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Right to Jury Trial under the Age Discrimination in Employment Act

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RIGHT TO JURY TRIAL UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT

I. INTRODUCTION

The Age Discrimination in Employment Act (ADEA),[1] enacted in 1967, prohibits employers who employ at least twenty persons[2] in an industry affecting interstate commerce from discriminating against persons between the ages of forty and sixty-five in work-related matters.[3] The ADEA attempts to insure that hiring and other decisions relating to an employee's position in his working environment are based on objective standards of the individual's perceived or potential capabilities rather than on a generalized value judgment as to the effects of age on ability.[4]

This comment will examine the enforcement sections of the ADEA to determine whether the seventh amendment right to jury trial[5] attaches to the issues arising in a civil action brought under the ADEA.

In order to maintain a private civil action under the ADEA, the aggrieved party must file notice of intent to sue with the Secretary of Labor at least sixty days prior to instituting the action and within 180 days after the alleged unlawful practice.[6] The notice provision is intended to give the Secretary of Labor time to mediate the grievance through informal methods of conciliation and persuasion.[7]

Two major stumbling blocks can prevent the maintenance of a private civil action for relief under the ADEA. The Secretary of Labor may

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1. 29 U.S.C. §§ 621-634 (1970 & Supp. V 1975).
2. *Id.* § 630(b).
3. *Id.* §§ 623, 631.
4. *Id.* § 621.
5. U.S. CONST. amend. VII provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law." In the federal courts, merger of law and equity took place under the Rules Enabling Act, 28 U.S.C. § 2072 (1970). It is clear from the Rules Enabling Act and Federal Rule of Civil Procedure 38(a) that no substantive change in seventh amendment law was intended through merger. It also should be noted that the Supreme Court has not held that the right to jury trial in civil cases is an element of due process applicable to state courts through the fourteenth amendment.
6. 29 U.S.C. § 626(d) (1970). *See Age Discrimination in Employment: Available Federal Relief,* 11 COLUM. J.L. & SOC. PROB. 281 (1975); Comment, *Procedural Aspects of the Age Discrimination in Employment Act of 1967,* 36 U. PITT. L. REV. 914 (1975).
7. 29 U.S.C. § 626(d) (1970).

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decide to pursue a section 217 action, as is his right under section 216(b) of the ADEA,[8] which terminates an aggrieved person's right to sue. In addition, sections 214(b) and 633(a) have been interpreted to require that the aggrieved party first must contact the appropriate *state* agency, which has at least sixty days to solve the complaint. Thus an individual cannot bypass available state remedies for age discrimination.[9]

II. REMEDIES

Section 626(b) of the ADEA[10] empowers an aggrieved individual or the Secretary of Labor to bring suit for "unpaid minimum wages or overtime compensation." In addition section 626 empowers federal courts to "grant such legal or equitable relief as may be appropriate to effectuate the purposes [of the Act]."[11]

Section 626(b) also provides that its provisions are to be enforced in accordance with certain enforcement provisions of the Portal to Portal Act (PPA).[12] Section 216(b) of the PPA provides that an employer who violates the Act is liable in the amount of unpaid minimum wages plus an additional equal amount as liquidated damages.[13] The availability of compensatory and punitive damages under sections 216 and 217 of the ADEA will be discussed later in this comment.[14]

It is well settled in discrimination cases that a plaintiff only need establish a prima facie case of discrimination to raise a presumption of discriminatory motive. A prima facie case under the ADEA ordinarily is shown through age-related advertisements, application forms, involuntary retirement policies, statistical evidence, or obvious discriminatory acts.[15] Once a plaintiff has established a prima facie case, the burden of proof shifts to the defendant employer to justify the discriminatory act.[16]

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8. *Id.* § 216(b) (1970 & Supp. V 1975).

9. *Id.* §§ 214(b), 633(a). Analogizing § 633(b) of the ADEA to a similar provision of Title VII of the Civil Rights Act of 1964 [hereinafter cited as Title VII], the Third Circuit held that prior resort to state agencies is jurisdictional. Goger v. H.K. Porter Co., 492 F.2d 13 (3d Cir. 1974). *See also* Hadfield v. Mitre Corp., 15 Fair Empl. Prac. Cases 1579 (1st Cir. 1977); Prater v. Shell Oil Co., 15 Fair Empl. Prac. Cases 1114 (W.D. Ky. 1977); Note, *Proving Discrimination Under the Age Discrimination in Employment Act,* 17 ARIZ. L. REV. 495 (1975).

10. 29 U.S.C. § 626(b) (1970).

11. *Id.* §§ 626(b), 626(c).

12. The sections of the PPA which are mentioned are 29 U.S.C. §§ 211(b), 216 (except subsection (a) which has been repealed), and 217 (1970 & Supp. V 1975).

13. Liquidated damages are recoverable only for willful violations, 29 U.S.C. § 216(b) (1970 & Supp. V 1975).

14. *See* text accompanying notes 97-106 *infra.*

15. *See* Lindsey v. Southwestern Bell Tel. Co., 546 F.2d 1123 (5th Cir. 1977).

16. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973) (interpreting Title VII). *See generally* Fiss, *A Theory of Fair Employment Laws,* 38 U. CHI. L. REV. 235 (1971). As to the ambiguous nature of the defendant employer's

III. The Constitutional Right to Jury Trial

The seventh amendment provides for the right to jury trial in all actions at common law exceeding the value of twenty dollars. Although the Federal Rules provide for a completely merged procedure,[17] the difference between legal and equitable remedies remains important in this context because the seventh admendment right to jury trial extends only to trial of "legal" issues. The trial judge must distinguish legal from equitable issues to decide upon which issues to grant a jury trial.

Crucial to any finding of the right to trial by jury under the ADEA is a comparison of the actions and remedies encompassed by the Act with their nearest common law counterparts.[18] A literal reading of the seventh amendment would dictate the division of legal and equitable issues simply by reference to the practice in 1791, freezing applicability of the right to jury trial to situations in which sufficiently similar historical analogies to the common law can be found. This historical approach, although seemingly straight-forward, is limited assistance in resolving jury trial rights in the case of the creation of a cause of action by a post-1791 statute. The statute may alter the essential character of the traditional legal action by varying either the elements of the action or the available remedies.[19] Of course, if a statutory cause of action has elements and remedies sufficiently similar to a pre-1791 legal action, the statute cannot curtail existing jury trial rights.

A modified view of the historical approach, propounded by Mr. Justice Story, would alleviate much of the analytical difficulty in dividing legal from equitable issues. Under this view, if a right historically had no protection in equity, any subsequent protection afforded that right must be enforceable "at law," because there is no third judicial forum.[20] Con-

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burden of proof, see Note, *The Age Discrimination in Employment Act of 1967,* 90 Harv. L. Rev. 380, 388-99 (1976).

