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COMMENTS

SETTLING THE FRONT PAY CONTROVERSY UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT: *WHITTLESEY v. UNION CARBIDE CORP.*

As part of historic legislation designed to eliminate a wide array of discriminatory employment practices,¹ Congress 20 years ago commissioned a study to examine the advisability of enacting legislation to prohibit age discrimination in employment.² The fruit of this study was the Age Discrimination in Employment Act of 1967 (ADEA),³ which was designed in part "to help employers

¹ See Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701-716, 78 Stat. 241, 253-256 (1964) (codified as amended at 42 U.S.C. §§ 2000e-17 (1976)). Under Title VII, it is illegal for an employer to discriminate on the basis of "race, color, religion, sex or national origin". *Id.* at § 703(a)(1).

² *Id.* at § 715. The Special Study by the Secretary of Labor, after exploring the possibility of non-statutory means of dealing with age discrimination and examining various state approaches to the problem, recommended legislative action to combat what was characterized as a "persistent and widespread practice of arbitrary age discrimination against older workers." See *Report of the Secretary of Labor to the Congress Under Section 715 of the Civil Rights Act of 1964, The Older American Worker: Age Discrimination In Employment* (1965), reprinted in *Hearings Before the Select Subcomm. on Labor of the House Comm. on Education and Labor on Employment Problems of Older Workers*, 89th Cong., 1st Sess. 201 (1966). In 1967, President Johnson advocated Congressional action by noting that "[h]undreds of thousands, not yet old, not yet voluntarily retired, find themselves jobless because of arbitrary age discrimination." See H.R. REP. No. 805, 90th Cong., 1st Sess. 2, reprinted in 1967 U.S. CODE CONG. & AD. NEWS 2213, 2214. Congressional attempts to prohibit age discrimination date to as early as 1951, see J. NORTHRUP, OLD AGE, HANDICAPPED AND VIETNAM-ERA ANTIDISCRIMINATION LEGISLATION 7 (1977), and several unsuccessful attempts were made to include age as a protected class under Title VII, see A. LARSON, EMPLOYMENT DISCRIMINATION § 98.32, at 21-9 to 21-11 (1983); Note, *The Age Discrimination in Employment Act of 1967*, 90 HARV. L. REV. 380, 381 n.7 (1976); see also Blackburn, *Charting Compliance Under the Age Discrimination in Employment Act*, 57 CHI.-KENT L. REV. 559, 560-62 n.5 (1981) (early federal and state efforts to combat age discrimination).

³ 29 U.S.C. §§ 621-634 (1982). The Age Discrimination in Employment Act of 1967 (ADEA) makes it unlawful for an employer:

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate

and workers find ways of meeting problems arising from the impact of age on employment.”⁴ Many of the substantive and proce-

against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

Id. § 623(a). It is also illegal under the Act for employers to advertise in such a way as to indicate “any preference, limitation, specification, or discrimination, based on age.” *Id.* § 623(e); 29 C.F.R. § 860.36 (1984). Employees age 40 through age 69 are covered by the Act as the result of 1978 amendments that raised the former age ceiling of 65. *See* 29 U.S.C. § 631 (1976), amended by 29 U.S.C. § 631(a) (1982). Mandatory retirement is permitted, however, when age is shown to be a bona fide occupational qualification (BFOQ). *See, e.g.,* EEOC v. Wyoming, 460 U.S. 226, 229 (1983); *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224, 238 (5th Cir. 1976) (employer may vindicate hiring policies by showing that the contended discrimination is a BFOQ); *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859, 865 (7th Cir. 1974) (Greyhound demonstrated that maximum hiring age policy is based on good faith judgment concerning safety needs of passengers and others), *cert. denied*, 419 U.S. 1122 (1975); *McKenry, Enforcement of Age Discrimination in Employment Legislation*, 32 HASTINGS L.J. 1157, 1175 (1981) (BFOQ accepted more readily as defense in ADEA cases). *But see also* *TransWorld Airlines v. Thurston*, 53 U.S.L.W. 4024, 4027 (U.S. Jan. 8, 1985) (employer cannot successfully interpose BFOQ defense to discriminate against older worker seeking to transfer to another position on ground that age was BFOQ for former job).

As part of the 1978 Amendments, Congress provided an exemption permitting the compulsory retirement of employees 65 years of age provided they were entitled to at least \$27,000 per year in benefits and were for at least 2 years prior to their retirement employed in a “bona fide executive” or “high policy-making” position.” *See* 29 U.S.C. § 631(c)(1) (1982); *infra* note 18 and accompanying text. One commentator has criticized the exemption by noting that it “allow[s] a group to qualify for mandatory retirement on the basis of income and job responsibility alone without requiring a determination of vocational competence, . . . [and thereby] . . . contradicts its stated purpose—to broaden and strengthen the Act's coverage and further eliminate arbitrary discrimination based on age.” Note, *Age Discrimination in Employment Act Amendments of 1978: A Questionable Expansion*, 27 CATH. U. L. REV. 767, 783 (1978).

⁴ 29 U.S.C. § 621(b) (1982). The ADEA places great emphasis on the potential for administrative conciliation and mediation as a recourse to litigation by requiring that a private litigant file a charge with the Equal Employment Opportunity Commission (EEOC) within 180 days after the alleged unlawful practice has occurred and then wait 60 days before bringing suit. *See id.* § 626(d)(1). The Supreme Court has held, however, that while plaintiffs are required to pursue available state remedies before commencing a federal suit, claimants are not barred by virtue of shorter state time limitations. *See Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 754-765 (1979). During the period before suit can be commenced, the EEOC is required to notify named defendants and “promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference and persuasion.” 29 U.S.C. § 626(d) (1982). Moreover, the ADEA, provides that the private right to sue terminates upon commencement of an action by the EEOC on behalf of an individual. *See id.* § 626(c)(1); *see also* *Brennan v. Ace Hardware Corp.*, 495 F.2d 368, 374 (8th Cir. 1974) (legislative history of Act indicates that exhaustive administrative action was designed to achieve conciliation before legal action was begun).

Pursuant to Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19807, 92 Stat. 3781, re-

dural questions under the ADEA have been resolved by comparing age discrimination with more highly publicized employer prejudices and by interpreting the ADEA in light of the goals and provisions of Title VII of the Civil Rights Act of 1964 (Title VII).⁵ When ascertaining the scope of available remedies, however, courts have referred not only to Title VII, but also to the Fair Labor Standards Act (FLSA),⁶ the remedial provisions of which are incorporated into the ADEA.⁷ This incorporation of FLSA provisions

printed in 1978 U.S. CODE CONG. & AD. NEWS 9799-800, administrative and enforcement functions previously vested in the Secretary of Labor under the ADEA were transferred to the EEOC. *Id.* The plan, however, contains a one-house veto clause of a type subsequently held unconstitutional by the Supreme Court. See *INS v. Chadha* 462 U.S. 919, 922 (1983). There currently is some disagreement among the circuits as to whether *Chadha*, in effect, invalidates the Reorganization Plan in its entirety. Compare *EEOC v. Hernando Bank*, 724 F.2d 1188, 1190-92 (5th Cir. 1984) (one-house veto provision is severable and therefore does not invalidate plan in entirety) with *EEOC v. CBS, Inc.*, 745 F.2d 969, 97-75 (2d Cir. 1984) (since veto provision not severable, plan is unconstitutional in its entirety and EEOC lacks authority to enforce ADEA). It should be noted, however, that the House of Representatives has already approved legislation to correct the constitutional infirmity. See H.R. 1314, 98th Cong., 2d Sess., 130 CONG. REC. 2519-21 (daily ed. April 10, 1984).

