Washington Law Review

Volume 62
Number 3 *Dedicated to Professor Luvern V. Rieke*

7-1-1987

Bootstrapping a Malice Requirement into ADEA Liquidated Damage Awards—Dreyer v. ARCO Chemical, 801 F.2d 651 (3d Cir. 1986), cert. denied, 55 U.S.L.W. 3586 (U. S. Mar. 2, 1987) (No. 86-1062)

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BOOTSTRAPPING A MALICE REQUIREMENT INTO ADEA LIQUIDATED DAMAGE AWARDS—*Dreyer v. ARCO Chemical*, 801 F.2d 651 (3d Cir. 1986), *cert. denied*, 55 U.S.L.W. 3586 (U.S. Mar. 2, 1987) (No. 86-1062).

In *Dreyer v. ARCO Chemical*,[1] the Third Circuit announced a standard for double damage awards under the Age Discrimination in Employment Act (ADEA) that departs radically from the standard the Supreme Court deemed acceptable in *Trans World Airlines v. Thurston*.[2] The ADEA[3] protects employees over forty from discrimination on the basis of age. In order to enforce the Act, Congress created a two-tier remedy scheme:[4] one, equitable and legal remedies to reimburse discrimination victims; and two, liquidated damages (hereinafter "double damages"[5]) to punish and deter employers from committing "willful" violations.

Before the Supreme Court issued its *Thurston* opinion, federal courts struggled with the definition of a willful violation. The statute requires proof that the employer acted because of the employee's age.[6] Courts interpreted this clause to require intentional discrimination. Willfulness and intent are inextricably related concepts. Nevertheless, the courts tried to separate proof of intent and proof of willfulness. The courts developed a threshold inquiry into intent to prove liability, and a separate, unrelated inquiry into willfulness to justify a double damage award. The confusion spread when eight circuits developed eight separate willfulness definitions.[7] After *Thurston*, most circuits accepted the Supreme Court's willfulness definition. *Dreyer* represents the Third Circuit's effort to resolve the remaining conceptual problems.

Under the *Dreyer* standard, fact patterns involving discrete employment decisions require additional evidence of outrageous conduct to meet the willfulness standard. In fact patterns involving a policy or plan, however,

1. 801 F.2d 651 (3d Cir. 1986), *cert. denied*, 55 U.S.L.W. 3586 (U.S. Mar. 2, 1987) (No. 86-1062).

2. 469 U.S. 111 (1985).

3. 29 U.S.C. §§ 621–634 (1982), *amended by* Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, 100 Stat. ____ (1986).

4. 29 U.S.C. § 626(b) (1982).

5. Courts compute liquidated damages by awarding an additional amount equal to the pecuniary damages, thus doubling the amount of damages the plaintiff receives.

6. 29 U.S.C. § 623(a)(1982).

7. Syvock v. Milwaukee Boiler Mfg. Co., 665 F.2d 149 (7th Cir. 1981); Hedrick v. Hercules, 658 F.2d 1088 (5th Cir. 1981); Goodman v. Heublein, Inc., 645 F.2d 127 (2d Cir. 1981); Spagnuolo v. Whirlpool Corp., 641 F.2d 1109 (4th Cir. 1981); Kelly v. American Standard, Inc., 640 F.2d 974 (9th Cir. 1981); Mistretta v. Sandia Corp., 639 F.2d 588 (10th Cir. 1980); Wehr v. Burroughs Corp., 619 F.2d 276 (3d Cir. 1980); Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979); *see also* Comment, *The Standard of Willfulness for Liquidated Damages Under the Age Discrimination in Employment Act*, 32 EMORY L.J. 583 (1983).

the Third Circuit stated it will follow *Thurston* and award double damages where the employer "knew or showed reckless disregard for . . . whether its conduct was prohibited by the ADEA."[8]

Although the Third Circuit correctly identified a possible internal inconsistency in *Thurston,* it employed the wrong analytic framework. The *Dreyer* standard creates a remedy system inconsistent with ADEA purposes, and, by design, avoids punishing intentional discrimination cases. After examining the *Dreyer* standard, this Note concludes that the *Thurston* standard should be followed and that double damages should be awarded based on conscious and unconscious violations of the ADEA.

I. BACKGROUND TO THE ADEA AND THE WILLFULNESS STANDARD

A. *ADEA Purposes, Prohibitions, and Remedies*

Congress enacted the ADEA in 1967 to promote employment of older persons, prohibit "arbitrary age discrimination," and educate employers about age discrimination.[9] Congress designed the ADEA discrimination prohibitions to parallel those found in Title VII of the Civil Rights Act.[10] The ADEA correspondingly forbids employers to make employment decisions or enact policies because of age.[11]

Rather than completely mirror Title VII,[12] Congress incorporated some

8. Dreyer v. ARCO Chemical, 801 F.2d 651, 656 (3d Cir. 1986), *cert. denied,* 55 U.S.L.W. 3586 (U.S. May 2, 1987) (No. 86-1062).

9. 29 U.S.C. § 621(b)(1982).

10. Lorillard v. Pons, 434 U.S. 575, 584 (1978). Title VII is codified at 42 U.S.C. §§ 2000e to 2000e-17 (1982). Title VII prohibits employment discrimination on the basis of race, color, sex, religion, and national origin.

11. Section 4(a) of the Act forbids employers:

> (1) to fail or refuse to hire or to discharge any individual or to otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's age;
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> (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.

29 U.S.C. § 623(a). As originally enacted, the Act protected employees aged 40 to 64. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 12, 81 Stat. 602, 607 (1967). On January 1, 1979, Congress raised the upper age limit to 69. Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, § 3, 92 Stat. 189, 189–90 (1978). On January 1, 1987, Congress eliminated the upper age limit. Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, 100 Stat. ____ (1986).