17. Fed. R. Civ. P. 2. Federal equity jurisdiction was conferred by Congress upon lower federal courts in 1789. Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 78. Equitable jurisdiction of the federal courts was held to be the same as that of the High Court of Chancery of England in 1789. Thompson v. Railroad Cos., 73 U.S. (6 Wall.) 134, 137 (1867); Robinson v. Campbell, 16 U.S. (3 Wheat.) 212, 223 (1818).

18. This is the traditional "historical approach" used to fix seventh amendment rights. *See, e.g.,* Baltimore & C. Line, Inc. v. Redman, 295 U.S. 654, 657 (1935); F. James & G. Hazard, Civil Procedure § 8.1-.3 (2d ed. 1977). During the past several years the federal right to jury trial has been expanded, and the current test utilizes historical inquiry as only the first element of a three-pronged test. Ross v. Bernhard, 396 U.S. 531 (1970).

19. Two recent Supreme Court cases have indicated that where post-1791 statutes are concerned, a "strict" historical test will not be followed. Instead, the method by which such rights might have been enforced had they existed in 1791 is a crucial consideration. Pernell v. Southall Realty, 416 U.S. 363 (1974); Curtis v. Loether, 415 U.S. 189 (1974).

20. Parsons v. Bedford, 28 U.S. 474, 478-79 (1830).

sequently, the right to jury trial extends beyond those actions involving legal rights cognizable under traditional common law remedies; it also extends to those actions having no historical counterpart in equity.

Recent United States Supreme Court decisions affecting the right to jury trial have cast doubt on the continued vitality of the historical test as the sole test to determine the constitutional right to jury trial. Because of the vast procedural changes undergone by the federal courts in this century, the Supreme Court has indicated that the conception of the right to jury trial must be redefined to reflect evolving procedure. Thus if modern procedure has the effect of correcting the former inadequacies inherent in legal remedies[21] by erasing outdated distinctions between legal and equitable actions,[22] a corresponding shrinkage of equity jurisdiction occurs. The Story method of historical analogy is directly attuned to expansive notions of legal jurisdiction predicated upon the removal of various inadequacies inherent in legal remedies.

In *Beacon Theatres, Inc. v. Westover*[23] the Supreme Court held that when both legal and equitable issues are joined within the same controversy and contain similar factual underpinnings, "only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial be lost through prior determination of equitable claims." The plaintiff Fox sought a declaratory judgment that the contractual arrangement between Fox and Beacon was not in violation of the antitrust laws, and also sought an injunction to prohibit Beacon from instituting any action against Fox under the antitrust laws. Beacon filed a counterclaim asking treble damages for alleged violations of the antitrust laws. The trial court viewed the issues raised by Fox's prayer for a declaratory judgment as essentially equitable and directed that the issues relating to the complaint be tried prior to any jury determination of the counterclaim. The Ninth Circuit refused a writ of mandamus to vacate the order on the basis of the "equitable clean-up" doctrine.[24] This doctrine states that if equity obtains jurisdiction because of the presence of an equitable issue in the case, the equity court can dispose of the entire controversy by deciding both legal and equitable issues.[25] The Supreme Court reversed, finding that the merged procedure of the federal courts and the effect of the Declaratory Judgment Act rendered the legal remedy of declaratory judgment adequate and foreclosed Fox's equitable

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21. *See, e.g.,* Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959). *See also* McCoid, *Procedural Reform and the Right to Jury Trial: A study of Beacon Theatres, Inc. v. Westover,* 116 U. PA. L. REV. 1 (1967).

22. *See, e.g.,* Ross v. Bernhard, 396 U.S. 531 (1970).

23. 359 U.S. 500 (1959).

24. Beacon Theatres, Inc. v. Westover, 252 F.2d 864 (9th Cir. 1958), *rev'd,* 359 U.S. 500 (1959).

25. 1 J. POMEROY, EQUITY JURISPRUDENCE §§ 231-242 (5th ed. 1941).

claim for an injunction. Consequently, the basis of Fox's plea for injunctive relief (inadequacy of legal remedies and irreparable harm pendente lite) had been removed by expansion of the legal remedy.

The Court continued *Beacon's* expansive view of the right to jury trial a few years later in *Dairy Queen v. Wood*.[26] The Court held in *Dairy Queen* that to the extent a complaint requests a money judgment, it presents a legal claim.[27] Thus the plaintiff's claim for an accounting and for a judgment for that amount was found to be a claim for legal relief. The plaintiff in *Dairy Queen,* like the plaintiff in *Beacon,* was denied equitable relief because of the effect of the Federal Rules on the adequacy of the legal remedy. Citing the power given the district courts to appoint masters to assist juries in complicated matters, the Court in *Dairy Queen* severely limited the traditional equitable accounting cause of action in the federal courts.[28] *Dairy Queen* thus can be read as a reaffirmation of the *Beacon* principle that grants the right to jury trial on legal issues, regardless of whether they are "incidental" to equitable claims. *Dairy Queen* also represents a refusal on the part of the Court to consider only the pleadings in deciding the nature of the relief sought.

The next major pronouncement concerning the right to jury trial came in *Katchen v. Landy*,[29] where the Supreme Court carved out a small exception to the *Beacon-Dairy Queen* rationale. The court held that summary jurisdiction in bankruptcy includes the power to set aside preferences without the aid of a jury. Asserting that proceedings of bankruptcy courts are inherently equitable and that the Bankruptcy Act involves a specific statutory scheme contemplating the prompt trial of disputed claims without the intervention of a jury, the Court denied petitioner's claim for a jury trial on the issue of preference.[30]

The expansion of the right to jury trial was continued in *Ross v. Bernhard*[31] where the Supreme Court granted a jury trial in a shareholder derivative suit, even though shareholder standing in such a suit traditionally had been recognized only in equity. The Court again emphasized the disappearance of procedural impediments to the presentation of both legal and equitable issues.[32] Thus, if the claim on behalf of the corporation presents a legal issue, the parties to a shareholders' derivative suit have the same seventh amendment right to a jury trial that historically belonged only to the corporation. This is another example of how the Federal Rules obviate a class of equitable remedies by curing the law's procedural inadequacies.

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26. 369 U.S. 469 (1962).
27. *Id.* at 476.
28. *Id.* at 478. FED. R. CIV. P. 53(b).
29. 382 U.S. 323 (1966).
30. Congressional intent and practical necessity formed the basis for the Court's rejection in *Katchen* of the *Beacon-Dairy Queen* jury trial policy.
31. 396 U.S. 531 (1970).
32. *Id.* at 542-43.