⁵ See *Lorillard v. Pons*, 434 U.S. 575, 584 (1978). The Supreme Court has noted that the prohibitions enunciated in the ADEA "were derived *in haec verba* from Title VII." *Id.*; see, e.g., *Geller v. Markham*, 635 F.2d 1027, 1032 (2d Cir. 1980), (Title VII disparate impact principles applicable to ADEA suits), *cert. denied*, 451 U.S. 945 (1981); *TransWorld Airlines v. Thurston*, 53 U.S.L.W. 4024, 4026 (U.S. Jan. 8, 1985) (Title VII burden of proof concepts in cases where there is direct evidence of discrimination apply in age suits); *Franci v. Avco Corp.*, 538 F. Supp 250, 255 (D. Conn. 1982) (Title VII case law adaptable to ADEA); see also *Rosenblum & Biles, The Aging of Age Discrimination-Evaluating ADEA Interpretations and Employee Relations Policies*, 8 EMPLOYEE REL. L.J. 22, 24 (1982) (ADEA and Title VII, in light of their common goals, are often read in tandem). But see *Laugesen v. Anaconda Co.*, 510 F.2d 307, 312 (6th Cir. 1975) (inappropriate simply to borrow and automatically apply Title VII guidelines to ADEA); *Schickman, The Strengths & Weaknesses of the McDonnell Douglas Formula in Jury Actions Under the ADEA*, 32 HASTINGS L. J. 1239, 1260 (1981) (*McDonnell Douglas* test needs to be refined when applied to ADEA actions); Note, *supra* note 2, at 382 (addressing distinctions between age discrimination and race or sex discrimination that might justify differing standards of proof).

⁶ Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (codified as amended at 29 U.S.C. § 201-219 (1982)) (FLSA). Remedies commonly dispensed under the ADEA and the FLSA include injunctive relief to prevent discriminatory advertising or discriminatory hiring policies, reinstatement of an unlawfully discharged employee to the same job or a comparable position, recovery of back wages that would have been earned but for the discrimination, and reasonable attorney's fees. See Note, *Age Discrimination in Employment: Available Federal Relief*, 11 COLUM. J. L. & SOC. PROBS. 281, 334-35 (1975).

⁷ 29 U.S.C. § 626(b) (1982); *Lorillard v. Pons*, 434 U.S. 575, 580 (1978). In *Lorillard*, the Supreme Court held that a private litigant had a right to a jury trial under the ADEA. 434 U.S. at 585. The Court, while noting that Congress incorporated FLSA remedial provisions within the ADEA, *id.* at 574-75, also indicated that Congress showed a "willingness to depart from those provisions regarded as undesirable or inappropriate for incorporation," *id.* at 581. Thus, unlike under the FLSA, liquidated damages equal to the pecuniary loss are

has led some courts to conclude that an award of prospective damages measured from the date of judgment, known as front pay,⁸ is not permissible under the ADEA.⁹ Recently, however, an increasing number of courts have recognized the legitimacy of such awards.¹⁰ In *Whittlesey v. Union Carbide Corp.*,¹¹ for instance, the Court of Appeals for the Second Circuit held that in certain circumstances when reinstatement is not feasible, "front pay" is an acceptable alternative remedy under the ADEA.¹²

recoverable only for "willful violations" of the ADEA. *Id.* at 581; see *TransWorld Airlines v. Thurston*, 53 U.S.L.W. 4024, 4028 (U.S. Jan. 8, 1985); 29 U.S.C. § 626(b); *infra* note 17. In addition, injunctive relief not available under the FLSA can be made available to litigants under the ADEA. 434 U.S. at 581. Finally, "Congress . . . declined to incorporate into the ADEA the criminal penalties" provided within the FLSA. *Id.* at 581-82; see also *TransWorld Airlines v. Thurston*, 53 U.S.L.W. 4024, 4027 (U.S. Jan. 8, 1985) (Congress declined to incorporate several FLSA sections into ADEA); Note, *Set-offs Against Back Pay Awards Under the Federal Age Discrimination in Employment Act*, 79 MICH. L. REV. 1113, 1113-14 (1981) (highlighting differences between ADEA and FLSA).

⁸ Front pay, as used in this Comment, can be defined as a court order to compensate the plaintiff for pecuniary, job-related loss constituting funds that would have been received by the employee after the date of the court's decree. See BLACK'S LAW DICTIONARY 602 (5th ed. 1979) (defining front wages); see also Note, *Front Pay—Prophylactic Relief Under Title VII of the Civil Rights Act of 1964*, 29 VAND. L. REV. 211, 212 (1976). Since every case under the ADEA that has considered the front pay issue has involved an instance of wrongful discharge rather than an unlawful discriminatory practice affecting "terms or conditions" of employment, a typical front pay award encompasses the salary that would have been realized by the plaintiff but for the discrimination until such time as the plaintiff can obtain comparable employment or is lawfully retired. See C. EDELMAN & I. SIEGLER, FEDERAL AGE DISCRIMINATION IN EMPLOYMENT LAW 207 (Cum. Supp. 1980). Back pay, on the other hand, is designed to compensate the plaintiff for the "job-related benefits" lost from the date of unlawful termination until the date judgment is entered. See Note, *supra* note 7, at 1118-19.

⁹ See, e.g., *Kolb v. Goldring, Inc.*, 694 F.2d 869, 874 n.4 (1st Cir. 1982) (damages are "settled" on date of judgment even though injury continues); *Covey v. Robert A. Johnston Co.*, 19 Fair Empl. Cas. (BNA) 1188, 1191-92 (D. Md. 1977) (no language in ADEA explicitly authorizes front pay and calculation would be unduly speculative); *Monroe v. Penn-Dixie Cement Corp.*, 335 F. Supp. 231, 235 (Ga. 1971) (front pay unavailable when reinstatement not requested); see also *infra* notes 38-46 and accompanying text.

¹⁰ See Crawford & McRae, *The Practical Labor Lawyer: Front Pay in Lieu of Reinstatement as a Remedy in ADEA Litigation*, 9 EMPLOYEE REL. L.J. 705, 710 (1984); Greble, *More Courts Are Using Front Pay to Remedy Discrimination Cases*, NAT'L L.J., June 6, 1983, at 26, col. 1; *infra* notes 47-53 and accompanying text.

Historically, front pay has been granted more routinely under Title VII than it has been under the ADEA. See Note, *supra* note 8, at 224-29 (examples of front pay under Title VII); see also *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 781 (1976) (Burger, C.J., concurring and dissenting) (front pay more equitable than competitive type seniority relief). Under Title VII it is provided that if an employer has "intentionally engaged in or is intentionally engaging in any unlawful employment practice," the court may order "any . . . equitable relief as the court deems appropriate." 42 U.S.C. § 2000e-5(g) (1982).

¹¹ 742 F.2d 724 (2d Cir. 1984).

¹² *Id.* at 729.

In *Whittlesey*, the defendant Union Carbide Corporation (Union Carbide) gave notice to its chief labor counsel that he would have to retire on his 65th birthday.¹³ In justifying this action in the face of an ADEA prohibition against mandatory retirement before age 70,¹⁴ Union Carbide relied on an exemption that permits the compulsory retirement at age 65 of certain employees in "bona fide executive" or "high policy making" positions.¹⁵ The forced retirement of Whittlesey took effect on September 1, 1982.¹⁶ Subsequently, he sued to recover back pay, liquidated damages, and either reinstatement or front pay.¹⁷

The United States District Court for the Southern District of New York held that Whittlesey's position did not fall within the scope of the exemption and thereby became one of the first courts to construe the meaning of the term "bona fide executive" or "high policy maker."¹⁸ While denying liquidated damages,¹⁹ the court au-

¹³ See 567 F. Supp. 1320, 1321 (S.D.N.Y. 1983). Whittlesey had been employed as an attorney for Union Carbide since 1953. *Id.*

¹⁴ See *supra* note 3.

