Fairfield UNIVERSITY

North East Journal of Legal Studies

Volume 3 *Spring 1995* Article 6

Spring 1995

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[34] In the Matter of Fred Gunzberg et al., Respondents, v. Art-Lloyd Metal Products Corp., Appellant, 112 A.D. 2d 423, 424; 492 N.Y.S. 2d 83, 85 (1985).

[35] *Id.* at p. 424, 85, citing Kemp v. Beatley, 64 N.Y. 2d 63, 74. *See* In the Matter of Robert H. Burack 137 A.D. 2d 523, 524 N.Y.S. 2d 457 (1988), at p. 527, 460.

[36] In the Matter of Topper, 107 Misc. 2d 25; 433 N.Y.S. 2d 359 (1980); In the Matter of Kemp v. Beatley, 64 N.Y. 2d 63; 473 N.E. 2d 1173; 484 N.Y.S. 2d 799 (1984); In the Matter of Robert H. Burack, 137 A.D. 2d 523; 524 N.Y.S. 2d 457 (1988); In the Matter of Gunzberg, 112 A.D. 2d 423; 492 N.Y.S. 2d 83 (1985).

[37] Matter of Kupersmith (Caduceus Medical Publishers, Inc.), Supreme Court Putnam County, NYLJ, Aug. 22, 1991, p. 21.

[38] *See* Lyons, supra.

[39] *See* O'Neal, 33 The Business Lawyer, at p. 488.

[40] *See* Gene Barry, supra., at p. 559, 541.

[41] *See* O'Donnel, supra, at p. 1207.

## FRONT PAY: AN INAPPROPRIATE REMEDY FOR AGE DISCRIMINATION

by

John McGee*

Successful plaintiffs under the Age Discrimination in Employment Act of 1976 (hereafter referred to as the ADEA)[1] may recover lost pay from the date of termination until trial (back pay) plus the pay they would have received from the date of trial until retirement age (front pay). While courts can easily calculate back pay, including fringe benefits and interest, it has proven far more difficult to accurately calculate front pay. A typical description of front pay as "a lump sum representing the discounted present value of the difference between the earnings an employee would have received in his old employment and the earnings he can be expected to receive in his present and future, and by hypothesis inferior, employment"[2] requires the court to speculate about the amount an employee would have received in the future until some hypothetical retirement date. The difficulty of calculating front pay with any degree of certainty makes such damages an inappropriate remedy in age discrimination cases.

The concept of front pay does not appear in the ADEA itself. The remedies section simply says that civil actions may be brought "for such legal or equitable relief as will effectuate the purposes of this chapter," and "legal and equitable relief ... includes ... without limitation judgments compelling employment, reinstatement or promotion".[3] Thus, Congress has given the courts broad authority to fashion remedies and front pay is the innovative remedial scheme that has emerged. Front pay was first proposed in law review articles which suggested that the usual remedies were insufficient to make whole certain workers who had been victims of discrimination. One author even argued that when reinstatement is not appropriate, the *only* way to make a plaintiff whole is with a front pay award.[4]

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So long as the "normal" retirement age was 65, there were various approaches to implementing front pay that minimized the speculative nature of the calculations. However, in 1986 the ADEA was amended to prohibit mandatory retirement and to eliminate any reference to a "normal" retirement age[5]. With the demise of a fixed retirement age, calculating the proper amount of front pay to award has become a more difficult task for courts and juries and the result has been some very speculative awards.

Reinstatement or Front Pay?

Reinstatement is the preferred remedy in discrimination cases. Courts often state the "rule" that reinstatement should suffice unless there are special factors involved which dictate a resort to front pay, described as a "special" remedy, warranted only by "egregious circumstances."[6] Therefore, it could be expected that front pay awards would be limited to situations involving discord or antagonism in the workplace that would render reinstatement ineffective. Trial courts must consider reinstatement before submitting the issue of front pay to the jury. The trial record in Walther v. Lone Star Gas Co.[7] did not indicate why the district court considered reinstatement impossible and the only evidence was the employer's testimony that it considered the employee a qualified and competent employee capable of resuming work. The Fifth Circuit found the district court's statement that the litigation was "protracted and necessarily vexing" to be insufficient to support an award of front pay.[8]