12. Congress chose Fair Labor Standards Act (FLSA) rather than Title VII remedies and enforcement mechanisms because it wanted to take advantage of the existing Department of Labor bureaucracy. Congress was concerned about lengthy EEOC charge processing backlogs, and wanted to avoid the possibility that age discrimination enforcement would be neglected in favor of other forms of discrimination. *Age Discrimination in Employment, 1967: Hearings on S. 830, S. 788 Before the*

of the Fair Labor Standards Act (FLSA)[13] remedies into the ADEA by reference.[14] In addition, the ADEA grants courts the power to award "such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter."[15] The statutory, legal, and equitable remedies presently available to the plaintiff include pecuniary awards of back pay and benefits, reinstatement, "front pay" in lieu of reinstatement, and double damages for willful violations.[16] In contrast, Title VII remedies are limited to back pay and equitable remedies such as reinstatement.[17] Federal circuit courts of appeals unanimously hold that common law punitive, pain and suffering, and emotional distress damages are not available under the ADEA.[18]

This Note focuses on the Act's double or "liquidated damage" clause.[19] The ADEA double damages award merges two concepts from the FLSA: one, the FLSA automatically awards double damages for any violations;[20] and, two the FLSA imposes criminal penalties for willful violations.[21] Instead of automatically awarding double damages, as under the FLSA, the ADEA provides double damages if the violation is willful. Thus, the

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Subcomm. on Labor of the Senate Committee on Labor and Public Welfare, 90th Cong., 1st Sess. 24 (1967) (remarks of Sen. Javits); *id.* at 29 (remarks of Sen. Smathers); *id.* at 396 (statement of National Retail Merchants Association).

The Department of Labor's dominion over age discrimination did not last. Congress transferred age discrimination enforcement to the EEOC as part of President Carter's 1978 reorganization plan. Reorg. Plan No. 1 of 1978, 3 C.F.R. 321 (1979), *reprinted in* 5 U.S.C. app. at 1155 (1982), *and in* 92 Stat. 3781 (1978).

Congress also incorporated FLSA remedies because of dissatisfaction with Title VII procedures and remedies. *See* Lorillard v. Pons, 434 U.S. 575, 584–85, 585 n.14 (1978). In *Lorillard*, the Court held that incorporating FLSA procedures and remedies demonstrated Congress' intent that jury trials be available in ADEA suits. *Id.* at 585. Title VII would not necessarily allow jury trials. The inference to be drawn is that FLSA remedies and procedures are more helpful to age discrimination victims than are Title VII remedies and procedures.

13. 29 U.S.C. §§ 201–219, 251–262 (1982). The FLSA establishes minimum standards for wages and hours, and penalizes employers who fail to pay mandatory overtime and keep required records.

14. Section 7(b) of the ADEA states:

> [t]he provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section.

29 U.S.C. § 626(b) (1982). Section 216 defines FLSA remedies. "Subsection (a) thereof" refers to the imposition of criminal penalties for "willful" violations.

15. *Id.*

16. *Id.* For a discussion of "front pay" in lieu of reinstatement, see Note, *Front Pay: A Necessary Alternative to Reinstatement Under the Age Discrimination in Employment Act*, 53 FORDHAM L. REV. 579 (1984); Annotation, *Award of "Front Pay" Under § 7 of the Age Discrimination in Employment Act of 1967*, 74 A.L.R. FED. 745 (1985).

17. 42 U.S.C. §§ 2000e to 2000e-17.

18. *See infra* text accompanying notes 71–77.

19. 29 U.S.C. § 626(b) (1982): "Provided, [t]hat liquidated damages shall be payable only in cases of willful violations of this chapter."

20. *Id.* § 216(b).

21. *Id.* § 216(a).

ADEA eliminates the FLSA criminal penalties for willful violations. Congress enacted the ADEA hybrid damages and eliminated criminal penalties in order to preserve a punitive and deterrent effect and avoid the proof problems of a criminal penalty.[22]

B. Proof of Disparate Treatment Under the ADEA: The Inquiry Into Intent

Disparate treatment analysis, which focuses on the employer's intent, is the most common model of proof used by ADEA litigants.[23] Disparate treatment cases follow two fact patterns. First, cases like *Dreyer,* where

22. 113 CONG. REC. 7076 (1967); *see also* Trans World Airlines v. Thurston, 469 U.S. 111, 125 (1985) (Court recognizes that Congress intended that the ADEA avoid difficult problems of proof for plaintiff-employees).

23. Litigants may also use the disparate impact model to prove discrimination when there is a facially neutral policy or practice that has a heavier negative impact on persons within a protected class. Player, *Title VII Impact Analysis Applied to the Age Discrimination in Employment Act: Is a Transplant Appropriate?* 14 U. TOL. L. REV. 1261, 1267–68 (1983) [hereinafter *Impact Analysis*]. Once the plaintiff demonstrates, usually by statistical analysis, an unequal impact on the protected class, an employer must then prove the disputed practice's business necessity. There is usually no need to prove discriminatory intent or motive in disparate impact analysis. "Business necessity" is an affirmative defense, so the burden is on the employer to prove necessity by a preponderance of the evidence. International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977). The plaintiff may choose to attack the business necessity defense by proving that the reasons advanced are a pretext for age discrimination, Gathercole v. Global Associates, 560 F. Supp. 642, 648 n.11 (N.D. Cal. 1983), *rev'd on other grounds,* 727 F.2d 1485 (9th Cir. 1984), thus putting the defendant's intent at issue. In addition, the plaintiff may choose to attack the business necessity defense by providing proof of alternative methods for achieving the business purpose which have a lesser negative impact on the protected group. Criswell v. Western Air Lines, 709 F.2d 544, 554 (9th Cir. 1983).

The disparate impact model of proof is suited for seeking out and eliminating discrimination that may be caused by unconscious stereotypes. Several courts of appeals have stated that disparate impact analysis is appropriate for proving age discrimination claims. *See* EEOC v. Borden's, Inc., 724 F.2d 1390 (9th Cir. 1984); Leftwich v. Harris-Stowe State College, 702 F.2d 686 (8th Cir. 1983); Geller v. Markham, 635 F.2d 1027 (2d Cir. 1980), *cert. denied,* 451 U.S. 945 (1981). The Third Circuit has left open whether disparate impact analysis is appropriate in age discrimination claims. Massarsky v. General Motors Corp., 706 F.2d 111 (3d Cir.), *cert denied,* 464 U.S. 937 (1983).