An additional impact of *Ross* was a reiteration by the Court of a three-part test which had been developing since *Beacon*. To determine the legal or equitable nature of a particular issue, the test requires inquiry first into "the pre-merger custom with reference to such questions; second, the remedy sought; and third, the practical abilities and limitations of juries."[33]

A. *Unitary Claim for Unpaid Wages*

The initial determination a court must make in deciding whether a plaintiff asserting a claim for lost wages will be entitled to a jury trial under the ADEA is whether Congress intended the issue to be tried by a jury.[34] Congress cannot statutorily deny the right to jury trial if that right otherwise would attach.[35] Conversely, the seventh amendment does not prevent the statutory *expansion* of the right to jury trial; there is no constitutional right to a non-jury trial under the seventh amendment. Therefore, Congress can expand the right to jury trial to encompass what otherwise might be an equitable action. The ADEA contains no express provision denying the right to jury trial of any issue which might arise under any of the available remedial provisions, and the legislative history on the topic is scant and inconclusive.[36]

However, congressional intent has provided the basis for the Supreme Court's only ruling on the right to jury trial under the ADEA. In *Lorillard v. Pons*[37] the Court held that the selective inclusion of parallel enforcement mechanisms and procedures of the Fair Labor Standards Act (FLSA)[38] with the authorization of "legal" relief in section 626(b) of the ADEA sufficiently established congressional intent that a private civil action under the ADEA should be tried to a jury upon demand.

The correctness of the Court's utilization of indirect indicia of intent to find a "fairly possible" construction of the ADEA by which the un-

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33. *Id.* at 538 n.10.

34. Resolution of the seventh amendment issue must focus initially on possible statutory constructions through which constitutional questions might be avoided. Pernell v. Southall Realty, 416 U.S. 363 (1974); United States v. Thirty-Seven Photographs, 402 U.S. 363, 369 (1971).

35. *See* Pernell v. Southall Realty, 416 U.S. 363, 383 (1974). *But see* Katchen v. Landy, 382 U.S. 323 (1966).

36. The whole test [of discrimination by an employer] is somewhat like the test in an accident case—did the person use reasonable care. A jury will answer yes or no. . . . The Civil Rights Act of 1964 does not cover age discrimination. . . . [T]he laws will operate completely independently of each other, as will the enforcement procedures.

113 CONG. REC. 31,255 (1967) (remarks of Sen. Javits).

37. 46 U.S.L.W. 4150 (1978), *aff'g* 549 F.2d 950 (5th Cir. 1977).

38. 29 U.S.C. §§ 201-260 (1970 & Supp. V 1975). The right to jury trial exists in a § 216 action under the FLSA. *E.g.*, Wirtz v. Jones, 340 F.2d 901 (5th Cir. 1965). The relief available to a § 216 plaintiff under the ADEA is broader in that equitable as well as legal relief may be awarded.

derlying seventh amendment question was avoided will not be dealt with in this comment. It should be noted, however, that the use of congressional intent to decide whether a statutory right to jury trial exists under the ADEA is consistent with the expansive notions of the right to jury trial typified by the Story method of historical analogy and the *Beacon-Dairy Queen* decisions. Statutory construction cannot defeat the right where it is constitutionally mandated,[39] but can provide the right where it would not otherwise exist.

The precise scope of the holding in *Lorillard* is unclear in that the Court did not state whether the statutory right to jury trial existed for all issues under the ADEA or merely for the issues comprising the relief sought by the plaintiff in *Lorillard.*[40] It also must be remembered that the holding in *Lorillard* may subsequently be altered by Congress. As such, the constitutional issues raised in this comment remain relevant.

Lacking a clear expression of congressional intent, the next step in determining the right to jury trial for a lost wages claim is to focus on the constitutional right to jury trial beginning with the pre-merger custom with respect to such a claim.[41] Analyzing a section 216 action for unpaid wages under the three-part *Ross* test, it is apparent that only limited parallels can be drawn to pre-merger practice. To recover for a discriminatory employment practice, the ADEA plaintiff must show that he was refused employment or promotion, or that he was treated in some other manner violative of section 623 of the Act.[42] If the historical analogue of this statutory cause of action was triable to a jury at common law, then it is now triable to a jury by right under the seventh amendment. The modern action and its historical counterpart need not be identical, so long as the court deems that they embrace the same basic legal right.[43]

Wrongful discharge and, to a more limited extent, employment discrimination were actionable at common law. Wrongful discharge of an employee would support a recovery of "lost wages" in an action tried to a jury at common law, even when no assumpsit or quantum meruit would lie because no work was done subsequent to final payment and discharge.[44]

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39. *Cf.* Katchen v. Landy, 382 U.S. 323 (1966). *See* text accompanying notes 29-30 *supra* and notes 87-91 *infra.*

40. The relief sought in *Lorillard* was reinstatement, lost wages, liquidated damages, and attorney's fees and costs.

41. This is the "historical approach," the first element of the three-part *Ross* test for determining the federal right to jury trial for any particular issue in a civil action.

42. 29 U.S.C. §§ 623(a), 623(c) (1970).

43. *See* note 19 *supra.*

44. B. SHIPMANN, COMMON LAW PLEADING 153-69 (3d ed. 1926); 2 J. SUTHERLAND, DAMAGES 471-78 (1883).

In this situation, the discharged servant was said to have the option of treating the employment contract as continuing and could bring suit for breach of contract by reason of the wrongful discharge. This remedy was mentioned in dictum in *Lampleigh v. Brathwait*[45] and subsequently became so settled that in 1853 Justice Compton of the House of Lords stated: "I am not aware that [this remedy] has ever been doubted . . . ."[46]

A serious analytical problem arises in attempting to analogize this ancient common law cause of action to the relief encompassed by the ADEA's lost wages action. The common law relief was in essence a suit on the contract where dismissal constituted a breach. The ADEA's coverage is far broader in that the discriminatory failure to hire or promote almost certainly will involve issues entirely independent of any contractual obligation.[47] Consequently, this area of the ADEA's coverage is more analogous to a tort action because the employer's duty not to discriminate is imposed by statute and not by a contract between the parties.[48] The ADEA has expanded immensely the common law coverage of employment discrimination and has changed the nature of the right being enforced.

Although the Story method of historical analogy would find the first element of the *Ross* test met and initially classify the loss wages claim as legal, failure of a *direct* historical analogy would preclude such a determination because no passable common law equivalent to the ADEA can be found. Nonetheless, several courts have found the historical analogy segment of the *Ross* test met,[49] while others simply have declared such an award legal in nature.[50]

On the other hand, several courts have found that the lost wages award can be characterized as a form of equitable relief,[51] and at least two courts have indicated that damages in the form of lost wages, with-

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45. 80 Eng. Rep. 255 (1616).

46. Emmens v. Elderton, 10 Eng. Rep. 606, 615 (1853).

47. *See* 29 U.S.C. §§ 623(a), 623(c) (1970).

