic payments are not widespread).

near future,¹⁸² it is useful to examine the sources of uncertainty in lump sum front pay awards under the ADEA.

2. Uncertainty and Front Pay Awards

The two sources of uncertainty in front pay awards are the plaintiff's future at his old job had he not been discharged¹⁸³ and his probable earnings in alternative employment.¹⁸⁴ That these uncertainties should not bar the use of front pay under the ADEA has previously been discussed.¹⁸⁵ This section considers methods of minimizing such uncertainties in computing front pay awards. Use of such methods in ADEA cases thus far has indicated that courts are able to avoid the pitfalls of uncertainty in granting equitable front pay awards.¹⁸⁶

a. Plaintiff's Future At His Old Job

A plaintiff's future at a job had the discrimination not occurred can never be precisely predicted.¹⁸⁷ Whether promotions,¹⁸⁸ demotions,¹⁸⁹

182. See *Frankel v. United States*, 321 F. Supp. 1331, 1340-41 (E.D. Pa. 1970), *aff'd*, 466 F.2d 1226 (3d Cir. 1972); see also *Whittlesey v. Union Carbide Corp.*, 35 Fair Empl. Prac. Cas. (BNA) 1085, 1086 (S.D.N.Y. 1983) (refusal to order periodic evaluation), *aff'd*, 742 F.2d 724 (2d Cir. 1984). The majority view in breach of employment contracts is that an employee may recover for his prospective loss for the unexpired period of unemployment. See D. Dobbs, *supra* note 146, § 12.25, at 924; C. McCormick, *supra* note 143, § 161.

183. See *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1023 (1st Cir. 1979).

184. See *EEOC v. Prudential Fed. Sav. & Loan Ass'n*, 741 F.2d 1225, 1232 (10th Cir. 1984), *vacated on other grounds*, 53 U.S.L.W. 3506 (U.S. Jan. 15, 1985); *Koyen v. Consolidated Edison Co.*, 560 F. Supp. 1161, 1167-69; *Crawford & McRae, Front Pay in Lieu of Reinstatement as a Remedy in ADEA Litigation*, 9 Employee Rel. L.J. 705, 708 (1984).

185. See *supra* notes 134-54 and accompanying text.

186. See, e.g., *Whittlesey v. Union Carbide Corp.*, 35 Fair Empl. Prac. Cas. (BNA) 1085, 1087-88 (S.D.N.Y. 1983) (plaintiff awarded \$93,000 salary at time of termination plus other benefits, less \$25,000 deduction for mitigation for each of four years until retirement), *aff'd*, 742 F.2d 724 (2d Cir. 1984); *Davis v. Combustion Eng'g, Inc.*, No. 79-241, slip op. at 5-6 (E.D. Tenn. Mar. 18, 1982) (plaintiff awarded a total of \$88,200 over a six year period until retirement), *aff'd*, 742 F.2d 916 (6th Cir. 1984); *O'Donnell v. Georgia Osteopathic Hosp., Inc.*, 574 F. Supp. 214, 222 (N.D. Ga. 1983) (plaintiff awarded a total of \$51,577.29 to cover four year period until retirement date), *aff'd in part, rev'd in part on other grounds*, 748 F.2d 1543 (11th Cir. 1984); *Koyen v. Consolidated Edison Co.*, 560 F. Supp. 1161, 1169 (S.D.N.Y. 1983) (plaintiff awarded total of \$60,107 for 23 month period until expected retirement); *Ventura v. Federal Life Ins. Co.*, 571 F. Supp. 48, 50-51 (N.D. Ill. 1983) (award of vested pension rights); cf. *Folz v. Marriott Corp.*, No. 82-0219 (W.D. Mo. Aug. 31, 1984) (available on LEXIS, Genfed library, Dist file) (in ERISA case, plaintiff awarded \$85,443 to cover difference in salary between old and new job over seven year period until retirement).