Defendants and commentators have attacked the application of disparate impact analysis to age discrimination cases. *See* EEOC v. Governor Mifflin School Dist., 623 F. Supp. 734, 739–40 (E.D. Pa. 1985); *Impact Analysis, supra,* at 1261; Stacy, *A Case Against Extending the Adverse Impact Doctrine to ADEA,* 10 EMPLOYEE REL. L.J. 437 (1984–85). These persons advance a variety of arguments based on the "reasonable factors other than age" defense in 29 U.S.C. § 623(f)(1). For example, one author argues the "reasonable factor" defense authorizes an employer to use any reasonable age neutral factor regardless of its impact. *Impact Analysis, supra,* at 1272. Similarly, the defendant in *Governor Mifflin* argued the "reasonable factor" language compelled the conclusion that the ADEA reaches only to intentional discrimination. *Governor Mifflin,* 623 F. Supp. at 740. Courts have not been receptive to these arguments, and have pointed to the strong similarity in the language of Title VII and the ADEA. *Id; see also* Comment, *Disparate Impact Analysis and the Age Discrimination in Employment Act,* 68 MINN. L. REV. 1038 (1984) (arguing that disparate impact analysis is consistent with the ADEA and necessary to achieve ADEA's remedial purposes).

plaintiffs challenge decisions to discharge, or refusals to hire or promote a single individual. This Note labels such cases "discrete employment decisions." Second, cases like *Thurston,* where the employer's policy or plan imposes a difference in salary, benefits, or working conditions based directly on age.[24] This Note labels such cases "age-based policy patterns."

The plaintiff carries the burden of proving age discrimination by a preponderance of the evidence.[25] Federal courts generally agree that age need not be the sole factor in the employer's decision.[26] A plaintiff need only show that age was the determining factor; in other words, "but for" the employee's age, the action would not have been taken.[27]

Under the disparate treatment model of proof, the plaintiff may prove discriminatory intent by direct or indirect evidence. Direct evidence may be found in overtly discriminatory statements or policies which, on their face, discriminate on the basis of age. Indirect proof of the employer's intent follows a three-step analysis: first, the plaintiff must demonstrate a prima facie case;[28] second, the employer must articulate a nondiscriminatory reason for its action;[29] and third, the plaintiff must then present evidence showing that the employer's stated reason is a pretext for discrimination.[30]

The ADEA provides several statutory affirmative defenses. Under the ADEA, age may be a bona fide occupational qualification for the position, the action may be taken pursuant to a bona fide seniority system, or the

24. Player, *Proof of Disparate Treatment Under the Age Discrimination in Employment Act: Variations on a Title VII Theme,* 17 GA. L. REV. 621, 625 (1983) [hereinafter *Disparate Treatment*].

25. Loeb v. Textron, 600 F.2d 1003, 1017–19 (1st Cir. 1979).

26. Perrell v. FinanceAmerica, 726 F.2d 654, 656 (10th Cir. 1984); Cancellier v. Federated Dep't Stores, 672 F.2d 1312, 1316 (9th Cir.), *cert. denied,* 459 U.S. 859 (1982); Loeb v. Textron, 600 F.2d 1003, 1019 (1st Cir. 1979).

27. *See* cases cited *supra* note 26.

28. The factors for establishing a prima facie case vary, depending upon the circuit and whether the challenged decision is one to hire, promote, or discharge. *Disparate Treatment, supra* note 24, at 634–44. In the Ninth Circuit, a prima facie case for discharge requires evidence that: first, the plaintiff is a member of the protected class; second, the plaintiff was performing satisfactorily in his job; third, the plaintiff was discharged; and, fourth the employer replaced the plaintiff with a substantially younger employee who had equal or inferior qualifications. Douglas v. Anderson, 656 F.2d 528, 532–33 (9th Cir. 1981). The elements of a prima facie case are defined because the courts believe that, if those elements are not rebutted, it is more likely than not that the defendant was illegally motivated. *Disparate Treatment, supra* note 24, at 627–28.

29. The legitimate, nondiscriminatory reason for the action must be introduced through admissible evidence. *Disparate Treatment, supra* note 24, at 631. Mere denial of a discriminatory motive is insufficient to withstand a directed verdict for the plaintiff. *Id.*

30. Typical forms of pretext evidence include direct evidence such as statements or memoranda, statistical evidence, and evidence that the allegedly nondiscriminatory reason was not uniformly applied. *Id.* at 662–65. Once all of the evidence has been produced, the trier of fact must decide whether the plaintiff, by a preponderance of the evidence, carried the burden of showing a discriminatory intent.

action may be taken pursuant to a bona fide employee benefit plan.[31] These defenses are, by their nature, applicable only to age-based policy patterns.

Once the plaintiff has established a disparate treatment case by direct or indirect proof, thus justifying pecuniary damages, the factfinder decides whether the employer willfully violated the Act, thereby justifying double damages. The definition of willfulness has plagued courts since the ADEA's inception. The statute does not define willfulness. Consequently, the courts of appeals were divided over what employer conduct constituted a willful violation sufficient to allow a double damage award.[32]

C. Trans World Airlines v. Thurston: *Trying to Define Willfulness*

The Supreme Court addressed the willfulness issue for the first time in *Trans World Airlines v. Thurston.*[33] *Thurston* involved an age-based policy pattern.[34] The Court affirmed the Second Circuit's standard, which awards double damages if the employer "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA."[35] The Court stated that the "know or recklessly disregard" standard is an "acceptable" definition.[36]

The Court concluded that Congress intended to establish two tiers of damages: first, pecuniary damages, which make the plaintiff whole; and second, double damages, which the Court concluded are punitive in nature.[37] The Court endorsed the "knew or showed reckless disregard" standard instead of the "in the picture" standard used in some circuits. The "in the picture" standard awarded double damages where the employer simply knew its acts were governed by the ADEA. The Court rejected the "in the picture" standard because it required a double damage award in almost every instance the employer was found liable.[38]

Nevertheless, the Court reversed the Second Circuit for misapplying the knew or recklessly disregarded standard.[39] The defendant had made a good

31. 29 U.S.C. § 623(f)(1), (2) (1982).

32. *See supra* note 7.

33. 469 U.S. 111 (1985).

34. *Thurston,* 469 U.S. at 114–20. Several plaintiffs challenged the defendant's complex job bidding practices for pilots and flight engineers. Federal aviation regulations prohibit pilots from flying once they reach age 60. There is no mandatory age regulation for flight engineers. The defendant's policy allowed pilots disqualified from flying for reasons other than age to "bump" to flight engineer positions. Pilots disqualified because of age, however, were required to follow a complex bidding procedure for flight engineer openings, which negatively affected their employment conditions.

35. *Id.* at 126.

36. *Id.* at 129. By doing so, the Court left the door open for other formulations.

37. *Id.* at 125.

38. *Id.* at 127–28 (Because employers must post ADEA notices, every time an employer discriminates on the basis of age, the employer will know that the ADEA is "in the picture.").