48. Several commentators have taken the position that employment discrimination should be actionable in tort rather than contract. *See, e.g.,* W. PROSSER, LAW OF TORTS § 124 (3d ed. 1964); Comment, *Enforcement of Fair Employment Under the Civil Rights Act of 1964,* 32 U. CHI. L. REV. 430 (1965); Note, *Tort Remedies for Employment Discrimination Under Title VII,* 54 VA. L. REV. 491 (1968).

49. *See, e.g.,* Rogers v. Exxon Research & Engr. Co., 550 F.2d 834 (3d Cir. 1977); Pons v. Lorillard, 549 F.2d 950 (5th Cir. 1977), *aff'd,* 46 U.S.L.W. 4150 (1978); Rechsteiner v. Madison Fund, Inc., 75 F.R.D. 499 (D. Del. 1977).

50. Davis v. Adams-Cates Co., 15 Fair Empl. Prac. Cases 397 (N.D. Ga. 1977); Bertrand v. Orkin Exterminating Co., 432 F. Supp. 952 (N.D. Ill. 1977); Locascio v. Teletype Corp., 74 F.R.D. 108 (N.D. Ill. 1977); Fellows v. Medford Corp., 431 F. Supp. 199 (D. Or. 1977); Coates v. National Cash Register Co., 15 Fair Empl. Prac. Cases 222 (W.D. Va. 1977).

51. *See* note 84 *infra.*

out any other decree, can comprise an equitable award under the ADEA.[52]

Traditionally, a court sitting in equity only infrequently made awards comprised solely of an order for the payment of money.[53] However, an order for the payment of money, which might be analogized to a lost wages award, could be made by an equity court pursuant to a decree of a constructive trust, an action for an accounting, or through an action for equitable restitution. The constructive trust analogy fails because a constructive trust traditionally required a trust *res*.[54] Because the employer will not have segregated the funds which by right belonged to the ADEA plaintiff, the only possible reasoning under a constructive trust theory is that the obligation imposed on the employer by the ADEA itself constitutes a trust *res*.[55] However, even under this rather strained logic, the constructive trust analogy fails because the obligor cannot be the trustee of his own obligation.[56]

Similarly, the action for lost wages cannot be characterized as an accounting action because there is nothing inherently difficult or confusing about the nature of the "transactions" between the parties. It likewise would not be difficult to compute the amount of lost wages due plaintiff should the employer's liability be established.[57]

Several courts have indirectly analogized the lost wages award to an action for equitable restitution.[58] However, if the only remedy sought is restitution of lost wages, the action properly would be characterized as legal rather than equitable. In praying for a money judgment, the ADEA plaintiff has admitted the adequacy of such an award; therefore, a court of equity would be without jurisdiction to grant monetary restitution.[59]

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52. Travers v. Corning Glass Works, 15 Fair Empl. Prac. Cases 584 (S.D.N.Y. 1977) (dictum); Ewald v. Great A & P Tea Co., 73 F.R.D. 374 (E.D. Mich. 1976).

53. Equitable relief developed largely because of the inadequacy of money judgments. Equitable restitution could only be had when the complaint based equity jurisdiction on mistake of fact, duress, undue influence, or where enforcement of the restitution decree was through a constructive trust, equitable lien, or subrogation. D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 4.3, at 240-52 (1973); RESTATMENT OF RESTITUTION 640-61 (1937).

54. RESTATEMENT (SECOND) OF TRUSTS § 74 (1959).

55. Rousseau v. Call, 169 N.C. 173, 85 S.E. 414 (1915).

56. Johnson v. Commissioner, 108 F.2d 104 (8th Cir. 1939).

57. Equity had jurisdiction to compel an accounting only where the relief at law was inadequate. *See* 4 J. POMEROY, *supra* note 25, § 1421. In addition, recovery under this theory would be limited to the defendant's identifiable profit which can be attributed to the harm done to the plaintiff, *i.e.*, the increase in defendant's profits attributable to plaintiff's job replacement. Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251 (1916).

58. *See, e.g.*, Morelock v. NCR Corp., 546 F.2d 682 (6th Cir. 1976).

59. The ADEA plaintiff's claim for lost wages is substitutionary legal restitution for the value of his services. The plaintiff would have no use for specific restitution because his object is not to compel defendant to perform similar ser-

It is doubtful, therefore, that a claim for lost wages under the ADEA can convincingly be characterized as either "legal" or "equitable" by direct analogy to ancient forms of action. The pre-merger analogue segment of the three-part *Ross* test has been treated with only minimal deference since the *Beacon, Dairy Queen* and *Ross* decisions. Thus to the extent that this discredited element of the *Ross* test produces inconclusive results, it should have little bearing on any final determination of the jury trial right.

However, adoption of the Story theory might revitalize the pre-merger custom test. Justice Story's oft-repeated position that the protection of the seventh amendment extends to *all* suits *except* those within the jurisdiction of equity or admiralty as of 1791,[60] would by implication make "legal" all rights which were not fixed in equity as of that date. This rationale was adopted by the *Ross* Court, which recognized that even suits which originally were cognizable only in equity, *e.g.*, an accounting, eventually can be "worked over" into the law.[61] Because no sufficiently clear analogue exists to a pre-merger equitable form of relief, the Story method would conclude that the cause of action must present "legal" issues regardless of "whatever may be the peculiar form which they may assume to settle legal rights."[62]

The second element of the *Ross* test focuses on the nature of the remedy sought. Fundamental to any inquiry concerning the nature of the remedy for lost wages available to an individual under section 216 of the ADEA is an analysis of the same lost wages award when recovered by the Secretary pursuant to section 217 of the Act.

Section 217, like the enforcement section of Title VII, authorizes equitable relief only in the form of an injunction. However, as in Title VII, section 217 expressly authorizes a lost wages award in the form of an order restraining the withholding of payment of lost wages. Because

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vices for him. Because a money judgment is the plaintiff's object, equity should not intervene as the available legal relief is adequate, and equity's intervention normally causes the loss of the seventh amendment right to jury trial. *See* D. DOBBS, *supra* note 53, § 4.4 at 256-60. It may be that an equity court has jurisdiction to make such an award and the burden is on the aggrieved party to object and appeal or waive the error. *See* 2 Z. CHAFEE, SOME PROBLEMS OF EQUITY 296-380 (1950); D. DOBBS, *supra* note 53, § 2.7, at 82-83.

60. Parsons v. Bedford, 28 U.S. 433, 446-47 (1830), *cited with approval in* Curtis v. Loether, 415 U.S. 189, 193 (1974).

61. Ross v. Bernhard, 396 U.S. 531, 539-41 (1970). Historically, the boundary between law and equity has been fluid. Continuous interaction between the two judicial entities resulted in concurrent jurisdiction for many types of cases. Equity often preceded law in recognizing various rights. When the law courts began using the "new" equitable devices, they were said to have "worked over" into law. 12 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 595-97 (1938); F. JAMES & G. HAZARD, CIVIL PROCEDURE § 8.2 (2d ed. 1977).