However, ordering reinstatement forces judges to supervise a coerced employment relationship. As a result, the use of front pay has become more and more common. Front pay instead of reinstatement has been ordered where 1) "discord, tension, suspicion, antagonism and sensitivity among (employees) would be productive of a very difficult employment environment"[9], 2) the employee's former job "required a close working relationship (with) top executives of defendant"[10], and 3) the claimant is "nearing" the normal retirement age anyway.[11] Even plaintiffs who request reinstatement sometimes end up with front pay instead, the court having found reinstatement "impracticable". The jury in Price v. Marshall Erdman & Associates, Inc.[12] awarded Price $750,000 in front pay, but he wanted to be reinstated instead. The court refused to order reinstatement because of "mutual dislike and defendants' continued opinion that plaintiff is incompetent", reasoning that "if the employee dislikes the idea of working for the employer or the employer dislikes the idea of having the employee work for him, reinstatement should not be ordered."[13] Price was a salesman who spent much of his working time away from the office and so was not constantly in touch with his enemies; nevertheless, the judge noted that



> "it is one thing to order the reinstatement of low-level employees performing routine tasks, or higher-level employees after the supervisors involved in the unlawful employment action have left the company or been transferred to another division, but to order reinstatement of a high-level employee performing discretionary functions into the division from which he was fired and which remains under the management of the person who fired him is a formula for continuous judicial intervention in the employment relation. If Price is reinstated, every time he is denied credit for a sale, or denied a raise or a bonus, or has a squabble with (the supervisor), he will be tempted to run to the district court".[14]

In Lewis v. Federal Prison Industries, Inc.[15] the court found it reasonable for Lewis to refuse reinstatement after a psychiatrist testified that Lewis experienced a " reactive depression" in response to the discriminatory acts that occurred at the company and that, although Lewis' health had improved since he left, his symptoms would return if he went back to work at the company. There was also evidence that Lewis had only four years until the date of his mandatory retirement[16]. In an earlier case[17] the employee, a lawyer, was awarded front pay because the animosity between employee and employer was so intense that reinstatement was impossible. The court specifically noted that the time period in this case was relatively short, approximately four years, and thus did not involve some of the uncertainties which might surround a front pay award to a younger worker.

Although the trial court ordered reinstatement in U.S. Equal Employment Opportunity Comm'n v. Century Broadcasting Corp.,[18] it was reversed because the judge had not given a sufficient rationale for withholding front pay. The case involved a radio station which had terminated all announcers over the age of 40. The trial court ordered that the announcers be rehired but the Court of Appeals would not allow this because "reinstatement would disrupt the operation of the station and would displace announcers currently employed" and "station management does not have confidence (in) these announcers...".[19]

The case that best illustrates the willingness of the courts to substitute front pay for reinstatement is Buckley v. Reynolds Metals Co.[20] The judge had ordered that Buckley be reinstated immediately to his old position or to a substantially equivalent position. However, after eight months of fruitless negotiations, the parties stipulated that Buckley would seek an award of front pay instead. The court agreed, concluding that reinstatement was impossible or impracticable because the parties said it was!

Calculating the Amount of Front Pay

If the trial court determines that a plaintiff is entitled to front pay, then the jury must determine the amount of damages. Factors to be considered are the employee's work and life expectancy, discount tables to determine the present value of future damages, the choice of an appropriate discount rate, and other factors that are pertinent to all types of prospective damage awards.[21] Some of this evidence, like the discount tables, is objective; but how is a judge or jury to know how long the plaintiff actually would have remained working at the job, whether he soon would have left for a different, perhaps better-paying job, or whether the plaintiff soon would have been dismissed for legitimate reasons?[22] Often the only source of such data, which is necessary to calculate a reasonably certain front pay award, is the testimony of the parties and their experts.

In Forest Electric Corp. v. Murtha[23] the employee testified that he was in excellent physical condition and enjoyed working with the people at Forest Electric so much that he would have worked until he was seventy-three to seventy-five years old. He also testified that he was earning $49,406 per year at the time he was terminated at age 66. Based on this evidence, and on evidence of earning history and fringe benefits, and based on reasonable assumptions about increases in earnings due to economic conditions, Murtha's expert economist declared that Murtha would have earned approximately $377,000 in the period from his termination until age seventy-three, if he worked to that age. The expert stated that work life was a fact which varied too much from person to person to use general tables to estimate it.[24] The company countered with the testimony of a statistician rather than an economist. He testified that Murtha would probably have worked until age seventy, based on what the typical man who was working at age sixty-six would do. Assuming he retired at age seventy, Murtha's economic loss until retirement would have been $69,713.[25] The jury accepted Murtha's expert and concluded that he would have worked to the age of seventy-one to seventy-three. The front pay award was $200,000.