39. *Id.* at 129.

faith effort to determine if its policy violated the Act by consulting legal counsel and negotiating with the union.[40] Based on these efforts, the defendant believed in good faith that its policy was consistent with the Act.[41] The employer defended the policy on the grounds that it met the standards of the bona fide occupational qualification and bona fide seniority system defenses.[42] Therefore, the Supreme Court ruled that the violation was not willful because the facts did not support a finding that the employer knew or recklessly disregarded whether its conduct violated the Act.[43] After the Supreme Court decided *Thurston,* courts of appeals uniformly applied the knew or recklessly disregarded standard to age-based policy patterns[44] and to discrete employment decisions.[45] *Dreyer* is the lone exception.

II. THE DECISION: *DREYER v. ARCO CHEMICAL*

A. Facts and Procedure

Plaintiffs Dreyer and Strayer worked in the Financial Controls Department of an ARCO plant in Pennsylvania. Defendant ARCO consolidated some of its operations, reducing the work force size in plaintiffs' department. ARCO alleged that it laid off Dreyer and Strayer because of the departmental restructuring.[46]

Plaintiffs filed suit together, claiming intentional and willful violations of the ADEA. Following a trial, the jury returned a verdict for plaintiffs and

40. *Id.* at 129–30.

41. *Id.*

42. *Id.* at 122.

43. *Id.* at 130.

44. EEOC v. Wyoming Retirement Sys., 771 F.2d 1425, 1431 (10th Cir. 1985) (EEOC challenged state employee mandatory retirement statute; defendants concluded ADEA inapplicable in good faith and in reliance upon counsel's advice); Whitfield v. City of Knoxville, 756 F.2d 455, 463–64 (6th Cir. 1985) (city had good faith belief ADEA not applicable to state and local governments).

45. Gilchrist v. Jim Slemons Imports, 803 F.2d 1488, 1496 (9th Cir. 1986) (jury award of double damages to discharged car sales manager reversed and remanded for reconsideration under *Thurston* standard); Smith v. Consolidated Mut. Water, 787 F.2d 1441, 1443 (10th Cir. 1986) (discharged employee received pecuniary damages, but not double damages because of thin evidence at trial); Archambault v. United Computing Sys., 786 F.2d 1507, 1513–14 (11th Cir. 1986) (branch manager of sales office discharged in violation of ADEA; remand to district court for determination of willfulness under *Thurston* standard); Galvan v. Bexar County, 785 F.2d 1298, 1307 (5th Cir. 1986) (double damage award upheld where testimony revealed age was explicit reason for not reinstating plaintiff); Wilhelm v. Blue Bell, Inc., 773 F.2d 1429, 1435 (4th Cir. 1985) (remand on willfulness issue because trial court gave "in the picture" instruction to the jury); Gilkerson v. Toastmaster, Inc., 770 F.2d 133, 136–37 (8th Cir. 1985) (upheld jury award of pecuniary damages based on sufficiency test, although court clearly disagreed with verdict; reversed double damage award because no evidence that defendant knew the conduct violated ADEA).

46. Dreyer v. ARCO Chemical, 801 F.2d 651 (3d Cir. 1986), *cert. denied,* 55 U.S.L.W. 3586 (U.S. Mar. 2, 1987) (No. 86-1062).

awarded double damages to Dreyer.[47] The Third Circuit upheld the defendant's liability for ADEA violations, but reversed the jury's willfulness finding.[48] In so doing, the Third Circuit announced a new standard for assessing willfulness in cases involving discrete employment decisions, overruling its prior willfulness standard.[49] The *Dreyer* standard requires evidence of outrageous conduct to support a double damages award.[50]

B. Reasoning

The Third Circuit distinguished between the two disparate treatment fact patterns.[51] The Third Circuit agreed with other federal courts that the *Thurston* standard should apply in cases where the employer embarked upon a generally applicable policy or plan.[52] In these cases, double damages will not result in every case because evidence of the employer's good faith or reasonable belief that the policy did not violate the Act will negate a knowing or reckless mental state.[53]

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47. *Id.* at 653. The court does not explain why Strayer did not receive a liquidated damage award. Strayer did not appeal the jury verdict.

48. *Id.* at 659.

49. *Id.* at 657–58.

50. *Id.* at 658.

51. *Id.*

52. *Id.* This language is broad enough to apply to disparate impact cases as well. *See supra* note 23. Double damages will probably not be awarded in disparate impact cases, since intent or knowledge is generally not at issue. However, if the plaintiff is able to show that the employer's business necessity defense conceals deliberate age discrimination, then double damages may be awarded.

53. *Dreyer,* 801 F.2d at 656. The Third Circuit in *Dreyer* may have confused the burdens of proof and production under the *Thurston* standard, and may have erroneously assigned the burden of proving good faith under the *Thurston* standard to the employer-defendant. In *Dreyer,* the Third Circuit stated that the employer should show good faith under the *Thurston* standard. *Id.* at 658. The court did not indicate whether it was imposing a burden of proof or a burden of production on the employer. The court may have made this error by confusing good faith under the *Thurston* standard with the statutory FLSA good faith defense to double damage awards.

"Good faith" and "reasonable belief" in the ADEA context only serve to negate willfulness and, thus, are elements of the plaintiff's case-in-chief. The ultimate burden of proving the employer acted with knowledge or reckless disregard should remain with the plaintiff-employee. However, courts should impose a burden of production for evidence of good faith on the employer because such evidence is under the control of the employer, and the plaintiff would have extreme difficulty locating evidence to disprove good faith.

The Supreme Court reasoned in *Thurston* that the employer's good faith belief that it did not violate the Act meant that it did not have the "knowledge" necessary to show willfulness. With this reasoning, the Court did not adopt the FLSA "good faith" affirmative defense to the award of double damages. The FLSA defense mitigates the automatic double damage award; it is not applicable to the imposition of criminal penalties. 29 U.S.C. § 260 (1982). The Supreme Court stated in *Thurston* that ADEA double damages are a substitute for the FLSA criminal penalty provisions. Trans World Airlines v. Thurston, 469 U.S. 111, 125–26 (1985). The Court cited FLSA precedent to support its reasoning that the defendant's good faith and reasonable belief meant that the violation of the ADEA was not willful. *Id.* at 129. The case cited, Nabob Oil v. United States, 190 F.2d 478 (10th Cir.), *cert. denied,* 342 U.S. 876 (1951), makes no reference to the statutory FLSA "good faith" defense. Instead, it refers to the

Nevertheless, the court stated that the *Thurston* standard is "not easily incorporated" in a case alleging age discrimination in a discrete employment decision, because it results in a double damage award in every situation.[54] The court reasoned that the ADEA as interpreted in *Thurston* requires two tiers of damages.[55] Yet the "knew or showed reckless disregard" standard would allow a double damage award in every discrete employment decision case where the employer violated the ADEA.[56] In such cases, liability by definition includes a finding that the employer intentionally acted because of the employee's age.[57] The court implicitly

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defendant's "reasonable belief" that the plan it was following did not violate the FLSA and did not warrant criminal penalties. *Nabob Oil,* 190 F.2d at 479.