62. Parsons v. Bedford, 28 U.S. 433, 447 (1830).

the courts have jurisdiction to grant only *equitable* awards under section 217, cases decided thereunder uniformly have denied the right to jury trial on the issue of lost wages, even though the sums recovered by the Secretary are paid directly to the affected employees.[63] The rationale in denying the right to jury trial in section 217 actions has been that the enforcement of a monetary award as an incident of injunctive relief promotes the public interest by assuring effective and uniform compliance with the Act, and that such enforcement is not primarily a tool for the reimbursement of private plaintiffs through civil litigation. However, the only apparent reason the lost wages award is considered equitable when granted pursuant to section 217 is because the discretionary language of the section does not expressly authorize legal relief.[64]

Section 216 of the ADEA allows an individual to recover "the amount of [his] unpaid minimum wages." Section 626(c) allows an individual to seek "such legal *or equitable* relief as will effectuate the purposes of this chapter." Normally an equitable decree is available only upon a showing that the remedy at law is inadequate.[65] It may be, however, that Congress has eliminated the necessity of a private plaintiff showing the inadequacy of legal remedies in a section 216 action, or has substituted a "purpose furthering" requirement so that a private individual may seek a unitary decree restraining the withholding of payment of lost wages in lieu of a mere "legal" lost wages claim.[66]

However, the fact that a federal statute may have done away with the necessity of showing the legal remedy inadequate before availing a private plaintiff of an equitable decree should not mandate the further conclusion that such statutory expansion of equity jurisdiction should cause a contraction of the right to jury trial. If a plaintiff need not show that, as to his particular lost wages claim, the remedy at law is in-

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63. *See* cases cited in Chilton v. National Cash Register Co., 370 F. Supp. 660, 662 (S.D. Ohio 1974).

64. Section 216(b) states: "Any employer who violates . . . this title shall be liable . . ."; whereas § 217 provides: "The district courts . . . shall have jurisdiction, for cause shown, to restrain violations . . . including . . . the restraint of any withholding of payment of minimum wages. . . ." 29 U.S.C. §§ 216(b), 217 (1970 & Supp. V 1975).

65. *See* note 59 *supra.*

66. Section 626(c) provides: "Any person aggrieved may bring a civil action . . . for such legal or equitable relief as will effectuate the purposes of this chapter. . . ." 29 U.S.C. § 626(c) (1970). "[T]he standards of the public interest, not the requirements of private litigation, measure the propriety and need for injunctive relief in these cases." Hecht Co. v. Bowles, 321 U.S. 321, 331 (1944) (action under § 205(a) of the Emergency Price Control Act of 1942). "[W]here an injunction is authorized by statute it is unnecessary for plaintiff to plead and prove the existence of the usual equitable grounds, irreparable injury and absence of an adequate remedy at law. It is enough if the requirements of the statute are satisfied." Shadid v. Fleming, 160 F.2d 752, 753 (10th Cir. 1947); Henderson v. Burd, 133 F. 2d 515 (2d Cir. 1943).

adequate, he is able to assert the admittedly legal claim in pursuit of an equitable remedy. The possibility of concurrent or alternate jurisdiction for the lost wages award might allow a plaintiff to destroy the defendant's right to jury trial merely by electing the available equitable remedy. Alternatively, if a showing of legal inadequacy has been obviated, concurrent jurisdiction might indicate that Congress purposefully has de-emphasized the role of equity in remedial distinctions. Given the normal presumption in favor of a constitutional right, if the latter view is adopted, the right to jury trial should still attach to the admittedly legal issues which will govern the equitable award. Further support for the "remedial de-emphasis" argument can be found through converse inquiry into the *Beacon, Dairy Queen,* and *Ross* decisions. The expansive view of the right to jury trial evident in those cases is predicated on the law courts' adoption of procedures which remove former inadequacies of legal remedies. Such a view would be inconsistent with allowing the statutory removal of the inadequacy requirement to expand equity jurisdiction and correspondingly contract the right to jury trial.

The third element of the *Ross* test would characterize as equitable those issues which are beyond the practical abilities of jurors. The traditional concern of the equity courts was the inadequacy of jury trial on complicated issues. Although the Supreme Court has acknowledged that this element may operate to defeat the jury right,[67] the availability of court-appointed masters to aid in sophisticated factual inquiries[68] in ADEA litigation would appear to weaken this basis for denying a jury trial.

It has been suggested that jury trials are inappropriate in civil rights cases not only because of the complexity of the issues involved, but also because of the dangers of jury prejudice and inconsistent decisions.[69] However, a fundamental constitutional guarantee should not yield to congressionally perceived inadequacies of the jury system as a method of implementing the right to jury trial; the constitutional limitations imposed on legislators might create merely transparent rights which would be cast aside to achieve a "higher good."

An additional argument has been used to defeat jury trial rights in Title VII actions. The enforcement section of Title VII grants the court discretion in awarding back pay subsequent to a finding of unlawful discrimination. Courts have found that the grant of discretion makes the

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67. Apparently congressional declarations concerning jury inadequacy in legislation creating a cause of action are without any effect in deciding the issue; the third element of the *Ross* test can be decided only by the courts. Curtis v. Loether, 415 U.S. 189, 192 n.56 (1974).

68. FED. R. CIV. P. 53(b).

69. *See Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964,* 84 HARV. L. REV. 1109 (1971).

award equitable, since legal awards are mandatory by nature.[70] Although the discretionary nature of the award can be construed as congressional intent that the newly created statutory right be considered equitable for seventh amendment purposes,[71] such indicia of intent should not be a stopping point in determining jury trial rights. In any event, the enforcement sections of the ADEA, except for section 217, are drafted in mandatory terms and provide for both legal and equitable remedies. Thus the argument that Congress intended only equitable remedies for the lost wages claim is without merit.

The fact that the ADEA's enforcement procedures differ significantly from the manner in which a private litigant normally pursues a "legal" claim also might have an effect on whether the issues involved in recovering a lost wages claim are to be considered legal or equitable. It has been argued in similar contexts that where the enforcement of statutory rights involves substantive differences from the enforcement of analogous common law rights, the "strangeness" of the statutory scheme to the common law precludes triggering of the seventh amendment's protection.[72] Even cursory inspection of the burdensome features of the two-tier process through which a private action evolves under the ADEA illustrates plainly that job restitution and not money damages is the principal relief contemplated by the Act. Thus it can be argued that a lost wages claim under the ADEA should not trigger seventh amendment jury trial rights. *Katchen v. Landy* may provide some support for this position.[73] However, adoption of this argument would vitiate the Story theory[74] and weaken the protection of the seventh amendment because the right in question is enforced by article III courts.