¹⁵ See 567 F. Supp. at 1321; *supra* note 3.

¹⁶ 567 F. Supp. at 1321. Whittlesey's application for a preliminary injunction was denied by Judge Pierre Leval, because he determined that "there was no showing of irreparable harm" since the plaintiff had not proved that other employment was not available. *Id.*

¹⁷ *Id.* at 1330. Whittlesey claimed that he was entitled to liquidated damages equal to his backpay. *Id.* Liquidated damages equal to the amount of pecuniary loss are recoverable under the Act only for "willful violations." See 29 U.S.C. § 626(b) (1982); *Trans-World Airlines v. Thurston*, 53 U.S.L.W. 4024, 4028 (U.S. Jan. 8, 1985); E. DEVITT & C. BLACKMAR, *FEDERAL JURY PRACTICE AND INSTRUCTIONS* §14.06, at 384 (3d ed. 1978). In *Thurston*, the Supreme Court recently ended a controversy that had been raging among the circuits over the standard to be applied in determining whether an employer has acted "willfully" and held that a violation "is 'willful' if the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." *Thurston*, 53 U.S.L.W. at 4028. It was argued that TWA should have been liable for liquidated damages since they knew that the ADEA was "in the picture," that is, they were aware of the Act's potential applicability. *Id.*

Ironically, liability in *Thurston* was established as the result of an attempt to comply with a 1978 amendment prohibiting mandatory retirement. *Id.* at 4025; see *supra* note 3. In its attempt at compliance, TWA devised a system that allowed certain pilots forced to retire at age 60 to continue working as flight attendants and it was this system, which gave preference to pilots displaced for reasons other than age, that was held illegal. *Id.* at 4026-27. Nonetheless, the Court refused to impose liquidated damages since TWA officials acted reasonably and in good faith in attempting to determine whether their plan would violate the ADEA. *Id.* at 4028.

¹⁸ 567 F. Supp. at 1321-28; Lewin, *Judge Bars a Forced Retirement at Age 65*, N.Y. Times, July 19, 1983 at D1, col. 3. In the analysis of the test for inclusion within the ADEA "bona fide executive" exemption, the district judge quoted extensively from interpretive regulations promulgated by the EEOC, 29 C.F.R. § 1625.12 (1979), and from material from the Conference Committee Report, H. CONF. REP. No. 950, 95th Cong., 2d. Sess. 8-10 (1978),

thorized a lump sum award that included back pay, and, in lieu of reinstatement, front pay from the date of judgment until age 70.²⁰ On appeal, Union Carbide challenged the District Court's interpretation of the "bona fide executive" exemption and contended that front pay was not permitted under the ADEA.²¹ Whittlesey cross-appealed, maintaining that Union Carbide had acted willfully, thus entitling him to an award of liquidated damages.²² The Court of Appeals for the Second Circuit affirmed.²³

Judge Pratt, writing for a unanimous panel, approved of the District Court's characterization of the test for inclusion within the

reprinted in 1978 U.S. CODE CONG. & AD. NEWS 504, 528, 530-31. *See* 567 F. Supp at 1322-25. The court concluded that the regulations make clear that the exemption applies "only to a very few top level employees who exercise substantial executive authority over a significant number of employees and a large volume of business." *Id.* at 1322 (quoting 29 C.F.R. § 1625.12(d)(2) (1979)).

¹⁹ 567 F. Supp at 1330. The court concluded that there was "excusable uncertainty" on the part of Union Carbide concerning the coverage of the 1978 amendment to the ADEA, and therefore denied Whittlesey's request for liquidated damages. *Id.* In implicitly rejecting the "in the picture" test with respect to liquidated damages and focusing on the extent of the employer's actual knowledge, the *Whittlesey* court, it is suggested, is in conformity with subsequent Supreme Court pronouncements. *See* *TransWorld Airlines v. Thurston*, 53 U.S.L.W. 4024, 4028 (U.S. Jan 8, 1985); *supra* note 17.

²⁰ *See* 567 F. Supp. at 1330-31. The district court noted that Union Carbide had exhibited "hostility and outrage against [Whittlesey] by reason of his bringing the suit," *id.* at 1330, and, therefore, since "he would be ostracized and excluded from the functions of giving counsel," reinstatement was not the "ideal remedy," *id.* Instead, Whittlesey was awarded front pay reduced by whatever sum he could have earned in mitigation. *Id.* at 1330-31.

The actual computation of front pay was rendered in a separate opinion. *See* No. 82-4401 slip op. at 6 (S.D.N.Y. October 13, 1983). Union Carbide argued that rather than awarding a lump sum payment, the court should conduct "annual proceedings to ascertain the amounts of plaintiff's actual earnings in mitigation." *Id.* at 7. While conceding that there existed "important future uncertainties," *id.*, the court summarily refused the chore of periodic supervision, citing "obvious reasons involving finality of litigation and the ability of courts to deal with their cases," *id.*

Whittlesey was credited with an annual salary of \$93,000, offset by \$25,000, which the court determined he could earn annually in mitigation, and \$34,893, which he would have contributed to the pension plan, as well as any social security benefits received. *Id.* at 4. In addition, the court drew inferences against Union Carbide since it failed to furnish "easily available evidence" regarding the amount of bonuses Whittlesey was to receive, and added an incentive bonus of \$18,600 per year. *Id.* Inflation was netted against the inflation component of the discount rate, leaving a discount for pure interest at the rate of 2%. *Id.* Each of the several calculations was strenuously contested by Union Carbide. *Id.* at 5. Whittlesey, who was 68 years of age at the time of judgment, received a total award of \$242,649.08. *See* 742 F.2d at 726.

²¹ *See* 742 F.2d at 726.

²² *Id.*

²³ *Id.*

"bona fide executive" exemption as properly "one of function, not of pay."²⁴ Since Whittlesey was engaged primarily in legal work and was not encouraged or invited to play a dynamic policy-creating role,²⁵ the court held that the position did not come within the exemption contemplated by the statute and regulations.²⁶ Therefore, Whittlesey was entitled to ADEA protection.

In approving front pay as a permissible remedy, Judge Pratt conceded that many of the enforcement provisions of the ADEA were modeled after the remedies in the FLSA,²⁷ yet asserted that remedies under the ADEA were not limited to those recoverable under the former statute.²⁸ Section 626(b) of the ADEA, the court contended, contains a "broad grant of remedial authority" not present under the FLSA that authorizes front pay awards when reinstatement is not possible.²⁹ Such a situation could occur, Judge Pratt suggested, either when the plaintiff's position has been eliminated or when the employer-employee relationship has been "irreparably damaged by animosity associated with the litigation."³⁰ The court determined that judicial experience with prospective damages in employment contract and personal injury cases coupled with the plaintiff's duty to mitigate damages were seen as sufficient safeguards against unduly speculative or excessive awards.³¹ Moreover, Judge Pratt was not persuaded by the argument that the possibility of front pay would discourage settlements.³² Any tendency on the part of plaintiffs to hold out in the hope of recovering large monetary awards, the court reasoned, would be "balanced by defendants' increased inclination to compromise when faced with a possible liability for front pay."³³

²⁴ *Id.*

²⁵ *Id.* at 726-27.