187. See *Whittlesey v. Union Carbide Corp.*, 742 F.2d 724, 728 (2d Cir. 1984); *EEOC v. Prudential Fed. Sav. & Loan Ass'n*, 741 F.2d 1225, 1235 (10th Cir. 1984) (Barrett, J., dissenting), *vacated on other grounds*, 53 U.S.L.W. 3506 (U.S. Jan. 15, 1985); *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1023 (1st Cir. 1979).

188. See *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1023 (1st Cir. 1979).

189. See *EEOC v. Prudential Fed. Sav. & Loan Ass'n*, 741 F.2d 1225, 1235 (10th Cir. 1984) (Barrett, J., dissenting) (quoting *Blim v. Western Elec. Co.*, 731 F.2d 1473, 1481

layoffs¹⁹⁰ or terminations¹⁹¹ would have taken place are sources of uncertainty. Nonetheless, personnel experts can make reasonably accurate predictions about the plaintiff's probable future in a job.¹⁹² For example, patterns of wage increases before trial can be extrapolated into the future;¹⁹³ defendants might attempt to prove that severe reductions in force that would clearly abolish the plaintiff's job title are almost certain to occur in the near future;¹⁹⁴ and plaintiffs might attempt to prove that substantial advancement in their old job was likely.¹⁹⁵ The courts can also rely on their experience in determining damages in wrongful discharge¹⁹⁶ and breach of contract actions¹⁹⁷ when calculating ADEA front pay awards.¹⁹⁸

b. *Plaintiff's Probable Earnings in Alternative Employment*

In breach of employment contract cases, courts have reduced awards by a mitigation factor equal to amounts an employee has earned or may be expected to earn in an alternative position.¹⁹⁹ There are two views regarding the plaintiff's duty to mitigate in these cases. Under the majority rule, the plaintiff has a duty to accept employment of the same or similar character.²⁰⁰ If the plaintiff has been unable to secure such em-

(10th Cir.) (Seth, J. dissenting), *cert. denied*, 105 S. Ct. 233 (1984), *vacated on other grounds*, 53 U.S.L.W. 3506 (U.S. Jan. 15, 1985).

190. See Crawford & McRae, *supra* note 184, at 708.

191. See *Blim v. Western Elec. Co.*, 731 F.2d 1473, 1481 (10th Cir.) (Seth, J., dissenting), *cert. denied*, 105 S. Ct. 233 (1984).

192. See *Davis v. Combustion Eng'g, Inc.*, No. 79-241, slip op. at 2-3 (E.D. Tenn. July 6, 1982) (front pay award based on testimony of Professor of Management and Marketing at the University of Tennessee), *aff'd in part, rev'd in part on other grounds*, 742 F.2d 916 (6th Cir. 1984); Crawford & McRae, *supra* note 184, at 708.

193. See *Folz v. Marriott Corp.*, No. 82-0219 (W.D. Mo. Aug. 31, 1984) (available on LEXIS, Genfed library, Dist file); Brief for the Plaintiff-Appellee at 26-27, *Davis v. Combustion Eng'g, Inc.*, 742 F.2d 916 (6th Cir. 1984).

194. See Crawford & McRae, *supra* note 184, at 708 ("Expert testimony on relevant labor market conditions, the plaintiff's health, foreseeable layoffs or plant closures, and similar issues all appear relevant to the inquiry into whether the front pay award would be speculative or a windfall.")

195. See *supra* note 193. Cf. *Johnson v. United States*, 510 F. Supp. 1039, 1044-45 (D. Mont. 1981) (courts may consider plaintiff's future earning power in determining damages in FTCA case), *aff'd in part, rev'd in part on other grounds*, 704 F.2d 143 (9th Cir. 1983); see generally Lawless, *Computation of Future Damages: A View From the Bench*, 54 Geo. L.J. 1131, 1133 (courts often consider plaintiffs' prospects for advancement absent an injury).

196. See *supra* note 144.

197. See *Whittlesey v. Union Carbide Corp.*, 742 F.2d 724, 728 (2d Cir. 1984). See *supra* notes 143-44 and accompanying text.