In Doyne v. Union Electric Co.[26] the employee testified that he planned to work until age 70 and that he had so informed Union Electric. One of Union Electric's own witnesses testified that prior to Doyne's termination he told another employee that he intended to work until age 70. The jury awarded $273,993.00 in front pay based on this testimony but the trial judge reduced the amount to $19,610.66 after declaring that there was insufficient evidence to support the jury's finding that Doyne would have remained employed with UE until age seventy and that the front pay award should be based on retirement at the age of 65.[27] The Court of Appeals sided with the jury and reinstated the $273,993.00 award.[28]



The longer a proposed front pay period the more speculative the damages become.[29] Awards have been allowed involving as much as four years between the trial date and the date when compulsory retirement could have been imposed[30] but it is the total circumstances, not merely the length of time until retirement, that determines whether a particular award is too speculative. Mr. Buckley, for example, sought an award to cover a nine year period, which under other circumstances might exceed the limits of permissible speculation. However, Buckley had worked for Reynolds for more than twenty-five years when he was fired; he had nine years to work before retirement. There was no reason to reject his assertion that he intended to remain at Reynolds until he reached the regular retirement age of sixty-five. It was also reasonable to assume that absent the illegal discharge he would have been able to remain at Reynolds until he planned to retire. In view of his age, it was unlikely that Buckley would voluntarily switch jobs again or embark on a new career path. Finally, the industry where Buckley was employed provided relatively steady and dependable employment. Under these circumstances nine years did not seem unduly speculative.[31]

Awards that have been considered unduly speculative have arisen in situations where the discharged employee is only forty years old or so, or where the award might encompass ten years or more during which the employee, had he not been unlawfully discharged but continued in his employment, might or might not get raises, reductions, fired or become incapacitated.[32] For example, the employees in Rengers v. WCLR Radio Station[33] requested nine years of front pay but the evidence indicated that in a fickle industry like radio, job security for disk jockeys is quite tenuous and so the court refused to speculate that the employees would have remained employed at the station until retirement. In Price[34], the employee's expert witness estimated damages ranging from $1.2 million if Price retired at the age of 65 to $2.1 million if he retired at 75 but failed to discount each year's projected earnings loss by the probability that Price would have lived long enough to obtain those earnings. The court thought that since the probability was not a hundred percent the estimate of lost earnings should have been scaled down accordingly. The court decided a bigger problem was the expert's failure to take into account the high volatility of a salesman's earnings:

> "the figures the expert projected may be the best possible estimate of ... mean expected earnings had (the employee) remained with (the employer), but the variance around that mean must be considerable. Risk- averse persons--and most people are assumed to be risk-averse in their serious financial affairs--will pay a premium, often a very large one, to avoid risk ... (A) person who did not mind risk would not be willing to pay a loading charge--he would prefer to take his

> chances on the loss's occurring or not ... The award in effect enabled (the employee) to exchange his risky expectations ... for a risk- free asset having the same expected value but, assuming (the employee) is risk averse, a substantially higher utility."[35]

Front pay awards will not be upbeld if there is no evidence in the record to support the calculations. For example, in Hybert v. Hearst[36] the court had assumed that 1) the employee would continue to work at his present rate of productivity until the age of 72 (he was 67 when the trial ended); 2) the employer would have continued to employ the employee in his last-held position until he retired at the age of 72; and 3) that the employer would have continued to employ the employee at his last-held salary level for five more years until he retired at 72.[37] Since there was no evidence to support any of these assumptions, the front pay award was reversed.