²⁶ *Id.*

²⁷ *Id.* at 727.

²⁸ *Id.* The court, citing *Geller v. Markham*, 635 F.2d 1027, 1036 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981), noted that district judges in the Second Circuit "have previously [been] encouraged . . . to fashion remedies designed to ensure that victims of age discrimination are made whole." *Id.* at 727-28.

²⁹ *Id.* at 728.

³⁰ *Id.*

³¹ *Id.* In support of the proposition that courts are capable of "determin[ing] reasonable compensation when reinstatement is inappropriate," the Court cited *Koyen v. Consolidated Edison Co.*, 560 F. Supp 1161, 1167 (S.D.N.Y. 1983), and noted that front pay had been awarded in Title VII cases. See 742 F.2d at 728; *supra* note 10.

³² 742 F.2d at 728.

³³ *Id.*

It is submitted that in *Whittlesey*, the Second Circuit properly concluded that awards of front pay are not precluded under the ADEA. Indeed, the case is illustrative of a recent judicial trend to approve such awards irrespective of whether the plaintiff has requested reinstatement.³⁴ This trend, it is suggested, will have monetary implications that could significantly affect the character of pretrial negotiations between aggrieved workers and their employers in a way that will decrease the likelihood that reinstatement will remain an acceptable remedy by the time judgment is rendered.³⁵ By tracing the development of the courts' present acquiescence to the remedy and analyzing various similarities to the debate over the availability of compensatory damages for pain and suffering under the ADEA, this Comment will explore the issues raised by *Whittlesey* and will suggest an approach for district courts confronted with a choice between forced reinstatement and front pay.

Section 626(b): "A Model of Imprecision"

Senator Jacob Javits, a major sponsor of the ADEA, noted that the enforcement provisions of the ADEA are "directly analogous to those available under the Fair Labor Standards Act."³⁶ De-

³⁴ See *supra* note 10; *infra* notes 47-52.

³⁵ The willingness of courts to recognize front pay awards coincides with an increase in the number of suits being brought under the Act. See Weaver, *Age Discrimination Charges Found in Sharp Rise in U.S.*, N.Y. Times, Feb. 22, 1982, at A12, col. 1 (formal charges of age discrimination filed with EEOC rose 75% from 1979 to 1981). Arguably, demographic trends indicate that suits brought under the Act will continue to rise. See Morrison, *The Aging of the U.S. Population: Human Resource Implications*, MONTHLY LAB. REV., May 1983, at 13, 14 (population age 55 and over is expected to increase to nearly 70 million over the next 30 years and 35 million people will be at least 65 years old); see also Rones, *The Aging of the Older Population and the Effect on its Labor Force Rates*, MONTHLY LAB. REV., Sept. 1982, at 27; Fullerton, *The 1995 Labor Force: A First Look*, MONTHLY LAB. REV. Dec., 1980, at 11-21.

³⁶ 113 CONG. REC. 31,254 (1967). On the day the ADEA was passed, Senator Javits stated that "[t]he enforcement techniques provided by [the ADEA] are directly analogous to those available under the Fair Labor Standards Act; . . . [and] incorporates by reference, to the greatest extent possible, the provisions of the Fair Labor Standards Act." *Id.* (quoted in *Lorillard v. Pons*, 434 U.S. 575, 582 (1978)). It has been suggested that the incorporation of FLSA procedures into the Act was not intended "to reflect differences in the degree of protection to be afforded." See Note, *supra* note 2, at 381. Indeed, it has been noted that the incorporation was motivated in part by "administrative convenience," see *id.* It was believed that the Wage and Hour Division of the Department of Labor would have the ability to handle complaints more efficiently than the overburdened EEOC, which had jurisdiction over claims arising under Title VII. See *id.*; see also Pavlo v. Stiefel Laboratories, Inc., 22 Fair Empl. Prac. Cas. (BNA) 489, 493 (S.D.N.Y. 1979); Note, *Damage Remedies*

spite the seeming clarity of this statement of congressional intent, the remedial section of the ADEA has created conceptual difficulties for courts by both referring specifically to the limited remedies available under the FLSA and subsequently granting district courts broad equitable power to fashion relief.³⁷

The Controversy

In *Monroe v. Penn. Dixie Cement Corp.*,³⁸ the first reported case to consider the issue of front pay under the ADEA,³⁹ it was stated categorically that “. . . money damages in a case under the Age Discrimination Act must be liquidated as of the date of judgment.”⁴⁰ Since the wrongfully discharged plaintiff in *Monroe* did not request reinstatement, which would have mitigated damages, the court held that he had waived any future rights against his former employer.⁴¹ Moreover, the court noted that any computation of front pay would be “highly speculative.”⁴²

Under the Age Discrimination in Employment Act, 43 BROOKLYN L. REV. 47, 64 n.66 (1976); *supra* note 7.

³⁷ See 29 U.S.C. § 626(b) (1982). Section 626(b) of the ADEA states that: “[t]he provisions of this chapter shall be enforced in accordance with the powers, remedies and procedures provided in . . . [various sections of the FLSA] . . . and subsection (c) of this section, [and] [a]mounts owing to a person as a result of a violation . . . shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 [of the FLSA]. . . .” The plain language of the statute indicates that remedies under the ADEA should be limited to the back pay and limited injunctive remedies dispensed under the FLSA. See *Pavlo v. Stiefel Laboratories, Inc.*, 22 Fair Empl. Prac. Cas. (BNA) 489, 493 (S.D.N.Y. 1979). Yet, in the same subsection, it is provided that “court[s] shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter,” 29 U.S.C. § 626(b), a provision which suggests that remedies should not be so limited. *Palvo*, 22 Fair Empl. Prac. Cas. (BNA) at 493. This language, which appears to provide for broad remedial relief, is repeated in a later subsection that confers upon an aggrieved party a right to bring private civil actions. See 29 U.S.C. § 626(c)(1) (1982).

³⁸ 335 F. Supp. 231 (N.D. Ga. 1971).

³⁹ See *id.* at 233 n.1.

⁴⁰ *Id.* at 235.

⁴¹ *Id.* The *Monroe* court, relying on the incorporation of FLSA language in the Act, see *id.* at 234 n.3, concluded that damages were restricted to the pecuniary loss realized prior to trial, “set-off” by benefits and earnings realized at other jobs during that period, see *id.* at 234-35. It has been noted, however, that the holding of the *Monroe* court is limited to instances in which the plaintiff has not requested reinstatement. See A. LARSON, *supra* note 2, § 103.44(a). Nonetheless, a number of courts have relied on dictum in *Monroe* to support the proposition that front pay is never recoverable. See *id.*; *infra* note 44 and accompanying text.

⁴² 335 F. Supp. at 235. The court maintained that front pay computations would be especially speculative “in cases where the plaintiff was in his forties and, thus, had many

The refusal of the *Monroe* court to authorize front pay has led at least one circuit court to conclude that the remedy is not available in the absence of a request for reinstatement.⁴³ Some courts have taken an even stricter view and have held that front pay is never recoverable under the ADEA regardless of the plaintiff's desire to be reinstated.⁴⁴ Courts adopting the stricter view have noted that front pay awards are not specifically authorized under the ADEA,⁴⁵ and have reiterated that such awards are unduly speculative in nature.⁴⁶

The leading case approving front pay in the absence of a reinstatement request is *Koyen v. Consolidated Edison Corp.*,⁴⁷ which involved a 66-year-old employee in Consolidated Edison's editorial department who was discharged because of his age.⁴⁸ In *Koyen*, Judge Weinfeld concluded that since Congress incorporated a "broad grant of equitable authority" in the ADEA that was not

years ahead in which he might or might not get raises, reductions, fired, or incapacitated all of which could greatly affect his future earnings." *Id.* Mr. Monroe, however, was 58 years old. *Id.* at 233.