198. See *supra* note 186 and accompanying text.

199. See *Katch v. Speidel, Div. of Textron, Inc.*, 746 F.2d 1136, 1138 (6th Cir. 1984); *Heheman v. E.W. Scripps Co.*, 661 F.2d 1115, 1125 (6th Cir. 1981), *cert. denied*, 456 U.S. 991 (1982); *Hollwedel v. Duffy-Mott Co.*, 263 N.Y. 95, 101, 188 N.E. 266, 268 (1933); *D. Dobbs, supra* note 146, § 12.25, at 925; McCormick, *supra* note 143, § 160.

200. *J. Calamari & J. Perillo, supra* note 143, § 14-18, at 544; see *Parker v. Twentieth Century-Fox Film Corp.*, 3 Cal. 3d 176, 181-84, 474 P.2d 689, 692 (1970); *Seco Chems., Inc. v. Stewart*, 169 Ind. App. 624, 636, 349 N.E.2d 733, 740-41 (1976); see also Ford

ployment, his award is not reduced.²⁰¹ Under the minority rule, if he has been unable to find employment of the same character and grade within a reasonable time, the plaintiff must accept other employment for which he is fit.²⁰²

The majority rule is more appropriate in ADEA front pay cases.²⁰³ Under the minority rule, a plaintiff would be awarded only the difference between his expected salary at his old job and that of the "employment . . . for which he [is] fitted."²⁰⁴ Such employment, however, may have much lower status and job satisfaction than did the plaintiff's old job.²⁰⁵ Forcing a plaintiff to accept such employment to regain his former salary would thwart the ADEA's purpose of making plaintiffs whole.²⁰⁶ The majority view should be applied cautiously, however, particularly in

Motor Co. v. EEOC, 458 U.S. 219, 231 (1981) ("[T]he unemployed or underemployed claimant need not go into another line of work, accept a demotion, or take a demeaning position . . .").

201. See *Ballard v. El Dorado Tire Co.*, 512 F.2d 901, 905 (5th Cir. 1975); *D. Dobbs*, *supra* note 146, § 12.25, at 925-26. See generally *Annot.*, 44 A.L.R.3d 629, 640-41 (1972) (discussion of general rule that wrongfully discharged employees have a duty to mitigate only by accepting employment of the same or similar character as that from which they were discharged).

202. See *Perry v. Simpson Waterproof Mfg. Co.*, 37 Conn. 520, 540 (1871); *Torson Constr. Co. v. Grant*, 251 Ky. 800, 806, 66 S.W.2d 79, 82 (1933); *Simon v. Allen & Co.*, 76 Tex. 398, 399, 13 S.W. 296, 296 (1890); *Copeland v. Hill*, 126 S.W.2d 567, 569 (Tex. Civ. App. 1939); *Annot.*, 44 A.L.R.3d 629, 641 & n.15 (1972). Even under the majority view, if the plaintiff has accepted prior to judgment a job of different or similar character, plaintiff's back pay and future damage award will be reduced by, respectively, amounts he has earned and will earn in that job. *D. Dobbs*, *supra* note 146, § 12.25, at 926. The purposes of the Act seem to be thwarted, however, by requiring a plaintiff who has won an ADEA suit and mitigated his damages at a job with lower status and/or salary to continue at that job after trial in order to earn his full former salary. Such a requirement would be an affront to the plaintiff's previous status and may limit his chances of regaining a job similar to his old position. See *infra* notes 205-06, 212-14 and accompanying text.

203. In determining the mitigation deduction for back pay awards under the ADEA, courts have followed the majority rule by not requiring plaintiffs to accept jobs that are not comparable to the job from which they were discharged. See, e.g., *EEOC v. Sandia Corp.*, 639 F.2d 600, 627 (10th Cir. 1980); *Buchholz v. Symons Mfg. Co.*, 445 F. Supp. 706, 712 (E.D. Wis. 1978). The same rationale should apply to front pay awards. *Cf. NLRB v. Madison Courier, Inc.*, 472 F.2d 1307, 1320-21 (D.C. Cir. 1972) (victim of discrimination in NLRB case not required to accept unsuitable employment).