The Duty to Mitigate

To be entitled to an award of front pay a plaintiff must make reasonable attempts at mitigation. The employer can avoid liability by showing that there were suitable positions available elsewhere and that the employee failed to use reasonable care in seeking them. For example, in Leeds v. Sexson[38] the employee was not entitled to an award of front pay because he failed to remain in the labor market and failed to diligently search for alternative work. The employee in Rodgers v. Western-Southern Life Insurance Co.[39] was not entitled to a front pay award because he declined an offer of reinstatement and failed to show that it would have been infeasible or inappropriate for him to return. The jury instructions in Gries v. Zimmer, Inc.[40] offer a concise statement of the duty to mitigate: the judge told the jury that if the plaintiff "failed to make reasonable efforts to find a new job, you should subtract from his damages any amount that he could have earned in a new job after his discharge".[41]

How long does an employee have to find comparable employment? The answer depends on the circumstances. In Fite v. First Tennessee Production Credit Ass'n[42] the employee postponed seeking other employment for a year in the expectation that he would be reinstated. When it became apparent that this would not happen, he vigorously sought other employment. Given these circumstances, the court gave him more than three years to find comparable employment before subtracting from his damages.[43]



Should Front Pay be Doubled?

The ADEA calls for the doubling of damages in the case of a willful violation. Should this doubling apply to front pay awards? In Olitsky v. Spencer Gifts, Inc.[44], the employee argued that the court should have doubled the jury's award of $400,000 front pay after finding that Spencer Gifts acted willfully and the Fifth Circuit agreed: " ... to exclude front pay would make no sense, for an award of double damages might well fall short of compensation and thus contain no punitive component at all (in fact contain a negative punitive component). In such a case the plaintiff might be better off if the violation were adjudged not willful".[45]

On the other hand, several courts have held that the liquidated damages provision of ADEA does not apply to front pay awards.[46] If front pay is exclusively an equitable award it is not subject to doubling. One court has even considered double back pay and front pay as mutually exclusive[47]. Clearly, the availability of double damages is one of the circumstances that courts look at when deciding whether to award front pay at all. In Lee v. Rapid City Area Sch. Dist.[48] the court entered judgment for $22,140 for back pay, $39,664.85 for front pay, and $10,000 for double damages, citing its "discretionary" authority regarding double damages while noting that the plaintiff had already received an award of front pay.[49] Even more courts are likely to multiply speculative front pay awards since the Supreme Court's recent decision in *Hazen Paper*[50] that broadly defines the term willful.

Summary and Conclusions

The phrase "without limitation" in the damages section of the ADEA invites federal courts to be imaginative in devising alternative remedies and front pay bas been one result. Initially, front pay was said to be appropriate only when the other damages awarded did not fully compensate the plaintiff for his injuries; subsequently, it has become the remedy of choice where reinstatement is not feasible in a wide range of cases. Front pay is being used to compensate employees until retirement even though the discrimination has ceased. This is a windfall, not restitution, says the Lewis dissent,[51] and it creates an incentive for the discharged employee to remain unemployed and for the employer to settle the case without addressing the possible age discrimination in the workplace. If front pay was not available, the employee would have little incentive to prosecute a frivolous claim.[52]

Congress did not include front pay as a remedy in the ADEA. It was incorporated by the federal district courts from other civil rights and labor laws. There

is no need for such a liberal construction of the act and, given the difficulties of calculation of front pay and the resulting speculative nature of the award, it is time to consider the wisdom of the widespread use of this remedy. There is no evidence in the case law that companies are so hostile to fired workers that it is impossible for them to return and reinstatement should be the remedy in all but the most exceptional cases. Front pay damages were originally allowed only in such exceptional cases and there may still be such a use for them, but the widespread use of front pay is inconsistent with the purposes of the ADEA and valid social policy.

## ENDNOTES

1. 29 U.S.C. secs. 621-34 (1988 ed., Supp. III).

2. McKnight v. General Motors Corp., 908 F.2d 104, 116 (7th Cir. 1990) *cert. denied 499 US.* 919, 111 S.Ct. 1306, 113 L. Ed. 2d 241 (1991).

3. 29 U.S.C. sec. 626(b) (1988 ed., Supp. III).

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

5. Age Discrimination in Employment Amendments of 1986, Pub. L. No. 99-592, 100 Stat. 3342 (October 31, 1986).

6. Goldstein v. Manhattan Indus., Inc, 758 F.2d 1435, 1449 (11th Cir.), *cert.denied*, 474 U.S. 1005, 106 S.Ct. 1005, 88 L.Ed.2d 457 (1985).

7. 952 F.2d 119 (5th Cir. 1992).

8. *Id.* at 126.

9. Combes v. Griffin Television, Inc., 421 F. Supp. 841, 846 (W.D. Okl. 1976) The plaintiff had formerly held the job of news anchorman with defendant television station, a position which involved a unique relationship with other employees.