Although the section 216 lost wages award should be available in the form of an in personam order of the court, the award most certainly

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70. Curtis v. Loether, 415 U.S. 189 (1974); H. McCLINTOCK, HANDBOOK ON THE PRINCIPLES OF EQUITY § 21 (2d ed. 1948).

71. Congress could not avoid the limitations of the seventh amendment merely by making an otherwise legal award discretionary with the court. Curtis v. Loether, 415 U.S. 189, 195 (1974).

72. *See, e.g.,* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 90 (1965); 5 J. MOORE, FEDERAL PRACTICE 38.06-.07 (1971). For a good discussion on how the ADEA defers to administrative processes to a lesser extent than Title VII, see Bertrand v. Orkin Exterminating Co., 432 F. Supp. 952 (N.D. Ill. 1977). Congressional preference for the administrative process of the ADEA is indicated in 113 Cong. Rec. 31,254 (Nov. 6, 1967) (remarks of Sen. Javits); 113 CONG. REC. 31,253 (Nov. 6, 1967) (remarks of Sen. Yarbrough); 113 CONG. REC. 31,250 (Nov. 6, 1967)(Committee Report).

73. 382 U.S. 323, 339 (1966), *cited with approval in* Curtis v. Loether, 415 U.S. 189, 195 (1974).

74. If a right historically has no corresponding protection in equity, any protection afforded the right subsequently must be enforceable at law because there is no third judicial forum.

presents legal issues under the Story interpretation of the seventh amendment. Thus the right to jury trial should attach to all issues decided pursuant to the lost wages claim. Section 216 is somewhat similar to the enforcement section of the Civil Rights Act of 1968 in that both sections are couched in mandatory, and not discretionary, language. The Supreme Court recently said that such mandatory phrasing substantially affects the characterization of the award as legal.[75] There is no multi-tier system of enforcement under the Civil Rights Act of 1968, but if the Story interpretation of the seventh amendment is accepted, the fact that there is a multi-tier process under the ADEA should not alter the primary factor: that legal rights are being decided.

B. *Injunctive Reinstatement in Addition to an Award of Lost Wages*

Several courts have distinguished the unitary lost wages award from situations in which the lost wages award is made concurrently with an in personam, equitable order of the court.[76] Fundamental to the assertion that the addition of an equitable decree can remove the right to jury trial is the position that the lost wages claim awarded in conjunction with an equitable decree of reinstatement does not present a separate and distinct claim, but rather one non-severable equitable cause of action.[77] The lost wages claim thus is viewed as "an integral part of the basic equitable claim for reinstatement."[78]

The *Beacon-Dairy Queen* rationale mandates a jury trial on all issues common to the legal and equitable claims joined in a single civil action. Therefore, it must be determined whether the addition of the lost wages claim creates a distinct and severable "legal" claim or is an integral part of the requested injunctive relief.[79]

The ADEA expressly grants jurisdiction to federal district courts to make a combined award of reinstatement and lost wages.[80] As discussed above, a lost wages award lacks significant historical similarity to any

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75. Curtis v. Loether, 415 U.S. at 196-98.

76. *See, e.g.,* Morelock v. NCR Corp., 546 F.2d 682 (6th Cir. 1976); Travers v. Corning Glass Works, 15 Fair Empl. Prac. Cases 584 (S.D.N.Y. 1977); Cobb v. Chevron U.S.A., Inc., 15 Fair Empl. Prac. Cases 408 (N.D. Ga. 1977).

77. If the claims are severable, *Beacon* and *Dairy Queen* bar the operation of the equitable clean-up doctrine to remove otherwise available seventh amendment rights.

78. Morelock v. NCR Corp., 546 F.2d 682 (6th Cir. 1976).

79. Recovery of lost wages is in no way contingent upon being successfully reinstated and vice versa. To state that the lost wages claim can be viewed as an integral part of a totally independent remedy is merely an attempt to escape the clear holding of *Dairy Queen. See* Comment, *Jury Trial in Employment Discrimination Cases—Constitutionally Mandated?*, 53 TEX. L. REV. 483, 501-05 (1975), for an excellent analysis of the "integral element" characterization.

80. 29 U.S.C. § 626(b) (1970).

pre-merger equitable decree[81] or common law remedy.[82] However, initial inquiry into the possible historical analogues to the combined reinstatement and lost wages award should not be precluded even by a finding that the unitary lost wages award, because of factors other than the pre-merger custom test, presents legal issues.

Historical inquiry must be directed toward the possible existence of an ancient equitable remedy which incorporated analogous elements of the combined reinstatement and lost wages award and which was not merely a combined legal and equitable remedy granted by a court of equity pursuant to its "clean-up" or "concurrent" jurisdiction.[83]

The "analysis" used by most courts which have characterized the combined award as equitable has been a broad statement of equity's jurisdiction to provide complete relief to the parties combined with a brief policy justification for finding the award equitable,[84] or merely a citation to a similar case.[85] The justification in these cases for the district courts' jurisdiction to make an equitable decree has obscured the attendant jury trial right to those legal awards made in conjunction with equitable decrees. In no sense other than through "clean-up" jurisdiction can the money claim be characterized as "equitable."[86]

The enforcement provisions of the ADEA and the *Katchen* holding may complicate this conclusion. By allowing the Secretary (under section 217) and an individual (under section 216) to seek reinstatement, Con-

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81. *See* text accompanying notes 42-50 *supra.*

82. *See* text accompanying notes 51-59 *supra.*

83. Corbin states that restitution is not available unless the defendant has received value from the plaintiff, 5 A. CORBIN, CONTRACTS § 1107, at 573 n.21 (1964); but Moore states that it also may be used to restore the status quo, 5 J. MOORE, *supra* note 72, § 38.24, at 190.5. Historically, equity courts likely would have refused to make the combined reinstatement and lost wages award because an award of specific performance of an employment contract was so rare as to be almost nonexistent. *See* 11 S. WILLISTON, A TREATISE OF THE LAW OF CONTRACTS § 1423, at 786-88 (3d ed. W. Jaeger 1968). *See* authorities cited note 87 *infra.*

84. The policy justification is ordinarily the perceived similarity of the ADEA to Title VII. *See, e.g.,* Morelock v. NCR Corp., 546 F.2d 682, 685 (6th Cir. 1976); Polstorff v. Fletcher, 430 F. Supp. 592, 594 (N.D. Ala. 1977) (combined award of lost wages and reinstatement comprises action for discretionary equitable restitution); Hannon v. Continental Nat'l Bank, 427 F. Supp. 215, 217 (D. Colo. 1977); Travers v. Corning Glass Works, 15 Fair Empl. Prac. Cases 584, 588 (S.D.N.Y. 1977); Platt v. Burroughs Corp., 424 F. Supp. 1329 (D. Pa. 1976).