204. *Copeland v. Hill*, 126 S.W.2d 567, 569 (Tex. Civ. App. 1939) (quoting *Simon v. Allen*, 76 Tex. 398, 399, 13 S.W. 296, 296 (1890)).

205. *Cf. Green v. Kaynar Mfg. Co.*, 369 F.2d 375, 376 (9th Cir. 1966) (executive would not be required to accept job doing "menial work"); *Ingrassia v. Shell Oil Co.*, 394 F. Supp. 875, 886 (S.D.N.Y. 1975) (wrongfully discharged employee has no duty to mitigate by accepting a job of reduced rank); 2 H. Eglit, *supra* note 10, § 18.12, at 18-49 (plaintiff not required to accept a job not comparable to previous job in mitigation of back pay award). See generally *Annot.*, 44 A.L.R. 3d 629, 668-71 (1972) (executives not required to accept lower ranking position in mitigation of damages for wrongful discharge).

206. A plaintiff's acceptance of a lower status position may jeopardize his future. His apparent demotion may make prospective employers suspicious. In wrongful discharge cases, an employee is not obligated to accept a position that would injure his future career. See *American Trading Co. v. Steele*, 274 F. 774, 783 (9th Cir. 1921).

ADEA cases involving younger plaintiffs.²⁰⁷ It might result in larger awards for a plaintiff whose high position before discharge makes it unlikely that he will immediately obtain a position of the same or similar character.²⁰⁸ When the plaintiff is relatively young, however, it is more likely that he will in time be able to regain such a position. These awards, therefore, should be limited in time according to the plaintiff's chances of regaining his former status quickly.²⁰⁹

It is possible, however, that the only way for such a plaintiff to regain a former high position may be to accept a lower paying job and seek advancement.²¹⁰ If this plaintiff acquires such a job after trial, however, under the majority view's rationale he would be receiving not only the front pay award fully covering his former salary but also the salary from his new job. It may be argued that he thereby would be made more than whole.²¹¹ This argument, however, fails to consider the nonsalary aspects of the process of making a plaintiff whole.²¹² For example, an executive

207. See *Davis v. Combustion Eng'g, Inc.*, 742 F.2d 916, 923 (6th Cir. 1984) (award of front pay through retirement to a discriminatorily discharged 41 year old may be unwarranted).

208. Cf. *Whittlesey v. Union Carbide Corp.*, 35 Fair Empl. Prac. Cas. (BNA) 1085, 1086 (S.D.N.Y. 1983) (Chief Labor Counsel found not likely to regain similar position before retirement), *aff'd*, 742 F.2d 724 (2d Cir. 1984).

209. Cf. *Crawford & McRae*, *supra* note 184, at 708 (factors favorable to a plaintiff, such as bright employment prospects, would serve to reduce, but not eliminate, a front pay award).

ADEA front pay awards for younger plaintiffs would be analagous to most front pay awards under Title VII: They would last for a limited period of time until the plaintiff regains his rightful place. See *EEOC v. Kallir, Philips, Ross, Inc.*, 420 F. Supp. 919, 927 (S.D.N.Y. 1976) (court ordered front pay after estimating that a plaintiff could within a year secure similar employment), *aff'd mem.*, 559 F.2d 1203 (2d Cir.), *cert. denied*, 434 U.S. 920 (1977); see also *EEOC v. Safeway Stores, Inc.*, 634 F.2d 1273, 1282 (10th Cir. 1980) (Title VII plaintiffs awarded front pay until rightful place secured), *cert. denied*, 451 U.S. 986 (1981). See *supra* notes 77-79 and accompanying text.

210. See *Rones*, *supra* note 44, at 10 (studies show a decline in status and salary for older displaced workers and retirees who return to work). See *supra* notes 44, 45 and accompanying text. A successful ADEA plaintiff may encounter additional difficulties in obtaining employment because of his notoriety as a victorious litigant. Although it could be argued that an employer's failure to hire him because of this constitutes another ADEA violation, proof of such a violation would be much more difficult to obtain than proof of unlawful discharge. Furthermore, a successful plaintiff should not be forced continually to resort to the courts because of his success.