⁴³ See *Wehr v. Burroughs Corp.*, 619 F.2d 276, 283-84 (3d Cir. 1980); see also *Ventura v. Federal Life Ins. Co.*, 571 F. Supp 48, 50 (N.D. Ill. 1983) (plaintiff may seek to acquire prospective pension benefits as alternative to reinstatement).

⁴⁴ See *Kolb v. Goldring, Inc.*, 694 F.2d 869, 874 n.4 (1st Cir. 1982); *Foit v. Surburban Bancorp.*, 549 F. Supp. 264, 267 (D. Md. 1982); *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, 1193-94 (D. Md. 1978); *Covey v. Robert A. Johnston Co.*, 19 Fair Empl. Prac. Cas. (BNA) 1188, 1191-92 (D. Md. 1977); *Price v. Maryland Casualty Co.*, 391 F. Supp. 613, 621 (S.D. Miss. 1975), *aff'd*, 561 F.2d 609 (5th Cir. 1977).

⁴⁵ See, e.g., *Covey v. Robert A. Johnston Co.*, 19 Fair Empl. Prac. Cas. 1188, 1191 (D. Md. 1977).

⁴⁶ See *id.* In *Covey*, the court asserted that front pay would be just as speculative whether or not the plaintiff requested reinstatement. *Id.* The court suggested that "[w]hen a court finds strong reasons against reinstatement, it should be able to exercise that option without automatically making the employer liable for potentially immense benefits in the future." *Id.*; accord *Foit v. Surburban Bancorp.*, 549 F. Supp. 264, 267 (D. Md. 1982). In *Foit*, the court indicated that "the plaintiff's argument that at age 49 his number of employable years is limited is somewhat hard to swallow." *Id.* Judge Northrup went on to add that he was 71 "and going strong . . . and considering the current make-up of the Supreme Court, [he] seriously doubt[ed] this court's rejection of [the] argument, if appealed, will be overruled." *Id.* at 267 n.7.

⁴⁷ 560 F. Supp. 1161 (S.D.N.Y. 1983).

⁴⁸ See *id.* at 1162. In *Koyen*, the employee was awarded back pay from his termination date to the date of judgment, which included salary increases he would have received during that period but for the unlawful discrimination. See *id.* at 1164. In addition, *Koyen*, who was 68 at the time of judgment, was awarded a lump sum representing the salary and other job-related financial benefits he would have received up to his 70th birthday, offset by payments he would have received from the company pension plan. *Id.* at 1169.

contained in the FLSA,⁴⁹ it was intended that courts "fashion whatever remedy is required to fully compensate an employee for the economic injury sustained."⁵⁰ To deny such authority, he asserted, would defeat the purpose of the ADEA in providing monetary damages when reinstatement is not feasible.⁵¹ Judge Weinfeld's reasoning has been substantially adopted by several circuit courts,⁵² including the Second Circuit in *Whittlesey*.⁵³

Comparing Compensatory Damages for Pain and Suffering

A majority of the circuits that have addressed the issue have held that, in certain circumstances, front pay is available under the ADEA,⁵⁴ yet the courts are in near unanimous agreement that

⁴⁹ *Id.* at 1168; *see supra* note 37.

⁵⁰ 560 F. Supp. at 1168; *see also* *Rodriguez v. Taylor*, 569 F.2d 1231, 1238 (3d Cir. 1977), *cert. denied*, 436 U.S. 913 (1978). In *Rodriguez*, the Third Circuit, relying heavily on Supreme Court precedent under Title VII, characterized the purpose of relief under the ADEA in a widely quoted statement: "The make whole standard of relief should be the touchstone for the district courts in fashioning both legal and equitable remedies in age discrimination cases. Victims of discrimination are entitled to be restored to the economic position they would have occupied but for the intervening unlawful conduct of employers." *Id.* (citing *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763-64 (1976)).

⁵¹ 560 F. Supp. at 1169. Judge Weinfeld specifically rejected the notion that a plaintiff who fails to request reinstatement automatically waives his right to prospective damages. *Id.* The court held that "[to] foreclose prospective damage awards under that concept would mean that the employee is left with no choice but to seek reinstatement, a remedy which in particular cases may be undesirable or unwarranted considering both the employee's or employer's interests." *Id.*

⁵² *See* *Davis v. Combustion Eng'g*, 742 F.2d 916, 922-23 (6th Cir. 1984); *EEOC v. Prudential Federal Sav. & Loan Ass'n*, 741 F.2d 1225, 1231-32 (10th Cir. 1984); *supra* notes 29-31 and accompanying text.

⁵³ *See supra* notes 27-33 and accompanying text.

⁵⁴ *See* *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, 1231-32 (10th Cir. 1984); *Gibson v. Mohawk Rubber Co.*, 695 F.2d 1093, 1100-01 & n.8 (8th Cir. 1982).

In *Loeb v. Textron, Inc.*, 600 F.2d 1003, (1st Cir. 1979), one of the first cases to discuss the availability of front pay at any length, the court concluded in dicta that such awards may be appropriate in certain circumstances, *id.* at 1023. The court characterized front pay as an equitable remedy, *see id.* at 1022 n.33, and drew support for its conclusion from an FLSA case in which the Supreme Court endorsed the granting of broad equitable relief. *See id.* at 1023 (citing *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291 (1960)). In addition, support was gleaned from cases under both Title VII and the FLSA in which payments were made in lieu of reinstatement, *id.* at 1023, though it was conceded that there was little precedent and the amounts granted "have been relatively small and . . . designed to assist plaintiff during the period in which he can be expected to find other employment," *id.*

In a separate opinion, Judge Bownes, concurring and dissenting, distinguished the FLSA cases cited by the majority by noting that they involved damages for "past lost wages," not prospective damage, *id.* at 1026 (Bownes, J., concurring and dissenting), and

compensatory damages for pain and suffering are never available under the Act.⁵⁵ The issues raised by the question of compensatory damages, however, share several important similarities with those pertinent to the front pay controversy.⁵⁶ In fact, a majority of the circuits that have rejected the notion that compensatory damages are authorized under the ADEA have used some of the same arguments that subsequently were found unconvincing in the context of front pay.⁵⁷

Thus, in the leading case disapproving of the availability of damages for pain and suffering,⁵⁸ it was stated that the ADEA "does not mention any money damages other than 'amounts' measured by 'unpaid minimum wages or unpaid overtime compensation' and liquidated damages."⁵⁹ It was further noted that "[w]hile

flatly concluded that "[t]here is no provision in the FLSA for an award based on loss of future earnings . . . therefore, . . . such an award is inconsistent with the ADEA," *id.* at 1027 (Bownes, J., concurring and dissenting); *see* *Martinez v. Behring's Bearings Service, Inc.*, 501 F.2d 104, 105 (5th Cir. 1974); *Powell v. Washington Post Co.*, 267 F.2d 651, 652 (D.C. Cir.) (denying prospective damages under FLSA), *cert. denied*, 360 U.S. 930 (1959).