85. *E.g.,* Cobb v. Chevron U.S.A., Inc., 15 Fair Empl. Prac. Cases 408, 411 (N.D. Ga. 1977) (citing *Morelock*); Ewald v. Great A & P Tea Co., 15 Fair Empl. Prac. Cases 590 (E.D. Mich. 1977) (citing *Laugesen*).

86. *Compare* Porter v. Warner Co., 328 U.S. 395 (1946) *and* Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288 (1960) (both authorized expansion of federal district court jurisdiction on the basis of equitable principles) *with* Dairy Queen v. Wood, 369 U.S. 469, 479 (1962) (under merged procedure legal claims cannot be awarded as "incident" to equitable claims to defeat seventh amendment jury trial rights).

gress has made available a remedy which would be almost certainly *not* otherwise available. Reinstatement is merely specific performance of an employment contract, and the general rule is that an employee may not obtain specific performance of an employment contract, even when the contract is breached by wrongful discharge.[87] The employee, but for the presence of the ADEA, would be relegated to a claim for damages. However, where only reinstatement is sought, there is no right to a jury trial under the ADEA.[88] Thus Congress has converted the employee's remedy from what would otherwise be an action at law with the right to jury trial into an equitable action which carries no jury right. This would appear to violate the seventh amendment.

It can be argued, however, that by allowing reinstatement and even the combined award of reinstatement and lost wages without a jury trial, Congress has neither violated the *Beacon-Dairy Queen* rationale, nor the more easily met "historical" seventh amendment test.

At least in the bankruptcy area, it is still possible for an otherwise legal claim to become sufficiently equitable to cause loss of the right to jury trial when such claim is asserted in a summary bankruptcy proceeding.[89] Such a rule is, at the least, an exception to the explicit holding of *Dairy Queen.* It may be, however, that *Katchen* illustrates that the holding in *Dairy Queen* was not *constitutionally* mandated, but only indicated the policy of the Supreme Court to prevent further erosion of the seventh amendment's protection in the merged federal court system.[90] If this is so, Congress then could legislate to the permissible boundaries of the historical test of the seventh amendment, not bound by the *Beacon-Dairy Queen* decisions. Historically, equity enjoyed jurisdiction to summarily decide preference claims as an incident of its bankruptcy jurisdiction.[91] Thus, the holding in *Katchen* fits within this theory.

If this theory is accepted as an explanation for the diversity between *Beacon-Dairy Queen* and *Katchen*, historical inquiry must focus on possible elements of ancient equitable jurisdiction which would allow a payment

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87. *See* D. DOBBS, *supra* note 53, at 929; 4 J. POMEROY, *supra* note 25, at 1343; 11 S. WILLISTON, *supra* note 83, § 1423, at 783-85; Van Hecke, *Changing Emphases in Specific Performance,* 40 N.C.L. REV. 1 (1961).

88. There are no reported cases in which a jury trial was sought under § 217 in an ADEA action. It is well settled that actions brought under § 217 in an FSLA action do not require a jury trial upon demand. Paradise Valley Investigation & Control Serv., Inc. v. Dunlop, 521 F.2d 1342 (9th Cir. 1975); Sullivan v. Wirtz, 359 F.2d 426 (5th Cir.), *cert. denied,* 385 U.S. 852 (1966); Wirtz v. Jones, 340 F.2d 901 (5th Cir. 1965); Hodgson v. Steward In-Fra-Red Commissary, Inc., 370 F. Supp. 503 (E.D. Pa. 1973).

89. Katchen v. Landy, 382 U.S. 323 (1966).

90. *See* Comment, *The Seventh Amendment and Civil Rights Statutes: History Adrift in a Maelstrom,* 68 NW. U.L. REV. 503, 534-35 (1973).

91. *See* 4 J. POMEROY, *supra* note 25, §§ 1334, 1413-15. Note, however, that the Bankruptcy Act gives "jurisdiction at law and in equity" to the bankruptcy courts. 11 U.S.C. § 11(a) (1970).

of lost wages in conjunction with an "incidental" award of reinstatement. The underlying statutory purposes of the ADEA also must be compared to the components of the Bankruptcy Act which influenced the court in *Katchen*.

It was stated previously that under some circumstances orders for the payment of money might be awarded pursuant to an equitable decree without any right to jury trial.[92] The only other situation in which equity courts would entertain a claim for money damages was when the claim was joined with a plea for an in personam and thus equitable order of the court, pursuant to the court's "clean-up" jurisdiction.[93]

Such "concurrent" jurisdiction would not be possible under the ADEA. Because an employee normally cannot get specific performance of an employment contract, no in personam order of the court is generally available.[94] Under the Story method of historical analogy, reinstatement would encompass legal issues because the only pre-1791 remedy available to an employee would be an action for damages for breach of the employment contract. The fact that an in personam order is made available by the ADEA should not change this basic *legal* nature of the reinstatement award. Although Congress can provide for equitable remedies to attach to legal claims, it cannot remove the right to a jury trial on legal issues.[95] Hence there would appear to be no traditionally available in personam order of the court to provide initial equity jurisdiction. The effect of allowing "incidental" jurisdiction of the lost wages claim to defeat the right to jury trial would be to bootstrap the legal claim of lost wages through the use of the reinstatement claim which also presents legal issues.

In addition, the ADEA does not appear to be the type of "specific statutory scheme contemplating the prompt trial of a disputed claim without the intervention of a jury" held to be so crucial in *Katchen*.[96] In sum, there appears to be no justification for denying the right to jury trial for all issues comprising a combined job reinstatement-lost wages award.

C. *Compensatory and Punitive Damages*

Although not specifically mentioned as an available remedy under the ADEA, several courts have allowed recovery of compensatory[97] and

92. *See* text accompanying notes 53-57 *supra*.

93. Camp v. Boyd, 229 U.S. 530, 552 (1912); 5 J. MOORE, *supra* note 72, § 38.19, at 169.

94. *See* authorities cited note 87 *supra*.

95. In Pernell v. Southall Realty, 416 U.S. 363, 383 (1974), the Court held that the seventh amendment's applicability was unaffected by congressional action where the statutory action involved common law rights brought in a federal court of general jurisdiction.

96. 382 U.S. at 339.

97. Coates v. National Cash Register Co., 433 F. Supp. 655 (W.D. Va. 1977); Davis v. Adams-Cates Co., 15 Fair Empl. Prac. Cases 397 (N.D. Ga. 1977); Ber-

punitive damages[98] in section 216 actions. The propriety of granting such relief under the ADEA is beyond the scope of this article.[99] However, to the extent that such damages are recoverable, the Supreme Court's holding in *Curtis v. Loether,*[100] that there is a right to jury trial for compensatory and punitive damages under the Civil Rights Act of 1968, practically assures a similar result under the ADEA.