Under *Thurston,* the plaintiff has the burden of proving the employer acted with knowledge or reckless disregard. The defendant has the burden of producing evidence of good faith. Unlike the FLSA good faith defense, the employer is not obligated to prove its good faith and reasonable belief by a preponderance of the evidence. To the extent that the court in *Dreyer* confused good faith under the *Thurston* standard with the FLSA statutory defense, it erred.

54. *Dreyer,* 801 F.2d at 656–57.

55. *Id.* at 657.

56. *Id.* at 656–57. A surprising number of cases have awarded pecuniary damages for ADEA liability, but denied a double damage award. *See* McNeil v. Economics Laboratory, Inc., 800 F.2d 111 (7th Cir. 1986); EEOC v. Community Unit School Dist. No. 9, 642 F. Supp. 902 (S.D. Ill. 1986); Durso v. Wanamaker, No. 83-1385 (E.D. Pa. June 12, 1986); Gregory v. Albert Einstein Medical Center, 41 Fair Empl. Prac. Cas. (BNA) 1579 (E.D. Pa. May 21, 1986); McDowell v. Avtex Fibers, Inc., No. 81-4822 (E.D. Pa. March 20, 1986); Spanier v. Morrison's Management Servs., 611 F. Supp. 642 (N.D. Ala. 1985); Berndt v. Kaiser Aluminum & Chem. Sales, 604 F. Supp. 962 (E.D. Pa. 1985), *aff'd,* 789 F.2d 253 (3d Cir. 1986). Unfortunately, the courts do not analyze the apparent contradiction between a finding of intentional discrimination and a finding of a lack of knowledge or willful disregard under the *Thurston* standard. The courts are constrained to uphold the verdict because of the sufficiency of evidence standard. Nevertheless, the courts deny double damages because the evidence does not support a finding that the defendant's state of mind met the *Thurston* standard. The decisions are result-oriented. The courts are obviously uncomfortable with any liability finding, and disagree with the jury verdict. Nevertheless, the court grants the defendant some relief by issuing a judgment notwithstanding the verdict on double damages.

The cases are not well reasoned. The cases suggest, however, that a gloss on the *Thurston* standard might reconcile the logical dilemma the Third Circuit presents in *Dreyer.* The courts seem to be searching for some item of evidence, other than circumstantial evidence needed to support a jury finding, to justify the double damage award. With the exception of *Spanier,* the courts have not looked for evidence of outrageous or aggravated conduct. If some additional evidence is required, two tiers of damages may be possible in discrete employment decision cases. If the evidence required does not rise to the high outrageous conduct standard, it would not create the problems discussed in this Note. Nevertheless, nothing in *Thurston* indicates that separate evidence is needed to establish liability for double damages.

57. In age discrimination cases prior to *Thurston* some courts found this concept troublesome. For example, in Syvock v. Milwaukie Boiler Mfg., 665 F.2d 149 (7th Cir. 1981), the court considered an age discrimination case factually similar to *Dreyer.* There, the Seventh Circuit articulated a standard essentially similar to *Thurston's*: the defendant's actions were knowing and voluntary and it knew or reasonably should have known its actions violated the ADEA. *Id.* at 156. In dicta, *Syvock* refused to differentiate between willful and nonwillful violations based on the distinction between disparate impact and disparate treatment cases, because it concluded that nothing in the legislative history supported such a distinction. *Id.* at 155. The court stated that there ought to be two levels of liability in disparate treatment cases as well. *Id.* at 155 & n.7. *Syvock* reasoned that unconscious violations were

recognized that evidence of good faith or reasonable belief will not negate the employer's discriminatory intent: in order to find liability, the jury must already have concluded that the employer's nondiscriminatory reasons were a pretext for age discrimination.[58] Constructive knowledge of the ADEA's application will be imputed from the Act's posting requirements.[59]

To resolve the ostensible conflict between the two-tier requirement and the single-tier effect of the knew or recklessly disregarded standard in discrete employment decision cases, the Third Circuit developed an outrageous conduct standard. The court sought a willfulness standard that distinguishes between violations in discrete employment decision cases, which are "almost always" intentional, and violations where double damages should be awarded to punish the employer.[60] The court contrasted age-based policy plans with discrete employment decisions, concluding in

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possible in disparate treatment cases as well as in disparate impact cases. *Id.* Presumably, *Syvock* was referring to disparate treatment cases involving discrete employment decisions, since it decided such a fact pattern. Unfortunately, *Syvock* failed to produce an example of an unconscious violation in a disparate treatment case, so it is impossible to tell whether it had the *Thurston* fact pattern in mind or whether the court thought it was possible to find an unconscious violation in a discrete employment decision. No cases since *Syvock* have found an unconscious violation in an individual employment decision. Since the essence of proof in these cases is an inquiry into the employer's intent, this result seems theoretically impossible. As one court that tried to apply *Syvock* noted:

> In a "disparate treatment" case . . . [precedent] require[s] an ultimate showing of an intent to discriminate, and that any articulated non-discriminatory reason necessarily is a pretext. How can a facially non-discriminatory scheme be a pretext and yet there be no intent to discriminate? . . . In fact, it is difficult if not impossible to make sense of congressional intent in 29 U.S.C. § 626(b) as long as the federal courts continue to apply [Title VII precedent] to ADEA cases and refuse to acknowledge the possibility of liability for non-intentional age discrimination. . . . [A]s a practical matter, [double] damages are virtually automatic if there is to be any monetary recovery at all by the employee.

Cowen v. Standard Brands, 572 F. Supp. 1576, 1580–81 (N.D. Ala. 1983).

Given that disparate treatment requires proof of intent, the distinction between conscious and unconscious violations only makes sense if viewed in terms of the difference between the *Thurston* and *Dreyer* fact patterns.

Group decisionmaking in employment actions is common, and is another area where unconscious violations in discrete employment situations could arguably be found. Conceivably, the employee's direct supervisor may make an intentionally discriminatory employment decision which is innocently ratified by higher levels of management. Berndt v. Kaiser Aluminum & Chem. Sales, 604 F. Supp. 962, 967 (E.D. Pa. 1985), *aff'd*, 789 F.2d 253 (3d Cir. 1986), suggests such a defense to plaintiff's allegations of willfulness. This result is undesirable, because employers should be responsible for intentional actions of supervisors. The result is also illogical, since the first-level supervisor's intent has been imputed to the employer. A court's already difficult inquiries into intent are severely complicated when several persons are involved in a potentially discriminatory employment decision.