⁵⁵ *See* *Johnson v. Al Tech Specialties Steel Corp.*, 731 F.2d 143, 148 (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); *Pfeiffer v. Essex Wire Corp.*, 682 F.2d 684, 685-688 (7th Cir.), *cert. denied*, 459 U.S. 1039 (1982); *Fiedler v. Indianhead Truck Line, Inc.*, 670 F.2d 806, 809-810 (8th Cir. 1982); *Naton v. Bank of Cal.*, 649 F.2d 691, 698-99 (9th Cir. 1981); *Slatin v. Stanford Research Inst.*, 590 F.2d 1292, 1293-96 (4th Cir. 1979); *Vazquez v. Eastern Air Lines, Inc.*, 579 F.2d 107, 109-12 (1st Cir. 1978); *Dean v. American Security Ins. Co.*, 559 F.2d 1036, 1038-39 (5th Cir. 1977), *cert. denied*, 434 U.S. 1066 (1978); *Rogers v. Exxon Research & Eng'g Co.*, 550 F.2d 834, 839-42 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978).

⁵⁶ *See* *Ginsberg v. Burlington Indus., Inc.*, 500 F. Supp. 696, 701 (S.D.N.Y. 1980). ("[f]or the same reasons prospective damages have been held by courts to be unauthorized, the ADEA should be read to preclude damages for pain and suffering"); *see also* *Jaffee v. Plough Broadcasting Co.*, 19 Fair Empl. Prac. Cases (BNA) 1194, 1195 (D.Md. 1979) (damages for front pay and pain and suffering are "too speculative" and not provided for by Congress in the ADEA).

⁵⁷ *See* *infra* notes 58-64 and accompanying text.

⁵⁸ *See* *Rogers v. Exxon Research & Eng'g Co.*, 550 F.2d 834, 841-42 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978).

⁵⁹ *Rogers*, 550 F.2d at 840. In *Rogers*, a prominent research scientist was illegally forced to retire at age 60, 404 F. Supp. 324, 326 (D. N.J. 1975), *vacated and remanded*, 550 F.2d 834, 849 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978). As a result, he "experienced a syndrome of severe abdominal pain, vomiting and impotency, all of which," according to the district court, "were clearly and persuasively demonstrated by [the] medical and lay testimony . . . to have been the proximate result of defendant's illegal discrimination." *Id.* at 330. Relying heavily on the "make whole" purpose of monetary damages that the ADEA shares with Title VII, *see id.* at 328, the district court approved a \$200,000 award of damages for pain and suffering, *id.* at 327, 333. The district court noted that "the ADEA essentially establishes a new statutory tort . . . [and] therefore, the panoply of usual tort remedies is available to recompense injured parties for all provable damages." *Id.* at 327.

It is suggested that the district court's reliance on Title VII precedent is inappropriate

the existence of [compensatory damages] might strengthen the claimant's bargaining position with the employer, it would also introduce an element of uncertainty which would impair the conciliation process."⁶⁰ Moreover, the "broad grant of remedial authority" under the ADEA, which has been used to legitimize awards of front pay,⁶¹ has been construed quite differently by the circuits when considering the availability of compensatory damages, and has been severely limited both by the incorporation of FLSA procedures and the definition of "amounts owing" a claimant.⁶²

in light of the fact that damages for pain and suffering are not available under Title VII, *see* *Henson v. City of Dundee*, 682 F.2d 897, 905 (11th Cir. 1982); *Shah v. Mt. Zion Hosp. & Medical Center*, 642 F.2d 268, 272 (9th Cir. 1981); A. LARSEN, *supra* note 2, § 55.43, at 11-80.69 to .71. Nonetheless, it must be conceded that there is ample support for awards for pain and suffering among the commentators. *See, e.g.*, Note, *Compensatory & Punitive Damages in Age Discrimination in Employment*, 32 U. FLA. L. REV. 701, 728-730 (1980); Note, *supra* note 36, at 88. Indeed, it has been suggested that certain discriminatory practices made illegal by the Act are analogous to the common-law tort of intentional infliction of emotional distress, *see* Note, *supra* note 36 at 51-53, and the legislative history of the ADEA is replete with statements indicating that Congress was aware of the significant psychological suffering that may accompany age discrimination, *see, e.g.*, 404 F. Supp. at 330, n.3.

⁶⁰ *Id.* at 841. The *Rogers* court envisioned a "three-sided conflict among the employer, the Secretary, and the claimant" that would create "serious administrative problems." *Id.* at 840-41. The court noted that "[t]he same drawbacks would apply in a court suit brought by the Secretary where the question of authority between him and the claimant to decide upon an acceptable amount would create another area of dispute." *Id.* at 841.

It is suggested that these same arguments could be made in the context of front pay, yet many circuits that have made them in the context of compensatory damages have, for some unexplained reason, found these arguments unconvincing with respect to front pay, and have not noted the apparent inconsistency. *Compare* *Johnson v. Al Tech Specialties Steel Corp.*, 731 F.2d 143, 147-48 (2d Cir. 1984); *with* *Whittlesey v. Union Carbide Corp.*, 742 F.2d 724, 727 (2d Cir. 1984); *compare* *Perrell v. Financeamerica Corp.*, 726 F.2d 654, 657 (10th Cir. 1984) *with* *EEOC v. Prudential Fed. Sav. & Loan Ass'n.*, 741 F.2d 1225, 1231 (10th Cir. 1984); *compare* *Hill v. Spiegel Inc.*, 708 F.2d 233, 235-36 (6th Cir. 1983) *with* *Davis v. Combustion Eng'g Inc.*, 742 F.2d 916, 923 (6th Cir. 1984); *compare* *Freidler v. Indianhead Truck Line, Inc.*, 670 F.2d 806, 810 (8th Cir. 1982) *with* *Gibson v. Mohawk Rubber*, 695 F.2d 1093, 1100-01 & n.3 (8th Cir. 1982). *But see* *Ginsburg v. Burlington Indus., Inc.*, 500 F. Supp. 696, 701 (S.D.N.Y. 1980) (suggesting that the argument is not convincing with respect to both compensatory damages and front pay).

⁶¹ *See supra* notes 29, 37 and accompanying text.

⁶² *See Pfeiffer v. Essex Wire Corp.*, 682 F.2d 684, 685-86 (7th Cir. 1982); *see also* *Fiedler v. Indianhead Truck Line, Inc.*, 670 F.2d 806, 810 (8th Cir. 1982) ("§ 216(b) [of FLSA] has never been interpreted to allow damage awards beyond those specifically enumerated in the statute"); *Naton v. Bank of Cal.*, 649 F.2d 691, 699 (9th Cir. 1981) (compensatory damages "conspicuously omitted from definition of amounts owing"). In considering the availability of compensatory damages, the Second Circuit has enunciated a position directly contradictory to the stance subsequently adopted with respect to front pay by the Whittlesey panel, *see supra* notes 27-33 and accompanying text, by noting that:

The statutory provision in question further states that "[a]mounts owing . . . as a

Policy Considerations

It is submitted that neither front pay nor damages for pain and suffering are precluded merely as the result of statutory silence; nor should the extensive incorporation of FLSA and Title VII provisions into the ADEA render them unavailable. The broad grant of legal and equitable authority present in the ADEA cannot simply be ignored.⁶³ There are, however, certain policy considerations and evidence of congressional intent that, it is suggested, argue strongly against the availability of damages for pain and suffering. For instance, the fact that such damages, unlike front pay, are designed to compensate for non-economic injury furnishes a compelling argument that Congress did not intend them to be part of "amounts owing" to a wrongfully discharged plaintiff.⁶⁴ In addi-

result of a violation . . . shall be deemed to be unpaid . . . wages." Under accepted principles of statutory construction, we consider this specific indication to be dispositive of the drafters' intentions. The more expansive grant of judicial authority relied upon by [the plaintiff] permits courts in their discretion to supplement back pay awards with injunctive relief, orders of reinstatement or promotion, or similar non-monetary remedies.