211. Cf. *Rogers v. Exxon Research & Eng'g Co.*, 550 F.2d 834, 840 (3d Cir. 1977) (compensatory damages for pain and suffering and punitive damages go beyond the statutory scheme of making plaintiffs whole), *cert. denied*, 434 U.S. 1022 (1978). Front pay, however, as the monetary equivalent of the equitable remedy of reinstatement, see *supra* note 213 and accompanying text, is distinguishable from the legal remedies of pain and suffering or punitive damages which have been rejected by most circuits. See *supra* notes 36-39 and accompanying text. It is awarded only in limited circumstances when reinstatement is inappropriate. See *supra* notes 96-115 and accompanying text.

212. "[T]hat which makes people whole is a matter for the discretion of the trial court under the facts and circumstances of the individual case." *Davis v. Combustion Eng'g, Inc.*, 742 F.2d 916, 923 (6th Cir. 1984) (citing *Gibson v. Mohawk Rubber Co.*, 695 F.2d 1093, 1097 (8th Cir. 1982)).

The legislative history of the ADEA includes much evidence of concern by supporters

forced after trial to advance from a lower position suffers from his reduction in status and the necessity to repeat the promotional steps he undertook to gain his previous high position.²¹³ A front pay award that is limited to a realistic assessment of the time necessary for reacquisition of the plaintiff to a job of the same or similar character as his old job would not go beyond the remedial purposes of the ADEA even if during that period the plaintiff recovers more than his previous salary.²¹⁴

CONCLUSION

The ADEA's remedies were designed to further the purposes of the Act by making unlawfully discharged workers whole and by deterring future discriminatory acts by employers. A back pay award and reinstatement are the preferred remedies to achieve these goals. In some cases, however, there may be factors that preclude reinstatement and make the alternate remedy of front pay appropriate.

Front pay in lieu of reinstatement need not be a speculative remedy if courts in the exercise of their equitable discretion carefully weigh the plaintiff's probable future at his former job and his duty to mitigate by seeking alternative employment. Furthermore, because of the limited factual circumstances under which front pay is awarded, it will not undermine the conciliation process mandated by the ADEA.

A worker who is wrongfully discharged because of age faces a job market in which it will be very difficult for him to regain his former salary and status. If such a worker cannot be reinstated, only front pay can fulfill the purposes of the ADEA.

Peter Janovsky

of the Act for the nonmonetary effects of age discrimination on discharged workers. For example, Senator Young noted that "it is a particular tragedy to amputate a human being's functions, to strip productive persons of their skills, cheating them of the dignity of continued self-support." 113 Cong. Rec. 31,256 (1967). Representative Eilberg noted that "employment plays a very important role in the makeup of the modern American and this role cannot be measured in the dollars he carries home on payday. Self-esteem, self-satisfaction and personal security are important by-products of employment in industrial America." 113 Cong. Rec. 34,745 (1967)

213. Front pay is the monetary equivalent of the equitable remedy of reinstatement. See *supra* note 79 and accompanying text. As an equitable remedy, reinstatement should be defined broadly to include restoration of salary, status and job satisfaction. An award that required an employee to work at a job with lower status and satisfaction in order to regain his former salary is not a true replacement of the equitable remedy of reinstatement. See *supra* notes 201-13 and accompanying text.

214. An additional way in which front pay may further the purposes of the Act is by encouraging employers to increase "out-placement services," which are programs to assist workers displaced by reductions in force in obtaining new employment. An employee who wins an ADEA claim but who has been successfully placed in a new position will be entitled to little or no front pay from his former employer. See *Front Pay Remedy, supra* note 45, at 5. The availability of the front pay remedy therefore would further effectuate the Act's central purpose of encouraging the continued employment of older workers. See *supra* notes 4, 31-32 and accompanying text.