58. *See supra* text accompanying notes 23–31.

59. Dreyer v. ARCO Chemical, 801 F.2d 651 (3d Cir. 1986), *cert. denied*, 55 U.S.L.W. 3586 (U.S. Mar. 2, 1987) (No. 86-1062).

60. *Id.* at 657.

the latter that the plaintiff must prove outrageous conduct to receive double damages.[61]

The court did not define outrageous. In common usage "outrageous" means involving or doing great injury or wrong; exceeding all bounds of decency or reasonableness.[62] The *Dreyer* court also declined to provide specific examples of situations where a factfinder could find willfulness. The court suggested a few possible situations, but noted that in most cases the award would depend upon an ad hoc inquiry into the particular facts.[63]

The court relied upon *Thurston's* assertion that double damages are intended to be punitive to support the outrageous conduct requirement.[64] The Third Circuit found its standard in the discussion of punitive damages in the Restatement (Second) of Torts § 908.[65] The *Dreyer* court rejected that portion of the Restatement language referring to an inquiry into "evil motive and reckless disregard of the rights of others," because *Thurston* had disclaimed a need to show "evil motive" as an element of willfulness.[66] Instead, the court focused on additional language in the Restatement defining punitive damages as an award given to punish the defendant for outrageous conduct and to deter him and others from similar conduct.[67]

III. ANALYSIS

Dreyer and *Thurston* cannot coexist, because different circuits interpreting the same statute will be applying different standards to reach different results. Furthermore, *Dreyer* is inconsistent with the Act's goals and

61. *Id.* at 658. The court stated:

> In sum, in some ADEA violations that are claimed to be willful, it will be sufficient to uphold a finding of willfulness through evidence that the defendant embarked on a policy or generally applicable course of conduct which it knew violated the ADEA or that it acted in reckless disregard of whether that conduct violated the Act. If an employer can show good faith and reasonable grounds for believing it was not in violation of the Act, a willfulness finding would be inappropriate.
>
> Where an employer makes a decision such as termination of an employee because of age, the employer will or should have known that the conduct violated the Act. Nonetheless, in order that the [double] damages be based on evidence that does not merely duplicate that needed for the compensatory damages, there must be some additional evidence of outrageous conduct.

Id. (citation omitted).

62. WEBSTER'S UNABRIDGED DICTIONARY 1271 (2d ed. 1983).

63. *Dreyer*, 801 F.2d at 658.

64. *Id.*

65. *Id.* at 657.

66. *Id.* (citing *Thurston*, 469 U.S. at 126 n.19).

67. *Id.* at 657.

structure. *Dreyer* fails to appropriately punish intentional age discrimination. Although *Dreyer* recognized a significant issue, it developed a standard that distorts the proper purpose and function of the ADEA.

A. Dreyer *and* Thurston *Cannot Coexist*

If the circuits apply different willfulness standards to similar facts, the lack of uniformity and predictability will lead to forum shopping and inequitable enforcement of the Act. The outrageous conduct standard places a high burden on the typical plaintiff because the employer often expresses plausible reasons for its actions. The employer's actions rarely appear to be grossly offensive or outside the bounds of decency. Therefore, double damages will be available in far fewer cases under the *Dreyer* standard.

An example illustrates the point. The hypothetical plaintiff is a 55-year-old middle manager demoted during a legitimate business consolidation and denied a transfer to another job for which he is arguably qualified. Substantially younger employees in equivalent positions retain their jobs or are transferred to lateral positions. The plaintiff's new position has less status and responsibility, but the employer continues to pay plaintiff's original salary. He is in constant conflict with his new, younger supervisor and quits. The plaintiff alleges age discrimination and asks for pecuniary and double damages. He asserts that he was demoted, denied transfer, and constructively discharged from his last position because of his age. The employer asserts that it demoted the plaintiff because of poor performance. It asserts that the younger employees receiving transfers were more qualified than the plaintiff. The employer denies constructively discharging the plaintiff, and claims the plaintiff was surly and uncooperative. Both sides present contradictory evidence. The employer has prominently posted the red, white, and blue ADEA bulletin.

Applying *Dreyer* and *Thurston* to these facts produces different results. An appeals court would easily affirm a pecuniary damages award under either standard. Under the *Thurston* standard, a willfulness verdict would also be upheld. The appeals court could conclude that the plaintiff satisfactorily proved willfulness by showing that the employer intentionally discriminated against the plaintiff while constructively aware that the Act applied. None of the employer's conduct, however, seems grossly offensive or indecent. Thus, the employer may escape double damages under *Dreyer*.

B. Dreyer *Is Inconsistent With the ADEA's Remedial Statutory Goals and Statutory Structure*

Congress enacted the ADEA to remedy the harms older workers suffer from pervasive employer misconceptions about the relationship of age to ability.[68] When Congress enacted the ADEA, it recognized that unemployment affects older workers more severely than younger workers.[69] It emphasized the physical and psychological hardships older workers suffer due to pervasive age discrimination.[70] Consequently, any court construing the ADEA is unfaithful to congressional intent unless the court interprets the Act consistently with its broad remedial purposes.

Double damages are punitive in nature, but Congress recognized that a necessary secondary impact of readily available double damages is to provide some compensation for nonpecuniary losses. Readily available double damages partially substitute for the lack of common law compensatory damages for pain and suffering and emotional distress.[71] The Act

68. 113 CONG. REC. 34,740 (1967) (testimony of Rep. Perkins).

69. *See* 29 U.S.C. § 621(a)(3) (1982) (statement of legislative findings and conclusions concerning noneconomic harms); 113 CONG. REC. 34,751 (1967) (remarks of Rep. Dwyer).

70. *See supra* note 69.

71. Double damages have both punitive and compensatory aspects. In the Senate floor debates before the ADEA's adoption, Senator Javits stated "the [FLSA's] criminal penalty in cases of willful violation has been eliminated and a double damage liability substituted. This will furnish an effective deterrent to willful violations and at the same time avoid the difficult problems of proof which would arise under a criminal provision." *See* 113 CONG. REC. 7076 (1967). For cases finding a punitive aspect of double damage awards, see Walker v. Pettit Constr., 605 F.2d 128, 130, *modified on other grounds sub nom.* Frith v. Eastern Airlines, 611 F.2d 950 (4th Cir. 1979); Dean v. American Sec. Ins. Co., 559 F.2d 1036, 1040 (5th Cir. 1977); Rogers v. Exxon, 550 F.2d 834, 840 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978).