Johnson v. Al Tech Specialties Steel Corp., 731 F.2d 143, 147-48 (2d Cir. 1984) (citations omitted).

⁶³ See 2 A. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 46.06, at 63 (Sands ed. 1973). "A statute should be construed so that effect is given to all its provisions, so that no part will be inappropriate or superfluous, void or insignificant." *Id.* Section 216(b) of the FLSA provides that "[a]ny employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3). . . ." 29 U.S.C. § 216(b) (1982). Arguably, both references to "legal or equitable relief" are circumscribed by the specific definition of "amounts owed" contained in the same section of both statutes. Compare *id.* 29 U.S.C. § 216 (b) with *id.* § 626(b). However, the ADEA contains an explicit, additional subsection providing for civil actions which empowers "any court of competent jurisdiction to grant such legal or equitable relief as will effectuate the purposes of this chapter." See *id.* § 626(c)(1). In addition, the fact that compensatory damages have not been made available under Title VII should not determine their availability under the ADEA since the remedial sections of the two statutes are very different. Compare 42 U.S.C. § 2000e-5(g) (1982) with 29 U.S.C. § 626(b) (1982) and *id.* § 626(c)(1). Under Title VII, courts are empowered to grant only equitable relief, see 42 U.S.C. § 2000e-5(g) (1982), whereas the ADEA authorizes the granting of both legal and equitable relief, see 29 U.S.C. § 626(b) & (c)(1) (1982).

⁶⁴ See H.R. CONF. REP. No. 95-950, 95th Cong., 2d Sess. 13 (1978), reprinted in 1978 U.S. CODE CONG. & AD. NEWS 528, 535. In a House conference report accompanying the 1978 amendments to the ADEA, it was noted that:

[u]nder section 7(b) [29 U.S.C. § 626(b) (1976)], which incorporates the remedial scheme . . . of the FLSA, "amounts owing" contemplates two elements: First, it includes items of pecuniary or economic loss such as wages, fringe, and other job-related benefits. Second, it includes liquidated damages (calculated as an amount equal to the pecuniary loss) which compensate the aggrieved party for nonpecuniary losses arising out of a willful violation of the ADEA.

tion, damages for pain and suffering are to some degree punitive in nature,⁶⁵ and since punitive damages are not authorized by the ADEA⁶⁶, it has been argued that it would be inappropriate to do so indirectly by authorizing awards for pain and suffering.⁶⁷

With respect to the speculative nature of both awards and their effect on pretrial conciliation processes, it should be noted that front pay is not as inherently speculative as are damages for pain and suffering.⁶⁸ There has been near uniform recognition that to qualify for front pay an employee must be able to point to a date in the not-too-distant future when the award will cease.⁶⁹ When this is not the case, the employee's duty to mitigate damages by finding other employment should provide some fixed limit to the extent of employer liability.⁷⁰

Id. But see *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 758 (1979) ("legislative observations [made 11 years after the passage of an act] . . . are in no sense part of the legislative history") (quoting *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 200 n.7 (1977)); accord *Pavlo v. Stiefel Laboratories, Inc.*, 22 Fair Empl. Prac. Cas. (BNA) 489, 494 (S.D.N.Y. 1979).

There has been a fundamental disagreement over whether an ADEA action is one that sounds in contract or tort. Compare *Kolb v. Goldring, Inc.*, 694 F.2d 869, 871-72 (1st Cir. 1982) (in its "essential nature" an ADEA action is identical to a common law suit for back wages for breach of contract") with *Pavlo v. Stiefel Laboratories, Inc.*, 22 Fair Empl. Prac. Cas. (BNA) 489, 494 (S.D.N.Y. 1979) (ADEA action is primarily one for redress of a tort).

⁶⁵ See *Walker v. Pettit Constr. Co.*, 605 F.2d 128, 130 (4th Cir. 1979); *Rogers*, 550 F.2d at 840; cf. *Developments in the Law, Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1260 (1971) (award of damages for mental suffering includes elements of punishment).

⁶⁶ See *Dean v. American Security Ins. Co.*, 559 F.2d 1036, 1039-40 (5th Cir. 1977), cert. denied, 434 U.S. 1066 (1978).

⁶⁷ See *Johnson v. Al Tech Specialties Steel Corp.*, 731 F.2d 143, 148 (2d Cir. 1984); *Rogers*, 550 F.2d at 840.

⁶⁸ Front pay damages, unlike damages for pain and suffering, are designed to compensate for pecuniary loss related to the job. See *Ventura v. Federal Life Ins. Co.*, 571 F. Supp. 48, 50 (N.D. Ill. 1983); Note, *supra* note 8, at 212. Moreover, awards of front pay are speculative not in terms of effectiveness in light of their stated goal, but only with respect to duration. See *supra* note 44; see also *Johnson v. Al Tech Specialties Steel Corp.*, 731 F.2d 143, 147 (2d Cir. 1984) (damages for pain and suffering not susceptible to computation in administrative conciliation process).

⁶⁹ See *Koyen v. Consolidated Edison Co.*, 560 F. Supp. 1161, 1168 (S.D.N.Y. 1983). Moreover, the Supreme Court's recent decision under Title VII to toll back pay liability upon an unconditional offer of reinstatement that did not include retroactive seniority should mean that under appropriate circumstances such an offer will extinguish front pay liability. See *Ford Motor Co. v. EEOC.*, 458 U.S. 219, 238 (1982); *Crawford & McRae*, *supra* note 10, at 710. But see *Fiedler v. Indianhead Truck Line, Inc.*, 670 F.2d 806, 808 (8th Cir. 1982).

⁷⁰ See *O'Donnell v. Georgia Osteopathic Hosp.*, 574 F. Supp. 214, 219 (N.D. Ga. 1982). In *O'Donnell*, the court set forth various factors that might mitigate for or against an award of front pay including the feasibility of reinstatement under the circumstances of the case, the plaintiff's efforts to mitigate damages by finding other comparable employment, and the

Reinstatement

It has been suggested that making front pay available would make reinstatement less likely and, therefore, it should not be made available.⁷¹ Concededly, it has been uniformly recognized that reinstating a plaintiff is preferable to providing monetary relief in lieu thereof.⁷² Reinstatement is the remedy specifically provided by Congress,⁷³ which recognized the significant psychological damages that may accompany age discrimination,⁷⁴ and expressed concern over the continued employability of older workers.⁷⁵ Nonetheless, it is suggested that making a request for reinstatement a condition precedent to an award of prospective damages makes little practical sense when reinstatement is truly not feasible. It is, in fact, when reinstatement is most inappropriate that the utility of front pay is most apparent to avoid the injustice of leaving the victim economically disadvantaged as a result of the employer's

date of the plaintiff's lawful retirement. *Id.* at 197-98; *See Crawford & McRae, supra* note 10, at 706; *see also Ginsberg v. Burlington Indus., Inc.*, 500 F. Supp. 696, 701 (S.D.N.Y. 1980). In *Ginsberg*, the court, while concluding that there is ample authority to grant awards of front pay, declined to do so in that case "where reinstatement was not genuinely pursued, and where the evidence that plaintiff performed inadequately was very substantial." *Id.*; *see also Davis v. Combustion Eng'g, Inc.*, 742 F.2d 916, 923 (6th Cir. 1984) (front pay award to 41-year old employee would not be appropriate).