10. EEOC v. Kallir, Phillips, Ross, Inc., 420 F. Supp. 919, 926-27 (S.D.N.Y. 1976), aff'd 559 F.2d 1203 (2d Cir.), *cert. denied*, 434 U.S. 920, 98 S. Ct. 395, 54 L. Ed.2d 277 (1977). The plaintiff's former job involved frequent personal contact with defendant's clients, with plaintiff acting as defendant's representative.

11. Eivens v. Adventist Health System, 660 F.Supp. 1255, 1264 (D. Kan. 1987). The plaintiff was 57 years old and the court found that he had altered his situation so completely that reinstatement would be a "huge burden".



12. 966 F.2d 320 (7th Cir. 1992).

13. *Id.* at 329.

14. *Id.* at 338.

15. 953 F.2d 1277 (11th Cir. 1992).

16. *Id.* at 1284.

17. Whittlesey v. Union Carbide Corp., 742 F.2d 724, 729 (2nd Cir. 1984).

18. 957 F.2d 1446 (7th Cir. 1992).

19. *Id.* at 1453.

20. 690 F. Supp. 211 (S.D.N.Y. 1988).

21. Roush v. KFC National Mgt. Co., 10 F.3d 392 (6th Cir. 1993).

22. Standley v. Chilhowee R-IV School Dist., 5 F.3d 319 (8th Cir. 1993).

23. No. 90-3259 (E.D. Pa. July 14, 1992) (Westlaw, Allfeds library).

24. *Id.*

25. *Id.*

26. 953 F.2d 447 (8th Cir. 1992).

27. *Id.* at 454.

28. Buckley was not allowed to recover his lost salary because the amount was too "speculative". He was allowed, however, to recover lost pension benefits because, said the court, a determination of lost pension benefits is "less sensitive to future salary fluctuations than is a calculation of the lost salary itself".

29. The cut-off date for the award is within the discretion of the district court, but some evidence must be submitted from which a reasonable projection can be made. Goss v. Exxon Office Systems, Inc., 747 F.2d 885 (3rd Cir. 1984).

30. Doyne v. Union Electric Co., 953 F.2d 447 (8th Cir. 1992).

31. Buckley v. Reynolds Metals Co., 690 F. Supp. 211 (S.D.N.Y. 1988).

32. Bonura v. Chase Manhattan Bank, N.A., 629 F.Supp. 353, 362 (S.D.N.Y), *aff'd on other grounds*, 795 F.2d 276 (2nd Cir. 1986).

33. 661 F.Supp. 649, 651 (N.D.Ill. 1986).

34. 966 F.2d 320 (7th Cir. 1992).

35. *Id.* at 345.

36. 900 F.2d 1050 (7th Cir. 1990).

37. *Id.* at 1055.

38. 1 F.3d 1246 (9th Cir. 1993).

39. 12 F.3d 668 (7th Cir. 1993).

40. 742 F.Supp. 1309 (W.D.N.C. 1990).

41. *Id.* at 1316.

42. Fite v. First Tennessee Prod. Credit Ass'n, 861 F.2d 884 (6th Cir. 1988).

43. *Id.* at 891.

44. 964 F.2d 1471 (5th Cir. 1992).

45. *Id.* at 1478.

46. Wheeler v. McKinley Enters., 937 F.2d 1163 n.2 (6th Cir. 1991); Graefenhain v. Pabst Brewing Co., 870 F.2d 1198, 1210 (7th Cir. 1989); Cooper v. Asplundh Tree Expert Co., 836 F.2d 1544, 1556 - 57 (10th Cir. 1988); Blum v. Witco Chem. Corp., 829 F.2d 367, 382-83 (3rd Cir. 1987); Dominic v. Consolidated Edison Co. of New York, Inc., 822 F.2d 1249, 1258-59 (2nd Cir. 1987).

47. Cancellier v. Federated Dep't Stores, 672 F.2d 1312, 1320 (9th Cir.), *cert. denied* 459 U.S. 859, 103 S.Ct. 131, 74 L.Ed. 2d 113 (1982).

48. 981 F.2d 316 (8th Cir. 1992).

49. *Id.* at 323.

50. Hazen Paper Co. v. Biggins, ___ U.S. ___, 113 S. Ct. 1701, 123 L. Ed. 2d 338 (1993).



51. Lewis v. Federal Prison Industries, Inc., 953 F.2d 1277 (11th Cir. 1992).

52. *Id.* at 1284.