Congress has also recognized that double damages have a compensatory effect. The word "liquidated" implies compensatory damages of a predetermined amount awarded where it is difficult to determine the actual measure of damages. Overnight Motor Transp. Co. v. Missel, 316 U.S. 572, 583–84 (1942) (liquidated damage award under the FLSA); RESTATEMENT (SECOND) OF CONTRACTS § 356 comments a, b (1979). The legislative history of the 1978 amendments to the ADEA supports this interpretation. H.R. REP. NO. 950, 95th Cong., 2d Sess. 13–14 (1978), *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 528, 535. The report states:

> The House recedes with an amendment which provides for a jury trial on any issue of fact in an action for recovery of amounts owing as a result of a violation of the ADEA. Under section 7(b), which incorporates the remedial scheme of sections 11(b), 16 and 17 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.
>
> The Supreme Court recently ruled that a plaintiff is entitled to a jury trial in ADEA actions for lost wages, but it did not decide whether there is a right to jury trial on a claim for liquidated damages. Because liquidated damages are in the nature of legal relief, it is manifest that a party is entitled to have the factual issues underlying such a claim decided by a jury. The ADEA as amended by this act does not provide remedies of a punitive nature. The conferees therefore agree

states that the courts may award "such legal or equitable relief as may be appropriate to effectuate the purposes" of the Act.[72] Based on that clause, some plaintiffs argue they are entitled to remedies above and beyond pecuniary and statutory double damages.[73] However, the circuit courts unanimously hold that common law punitive damages, pain and suffering damages, and emotional distress damages are not available under the ADEA.[74] The courts reason that because the ADEA is based on the FLSA, and because the FLSA does not provide for similar damages, the broad ADEA language is restricted by the FLSA restraints. The courts also conclude that the administrative conciliation process[75] would be hampered by introducing the uncertainty of unmeasurable damages.[76] Some courts also rely upon the availability of double damages.[77]

The *Dreyer* standard is inconsistent with the Act's remedial goals. Under *Dreyer's* outrageous conduct standard, double damages will be awarded in far fewer intentional discrimination cases. The double damages' compensatory aspect will be essentially lost. Consequently, *Dreyer's* severe limitation on double damages will leave age discrimination victims considerably worse off than they are under the *Thurston* standard.[78]

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to permit a jury trial on the factual issues underlying a claim for liquidated damages because the Supreme Court has made clear that an award of liquidated damages under the FLSA is not a penalty but rather is available in order to provide full compensatory relief for losses that are "too obscure and difficult of proof for estimate other than by liquidated damages."

Id. at 535 (citation omitted).

One court has used this statement to support denial of damages for pain and suffering. Pfeiffer v. Essex Wire Corp., 682 F.2d 684, 687 (7th Cir.), *cert. denied*, 459 U.S. 1039 (1982); *see also* Perrell v. FinanceAmerica Corp., 726 F.2d 654, 657 (10th Cir. 1984); Hill v. Spiegel, Inc., 708 F.2d 233, 235 (6th Cir. 1983) (citing *Pfeiffer* with approval of reasoning). The Supreme Court did not consider the legislative history to the 1978 ADEA amendments in *Thurston*.

72. 29 U.S.C. at § 626(b) (1982).

73. *See infra* note 74 and cases cited therein.

74. Perrell v. FinanceAmerica Corp., 726 F.2d 654, 657 (10th Cir. 1984); Hill v. Spiegel, Inc., 708 F.2d 233, 235 (6th Cir. 1983); Pfeiffer v. Essex Wire Corp., 682 F.2d 684, 686–88 (7th Cir.), *cert. denied*, 459 U.S. 1039 (1982); Fiedler v. IndianHead Truck Line, Inc., 670 F.2d 806, 809–10 (8th Cir. 1982); Naton v. Bank of California, 649 F.2d 691, 698 (9th Cir. 1981); Slatin v. Stanford Research Inst., 590 F.2d 1292, 1295–96 (4th Cir. 1979); Vasquez v. Eastern Air Lines, 579 F.2d 107, 109 (1st Cir. 1978); Dean v. American Sec. Ins. Co., 559 F.2d 1036, 1038 (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).

75. 29 U.S.C. § 626(c)(1), (d) (1982). The Act grants employees the right to bring a civil action. The employee cannot bring a private action, however, until 60 days after filing an EEOC complaint. The Act directs the EEOC to seek to correct the unlawful practice by conciliation, conference and persuasion during the 60-day period.

76. *Fiedler*, 670 F.2d at 809–10 (summarizing reasoning of other circuits in earlier cases).

77. *See supra* note 71.

78. *Compare* Dreyer v. ARCO Chemical, 801 F.2d 651, 658 (3d Cir. 1986), *cert. denied*, 55 U.S.L.W. 3586 (U.S. Mar. 2, 1987) (No. 86-1062) (in order to avoid duplicating compensatory damages, a plaintiff is charged with showing additional evidence of outrageous conduct) *with Thurston*, 469 U.S. 111, 125 (1986) (Congress suggests that an employee not face difficult problems of proof).

The *Dreyer* standard is contrary to the ADEA's statutory origins and structure, as well as to its remedial goals. Congress specifically based ADEA remedies on the FLSA rather than on Title VII of the Civil Rights Act.[79] A comparison of ADEA and Title VII remedies illustrates *Dreyer's* incongruity. The severely limiting "outrageous conduct" standard, when coupled with the lack of damages for nonpecuniary harm, makes the ADEA remedy system resemble remedies under Title VII. Under the FLSA, double damage awards are automatic, unless the employer is able to prove it acted in good faith and in the reasonable belief it was not violating the Act.[80] Under Title VII, however, remedies are limited to back pay and equitable remedies such as reinstatement.[81] The *Thurston* standard resembles the FLSA statutory structure by making liquidated damages available through proof of knowing or reckless disregard, which may be negated by evidence of good faith or reasonable belief. The *Dreyer* standard, on the other hand, approximates Title VII remedies by stripping the plaintiff of double damages in all but a few cases. Therefore, the *Thurston* standard is consistent with the ADEA's statutory structure and origins while the *Dreyer* standard is not.