Compensatory damages recoverable under civil rights statutes ordinarily do not attempt to reimburse the plaintiff for actual pecuniary harm.[101] The purpose of compensatory damages is to effect compliance with the statute, while providing a money recovery for deprivation of statutorily protected interests. This deprivation is merely measured in monetary terms. As such, compensatory damages are "substitutionary relief."[102] Regardless of whether the statutory cause of action is analogized to breach of contract or tort, if an award of damages is the relief sought by an ADEA plaintiff, his remedy at law is clearly adequate. Equitable relief therefore would be inappropriate. Further, courts which have allowed recovery of compensatory damages in ADEA actions have done so because the ADEA was viewed as a new statutory tort.[103] Juries typically determine the amount of compensatory damage awards; thus the three-part *Ross* test would mandate the right to jury trial on all issues comprising a claim for compensatory damages.

A split of authority exists on the availability of punitive damages in an ADEA action.[104] Historically, punitive damage awards were dis-

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trand v. Orkin Exterminating Co., 419 F. Supp. 1123 (N.D. Ill. 1976), *aff'd on rehearing,* 432 F. Supp. 952 (N.D. Ill. 1977). *Contra,* cases cited note 104 *infra;* Dean v. American Sec. Ins. Co., 15 Fair Empl. Prac. Cases 889 (5th Cir. 1977); Rechsteiner v. Madison Fund, Inc., 15 Fair Empl. Prac. Cases 216 (D. Del. 1977); Hannon v. Continental Nat'l Bank, 427 F. Supp. 215 (D. Colo. 1977); Sant v. Mack Trucks, Inc., 424 F. Supp. 621 (N.D. Cal. 1976).

98. Bertrand v. Orkin Exterminating Co., 432 F. Supp. 952 (N.D. Ill. 1977); Davis v. Adams-Cates Co., 15 Fair Empl. Prac. Cases 397 (N.D. Ga. 1977); Murphy v. American Motors Sales Corp., 410 F. Supp. 1403 (N.D. Ga. 1976).

99. *See* Richards, *Monetary Awards for Age Discrimination in Employment,* 30 ARK. L. REV. 305 (1976); Richards, *Compensatory and Punitive Damages in Employment Discrimination Cases,* 27 ARK. L. REV. 603 (1974); Note, 43 BROOKLYN L. REV. 47 (1976); Note, 7 SETON HALL L. REV. 642 (1976).

100. 415 U.S. 189 (1974).

101. This presumably is the function of the lost wages award and to a lesser extent, the liquidated damages award under the ADEA. See the "back pay" provision of 42 U.S.C. § 2000e-5(g) (1970).

102. D. DOBBS, *supra* note 53, § 3.1, at 135.

103. *See* cases cited note 97 *supra.*

104. Cases which have held that punitive damages are not available under the ADEA include Rogers v. Exxon Research & Engr. Co., 550 F.2d 834 (3d Cir. 1977); Travers v. Corning Glass Works, 15 Fair Empl. Prac. Cases 584 (S.D.N.Y. 1977); Cobb v. Chevron U.S.A., Inc., 15 Fair Empl. Prac. Cases 408 (N.D. Ga. 1977). *Contra,* cases cited note 98 *supra.*

cretionary with the jury,[105] and equity courts would neither make punitive damage awards nor help to enforce punitive damage awards obtained in law courts.[106] Because the remedy is in the form of a money judgment, and because juries have traditionally been allowed to decide punitive damage issues, punitive damages present legal issues if recoverable under the ADEA.

D. *Liquidated Damages*

Section 216(b) of the Fair Labor Standards Act[107] provides that employers who are found to be in violation of the Act are liable not only for lost wages, but also for an additional equal amount as liquidated damages.[108] In 1974 section 260 of the PPA amended section 216 and gave the courts discretion to reduce or disallow a liquidated damages award if the employer could show good faith and reasonable grounds for believing his acts did not violate the FLSA.[109]

Section 626(b) of the ADEA incorporates section 216(b) but makes no mention of section 260's applicability. Section 626(b) merely states "that liquidated damages shall be payable only in cases of willful violations of this chapter."[110] If section 260 of the PPA permitting discretionary reduction of the liquidated damages award is not applicable to a section 216 action under the ADEA, then given the mixed compensatory and punitive aspects of the award, the right to jury trial should attach to the only issue to be determined, *i.e.,* whether the violation was willful.

If section 260 of the PPA is applicable to a section 216 award in an ADEA action, a more complex problem is presented. The element of discretion contained in section 260 is similar to the discretion granted the courts under Title VII.[111] In *Albemarle Paper Company v. Moody*[112] the Supreme Court cited *Curtis* for the proposition that "the court's discretion is equitable in nature."[113] In *Curtis* it is apparent that the Court

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105. Fleitmann v. Welsback St. Lighting Co., 240 U.S. 27, 29 (1916); Decorative Stone Co. v. Building Trades Council, 23 F.2d 426, 427 (2d Cir. 1928) (right to recover penal damages enforceable only in a common law action).

106. 2 J. POMEROY, *supra* note 25, §§ 433-460(d).

107. 29 U.S.C. §§ 201-219 (1970 & Supp. V 1975).

108. *Id.* § 216(b).

109. *Id.* § 260.

110. *Id.* § 626(b).

111. *Compare* 29 U.S.C. § 260 (1970 & Supp. V 1975) ("the court may, in its sound discretion, award no liquidated damages or award any amount thereof") *with* 42 U.S.C. § 2000e-5(g) (Supp. V 1975) ("the court may ... order such affirmative action as may be appropriate ... or any other equitable relief as the court deems appropriate").

112. 422 U.S. 405 (1975).

113. *Id.* at 416.

found equally decisive the fact that Title VII authorizes *only* equitable awards.[114]

Even if section 260 is held to be a part of the ADEA by virtue of amending section 216, it is difficult to see how congressional provisions granting discretion to the courts are any less violative of the seventh amendment than any other functional abridgement of jury trial rights, if such discretion effectively removes a legal issue from the province of the jury. Thus regardless of section 260's applicability, all issues involved in a liquidated damages claim should be tried to a jury.

V. *Conclusion*

The right to jury trial under the ADEA is in an unnecessary state of confusion. Even assuming that the constitutional limitations imposed on Congress with respect to the right to jury trial are represented by *Katchen,* there is no permissible justification for denying the right to jury trial in an ADEA action for any issues related to claims for relief available under the Act, including reinstatement. Legal issues should not be magically converted into equitable issues by federal statutes that permit equitable remedies in cases that presented legal issues before an equitable remedy was available. Neither the equitable clean-up doctrine, thinly disguised through a characterization of legal claims as integral parts of equitable ones, nor a grant of "discretion" to the courts should be allowed to accomplish a like result.

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114. After contrasting Title VII's purely equitable relief with Title VIII's "simple authorization of an action for actual and punitive damages," the Court considered the "discretion" argument. 415 U.S. at 197.