In addition, it is suggested that, beyond awarding lump sum payments, courts should not hesitate to exercise continuing jurisdiction over a case involving front pay and supervise the payment of "amounts owing" in installments as an alternative. Although such an approach would entail a type of continuing legal intervention not favored in the context of employment, it is submitted that it has the advantage of lessening the speculative nature of the award by allowing the employer to show that the employee has failed to mitigate his damages. Furthermore, it enables the court, in its discretion, to take into consideration various factors that would justify discontinuing payments. There is precedent for such a practice under both Title VII and the National Labor Relations Act. *See, e.g., Fitzgerald v. Sirloin Stockade, Inc.*, 624 F.2d 945, 957 (10th Cir. 1980) (dictum) (in Title VII cases, payment in installments is "a possible" alternative, but is not mandatory); *Hollywood Brands, Inc.*, 169 N.L.R.B. 691, 697 (1968); *see also Note, supra* note 8, at 220-22, 224-29.

⁷¹ *See Monroe v. Penn-Dixie Cement Corp.*, 335 F. Supp. 231, 235 (N.D. Ga. 1971).

⁷² *See, e.g., Whittlesey*, 742 F.2d at 728; *EEOC v. Prudential Fed. Sav. & Loan Ass'n*, 741 F.2d 1225, 1232 (10th Cir. 1984) (citing *Blim v. Western Elec. Co.*, 731 F.2d 1473, 1479 (10th Cir. 1984)).

⁷³ 29 U.S.C. § 626(b) (1982).

⁷⁴ *See Rogers v. Exxon Research Eng'g Co.*, 404 F. Supp. 324, 330 n.3 (D.N.J. 1975), *vacated*, 550 F.2d 834 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978). It has been suggested that rather than providing damages for pain and suffering, "Congress might well have believed that the resumption of productive work removes the root of the emotional anxiety . . ." *Rogers*, 550 F.2d at 840.

⁷⁵ 29 U.S.C. § 621(a)(1) (1982); *Note, supra* note 36, at 49 n.3.

unlawful act.⁷⁶ This is particularly evident in age discrimination cases, in which the older employee will more often than not have great difficulty finding other suitable employment.⁷⁷ Courts recognizing the availability of front pay have recognized this fact and have approved the award only when reinstatement has been considered impracticable.⁷⁸ However, it is submitted that clear standards for evaluating whether reinstatement is feasible in the first place have not been developed.

Although equitable remedies are generally viewed as within the discretion of the trial court,⁷⁹ the Supreme Court has indicated that the equitable remedy of back pay should be denied in Title VII cases only in extraordinary situations,⁸⁰ and only for reasons that would not frustrate Congressional intent.⁸¹ This same strict standard, it is submitted, should be applied by district courts when determining whether there should be reinstatement in an ADEA case.

In *Whittlesey*, the court justified front pay and denied reinstatement because of "animosity associated with the litigation."⁸² It is submitted that such reasoning, without further clarification, is inadequate since all ADEA claims are likely to create some animosity.⁸³ Therefore, it is suggested that courts should examine the possibility of reinstatement from a more functional standpoint, and should deny it only after a clear showing that animosity will

⁷⁶ See *Whittlesey*, 742 F.2d at 728. Although a verdict for the plaintiff on an age discrimination claim is ordinarily res judicata on his claim for reinstatement, see, e.g., *Cleverly v. Western Elec. Co.*, 450 F. Supp. 507, 511 (W.D. Mo. 1978), *aff'd*, 594 F.2d 638 (8th Cir. 1979), it has been noted that "[r]einstatement is not a mandatory remedy; it lies within the discretion of the trial court after careful consideration of the particular facts of the case," *Cancellier v. Federated Dep't Stores*, 672 F.2d 1312, 1319 (9th Cir. 1982) (citation omitted), *cert. denied*, 459 U.S. 859 (1982).

⁷⁷ See *Morrison*, *supra* note 35, at 17. Recent data indicates that older persons who have been working and become unemployed face the longest median duration of unemployment when searching for another job. *Id.*

⁷⁸ See *supra* note 51.

⁷⁹ See *Mitchell v. DeMario Jewelry*, 361 U.S. 288, 291 (1960); see also *Davis v. Combustion Eng'g, Inc.*, 742 F.2d at 923 (front pay a matter of discretion with the trial court).

⁸⁰ *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 416-21 (1975)

⁸¹ *Id.* at 421.

⁸² See *Whittlesey*, 742 F.2d at 728.

⁸³ Cf. *EEOC v. Kallir, Philips, Ross, Inc.*, 420 F. Supp. 919, 926-27 (S.D.N.Y. 1976), *aff'd*, 559 F.2d 1203, *cert. denied*, 434 U.S. 920 (1977). In *Kallir, Philips*, the court noted that "[s]ome antagonism is the natural result of the filing and litigation of discrimination and retaliation charges and to deny reinstatement merely because of the existence of hostility might be contrary to the remedial goals of Title VII." 420 F. Supp.

actually prevent the plaintiff from performing his job effectively.⁸⁴ Congress has explicitly recognized a need for older workers to retain employment.⁸⁵ This need, it is submitted, indicates that courts should meticulously scrutinize front pay requests and carefully articulate why reinstatement is not feasible.

CONCLUSION

A recent line of cases indicates that, in certain circumstances, front pay is an acceptable remedy under the ADEA. While this conclusion as to availability is legally correct and will serve to avoid injustice in certain situations in which reinstatement is not feasible, the increasing tendency to dispense the award in lieu of reinstatement could result in an increase in unemployed, albeit economically compensated, victims of age discrimination. If this result is to be avoided, clear and consistent standards for evaluating the practicability of reinstatement that focus on the nature of the job involved need to be developed and employed by the district courts.

In *Whittlesey*, the Second Circuit became the first Court of Appeals to hold that the test for inclusion within the "bona fide executive" exemption of the ADEA was "one of function, not pay."⁸⁶ Indeed, the court properly analyzed the nature of *Whittlesey's* job responsibilities in some detail in reaching its conclusion as to the applicability of the exemption. No such functional analysis was employed, however, when it came to analyzing the practicability of reinstatement. Yet, such an analysis and a heightened judicial scrutiny are necessary so that the availability of front pay, which presents an economic disincentive to reinstatement, does not

⁸⁴ Compare *id.* at 927 with *Whittlesey*, 567 F. Supp. at 1330-31. In *Kallir, Philips*, reinstatement of the financial account administrator was denied. 420 F. Supp. at 927. The court noted that "the situation here is quite unlike that presented when reinstatement is sought for an assembly line or clerical worker, or even for an executive whose job is not as sensitive for his employer's interests as is plaintiff's job here." *Id.* In *Whittlesey*, on the other hand, the district court, after noting that the plaintiff "acts primarily as a lawyer, whose executive responsibilities are minor and who does not exert an impact on company policy," 567 F. Supp. at 1321, nonetheless denied reinstatement because of "employer's hostility," *id.* at 1330. In *Whittlesey*, it was the employer and not the employee who objected to reinstatement. *Id.* It is submitted that in refusing to more closely analyze what specific aspects of *Whittlesey's* job would have been impossible to perform in the event of reinstatement, the court, in a very real sense, may have let the employer's vengefulness preclude the plaintiff from obtaining adequate, congressionally preferred relief. *Id.*

⁸⁵ See *supra* note 75 and accompanying text.

⁸⁶ 742 F.2d at 726 (quoting *Whittlesey*, 567 F. Supp. at 1326).

frustrate the purposes of a congressionally enumerated and preferred remedy.

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