C. *The* Dreyer *Standard Fails to Appropriately Punish ADEA Violations*

The *Dreyer* standard fails because it does not properly punish the precise employer actions the ADEA prohibits. The Supreme Court has expressly decided that the double damages provision is punitive.[82] Therefore double damages remedies should be structured to punish persons who willfully violate the Act. "Willful," however imprecise, is a word describing mental state. In civil litigation, it encompasses the concept of intent, in addition to the lower mental states of knowledge or recklessness. Only in criminal litigation is it used to describe malice and evil intent.[83] If an employer is found liable for age discrimination in a discrete employment situation, the jury has, by definition, concluded the employer intentionally acted for an illegal purpose.[84] Such actions are willful by definition, yet the actions may go unpunished under *Dreyer's* outrageous conduct standard.

Despite the Third Circuit's disclaimer to the contrary, by adopting an "outrageous conduct" standard, *Dreyer* bootstraps a mental state of malice

79. *See generally* Lorillard v. Pons, 434 U.S. 575 (1978).
80. 29 U.S.C. §§ 216(b), 260 (1982).
81. 42 U.S.C. §§ 2000e to 2000e-17 (1982).
82. *Thurston*, 469 U.S. at 125.
83. Wehr v. Burroughs Corp., 619 F.2d 276, 280–84 (3d Cir. 1980), *overruled on other grounds*, Dreyer v. ARCO Chemical, 801 F.2d 651 (3d Cir. 1986).
84. *See supra* text accompanying notes 23–31.

into the "willfulness" definition. In *Thurston,* the Supreme Court specifically rejected the requirement that malice or specific intent be proved in order to award double damages. *Dreyer* therefore imposes a higher standard for awarding double damages than the Supreme Court requires. Double damages are not awarded to punish malice and ill-will; double damages are awarded to punish intentional discrimination. Because these violations are precisely the kind of employer actions the ADEA forbids, such action should be punished. The *Dreyer* standard would prevent such a result.

D. Dreyer *Asks the Right Question, but Gives the Wrong Answer*

The *Dreyer* court failed to consider an alternative view of *Thurston's* two-tier requirement. *Thurston's* two-tier requirement may be read to distinguish between conscious and unconscious violations: a distinction that preserves two tiers of damages without perverting the ADEA's purpose. In *Dreyer,* the Third Circuit correctly recognized that applying the *Thurston* standard to discrete employment decisions results in a double damage award whenever the employer is liable for pecuniary damages. The court reasoned that this result conflicted with *Thurston's* statement that the ADEA requires two tiers of damages. In struggling with this dilemma, the Third Circuit created a standard inconsistent with the focus of the ADEA. Applying the *Thurston* standard to all discrimination cases properly allocates double damages between conscious and unconscious violations.

The Supreme Court's *Thurston* decision simply requires two levels of damages in age cases in the aggregate. The Third Circuit developed the "outrageous conduct" standard because it concluded that *Thurston* requires two levels of remedies in each distinct fact pattern.[85] *Thurston,* however, does not require this conclusion. *Thurston* discusses two tiers of damages in language rejecting the "in the picture" standard.[86] The Court reasoned that because the Act requires employers to post notices about the Act's existence and purposes, employers will nearly always be aware of the Act and its implications.[87] Accordingly, the "in the picture" standard permitted a double damage award in both fact patterns, thus frustrating Congress' intent to establish a two-tiered damage system.[88]

By constructing a distinction between conscious and unconscious violations, the *Thurston* standard establishes a two-tier damage system when

85. *Dreyer,* 801 F.2d at 657.
86. *Thurston,* 469 U.S. at 127–28, 128 n.22; *see supra* text accompanying note 38.
87. *Thurston,* 469 U.S. at 128.
88. *Id.*

age discrimination cases are examined in the aggregate. Unlike the outrageous conduct standard, the knew or showed reckless disregard standard satisfies the ADEA's remedial goals. Courts assist age discrimination victims and punish violators by awarding double damages if the employer is liable in the discrete employment decision fact pattern. In these cases, the factfinder has concluded the employer intentionally discriminated and that any stated nondiscriminatory reasons are a pretext.[89] However, in age-based policy patterns, it is possible that the employer unconsciously violated the Act if it instituted the policy in good faith.[90] The *Thurston* standard thus equates willful and nonwillful violations with conscious and unconscious violations. The two-tier damage system is preserved for age discrimination cases in the aggregate, and punishment for intentional discrimination is maintained.

The "outrageous conduct" standard goes too far. In trying to reconcile the apparent internal conflict between the *Thurston* standard's application to discrete employment decisions and the need for two tiers of damages, the Third Circuit distorts the Act's structure and fails to punish intentional discrimination. A forced choice between fulfilling the ADEA's essential function and providing two tiers of damages is unnecessary. Distinguishing between conscious and unconscious violations allows two tiers of damages in age discrimination cases in the aggregate. The knowing or reckless disregard standard punishes the precise employer action the ADEA was designed to prevent and preserves adequate compensation for age discrimination victims.

IV. CONCLUSION

Congress enacted the ADEA to eradicate discrimination based on age. In order to achieve this goal, Congress created a two-tiered remedy scheme: equitable and legal remedies to reimburse the discrimination victims; and double damages to punish and deter "willful" violations. In *Trans World Airlines v. Thurston,* the Supreme Court approved a willful definition which requires the plaintiff to show the employer "knew or showed reckless disregard for . . . whether its conduct was prohibited by the ADEA." Every circuit considering the issue since *Thurston* chose to adopt this language. However, in *Dreyer v. ARCO Chemical,* the Third Circuit refused to follow the *Thurston* definition because it resulted in an automatic

89. *See supra* text accompanying notes 23–31.

90. *Thurston* provides a good example of a good faith enactment of a discriminatory policy. There, the employer consulted with legal counsel and negotiated with the union. *See supra* text accompanying notes 33–43.

double damage award in cases involving discrete employment decisions. *Dreyer* requires the plaintiff to produce additional evidence sufficient to demonstrate "outrageous conduct" to support a double damage award.

The *Dreyer* decision should not be followed. The knowing or reckless disregard standard should be used in both age-based policy patterns and discrete employment decision cases. The *Thurston* standard, by equating willful and non-willful violations with conscious and unconscious violations, punishes intentional ADEA violations and preserves adequate compensation for age discrimination victims. *Thurston* thus preserves two tiers of damages by examining age discrimination cases in the aggregate. In contrast, the *Dreyer* standard imposes a higher standard of proof for punitive awards than the statute requires and contorts the Act's statutory structure.

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